MAYBAN TRUSTEES BHD

v.

BAYAN BAY DEVELOPMENT SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
HASHIM YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: P-02-1254-2004]
29 JUNE 2007

COMPANY LAW: *Arrangement, scheme of - Court approval - Appeal against High Court decision allowing respondents' petition for sanction of scheme of compromise and arrangement - Appellant trustee claiming against respondents for repayment of monies paid - Whether monies claimed by appellant trust monies - Whether appellant an unsecured creditor - Whether scheme lacked bona fides - Companies Act 1965, ss. 88, 95, 176 - Trust Companies Act 1949, s. 16*

TRUSTS: *Company law - Arrangement, scheme of - Court approval - Appeal against High Court decision allowing respondents' petition for sanction of scheme of compromise and arrangement - Appellant trustee claiming against respondents for repayment of monies paid - Whether monies claimed by appellant trust monies - Whether appellant an unsecured creditor - Whether scheme lacked bona fides - Companies Act 1965, ss. 88, 95, 176 - Trust Companies Act 1949, s. 16*

This was an appeal by the appellant against the decision of the learned High Court judge allowing the first and second respondents' petition for sanction of a scheme of compromise and arrangement ('SCA') between them and their creditors under s. 176 of the Companies Act 1965 ('Act'). The second respondent was a wholly owned subsidiary of the first respondent, which in turn was a joint venture vehicle of one Anson Perdana Bhd and one Penang Development Corporation to develop a shopping mall, housing accommodation, shop offices and a yacht club ('Club') in the Bayan Lepas area in Pulau Pinang. Unable to continue and complete the proposed development, the first and second respondents entered into a single composite scheme of arrangement with their respective creditors in accordance with their legal rights and claims. The appellant, as trustee for members who bought membership of the Club, commenced legal

proceedings against the respondents for the repayment of the sum of RM9,428,661, being the membership fees paid by the trustee from its trust account to the second respondent together with interests and damages. Subsequently, the first and second respondents applied to the High Court for, *inter alia*, leave to call and convene meetings in respect of their creditors for the purpose of considering and passing the SCA. The High Court granted the application and despite the appellant's objections to the SCA, sanctioned the SCA. The appellant appealed, arguing that: (i) the court should consider the appellant's position as a trustee for the members of the second respondent in its capacity as a trust corporation registered pursuant to the Trust Companies Act 1949 ('TCA'), and that based on s. 16 of the TCA, the membership fees adverted to in the trust deed describing the appellant's status as a trust corporation ('Trust Deed') were such trust monies; (ii) the appellant was entitled to full recovery of the monies paid to the second respondent in accordance with the Trust Deed; (iii) the individual club members should be the creditors and not the appellant; (iv) the order dated 2 November 2004 sanctioning the SCA had resulted in the Trust Deed being terminated; (v) any termination or winding up of a trust as created by the Trust Deed could only be brought about in strict compliance with the provision under s. 95 of the Act. Clause 17 of the Trust Deed which dealt with the "Duration of Scheme and Termination" as contended by the appellant made specific reference to s. 95 of the Act; and (vi) the SCA lacked *bona fides*.

Held (dismissing the appeal)
Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) Under the terms of the Trust Deed, the appellant was the trustee and not the first and second respondents. When the membership fees were first paid to the appellant, it was under a legal obligation to place the membership fees in trust accounts to be released to the second respondent. Section 16 of the TCA referred to by the appellant was applicable to the appellant as a trust corporation to ensure that the appellant kept trust money separate from its own assets. This was to ensure that should the appellant be wound up or carry out a scheme of arrangement, the monies held on trust by the appellant would remain out of reach of the appellant's creditors. Section 16 of the TCA had no relevance to the first and second respondents' scheme of arrangement. They were

not trust corporations. The purpose and intent of the Trust Deed was to appoint the appellant as a stakeholder or trustee of the membership fees pending completion of the development of the Club to ensure that the membership fees were used solely to pay the expenses incurred by the second respondent in the development of the Club. The appellant was authorized by the parties to the Trust Deed to release such amount of the membership fees sufficient to pay the sums stipulated in the architect's certificate. The monies once released by the appellant pursuant to the terms of the Trust Deed would no longer be monies held on trust by the appellant and could not be trust monies. (paras 7, 8 & 9)

(2) The appellant was not entitled to full recovery of the monies paid to the second respondent in accordance with the Trust Deed. If the first and second respondents were wound up (there being no scheme) the appellant's debt would rank *pari pasu* with the other unsecured creditors, otherwise there would an undue preference in favour of the appellant. The appellant was not a preferred creditor. In a winding up, there are only three classes of creditors; the preferential creditors, the secured creditors and the unsecured creditors. The appellant was neither a preferential nor secured creditor. The appellant was in fact an unsecured creditor and was estopped from saying otherwise for the following reasons: (i) the appellant claimed for the monies and filed the legal action in 2002 against the first and second respondents before the SCA was proposed; (ii) the appellant filed its proof of debt with the second respondent as an unsecured creditor of the first and second respondents; (iii) the appellant attended the creditors meeting, participated and voted against the SCA; and (iv) the appellant obtained leave and became an intervener in these proceedings by reason that it was an unsecured creditor. (para 10)

(3) For the reasons stated above, the appellant's argument that the monies claimed were trust monies was misconceived and without basis. The appellant was an unsecured creditor and was properly classified as such. (para 11)

(4) The Club members and the appellant had no proprietary right or any interest whatsoever over the assets of the Club. The Club members merely had the bare right to enter the Club to use and enjoy in common with other members the facilities of

A the Club during the period of the licence granted subject to compliance with the rules governing such use. Under the membership agreement, the respective members had no legal right to seek any repayment or refund of the membership fees from the second respondent. The legal right to such
B repayment or refund of the membership fees rested with the appellant under the Trust Deed. Accordingly, the respective members had no legal right or claims against the first and second respondents. This was evident from the legal action that was commenced by the appellant against the first and
C second respondents and not by the individual members. (para 13)

(5) The order sanctioning the SCA did not terminate the Trust Deed. It was only the membership agreement that was
D deemed to be terminated as the SCA provided for the refund of the membership fees in part in common with the other unsecured creditors. This was part of the proposal contained in the SCA that was considered and approved by the creditors. (para 14)

E

(6) Section 95 of the Act and cl. 17 of the Trust Deed were not relevant in the context of the appellant's argument. Section 95 of the Act required the appellant as trustee to summon a meeting of the members to discuss the winding up of the
F scheme while cl. 17.2 of the Trust Deed provided for the appellant as trustee to terminate the operation of the Club by giving six months' notice. Clause 17.3 of the Trust Deed provided that if the Club were not yet completed the appellant as trustee should, in the event of the determination and
G winding up of the scheme, institute legal proceedings against the second respondent to secure the repayment or refund of the membership fees for the remaining period of the un-utilized period. The appellant had already commenced the legal action in 2002 and it must be assumed that the appellant as trustee
H had complied with s. 95 of the Act and with the provisions of cl. 17.3 of the Trust Deed. The appellant was estopped from saying otherwise. (para 15)

(7) With regard to the appellant's contention that the SCA lacked *bona fides*, the learned trial judge was right in finding that this
I was a mere allegation as there was no cogent evidence to support it. The appellant's allegation of breach of trust and contravention of s. 88 of the Act against the first and second

respondents which premised on the fact that the Club would not be built was wholly misconceived and without merit. It must be noted that the said members of the Club had invoked and opted for their right under the Trust Deed to have the appellant as their trustee to institute legal proceedings against the respondents to claim for the refund of the membership fees paid to the second respondent. (para 17)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim Mahkamah Tinggi kerana membenarkan petisyen responden-responden pertama dan kedua yang memohon keizinan terhadap satu skim kompromi dan penyusunan ('SCA') yang mereka meterai dengan pemiutang-pemiutang mereka di bawah s. 176 Akta Syarikat 1965 ('Akta'). Responden kedua adalah anak syarikat yang dimiliki sepenuhnya oleh responden pertama, sementara responden pertama pula adalah satu syarikat usahasama di antara Anson Perdana Bhd dan Penang Development Corporation bagi memajukan sebuah pusat belibelah, rumah-rumah penginapan, kedai-kedai dan sebuah kelab perahu layar ('Kelab') di kawasan Bayan Lepas, Pulau Pinang. Ekoran kegagalan mereka menerus dan menyiapkan pembangunan yang dicadangkan, responden-responden pertama dan kedua telah memeterai satu skim penyusunan komposit dengan pemiutang-pemiutang mereka masing-masing selaras dengan hak dan tuntutan undang-undang mereka. Perayu, sebagai pemegang amanah kepada ahli-ahli yang membeli keahlian Kelab, memulakan prosiding undang-undang terhadap responden-responden menuntut pembayaran balik sejumlah RM9,428,661, iaitu jumlah fee keahlian yang dibayar oleh pemegang amanah dari akaun amanahnya kepada responden kedua, serta faedah dan juga gantirugi. Berikutnya, responden-responden pertama dan kedua memohon ke Mahkamah Tinggi, antara lain untuk kebenaran memanggil dan mengadakan mesyuarat-mesyuarat berhubung pemiutang-pemiutang mereka guna untuk menimbang dan meluluskan SCA. Mahkamah Tinggi membenarkan permohonan dan mengizinkan SCA walaupun ianya dibantah oleh perayu. Perayu merayu dan berhujah bahawa: (i) mahkamah harus mempertimbang kedudukan perayu sebagai pemegang amanah bagi ahli-ahli responden kedua serta kapasitinya sebagai satu perbadanan amanah yang didaftar di bawah Akta Syarikat Amanah 1949 ('TCA'), dan bahawa berdasarkan kepada s. 16 TCA, fee keahlian seperti yang dirujuk dalam suratikatan amanah yang memerihalkan status perayu sebagai satu perbadanan

amanah ('Suratikatan Amanah') adalah wang amanah tersebut; (ii) perayu berhak dibayar balik sepenuhnya segala wang yang telah dibayar kepada responden kedua selaras dengan Suratikatan Amanah; (iii) ahli-ahli individu kelab harus menjadi pemiutang-pemiutang dan bukannya perayu; (iv) perintah bertarikh 2 November 2004 mengizinkan SCA telah menyebabkan Suratikatan Amanah ditamatkan; (v) mana-mana penamatan atau penggulungan amanah seperti yang dicipta oleh Suratikatan Amanah hanya boleh dibuat dengan cara yang mematuhi secara ketat peruntukan s. 95 Akta. Fasal 17 Suratikatan Amanah yang menyentuh "Tempoh dan Penamatan Skim" seperti yang dihujahkan oleh perayu membuat rujukan khusus kepada s. 95 Akta; dan (vi) SCA ketandusan *bona fides*.

Diputuskan (menolak rayuan)

Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Di bawah terma-terma Suratikatan Amanah, pemegang amanah adalah perayu dan bukannya responden-responden pertama dan kedua. Apabila fee keahlian mula dibayar kepada perayu, ia menanggung obligasi undang-undang untuk meletakkan fee keahlian ke dalam akaun amanah untuk diserahkan kepada responden kedua. Seksyen 16 TCA yang dirujuk terpakai kepada perayu sebagai satu perbadanan amanah bagi mempastikan perayu menyimpan wang amanah secara berasingan dari aset-aset peribadinya. Tujuannya adalah untuk mempastikan bahawa jika perayu digulung atau melaksanakan suatu skim penyusunan, wang-wang yang dipegang secara amanah oleh perayu tidak boleh diusik oleh pemiutang-pemiutang perayu. Seksyen 16 TCA tidak relevan kepada skim penyusunan responden-responden pertama dan kedua. Ini kerana mereka bukan perbadanan amanah. Tujuan dan maksud Suratikatan Amanah adalah untuk melantik perayu sebagai stakeholder atau pemegang amanah kepada fee keahlian sementara menunggu pembangunan Kelab siap bagi mempastikan bahawa fee keahlian digunakan khusus untuk membayar perbelanjaan yang ditanggung responden kedua dalam menyiapkan pembangunan Kelab. Perayu telah diizin oleh pihak-pihak kepada Suratikatan Amanah untuk membayar jumlah-jumlah tertentu setakat yang mencukupi bagi memenuhi jumlah yang dinyatakan di dalam sijil arkitek. Sebaik wang

dibayar oleh perayu selaras dengan terma-terma Suratikatan Amanah, wang tersebut bukan lagi wang yang dipegang sebagai amanah dan tidak lagi menjadi wang amanah.

(2) Perayu tidak berhak untuk mendapat kembali sepenuhnya wang yang dibayar kepada responden kedua selaras dengan terma-terma Suratikatan Amanah. Jika responden-responden pertama dan kedua digulung (dengan tiadanya skim) maka hutang perayu akan berdiri *pari pasu* bersama-sama dengan pemiutang-pemiutang tak bercagar lain, jika tidak ia bererti bahawa perayu telah diberikan keutamaan tidak wajar. Perayu bukanlah seorang pemiutang yang mendapat keutamaan. Dalam satu penggulungan, hanya terdapat tiga kelas pemiutang; pemiutang yang diberi keutamaan, pemiutang bercagar dan pemiutang tak bercagar. Perayu bukan pemiutang yang diberi keutamaan ataupun pemiutang bercagar. Perayu sebenarnya adalah pemiutang tak bercagar dan dengan itu dihalang dari menidakkannya atas alasan-alasan berikut: (i) perayu telah menuntut pembayaran balik wang dan telah memfail guaman pada tahun 2002 terhadap responden-responden pertama dan kedua sebelum SCA dicadangkan; (ii) perayu telah memfail bukti keberhutangannya dengan responden kedua sebagai seorang pemiutang tak bercagar responden-responden pertama dan kedua; (iii) perayu telah menghadiri dan mengambil bahagian dalam mesyuarat pemiutang-pemiutang dan menolak SCA; dan (iv) perayu telah mendapat izin untuk menjadi dan menjadi seorang pencelah dalam prosiding-prosiding ini berdasarkan kedudukannya sebagai pemiutang tak bercagar.

(3) Atas alasan-alasan yang dinyatakan di atas, hujah perayu bahawa wang yang dituntut adalah wang amanah adalah tersasul dan tidak berasas. Perayu adalah seorang pemiutang tak bercagar dan telah digolongkan begitu dengan sewajarnya.

(4) Ahli-ahli Kelab dan perayu tidak mempunyai hak milikan atau apa jua kepentingan terhadap aset-aset Kelab. Ahli-ahli kelab hanya memiliki hak asas untuk memasuki Kelab dan menggunakan dan menikmati secara bersama fasiliti-fasilitinya dalam tempoh lesen yang diberi tertakluk kepada peraturan-peraturan yang mengawalselia penggunaan tersebut. Di bawah perjanjian keahlian, masing-masing ahli tidak berhak untuk menuntut pembayaran semula fee keahlian dari responden kedua. Di bawah Suratikatan Amanah, hak undang-undang

untuk menuntut pembayaran semula fee keahlian tersebut adalah terletak kepada perayu. Oleh itu, di sisi undang-undang, masing-masing ahli tidak mempunyai hak untuk membuat tuntutan terhadap responden-responden pertama dan kedua. Ini terserlah apabila guaman terhadap responden-responden pertama dan kedua difailkan oleh perayu dan tidak oleh ahli-ahli secara individu.

(5) Perintah mengizinkan SCA tidak menamatkan Suratikatan Amanah. Apa yang dianggap ditamatkan adalah perjanjian keahlian oleh kerana SCA memperuntukkan pengembalian sebahagian fee keahlian, iaitu seperti halnya dengan pemiutang-pemiutang tak bercagar lain. Ini merupakan sebahagian dari cadangan yang terkandung di dalam SCA yang telah dipertimbang dan diluluskan oleh pemiutang-pemiutang.

(6) Dalam konteks hujahan perayu, s. 95 Akta dan fasal 17 Suratikatan Amanah adalah tidak relevan. Seksyen 95 Akta mengkehendaki perayu selaku pemegang amanah untuk memanggil mesyuarat ahli-ahli bagi membincang penggulungan skim sementara fasal 17.2 Suratikatan Amanah mengkehendaki perayu selaku pemegang amanah untuk menamatkan operasi Kelab dengan memberi enam bulan notis. Fasal 17.3 Suratikatan Amanah pula memperuntukkan bahawa jika Kelab belum lagi disiapkan perayu selaku pemegang amanah harus, sekiranya skim ditamatkan dan digulung, memulakan prosiding undang-undang terhadap responden kedua bagi mendapatkan kembali pemulangan atau pembayaran balik fee keahlian berhubung baki tempoh masa yang masih tidak dimanfaatkan. Perayu telahpun memulakan guaman pada tahun 2002 dan ianya hendaklah dianggap bahawa perayu selaku pemegang amanah telah mematuhi s. 95 Akta serta fasal 17.3 Suratikatan Amanah. Perayu tidak boleh mengatakan sebaliknya.

(7) Berhubung hujah perayu bahawa SCA ketandusan *bona fides*, yang arif hakim bicara betul bilamana memutuskan bahawa itu hanyalah satu dakwaan kosong kerana tidak terdapat keterangan kukuh untuk menyokongnya. Dakwaan perayu mengenai pecah amanah dan pelanggaran s. 88 Akta terhadap responden-responden pertama dan kedua, yang didasar kepada fakta bahawa Kelab tidak akan dibina, adalah tersasul secara keseluruhannya dan tidak berasas. Harus diingat bahawa ahli-ahli Kelab telah menggunakan hak mereka di bawah

Suratikatan Amanah supaya perayu sebagai pemegang amanah mengambil tindakan undang-undang terhadap responden-responden untuk menuntut pemulangan fee keahlian yang telah dibayar kepada responden kedua.

Legislation referred to:
Companies Act 1965, ss. 88, 95, 176(1)
Courts of Judicature Act 1964, s. 42
Housing Developer's (Control and Licensing) Act 1966,
Trust Companies Act 1949, s. 16

For the appellant - Datuk N Chandran (Chan Kok Keong & Norazali Nordin with him); M/s Chan & Assoc
For the 1st & 2nd respondents - Tang Woh Heng (TS Chin with him); M/s Arifin & Partners
For the 3rd respondent - Mathew Thomas Phillip; M/s Thomas Philip
For the 5th-8th respondents - Not represented
For the Proposed Intervener - Selvarajah (Derek Fernandez with him)

[Appeal from High Court, Pulau Pinang; Petition No: MTI-26-9-2004]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] This is an appeal by the appellant ("the seventh intervener in the court below") against the decision of the learned judge of the High Court at Penang in allowing the first and second respondents' ("the petitioners in the court below") petition for sanction of the scheme of compromise and arrangement ("SCA") between them and their creditors under s. 176 of the Companies Act 1965 ("the Act"). Section 176(1) of the Act provides as follows:

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

Facts Of The Case

[2] The relevant background facts of the case are as follows:

(1) The second respondent is a wholly owned subsidiary of the first respondent. The first respondent is the joint venture vehicle of Anson Perdana Berhad and Penang Development Corporation (PDC) to develop a shopping mall, housing accommodation, shop offices and a yacht club ("the club") in the Bayan Lepas area in Pulau Pinang. The PDC has 30% share in the first respondent.

(2) Due to the financial crisis in 1997 the first respondent and second respondent were unable to continue and complete the proposed development. The first respondent and second respondent entered into a single composite scheme of arrangement wuh their respective creditors in accordance with their legal rights and claims.

(3) On 11 December 2002, the appellant as trustee for members who bought membership of the Club commenced legal proceedings in the High Court Kuala Lumpur (S-22-5-2003) against the first and second respondents for the repayment of the sum of RM9,428,661 being the membership fees paid by the trustee from its trust account to the second respondent, interest, general damages and costs by reason of the fact that the second respondent jointly with the first respondent failed to complete the club and had abandoned the development of the club. The club members had lost the use of the facilities of the club. The SCA is a single composite scheme of arrangement that included the settlement of the debts of the second respondent. The appellant was recognized as an unsecured creditor in the SCA by the first respondent for the same debt that was also claimed against the second respondent.

(4) On 13 May 2003, the first and second respondents applied to the High Court (OS D1-24-113-2003) for *inter alia*, leave to call and convene meetings in respect of their creditors for the purpose of considering and passing the SCA proposed to be made between the first and second respondents and their respective creditors. Pending the meetings a restraining order was granted by the court on 22 May 2003, and by an order

dated 13 August 2003 the court extended the validity of the restraining order. The first and second respondents were to be restructured in accordance with the SCA. The preferential creditors, unsecured creditors and contingent creditors of the respondents including the appellant, will be paid or derived such benefit according to the SCA.

(5) The first to the sixth interveners (the third to the eighth respondents) supported the petition and sought approval of the court for the SCA but it was opposed by the appellant. The effect of the SCA is that the unsecured creditors of the first respondent shall receive cash distribution which will be a moratorium of enforcement of claims by the creditors in the SCA pending the completion of the project/shopping mall. The SCA upon sanction by the court and being implemented shall discharge all claims by creditors. The SCA satisfied the statutory requirement and was approved by the required 50% in majority of the creditors.

Issues

[3] Before the learned judge of the High Court the questions for determination were focused mainly on the objection of the appellant to the SCA on the following issues:

(i) Whether the appellant can be classified under a category of its own.

(ii) Whether the appellant has been excluded from the creditors meeting of the second respondent.

(iii) Whether the appellant is only given one vote though it purported to represent the 291 club members.

(iv) Whether the scheme lacks *bona fide*.

(v) Whether the failure to build the club constitutes a breach of trust and contravenes s. 88 of the Act.

Decision Of The Court On Appeal

[4] It was argued for the appellant that the court should consider the appellant's position as a trustee for the members of the Bayan Bay Marina Club (the second respondent) in its capacity as a Trust Corporation registered pursuant to the Trust

Companies Act 1949 ("the TCA"). Reference was made to the trust deed which described the appellant as a company incorporated in Malaysia and registered as a Trust Corporation under the TCA. Learned counsel for the appellant in the appeal before us submitted that the position of the appellant as a Trust Corporation is of importance to this appeal as the TCA has entrenched in it a specific provision governing the manner of handling of trust monies by a trust corporation like the appellant here. The relevant part of s. 16 of the TCA provides as follows:

> All moneys, ... received or held by any trust company in a fiduciary capacity shall always be kept distinct from those of the company, and in separate accounts, ... so that at no time shall trust monies form part of or be mixed with the general assets of the company.

[5] Based on the provision of s. 16 of the TCA the appellant therefore contended that the membership fees adverted to in the trust deed in this case are such trust monies. All payments made out of the trust fund of the membership fees by the appellant in accordance with the terms of the trust deed dated 3 July 1996 will have to be considered in the light of this special position of the appellant as a trustee pursuant to the TCA. Clause 12 of the trust deed as contended by the appellant is in point here. (See pp. 952-953 of appeal record (volume 1)).

[6] It is the contention of the appellant that the membership fees referred to in the trust deed and disbursed to the second respondent cannot be treated as an ordinary debt of any other unsecured creditor. To the appellant the members of the intended club as represented by the appellant cannot be classified as unsecured creditors for the purposes of a s. 176 scheme as envisaged by Part VIII of the Act.

[7] With respect to the above contention of the appellant I do not think that the monies claimed by the appellant are trust monies. The appellant's monetary claim is for the refund of the membership fees. Under the terms of the trust deed, the appellant is the trustee and not the first and second respondents. When the membership fees were first paid to the appellant the appellant was under a legal obligation to place the membership fees in trust accounts to be released to the second respondent. (See Recital vii, cls. 8 and 12 of the trust deed).

[8] It is my view that s. 16 of TCA referred to by the appellant is applicable to the appellant as a Trust Corporation to ensure that the appellant keeps trust money separate from its own assets. This is to ensure that should the appellant be wound up or carry out a scheme of arrangement the monies held on trust by the appellant would remain out of reach of the creditors of the appellants. Section 16 of TCA has no relevance to the first and second respondents' scheme of arrangement. The first and second respondents are not trust corporations.

[9] The purpose and intent of the trust deed is to appoint the appellant as a stakeholder or trustee of the membership fees pending completion of the development of the club to ensure that the membership fees were used solely to pay the expenses incurred by the second respondent in the development of the club. The appellant was authorized by the parties to the trust deed to release such amount of the membership fees sufficient to pay the sums stipulated in the architect's certificate. The trust account here can be treated as being similar to the Housing Developer's Account ("HDA Account") under the Housing Developers (Control and Licensing) Act 1966 (Act 118) where the purchase price paid by the purchaser of a house is paid to the HDA Account to be released progressively to pay for the construction of the house. The monies once released by the appellant pursuant to the terms of the trust deed would no longer be monies held on trust by the appellant and cannot be trust money.

[10] Learned counsel for the appellant also argued that the appellant is entitled to full recovery of the monies paid to the second respondent in accordance with the trust deed. In my view this cannot be the case. If the first and second respondents were wound up (there being no Scheme) the appellant's debt would rank *pari pasu* with the other unsecured creditors, otherwise there will be an undue preference in favour of the appellant. The appellant is not a preferential creditor. In a winding up there are only three classes of creditors; the preferential creditors, the secured creditors and the unsecured creditors. The appellant is not a preferential creditor and is also not a secured creditor. The appellant is in fact an unsecured creditor and is estopped from saying otherwise for the following reasons:

A (i) the appellant claimed for the monies and filed the legal action in 2002 against the first and second respondents before the SCA was proposed;

(ii) the appellant filed its proof of debt with the second
B respondent as an unsecured creditor of the first and second respondents (See exh. MTB 10 at pp 1088-1091 appeal record (vol 4)1;

(iii) the appellant attended the creditors meeting, participated and
C voted against the SCA;

(iv) obtained leave to intervene and became an intervener in these proceedings by reason that the appellant is an unsecured creditor.

D **[11]** For the above stated reasons I find the appellant's argument that the monies claimed is trust money is misconceived and without basis. The appellant is an unsecured creditor and is properly classified as an unsecured creditor.

E **[12]** It is also the contention of the appellant that the individual club members should be the creditors and not the appellant. In my view if this is the case then the appellant has no *locus standi*. On this point I find the learned trial judge had made correct findings of fact wherein in his grounds of judgment he had *inter*
F *alia* stated as follows:

(i) The club members through the appellant opted under the trust deed to pursue a refund of the monies they paid towards membership fees which is a monetary claim and this is the same with any other unsecured creditor.

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(ii) Having participated in the meeting the appellant's objection that it has been excluded from the meeting of the second respondent is misplaced.

H (iii) The club members having chosen to pursue a monetary claim against the first and second respondents through the appellant cannot now claim to be recognized as another class of creditors under the Scheme as to be entitled to attend in their individual capacity as members of the club and to vote therein.
I It is the appellant who had assumed the role of the creditor for and on behalf of the individual members and such creditor was entitled to one vote.

[13] It is my view the club members and the appellant have no proprietary right or any interest whatsoever over the assets of the club. The club members merely have the bare right to enter the club to use and enjoy in common with other members the facilities of the club during the period of the licence granted subject to compliance with the rules governing such use. (See cl. 6.2 of the Membership Agreement). Under the membership agreement the respective members have no legal right to seek any repayment or refund of the membership fees from the second respondent. The legal right to such repayment or refund of the membership fees rest with the appellant under the trust deed. Accordingly the respective members have no legal right or claims against the first and second respondents. This is evident from the legal action that was commenced by the appellant against the first and second respondents and not by the individual members.

[14] It was also argued for the appellant that the order dated 2 November 2004 sanctioning the SCA had resulted in the trust deed being terminated. I do not agree with such a contention. The order did not terminate the trust deed. It is only the membership agreement that is deemed to be terminated as the SCA provides for the refund of the membership fees in part in common with the other unsecured creditors. This is part of the proposal contained in the SCA that was considered by the creditors and approved by the creditors.

[15] Learned counsel for the appellant submitted that any termination or winding up of a trust as created by the trust deed can only be brought about in strict compliance with the provision under s. 95 of the Act. Clause 17 of the trust deed which deals with the "Duration of Scheme and Termination" as contended by learned counsel for the appellant made specific reference to the said s. 95 of the Act. With respect I do not find s. 95 of the Act and cl. 17 of the trust deed are relevant in the context of the argument of learned counsel for the appellant. Section 95 of the Act requires the appellant as trustee to summon a meeting of the members to discuss the winding up of the scheme. Clause 17.2 of the trust deed provides for the appellant as trustee to terminate the operation of the club by giving six months notice. Clause 17.3 of the trust deed provides that if the club is not yet completed the appellant as trustee shall in the event of the determination and

winding up of the scheme institute legal proceedings against the second respondent to secure the repayment or refund of the membership fees for the remaining period of the unutilized period. The appellant had already commenced the legal action in 2002 and it must be assumed that the appellant as trustee had complied with s. 95 of the Act and with the provision of cl. 17.3 of the trust deed. The appellant is estopped from saying otherwise.

[16] With regard to the appellant's contention that the SCA lacks *bona fide* the learned trial judge was right in finding that this is a mere allegation as there is no cogent evidence to support it. I also find the appellant's allegation of breach of trust and contravention of s. 88 of the Act against the first and second respondents which premised on the fact that the club would not be built is wholly misconceived and without merit. It must be noted that the said members of the club have invoked and opted for their right under the trust deed to have the appellant as their trustee to institute legal proceedings against the respondents to claim for the refund of the membership fees paid to the second respondent.

Conclusion

[17] For the reasons already given I would dismiss the appellant's appeal with costs and order the deposit to be paid to the respondents on account of taxed costs.

[18] My learned brother Hashim bin Dato' Hj. Yusoff (now FCJ) has seen this judgment in draft and has conveyed his agreement thereto. A member of the panel who was the Chairman which heard this appeal, Denis Ong Jiew Fook, JCA went on retirement on 3 June 2007 but has not indicated his decision on this appeal. This judgment is therefore a majority judgment that is in accordance with s. 42 of the Courts of Judicature Act 1964.