

1 **Apex Equity Holdings Berhad & Anor**

v

5 **Lim Siew Kim & 17 Ors**

**High Court**, Kuala Lumpur – Originating Summons  
No. WA-24NCC-264-05/2019

10 Ong Chee Kwan JC

December 6, 2019

15 *Securities – Take-overs and mergers – Contravention of securities law – Plaintiff  
alleging defendants acted in concert to seek control over first plaintiff – Alleged  
contravention by defendants of ss 60(7), 64(1), 64(1)(h), (iv), (v), 72(2)(a)(i), 218(1), (2),  
(3) of the Capital Markets and Services Act 2007 ("the CMSA") and/or rule 4.02(8) and  
20 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018) – Whether plaintiffs a  
"person aggrieved" within meaning of s 360(1)(d) of the CMSA – Whether ss 60(7),  
64(1), 64(1)(h), (iv), (v), 72(2)(a)(i), 218(1), (2), (3) of the CMSA and/or rule 4.02(8) and  
4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018) are a "relevant requirement"  
for purposes of s 360 of the CMSA – Capital Markets and Services Act 2007, ss 60(7),  
25 64(1), 64(1)(h), (iv), (v), 72(2)(a)(i), 218(1), (2), (3), 360(1)(d)*

The first plaintiff, Apex Equity Holdings Berhad ("Apex") and the second  
plaintiff, JF Apex Securities Berhad ("JF Apex") had in 2012 lodged a complaint  
with the Securities Commission ("SC") alleging that the defendants are persons  
30 acting in concert and had taken control of Apex. The complaint was made to  
ensure compliance with the Capital Markets and Services Act, 2007 ("the CMSA")  
and the Malaysian Code on Take-Overs and Mergers 2016 ("the Code").  
However, no ruling was made by the SC with regard to the complaint. In 2018,  
35 Apex entered into an agreement with one Mercury Securities Sdn Bhd ("Mercury  
Securities") to merge the business of JF Apex with Mercury Securities  
("the proposed merger"). Subsequent thereto, in 2019, Apex lodged an update to  
its previous complaint to SC, reproducing the same allegations and with fresh  
40 allegations that the defendants intended to resist the proposed merger. The  
plaintiffs then filed the instant action ("OS264") against the defendants seeking  
inter alia a declaration that the Apex is a "person aggrieved" within the meaning  
of s 360(1)(d) of the CMSA on account of the alleged contravention by the  
defendants of ss 60(7), 64(1), 64(1)(h), (iv), (v), 72(2)(a)(i), 218(1), (2), (3) of the  
CMSA and/or rule 4.02(8) and 4.02(9) of the Licensing Handbook SC-GL/2007  
(R6-2018).

The defendants respectively applied to strike out the plaintiff's claim. Relying  
on *Lai Soon Onn v Chew Fei Meng (and 3 Other Appeals)* [2018] 4 AMR 549 ("*Lai Soon  
Onn*") the defendants contended inter alia that s 360 of the CMSA is only

applicable when there is a contravention of a "relevant requirement" and that for the purposes of s 360 of the CMSA, ss 60(7), 64(1), 64(1)(h), (iv), (v), 72(2)(a)(i), 218(1), (2), (3) of the CMSA and/or rule 4.02(8) and 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018) are not a "relevant requirement". It was further also contended that the plaintiffs did not have the locus standi and are not a "person aggrieved" under s 360 of the CMSA. 1  
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### Issue

Whether the plaintiffs are a "person aggrieved" and have the locus standi to claim the declaratory relief as prayed for. 10

**Held**, allowing the striking out applications. 15

1. The plaintiffs' action in commencing OS264 amounts to a backdoor attempt to administer the Code by getting the court to make findings of fact on issues that are within the purview of and presently the subject of investigations by the SC. As was held in in *Lai Soon Onn*, this must not be allowed or encouraged. [*see p 678 para 24 - p 679 para 25*] 20
2. As was held in *Lai Soon Onn*, there must first be a contravention by the other person of a "requirement" inter alia imposed by or under the CMSA and that insofar as the provisions in the CMSA are concerned, provisions which amount to "requirements" are those which are expressly or explicitly identified and spelled out as such. In this regard and following *Lai Soon Onn*, ss 60(7), 64(1), 64(1)(h), (iv), (v), 72(2)(a)(i), 218(1), (2), (3) of the CMSA and/or rule 4.02(8) and 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018) are clearly not a "relevant requirement" for the purposes of s 360. [*see p 679 para 27 - p 680 para 29*] 25  
30
3. The plaintiffs cannot be a "person aggrieved" when they, as the target companies, are the subject of the instant case and it is the minority shareholders if at all who are the ones affected by the defendants' actions. It is therefore the minority shareholders and not the plaintiffs who can sue. In the premises, the plaintiffs neither have the locus standi nor can they be "a person aggrieved". [*see p 681 paras 30-33*] 35  
40
4. Clearly, the reliefs sought by the plaintiffs in their updated complaints which are pending investigation by the SC and in particular, prayers 5 to 7, are premature. Further, whilst prayer 6.1 of OS264 seeks to compel the SC to act, the SC was however not made a party to these proceedings. [*see p 681 para 35*] 40

1 **Case referred to by the court**

*Lai Soon Onn v Chew Fei Meng (and 3 Other Appeals)* [2018] 4 AMR 549; [2018] 10 CLJ 48, CA (foll)

5 **Legislation referred to by the court**

*Malaysia*

10 Capital Markets and Services Act 2007, ss 60(7), 64(1), (1)(h)(iv), (v), 72(2)(a)(i), 217, 218, 218(1), (2), (3), 219, 220, 357, 360, 360(1)(d)

**Other references**

*Code on Take-Overs and Mergers 2016*

15 *Rules on Take-Overs, Mergers and Company Acquisition 2016*

*Mak Lin Kum, R Himahlini, Muhammad Izzul Faris, Lee Shiow Chi and Yong Veng Loc (Himahlini & Loh)* for plaintiffs

20 *Mathew Thomas Philip and Sean Tan* (Thomas Philip) for first, seventh, 14th and 15th defendants

*Robert Lazar, Gopal Sreenivasan and Tan Shang Neng* (Sreenevasan Young) for second, eighth and 16th defendants

25 *David Morais, Shaik Saleem, Pavitra Shankar and Pavitra Pillai* (Shaik David & Co) for third, fifth, sixth, 10th and 11th defendants

*Wong Rhen Yen, Goik Kenwayne, Sharon Chong and Natasha* (Dennis Nik & Wong) for fourth defendant

30 *Aida Haryani* (Brendan Siva) for ninth and 17th defendants

*Justin Voon and Lim Pei Sin* (Justin Voon Chooi & Wing) for 12th and 13th defendants

*Razlan Hadri and Danny Soong* (Gan Ho & Razlan Hadri) for 18th defendant

35 *Judgment received: March 9, 2020*

**Ong Chee Kwan JC**

40 **Background**

[1] Apex Equity Holdings Berhad ("Apex") is a company listed on Bursa Malaysia Securities Berhad whereas JF Apex Securities Berhad ("JF Apex") is a subsidiary of Apex and is a holder of a Capital Markets Services License ("CMSL").

[2] The first to the 11th defendants are individuals whereas the 12th to 18th defendants are corporate entities. Save for 12th and 13th defendants, which are corporate entities incorporated under the laws of Hong Kong, the remaining corporate entities were incorporated under the laws of Malaysia.

[3] The first to 11th defendants are either shareholders in Apex and/or directors and/or former directors and/or shareholders in the 12th to 17th defendants.

[4] The first defendant and the 12th to 17th defendants collectively have 82,148,854 voting shares in Apex. The total number of issued shares of Apex is 213,563,324 whereas there are 10,923,118 held as treasury shares which cannot be counted when determining interest in shares in a company. The 82,148,854 shares translate into an interest of around 40.5% when treasury shares are included. When 10,923,118 treasury shares are not taken into account, it is around 38.5%. In either case, that voting power exceeds the 33% threshold of the voting shares of Apex. The same can be described with the table below:

Shareholder	No of shares	% (raw) [divided by 213,563,324]	% (corrected for treasury shares) [divided by 202,640,206]
Lim Siew Kim	5,656,920	2.65%	2.79%
Fun Sheung Development	31,969,914	14.97%	15.78%
Yenson Investments	10,495,800	4.91%	5.18%
Pinerains	8,898,480	4.17%	4.39%
Cergas Megah	7,549,040	3.53%	3.73%
Concrete Parade	10,000,000	4.68%	4.93%
Joymap Bridge	7,590,700	3.55%	3.75%

### 2012 annual general meeting ("2012 AGM")

[5] At the 2012 AGM, Chan Guan Seng, a founder and previously a substantial shareholder of Apex, was not re-elected as executive chairman at the 2012 AGM due to first defendant, the 12th to the 15th defendants and also Metroplex Berhad and Metroplex Project Management Sdn Bhd voting against his re-election with 82,148,854 shares. Today, the 12th to 17th defendants hold the same number of shares.

[6] It is the plaintiffs' case that the first defendant, 12th to the 15th defendants and also Metroplex Berhad and Metroplex Project Management Sdn Bhd are "persons acting in concert" ("PACs") in that they have used their collective voting power in excess of 33% for a specific purpose i.e. to seek control of the board of Apex.

[7] On July 17, 2012, Apex had lodged a complaint with the Securities Commission to allege that the defendants were PACs who have obtained control

1 of Apex ("the 2012 complaint"). The purpose of the 2012 complaint was to enable  
the Securities Commission to commence an investigation as a market regulator  
and to ensure strict compliance with the Capital Markets and Services Act 2007  
("CMSA") and the Malaysian Code on Take-Over and Mergers.

5 [8] The Securities Commission had on August 3, 2012 issued a letter to Apex to  
confirm that it would be looking into the 2012 complaint and would take action  
against the PACs in the event there were any breach of the laws.

10 [9] It is not in dispute that the Securities Commission did not make any ruling  
with regard to any breach against the alleged PACs arising from the 2012  
complaint.

15 **The proposed merger in 2018**

[10] On September 21, 2018, Apex entered into a heads of agreement with one  
Mercury Securities Sdn Bhd ("Mercury Securities") to merge the business of JF  
Apex and Mercury Securities. This would entail:

- 20 i. The transfer of Mercury Securities' business to JF Apex for the  
consideration of RM140,000,000.00;
- 25 ii. The issuance of 20,000,000 new ordinary shares of Apex to part finance  
the consideration of the proposed merger ("the proposed private  
placement");
- 30 iii. The issuance of 100,000,000 ordinary shares of Apex to Mercury  
Securities equivalent to the balance consideration of the proposed  
merger  
("the proposed merger").

35 [11] On December 18, 2018, a formal business merger agreement was executed  
between the plaintiffs and Mercury Securities in respect of the proposed merger  
("BMA"). It was a condition precedent to the BMA that the approval of the Apex's  
shareholders to the proposed merger and the proposed private placement shall  
40 be obtained. An announcement was made on March 15, 2019 that the period to  
fulfil the conditions precedent under the BMA would be extended to August 18,  
2019.

[12] On April 25, 2019, Apex lodged an update to its 2012 complaint to renew its  
allegation that the defendants were PACs. The updated complaint reproduced  
the same allegations from the 2012 complaint with fresh allegations made that  
the PACs were attempting a renewed stealth take-over attempt and intend to  
resist the proposed merger and proposed private placement from taking effect  
("the updated complaint").

### Persons acting in concerts

[13] The plaintiffs' contention is that the defendants are parties acting in concert ("PAC") in order to seek control of the plaintiffs which manifested as early as 2012 where the defendants and their combined shareholding which is in excess of 33% had used their voting power in a very specific fashion which raises the presumption that they are acting in concert.

[14] The central figure or the protagonist of the PACs is Madam Lim Siew Kim, the first defendant.

[15] The plaintiffs therefore contended that in such circumstances, the defendants are obliged to comply with s 218(2) of the CMSA, i.e. to make a takeover offer in accordance with the code, guidelines, directions, practice notes and rulings made by the Securities Commission.

[16] The defendants have not only failed to make the takeover offer for the remaining shares not already owned by them but also failed to apply to the Securities Commission to seek for an exemption from making the offer pursuant to s 219 of the CMSA or for that matter, under the provisions of the code, guidelines and take-over and merger rules.

[17] The plaintiffs filed this OS164 on May 17, 2019. On June 3, 2019, the plaintiffs announced that an extraordinary general meeting would be held on June 19, 2019 at 8:45 a.m. ("the 2019 EGM") for the Apex's shareholders to approve the proposed merger and the proposed private placement.

[18] At the 2019 EGM, the proposed merger and proposed private placement were approved by Apex's shareholders with a majority of 54.8% to 45.2%.

[19] In the OS264, the plaintiffs seek:

*As regards the 1<sup>st</sup>. Plaintiff*

1 A declaration that the 1<sup>st</sup>. Plaintiff is a 'person aggrieved' within the meaning of a s.360(1)(d) of the Capital Markets and Services Act 2007 ('CMSA') whether by reason of one or more of the following:

- 1.1 The alleged contravention of s.218(1) and/or 218(2) and or 218(3) of the (CMSA) by the 1<sup>st</sup>. to 17<sup>th</sup>. defendants or any combination of them; and or
- 1.2 The alleged contravention of s.60(7) and 64(1) of the CMSA and/or Rule 4.02(8) and 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018) when the 12<sup>th</sup>. and 13<sup>th</sup>. Defendants had failed to inform the 2<sup>nd</sup>. Plaintiff of their indirect shareholding and or deemed interest in the 2<sup>nd</sup>. Plaintiff; and/or
- 1.3 The alleged contravention of s.64(1)(h)(iv) and (v) and s.72(2)(a)(i) of the CMSA by the 18<sup>th</sup>. defendant;

1           2 Further to paragraph 1 above, pending the conclusion of an  
investigation/inquiry by the Securities Commission of the matters  
raised in a complaint lodged by the 1<sup>st</sup>. Plaintiff on 17.7.2012 and in an  
update complaint by the 1<sup>st</sup>. Plaintiff and the 2<sup>nd</sup>. Plaintiff on 25.4.2019 with  
5           the Securities Commission and until such time where the Securities  
Commission shall make a decision whether or not to exercise any of the  
powers it may have under s. 220 or any other section(s) of the CMSA that  
pursuant to s.360(1)(d) of the CMSA, the following orders:

10           2.1 an order that the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants, whether by their servants,  
agents, representatives and or any person acting in concert with them,  
be jointly and severally restrained from any further contravention of  
s.218(1) and or 218(2) and or 218(3) of the CMSA;

15           2.2 an order that the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants whether by their servants,  
agents, representatives and or any person acting in concert with them,  
be jointly and severally restrained from acquiring, disposing and or  
dealing with, whether by encumbering, assigning or declaring any  
20           trust over any shares and or securities of the 1<sup>st</sup>. Plaintiff held in the  
name of such Defendant, as the case may be;

25           2.3 an order that the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants whether by their servants,  
agents, representatives and or any person acting in concert with them,  
be jointly and severally restrained from requisitioning any general  
meeting of the 1<sup>st</sup>. Plaintiff for any reason whatsoever;

30           2.4 an order that the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants whether by their servants,  
agents, representatives and or any person acting in concert with them,  
be jointly and severally restrained from giving any notice to convene  
any general meeting and or adjourned general meeting of the  
1<sup>st</sup>. Plaintiff;

35           2.5 an order that the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants whether by their servants,  
agents, representatives and or any person acting in concert with them,  
be jointly and severally restrained from exercising their voting or other  
rights at any general meeting, or otherwise, of the 1<sup>st</sup>. Plaintiff.

40           3 An order that the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants do jointly and severally take steps  
to comply with Part III, Division I, Subdivision 7, and more specifically,  
sections 137 and 138 of the Companies Act 2016 or the corresponding  
provisions of the Companies Act 1965, as the case may be;

4           4 An order that the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants or any of them, be restrained from  
taking out any proceedings against the 1<sup>st</sup>. Plaintiff and or 2<sup>nd</sup>. Plaintiff  
without leave of this Honourable Court;

As regards the 1<sup>st</sup>. Plaintiff in the alternatives

5 In the alternative to paragraphs 1 to 4 above, a declaration that:

5.1 the 1<sup>st</sup>. and 12<sup>th</sup>. to 17<sup>th</sup>. Defendants are persons acting in concert for  
the purpose of exercising control over the 1<sup>st</sup>. Plaintiff; and or

- 5.2 1<sup>st</sup>. to 17<sup>th</sup>. Defendants have acted in concert for the purpose of exercising control over the 1<sup>st</sup>. Plaintiff; 1
- 6 Further to paragraph 5 above, either of the following:
- 6.1 an order directing the Securities Commission to exercise such powers as it may have under the CMSA against the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants; or 5
- 6.2 an order directing the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants to apply for an exemption from the requirements of the CMSA, Code and or TOM Rules, as the case may be; 10
- 7 Further to paragraph 1 to 6 above, any one or more of the orders that may be made under s.360(1)(A) to (P) of the CMSA; 15
- As regards the 2<sup>nd</sup>. Plaintiff:
- 8 A declaration that the 2<sup>nd</sup>. Plaintiff is a 'person aggrieved' within the meaning of s.360(1)(d) of the CMSA by reason of the alleged contravention of s.218(1) and or s.218(2) of the CMSA by the Defendants or any combination of them; 20
- 9 A declaration that the 2<sup>nd</sup>. Plaintiff is a 'person aggrieved' within the meaning of s.360(1)(d) of the CMSA by reason of the alleged contravention s.60(7) and s.64(1) of the CMSA and or Rule 4.02(8) and 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018) when the 12<sup>th</sup>. and 13<sup>th</sup>. Defendants had failed to inform the 2<sup>nd</sup>. Plaintiff of their indirect shareholding in the 2<sup>nd</sup>. Plaintiff; 25
- 10 Further to paragraph 9 above, an order that the 3<sup>rd</sup>., 10<sup>th</sup>., 11<sup>th</sup>., 12<sup>th</sup>. and 13<sup>th</sup>. Defendants do disclose to the 2<sup>nd</sup>. Plaintiff the identity of the ultimate beneficial shareholder of the 12<sup>th</sup>. and 13<sup>th</sup>. Defendants; 30
- As regards the 18<sup>th</sup>. Defendant 35
- 11 An order that the 18<sup>th</sup>. Defendant do not:
- 11.1 act for or otherwise advise or provide advisory service to the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants; 40
- 11.2 make available any servant, agent and or representative to the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants for the purpose of attending any general meeting of the 1<sup>st</sup>. Plaintiff whether as observer, invitee, proxy or corporate representative as the case may be;
- 11.3 make available any servant, agent and or representative to the 1<sup>st</sup>. to 17<sup>th</sup>. Defendants to plan, organise or conduct any general meeting of the 1<sup>st</sup>. Plaintiff.

1 [20] The plaintiffs' reliefs can be categorised as follows:

20.1 *Prayers 1 to 4:*

5 Remedies pending the investigation conducted by the Securities  
Commission in respect of contravention of s 218(1) and/or 218(2)  
and/or 218(3) of the CMSA and contravention of ss 60(7) and 64(1),  
64(1)(h)(iv) and (v) and s 72(2)(a)(i) of the CMSA and/or rule 4.02(8)  
and 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018)T.

10 20.2 *Prayers 5 to 7:*

15 An alternative position in the event the Securities Commission chooses  
not to investigate the alleged contraventions, seeking for an order  
directing the Securities Commission to exercise its powers under the  
CMSA against the defendants and an order directing the first to 17th  
defendants to apply for an exemption under the CMSA, Code on  
Take-Overs and Mergers 2016 and/or Rules on Take-Overs, Mergers  
and Company Acquisition 2016.

20.3 *Prayers 8 to 10:*

25 Remedies in respect of the second plaintiff's position as a "person  
aggrieved" within the meaning of s 360(1)(d) of the CMSA by reason of  
the defendants' alleged breaches of ss 218(1) to (3) of the CMSA and  
s 60(7) and s 64(1) of the CMSA and or rule 4.02(8) and 4.02(9) of the  
Licensing Handbook SC-GL/2007 (R6-2018).

30 20.4 *Prayer 11:*

Remedies directed at the 18th defendant as company secretary.

35 [21] All the defendants filed their respective applications to strike out the  
plaintiffs' OS264 and after reading the written submissions and the cause papers  
and after oral submissions by learned counsel for the respective parties, I allowed  
the defendants' application to strike out with costs.

40 [22] The legal issues raised in the plaintiffs' OS264 were considered by the Court  
of Appeal in *Lai Soon Onn v Chew Fei Meng (3 Other Appeals)* [2018] 4 AMR 549;  
[2018] 10 CLJ 48. In that case the Court of Appeal essentially ruled that:

22.1 In a claim made by a person under s 357 of CMSA for the recovery of the  
loss or damage by reason of or by relying on the conduct of another  
person who had contravened any provision of Part VI or any regulations  
made under CMSA, a ruling from the Securities Commission is required  
before s 357 can be invoked;

22.2 Section 360 of the CMSA is only applicable to a breach or contravention of the provisions in the CMSA where the words "relevant requirement" appear. A contravention of a "relevant requirement" is a condition precedent before a person aggrieved can invoke section 360 of the CMSSA;

22.3 Sections 217 to 220 of the CMSA which deal with compliance with the take-over code are not "relevant requirement" under the CMSA.

[23] *Lai Soon Onn's* case (supra) is binding on this court.

[24] Sections 217, 219 and 220 of the CMSA expressly confer upon the Securities Commission the jurisdiction to ensure and enforce compliance with the provisions of, amongst others, s 218. Not only is the Securities Commission conferred with the powers to direct compliance and impose sanctions or penalties in the event it finds any non-compliance, the Securities Commission is also empowered to grant any exemptions from, amongst others, such compliance. This includes that of s 218. Therefore, the proper forum for the determination of the plaintiffs' complaints is in fact with the Securities Commission, and not this court. Indeed, the plaintiffs' very complaints are now before the Securities Commission.

[25] By commencing the OS264, the plaintiffs are seeking from this court to make findings of facts which are within the purview of and presently a subject of investigations by the Securities Commission, and thereby effectively amounting to a backdoor attempt to administer the Code on Take-Overs and Mergers 2016. This, the Court of Appeal has held must neither be allowed nor encouraged. This was what the Court of Appeal said:

[42] Similarly, it is not for the courts to usurp the function of the market regulatory bodies in carrying out its objective as stipulated under the law. The functions of the SC are statutorily provided in s 15(1)(d) of the SCA, where it is tasked to regulate the take-over and mergers of companies. Section 217(4) of the CMSA provides that:

...

[43] Gleaning through the provisions of the CMSA, it is the intention of the Act that the bodies established under the Act are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions. In *R v International Stock Exchange of UK and Ireland; Ex parte Else Ltd, R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd; Ex parte Else (1982) Ltd & Anor, R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd; Ex parte Roberts* [1993] 1 All ER 420; [1993] QB 534, Lord Bingham observed that "the court will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market". This court applied the same principle in *Shahidan Shafie* in arriving at its decision when interpreting s 153 of the SCA. To interpret otherwise would result in a situation

1 where there would be two decisions, one of the court and the other from the SC.  
That cannot be the position in law (refer to paragraph 29 of *Shahidan Shafie*). The  
courts have shown a reluctance to interfere with the decision of regulatory bodies  
in carrying out its objective in the absence of mala fide or acting in excess of  
5 jurisdiction. A similar stance was taken by this court in *Bursa Malaysia Securities  
Berhad* and also in *Khiudin bin Mohd & Anor v Bursa Malaysia Securities Berhad  
(and Another Application)* [2012] 5 AMR 59; [2012] 6 MLJ 131 which had referred to  
various Commonwealth jurisdictions, which demonstrated the attitude of the  
10 courts in reviewing the decision made by the regulators in different jurisdictions.  
Therefore, it is not within this court's jurisdiction to interfere with the duties  
mandated to the market regulatory bodies in maintaining and promoting the  
interests of the public in dealing on the exchange and these bodies should be left  
to carry out its objective as stipulated under the Act.

15 [44] Therefore, a person who has suffered loss or incurred damage may institute a  
civil action to recover the amount of the loss or damage after a contravention of  
any provision or any regulations made under the CMSA has been determined by  
the SC. It is not necessary for the courts to adjudicate whether there is a  
20 contravention of the Act before s 357(1) of the CMSA can be applied. All that is  
required is for the SC first to determine whether there was a contravention.

25 [26] I also hold that the plaintiffs do not have the necessary locus standi or  
standing to bring this OS264.

30 [27] The entirety of the plaintiffs' OS264 is premised upon their status as  
"aggrieved persons" pursuant to s 360(1)(d) of the CMSA. The locus standi or  
standing upon which the plaintiffs are bringing the OS264 is their allegation that  
they have been aggrieved by virtue of the alleged breaches by the defendants of  
s 218(1) to (3) of the CMSA and ss 60(7), 64(1), 64(1)(h)(iv) and (v) and s 72(2)(a)(i)  
of the CMSA and/or rule 4.02(8) and 4.02(9) of the Licensing Handbook  
SC-GL/2007 (R6-2018)T.

35 [28] Again, the Court of Appeal in *Lai Soon Onn* (supra) has opined on this issue.  
At paragraphs [47] to [51] of the judgment, the circumstances in which a person  
becomes "aggrieved" for the purposes of s 360 were examined. In short, the Court  
of Appeal held that there must first be a contravention by the other person of a  
40 "requirement" inter alia imposed by or under the CMSA. The Court of Appeal  
held that insofar as the provisions in the CMSA are concerned, provisions which  
amount to "requirements" are those which are expressly and explicitly identified  
and spelled out as such. Pertinently, this was what the Court of Appeal had to say  
about s 218, this being the provision in the CMSA which the defendants have  
alleged to have contravened:

[54] The word "requirement" does not appear in ss 217 to 220 of the CMSA. In fact,  
s 218 of the CMSA uses the words "compliance with code, guidelines, directions  
and practice notes and rulings". What is the rule of construction to be applied  
when there are such wordings in the legislation? In the Court of Appeal case of  
*Yung Ing Ing v Hunfara Construction Sdn Bhd* [2015] 2 AMCR 349; [2015] 5 MLJ 668

this court had the occasion to consider the implication of such wordings in the statute, when Parliament includes a particular term in one part or section of the statute but omits it in another part or section of the same statute. In such instance this court held that:

"[29] ... It is a principle of interpretation of statutes that where the Legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion. There are the principles of construction as pointed out by Bennion on *Statutory Interpretation* (LexisNexis (5th Edn) at pp 157, 1160):

'Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings.

Every word to be given meaning on the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded.'

Different words to be given different meanings similarly it is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning ...

[30] Therefore, the inclusion of the word 'cheque' in limb (c) of subsection (2) of s 121 and the exclusion of the word 'cheque' in the latter limb of that subsection was done intentionally and purposely by Parliament; and the court must give effect to the intention of Parliament: that whilst the former limb (limb (c)) applies to cheques, the latter (subsequent) limb does not."

[55] Therefore, guided by the principle of construction in the above case, as the word "requirement" is not found in ss 217 to 220 of the CMSA, it must therefore follow that it was never the intention of Parliament when it legislated s 360 of the CMSA to confer on the plaintiff a right to apply to court to compel the defendants to undertake an MGO. This is fortified further if one is to examine the provisions of Division 2 of Part VI of the CMSA (comprising of ss 217 to 220). This is in pari materia with Division 2 Part IV of the SCA (comprising of ss 33 to 34C).

[29] I agree with learned counsel for the defendants that on the authority of *Lai Soon Omn* (supra), s 218(1) to (3) of the CMSA and ss 60(7), 64(1), 64(1)(h)(iv) and (v) and s 72(2)(a)(i) of the CMSA and/or rule 4.02(8) and 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018)T.218 are clearly not a "relevant requirement" for the purposes of s 360.

1 [30] I also agree with learned counsel for the 12th and 13th defendants that the  
plaintiffs do not have locus standi and neither can they be a "person aggrieved"  
when:

5 (i) The plaintiffs, as the target companies, are the very subject matter of this  
case; and

(ii) It is the minority shareholders in this case, if at all, who are affected by the  
acts of "persons acting in concert" who can sue and not the plaintiff.

10 [31] As alleged in the paragraphs 163 until 165 of Dato' Azizan's affidavit under  
the heading of "*The Heart of the "Conflict"*", this case involves the rights of the  
minority shareholders against the purported "PAC" or "persons acting in  
15 concert" as regards the latter's obligations to them under the provisions of the  
Code on take-overs and mergers and the relevant provisions of the CMSA.

[32] Paragraphs 163 to 165 of Dato' Azizan's affidavit in support of the said  
OS264 are reproduced below:

20 The Heart of the "Conflict"

163. The heart of conflict is whether the shareholders (as a whole) should be  
25 given the choice to decide whether the Apex and Mercury should merge,  
which is the direction that the board is moving in, or whether the control of  
Apex should be "handed" to the PACs without the shareholders deciding  
whether Apex should be allowed to merge with Mercury.

30 164. Mercury cannot influence the outcome of any general meeting called to  
consider the Proposed Merger. This is because it does not have Apex shares.

165. The conflict is essentially between the rights of the minority shareholders  
and the "rights" of the PACs.

35 [33] As such, given the admissions in paragraphs 163 to 165 of Dato' Azizan's  
affidavit, even if there are persons acting in concert, it is the minority  
shareholders who ought to sue and not the plaintiffs.

40 [34] Accordingly, the basis upon which the plaintiffs claim to be "aggrieved  
persons" falls, bringing along with it any locus standi the plaintiffs allege they  
may have to commence this OS246.

[35] Quite apart from the aforesaid, the plaintiffs' OS 246 seeks reliefs in relation  
to the plaintiffs' updated complaints which are currently pending investigations  
by the Securities Commission and/or alternatively reliefs only in the event the  
Securities Commission chooses not to investigate. Clearly, these reliefs, in  
particular, prayers 5 to 7 are premature. Further, whilst prayer 6.1 of the OS246  
seeks to compel the Securities Commission to act, however, the Securities  
Commission is not made a party in these proceedings.

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[36] Hence, for the above reasons, I allowed the defendants' applications to strike out the OS264 with costs. Given the above grounds apply to all the defendants, there is no necessity for the court to consider the peculiar circumstances that were canvassed by each of the defendants as a further ground to strike of the OS264.

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