PELORUS HOLDING SDN BHD

v.

JAFFA ROGER DAWKINS & ORS

Federal Court, Putrajaya
Wan Ahmad Farid Wan Salleh CJ, Collin Lawrence Sequerah, Azimah Omar FCJJ
[Civil Appeal No: 02(f)-51-11-2024(B)]
21 September 2026

***Contract*:** *Joint venture agreement — Claim for repayment of monies advanced to defendants and repayment of monies belonging to joint venture company that were allegedly diverted for benefit of 3rd defendant — Appeal against Court of Appeal's finding that monies claimed belonged to joint venture company and had to be pursued by the company itself through direct or derivative action, and that plaintiff lacked standing to bring those claims — Joint venture company incorporated prior to execution of joint venture agreement, but not made party to it — Whether plaintiff's only remedy lay in derivative action in name of joint venture company to exclusion of remedy for breach of joint venture agreement — Whether plaintiff's cause of action attracted s 347 Companies Act 2016 — Whether plaintiff's losses were personal and direct, and legally distinct from any loss suffered by joint venture company — Whether rule in Foss v. Harbottle applied — Whether board or shareholder resolution required to authorise suit — Whether monies advanced to 3rd defendant amounted to illegal moneylending, rendering the underlying contracts void under s 24 Contracts Act 1950*

The appellant (plaintiff) and the 1st and 2nd respondents (1st and 2nd defendants), who were shareholders and directors of the 3rd respondent (3rd defendant), entered into a joint venture agreement dated 16 August 2016 (the JVA) to establish a joint venture company, Pelorus HLG Sdn Bhd (the JV Company). The JV Company was not made a party to the JVA although the parties had actual knowledge that the JV Company had been incorporated on 20 June 2016. The plaintiff provided financial resources to the defendants to develop and operate the JV Company. The relationship between the parties subsequently deteriorated, and the plaintiff alleged that the JV Company had not been managed in accordance with the terms of the JVA. The plaintiff then commenced proceedings against the defendants claiming, as against the 1st and 2nd defendants, repayment of a loan of RM1,000,000.00 advanced to the 3rd defendant, and RM516,972.02 advanced to the JV Company. As against all the defendants jointly and/or severally, the plaintiff claimed repayment of RM1,188,691.94 which belonged to the JV Company and was alleged to have been diverted for the benefit of the 3rd defendant, and RM1,213,060 that was advanced to the defendants to service the 3rd defendant's loan with Agrobank. The defendants' main defence was that the plaintiff lacked *locus standi* to bring the action which was premised on the JVA, without having obtained the

consent of the JV Company and that any such action had to be filed by the JV Company. The JV Company intervened and counterclaimed against the plaintiff based on the same reasons as in the defendants' defence and sought *inter alia* a declaration that the plaintiff could not initiate any action against any party to the JVA without going through the JV Company. The High Court allowed the plaintiff's claim in part, dismissed the counterclaim, and found the 1st and 2nd defendants jointly and/or severally liable to pay the plaintiff the sums of RM1,000,000.00 and RM516,972.02. The High Court also found all the defendants jointly and/or severally liable to pay the plaintiff the sums of RM1,188,691.94 and RM1,213,060 together with costs. The defendants and the JV Company appealed against the said decision. The Court of Appeal, in allowing the defendants' appeal in part and affirming the dismissal of the counterclaim, found that the claim for RM1,000,000.00 was based on the personal guarantee of the 1st and 2nd defendants; that the claim for RM516,972.02 was unsubstantiated; that the sum of RM1,188,691.94 which was allegedly diverted out of the JV Company and the sum of RM1,213,060 that was used to settle the 3rd defendant's loan were monies belonging to the JV Company and therefore had to be pursued by the JV Company itself through a direct or derivative action; and that the plaintiff lacked the standing to claim the same from the 1st and 2nd defendants. The plaintiff obtained leave to appeal to the Federal Court on a question of law, namely, whether in the circumstances of the case, the plaintiff's only remedy lay in a derivative action in the name of the JV Company to the exclusion of any remedy in breach of contract of the JVA. Before the Federal Court, the defendants, relying on *Triple Zest Trading & Suppliers Sdn Bhd & Ors v. Applied Business Technologies Sdn Bhd (Triple Zest)*, contended that the plaintiff's claims arose from a transaction tainted by illegal and unlicensed moneylending activities and were therefore void *ab initio* under s 24 of the Contracts Act 1950.

Held (allowing the plaintiff's appeal in part; answering the leave question in the negative):

(1) The plaintiff's cause of action was founded upon contractual principle in the JVA. The JVA imposed personal, distinct, direct and enforceable obligations upon the 1st and 2nd defendants in their capacities as contracting parties and co-joint venturers, giving rise to privity of contract between the plaintiff and the defendants. The parties had entered into the JVA with actual knowledge of the JV Company's existence, and yet chose not to make it a party. That was not a drafting oversight but a clear demonstration of contractual intent in that the parties consciously elected to bind themselves personally under the JVA and to keep the JV Company outside the framework governing their mutual rights and obligations. The subsequent deployment of the JV Company as the operational vehicle for implementing the joint venture did not and could not extinguish, novate, modify, or otherwise displace the personal contractual obligations that the 1st and 2nd defendants had already undertaken under the JVA. The JV Company was a means of operational implementation, not a mechanism for the evasion of personal liability. To permit the defendants to

shelter behind the JV Company, which they knowingly excluded from the JVA would be to allow them to unilaterally resile from the solemn obligations that were freely and deliberately undertaken. (paras 24-31)

(2) The rule in *Foss v. Harbottle* operated to bar a shareholder from bringing a personal action to recover losses that were merely reflective of harm suffered by the company. A derivative action was only warranted where the actionable wrong was the company's to vindicate. On the facts, the plaintiff's cause of action, which was based on the JVA did not attract the provision of s 347 of the Companies Act 2016. Hence, to confine the plaintiff exclusively to the derivative route would impermissibly defeat the clear contractual rights that were bargained for, freely given and legally binding. As the obligations were personally assumed, personally breached, and personally caused loss to the plaintiff under an agreement that deliberately excluded the JV Company, the derivative route was not only unnecessary but wrong in principle. The rule in *Foss v. Harbottle* thus was inapplicable in this instance. (paras 33, 34, 35, 36, 37, 38, 47, 48 & 76(a)-(c))

(3) The plaintiff's losses were direct and personal, and legally distinct from any loss that might have been suffered by the JV Company. It was not a case of reflective loss. The passage of funds through a company's accounts did not, without more, transform a personal contractual claim into a derivative one, nor did it relocate the seat of loss from the party who advanced the funds to the corporate vehicle through which they were channelled. The critical question was not through whose account the funds transited, but from whose pocket the funds were extracted and to whom the personal obligations of repayment were owed. The 1st defendant's own statement of account recorded the funds advanced as loans to the 1st and 2nd defendants personally. A contracting party could not be made to forfeit its personal rights of action simply because the same wrongful conduct happened to have caused concurrent harm to a related corporate entity. (paras 49, 50, 51, 52, 53, 54, 55, 58, 59, 60, 61, 62, 65 & 76(d)-(g))

(4) The requirement of a board or shareholder resolution authorising the suit was a feature of derivative proceedings brought on behalf of the company by a shareholder where the company itself had failed to act. It had no application to a direct contractual claim brought by a contracting party for breach of a contract to which it was personally a party. To import that requirement into the present proceedings would permit the very wrongdoers who breached the JVA to shield themselves from liability by the simple expedient of refusing to authorise proceedings against themselves. A party could not be allowed to weaponise procedural requirements designed for a different genus of claim in order to extinguish rights that arose on an entirely different and independent legal footing. (paras 66-69)

(5) The advance made by the plaintiff to the 3rd defendant was contractual performance under the JVA, not an independent loan contract, and the plaintiff had not extended credit as an isolated act of lending. The settlement

of the 3rd defendant's loan reinforced that it was not a moneylending transaction, since the plaintiff was asked to fund that settlement in circumstances where it was agreed that the 3rd defendant would cease operations so as not to compete with the JV Company. No illegality had been established in this instance. (paras 70, 71, 75 & 76(h))

(6) *Triple Zest* was distinguishable because it did not concern funding advanced pursuant to a joint venture agreement between commercial partners with mutual obligations, much less an advance tied to a specific commercial objective (elimination of a competing entity) forming part of the JV bargain. The court was not prepared to extend it to arrangements integral to a joint venture as the result would be that every instance of one JV partner funding another under the JVA, for working capital, expansion, or protection of the JV's commercial position, was at risk of being struck down as illegal moneylending, notwithstanding that such funding arrangements were commonplace, commercially necessary, and expressly contemplated by the parties' own agreement. (paras 72-73)

Case(s) referred to:

CIMB Bank Berhad v. Anthony Lawrence Bourke & Anor [2019] 1 MLRA 599 (refd)

Foss v. Harbottle (1843) 2 Hare 461 (distd)

Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal [2014] 2 MLRA 597 (distd)

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 1 MLRA 213 (refd)

Low Cheng Teik & Ors v. Low Ean Nee [2024] 6 MLRA 220 (refd)

Marex Financial Ltd v. Sevilleja [2020] 3 WLR 255 (folld)

Prudential Assurance Co v. Newman Industries Ltd [1982] 1 All ER 354 (distd)

Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors [2018] 1 MLRA 368 (distd)

Salomon v. A Salomon & Co Ltd [1897] AC 22 (refd)

Triple Zest Trading & Suppliers Sdn Bhd & Ors v. Applied Business Technologies Sdn Bhd [2024] 1 MLRA 144 (distd)

Legislation referred to:

Companies Act 2016, ss 345, 347, 348, 349, 350

Contracts Act 1950, s 24

Counsel:

For the appellant: David Mathews (Shaarvin Raaj Selva Kumar, Ravvenneah Kalisvaran & Reuben Choong with him); M/s Kumar Partnership

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[For the Court of Appeal judgment, please refer to *Jaffa Roger Dawkins & Ors v. Pelorus Holding Sdn Bhd* [2025] MLRAU 375]

JUDGMENT

Wan Ahmad Farid Wan Salleh CJ:

Factual background

[1] The parties will be referred to as they were in the High Court.

[2] The plaintiff is a private limited company incorporated in 2010. The 1st and 2nd defendants are shareholders of the 3rd defendant, Harris Luqman Group Sdn Bhd, and concurrently serve as its directors. The plaintiff, along with the 1st and 2nd defendants, entered into a joint venture agreement dated 16 August 2016 ("JVA") to establish a joint venture company ("JV Company") known as Pelorus HLG Sdn Bhd. This JV Company later became the Intervener at the High Court suit.

[3] The JVA sets out the JV Company's objectives, requiring each party to contribute its own resources toward various business activities, including livestock supply, integrated farming and breeding, abattoir operations, the provision of fresh and frozen meat products, fertiliser distribution, and any other related activities the parties may pursue in the future.

[4] The agreement further provides that the Board of Directors shall consist of two directors appointed by the plaintiff company and another two from the 1st and 2nd defendants, with the 1st defendant being appointed as Chief Executive Officer of the JV Company.

[5] The plaintiff provided financial resources to the defendants to develop and operate the JV Company.

[6] However, the relationship between the parties gradually deteriorated over time. The plaintiff alleged that the JV Company had not been managed in accordance with the terms of the JVA.

[7] The plaintiff then commenced its suit at the High Court against the defendants claiming the following:

Against the 1st and 2nd as follows:

a) Repayment of a loan of RM1,000,000.00 advanced to the 3rd Defendant; and

b) Repayment of money advanced to the JV Company amounting to RM516,972.02 as of 30 June 2018.

Against all the defendants, jointly and/or severally, as follows:

a) Repayment of a sum of RM1,188,691.94 that belonged to the JV Company and was diverted for the benefit of the 3rd Defendant;

b) Repayment of a sum of RM1,213,060.00 advanced to the defendants to service the 3rd Defendant's loan with Agrobank; and

c) The cost of financing the plaintiff's investment in the JV Company at 2.5% per month.

[8] The main defence of the defendants was that the plaintiff did not have the *locus standi* to bring the action.

[9] The defendants contended that since the plaintiff's action was premised on the JVA, the plaintiff must first obtain the consent from the JV Company. Further, any action has to be filed by the JV Company.

[10] Following the defendants' defence, the Intervener filed a counterclaim against the plaintiff based on the same reasons as in the defendants' defence and sought an order, *inter alia*, for a declaration that the plaintiff could not initiate any action against any party in the JVA without going through the JV Company.

At the High Court

[11] After a full trial, the learned High Court Judge allowed the plaintiff's claim in part and ordered, *inter alia*:

a) The 1st Defendant and the 2nd Defendant to be jointly and/or severally liable to pay the plaintiff the sums of RM1,000,000.00 and RM516,972.02.

b) All the defendants to be jointly and/or severally liable to pay the plaintiff the sums of RM1,188,691.94 and RM1,213,060.00.

c) The defendants to pay costs of RM100,000.00 (subject to allocatur fees) to the plaintiff.

[12] The Intervener's counterclaim was dismissed, and the Intervener was ordered to pay costs of RM50,000.00 (subject to allocatur fees) to the plaintiff.

At the Court of Appeal

[13] Dissatisfied, the defendants and Intervener appealed against the decision of the High Court.

[14] In allowing the defendants' appeal in part and affirming the dismissal of the Intervener's counterclaim, the Court of Appeal made the following findings:

a) The claim of RM1,000,000.00 is based on the personal guarantee that was given by the 1st and 2nd Defendants to the plaintiff.

Hence, this point is dismissed and the decision of the High Court is affirmed.

b) The claim of RM516,972.02 is not substantiated. The plaintiff merely stated the figure without providing details of the amount they allegedly claimed was a loan to the 1st and 2nd Defendants.

c) The claim of RM1,188,691.94 (alleged to have been diverted out of the JV Company) and RM1,213,060.00 (used to settle the 3rd Defendant's loan) are sums belonging to the JV Company and must therefore be pursued by the JV Company itself, either through a direct or derivative action. According to the Court of Appeal, the plaintiff therefore lacked the standing to bring these claims against 1st and 2nd Defendants in the present proceedings.

At the Federal Court

[15] Aggrieved, the plaintiff filed leave to appeal against the decision of the Court of Appeal and leave was granted for one question of law as follows:

> Whether in the circumstances of this case, the Appellant's only remedy lay in a derivative action in the name of the joint venture company, to the exclusion of any remedy in breach of contract of the joint venture agreement?

The Defendants' Argument

[16] The defendants argue that the plaintiff lacks the *locus standi* to initiate the suit in a personal capacity because the disputed financial injuries were suffered exclusively by the JV Company.

[17] Relying on the established rule in *Foss v. Harbottle* (1843) 2 Hare 461 and corporate separate legal personality in *Salomon v. A Salomon & Co Ltd* [1897] AC 22, the defendants submit that a cause of action for a corporate wrong vests solely in the company itself, not in its individual shareholders.

[18] Consequently, the plaintiff's failure to initiate a statutory derivative action under s 347 of the Companies Act 2016, which requires seeking leave from the court to sue on the company's behalf, renders the entire proceeding procedurally defective and legally unsustainable.

[19] Furthermore, the defendants emphasise that there is an absolute lack of legal nexus between the plaintiff and the 3rd defendant corporate entity. It was argued that any alleged siphoning or diversion of funds by common directors cannot be personal grounds for a breach of contract claim.

[20] Beyond the procedural standing defects, the defendants contend that the plaintiff's claims are entirely unenforceable because they arise from a transaction tainted by illegal and unlicensed moneylending activities. Citing

the judgment of this Court in *Triple Zest Trading & Suppliers Sdn Bhd & Ors v. Applied Business Technologies Sdn Bhd* [2024] 1 MLRA 144, learned counsel for the defendants assert that because the transactions involved an unwritten agreement to charge interest or profits on advanced business loans without a valid moneylending licence, the underlying contracts are void *ab initio* under s 24 of the Contracts Act 1950.

[21] Learned counsel for the defendants further submitted that under this doctrine, the legal principle that "a loss should lie where it falls" applies strictly and the courts will have to refuse to extend a helping hand or grant restitution to any litigant approaching the bench with "unclean hands".

[22] Finally, learned counsel contended that even if this issue of illegality was not explicitly pleaded at the courts below, it remains a critical matter of public interest and legal substance of which this court is bound to take judicial notice and enforce at any stage of the appellate process.

Our Analysis

[23] The central question before us is whether the Plaintiff was confined to pursuing a derivative action in the name of the JV Company, to the complete exclusion of any personal cause of action in contract under the JVA.

Issue 1: The Plaintiff's Claim Is Rooted in Contract

[24] The Plaintiff's cause of action is founded upon contractual principle in the JVA. The JVA imposed personal, distinct, direct and enforceable obligations upon the 1st and 2nd defendants in their capacities as contracting parties and co-joint venturers, giving rise to privity of contract between the plaintiff and the defendants.

[25] The JVA was executed by the parties dealing at arm's length, who thereby freely and voluntarily assumed the obligations arising thereunder in furtherance of a joint venture that had evolved from what was originally an informal business relationship.

[26] The JV Company was incorporated on 20 June 2016, and thereafter, on 16 August 2016, the JVA was executed by the parties. It follows that the parties entered into the JVA with actual knowledge of the JV Company's existence.

[27] Yet, with that knowledge, they chose not to make the JV Company a party to the JVA. We are of the respectful view that it was not a drafting oversight, but a clear demonstration of contractual intent. The parties consciously elected to bind themselves personally under the JVA, and to keep the JV Company outside the framework governing their mutual rights and obligations.

[28] In the case of *CIMB Bank Berhad v. Anthony Lawrence Bourke & Anor* [2019] 1 MLRA 599, this Court held that:

> "[27] The law recognises the principle of freedom of contract. Parties to a contract are free to determine for themselves what their obligations are."

[29] We find that the significance of not including the JV Company in the JVA cannot be overstated. It directly undermines the defendants' invocation of the corporate form as a shield against personal liability.

[30] The subsequent deployment of the JV Company as the operational vehicle for implementing the joint venture did not and could not extinguish, novate, modify, or otherwise displace the personal contractual obligations that the 1st and 2nd defendants had already undertaken under the JVA.

[31] We are of the view that the JV Company was a means of operational implementation, not a mechanism for the evasion of personal liability. To permit the defendants to now shelter behind the JV Company they knowingly excluded from the JVA would be to allow them to unilaterally resile from solemn obligations freely and deliberately undertaken. That is a proposition that finds no support in principle, in equity, or in authority, and we are not ready to countenance it.

[32] It is in that same light that the defendants' reliance on *Foss v. Harbottle* and *Prudential Assurance Co v. Newman Industries Ltd* [1982] 1 All ER 354 CA must be scrutinised. The defendants invoke these authorities for the proposition that the plaintiff's claims, save except for the loan of RM1,000,000.00 advanced to the 3rd Defendant to which personal guarantees were executed by the 1st and 2nd defendants, belong exclusively to the JV Company and must therefore be pursued derivatively.

[33] With respect, this argument conflates two analytically distinct categories of loss and misapplies settled legal principles to the facts of this case. The rule in *Foss v. Harbottle* operates to bar a shareholder from bringing a personal action to recover losses that are merely reflective of harm suffered by the company, that is, where the shareholder's loss is simply a consequence of the diminution in the company's value or assets.

[34] Derivative proceedings are the response to that problem. They are actions brought by a minority shareholder, but not on their own behalf. The shareholder sues on behalf of, and for the benefit of, the company, to enforce a right that belongs to the company. It's called "derivative" because the shareholder's right to sue derives entirely from the company's right; any recovery goes to the company, not the shareholder personally.

[35] The law on derivative proceedings is found in ss 347 to 350 of the Companies Act 2016. This Court in *Low Cheng Teik & Ors v. Low Ean Nee* [2024] 6 MLRA 220, clearly enunciated the principles as follows:

> "[77] The characteristic feature of the derivative action is that there is harm done to the company. Where the majority shareholders fail to rectify the harm inflicted on the company by filing an action for relief in the name of

> the company, the company's power to enforce its legal rights is delegated to its minority shareholders for the purpose of enforcing the company's rights through a derivative action. In other words, a minority shareholder's right to pursue a derivative action 'derives' from the right vested in the company."

[36] Coming back to the instant appeal, the plaintiff does not seek to recover a diminution in share value, nor does it claim a share of company profits withheld from it as a shareholder. Rather, the plaintiff claims the return of its own capital directly injected into the joint venture on the strength of personal obligations undertaken by the 1st and 2nd Defendants under the JVA.

[37] In short and as alluded to earlier, the cause of action is based on the JVA which does not attract the provision of s 347 of the Companies Act 2016.

[38] These are obligations owed to the plaintiff as a contracting party, arising from the JVA from which the JV Company was deliberately excluded. To confine the plaintiff exclusively to the derivative route would therefore be to impermissibly defeat clear contractual rights that were bargained for, freely given, and legally binding. Our courts do not lightly deprive parties of their contractual remedies, and they ought not do so here.

[39] Likewise, we do not respectfully think that Prudential Assurance avails the defendants. That case was itself careful to preserve a shareholder's right to sue where the loss claimed is separate and distinct from the company's loss, a qualification that squarely applies on the facts of this case. The cause of action in *Prudential Assurance* is based on breach of *fiduciary* duty by the directors amounting to fraud on the minority, brought by way of a derivative action on behalf of the company against the wrongdoers in control.

[40] As affirmed by the UK Supreme Court in *Marex Financial Ltd v. Sevilleja* [2020] 3 WLR 255, the reflective loss principle does not apply where a claimant suffers loss under an independent cause of action that is not merely a mirror of the company's loss. The plaintiff's cause of action arises from the JVA, a contract to which it is a party, and from personal guarantees executed in its favour.

[41] These are independent causes of action vested in the plaintiff, not in the JV Company, and they cannot be subsumed into the derivative action framework without doing violence to the contractual bargain the parties themselves struck.

[42] The defendants further rely on *Low Cheng Teik* for the proposition that a derivative action is the appropriate vehicle where harm is to the company rather than to individual shareholders. This Court accepts that proposition as a statement of general principle. However, the test laid down in *Low Cheng Teik*, namely, the inquiry into against whom the alleged harm was caused, when applied to the facts of this case, compels the opposite conclusion to that urged by the defendants.

[43] The alleged harm here was caused to the plaintiff directly: the plaintiff's own funds were solicited, received, and misapplied by the 1st and 2nd defendants in breach of their personal obligations under the JVA. The loss flows from the wrongful dissipation of the plaintiff's own property, not from any injury to the JV Company's assets for which the JV Company alone could claim.

[44] The defendants' own chronology, incorporating the JV Company before execution of the JVA, then proceeding to sign the JVA without joining it, shuts down any argument that the harm alleged is corporate rather than personal in nature.

[45] The cases of *Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors* [2018] 1 MLRA 368 and *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 MLRA 597, also cited by the defendants, are readily distinguishable and, on closer analysis, lend no assistance to their position either. In *Rinota,* the court identified the presence of a personal element, i.e. the petitioner's personal interest as a minority shareholder, as a decisive factor in determining the appropriate cause of action.

[46] In *Koh Jui Hiong,* the derivative action was appropriate because the misconduct was actionable by the company itself. In the present case, by contrast, the obligations breached, the duty to manage the JV Company for the mutual benefit of the parties, to ensure agreed profit margins, to honour the non-competition covenants, and to repay advances, were owed to the plaintiff personally under the JVA, not to the JV Company as a corporate entity.

[47] The common thread running through all of the defendants' authorities, properly understood, is that a derivative action is only warranted where the actionable wrong is the company's to vindicate.

[48] In contrast, as here, the wrong is the plaintiff's to vindicate, because the obligations were personally assumed, personally breached, and personally caused loss to the plaintiff under an agreement that deliberately excluded the JV Company, the derivative route is not only unnecessary but wrong in principle.

Issue 2: The Plaintiff's Losses Are Personal and Direct

[49] The losses for which the plaintiff seeks redress are personal to it, direct in nature, and legally distinct from any loss that may have been suffered by the JV Company itself. That characterisation is not merely asserted, it is compelled by the nature of what is claimed, by the evidence at trial, and by a proper application of the reflective loss principle, which the defendants have both overstated and misapplied.

[50] The rule against reflective loss, as classically stated in *Foss v. Harbottle* and its progeny, bars a shareholder from recovering damages that are merely the

diminution in the value of its shares or the loss of expected dividends, where that diminution is itself a reflection of a wrong done to the company.

[51] In our view, the rationale is straightforward. If the wrong in such cases is suffered by the company, it is the company that must bring the claim. But the force of that rationale depends entirely on the claim in question being, at its core, a company claim dressed in shareholder clothing. Where it is not, the position is different. The claimant, in such a case, suffers loss independently, under its own cause of action, from a wrong done to it personally. In those circumstances, the rule has no purchase. Its invocation amounts to nothing more than an attempt to extinguish a personal right by mischaracterising its true nature.

[52] Unfortunately, that is precisely what the defendants seek to do here, and it cannot succeed. The plaintiff does not seek to recover any diminution in the value of its shareholding in the JV Company, nor any foregone distribution or dividend.

[53] The plaintiff claims, first, the return of its own capital injected directly into the joint venture in reliance on the terms of the JVA.

[54] Second, the repayment of advances made in direct reliance upon personal representations made by the 1st and 2nd defendants; and third, profits expressly promised to the plaintiff under the terms of the JVA itself.

[55] Each of these heads of claim arises from a wrong done to the plaintiff as a contracting party, not as a mere shareholder, and each is independently actionable without reference to any harm the JV Company may have suffered. These are not losses of the JV Company. They are losses exclusively of the plaintiff, and the reflective loss bar has no application to them.

[56] The defendants' principal response to this is to point to the JV Company's corporate structure and the fact that certain funds passed through the JV Company's accounts, urging that this demonstrates the harm was suffered by the company rather than by the plaintiff personally.

[57] We, however, respectfully could not agree with that. The reason is this.

[58] The passage of funds through a company's accounts does not, without more, transform a personal contractual claim into a derivative one, nor does it relocate the seat of loss from the party who advanced the funds to the corporate vehicle through which they were channelled.

[59] The critical question in this appeal is not through whose account the funds transited, but from whose pocket the funds were extracted and to whom the personal obligations of repayment were owed. To hold otherwise would be to allow the mere mechanics of fund transmission to override the substance of the parties' rights, an outcome that neither principle nor authority supports.

[60] The evidence at trial speaks for itself. The 1st defendant's own statement of account recorded the funds advanced as loans to the 1st and 2nd defendants personally. Those advances were made on the faith of the 1st and 2nd defendants' personal undertakings, extended to the plaintiff as a contracting party under the JVA, not as a shareholder of the JV Company.

[61] The loss suffered when those undertakings were dishonoured is therefore the plaintiff's loss, direct, personal, and independent of any corporate injury, and it falls to be vindicated through the plaintiff's personal action, not through the derivative route that the defendants would confine it to. With respect and as alluded to earlier, this is not a case of reflective loss. It never was.

[62] We cannot allow a contracting party to forfeit its personal rights of action simply because the same wrongful conduct happens to have caused concurrent harm to a related corporate entity. To so hold would be to subordinate substantive contractual rights to procedural form, and to do so in a manner that the authorities have consistently declined to endorse.

[63] The correct analytical framework requires the court to look beneath the procedural surface and examine the substantive character of the loss alleged: is the loss claimed a direct and personal loss suffered by the plaintiff as a contracting party, or is it merely a reflective loss that flows indirectly through the diminution in value of the plaintiff's shares in the company?

[64] That inquiry is substantive, not merely taxonomic, and it demands that the court attend to the true nature of what is claimed rather than to the incidental corporate context in which the events occurred. Form cannot be permitted to swallow substance, and the presence of a joint venture company in the background cannot be allowed to recharacterise a direct contractual wrong as a corporate one.

[65] To our mind, the plaintiff's loss is direct and personal, not reflective and derivative. Simply put, the plaintiff is not an aggrieved shareholder complaining of a wrong done to its company, but a contracting party claiming its due under a binding JVA, an agreement that the 1st and 2nd defendants personally executed, personally breached, and from which they now seek, through the vehicle of corporate form, to personally escape. Its claim is properly brought, properly constituted, and properly maintainable.

[66] That conclusion is further reinforced by the defendants' argument on board and shareholder resolutions, which, examined carefully, reveals the full extent to which their position is misconceived. The defendants contend that the absence of a board or shareholder resolution authorising the suit is fatal to the plaintiff's standing.

[67] But that requirement is a feature of derivative proceedings brought on behalf of the company, by a shareholder, in circumstances where the company itself has failed to act. It has no application to a direct contractual claim brought

by a contracting party for breach of the contract to which it is personally a party.

[68] To import that requirement into the present proceedings would produce a result that equity and the law will not countenance: the very wrongdoers who breached the JVA would be permitted to shield themselves from liability by the simple expedient of refusing to authorise proceedings against themselves.

[69] We, therefore, are of the respectful opinion that the learned High Court Judge was correct to reject that argument. A party cannot be allowed to weaponise procedural requirements designed for a different genus of claim in order to extinguish rights that arise on an entirely different and independent legal footing.

Issue 3: Illegality of Transactions

[70] We find that the advance made by the plaintiff to the 3rd Defendant was contractual performance under the JVA, not an independent loan contract. The plaintiff did not extend credit as an isolated act of lending. The funding was made pursuant to, and in performance of, obligations/arrangements agreed between the JV parties under the JVA itself and in fact for the use of the JV Company.

[71] We further note that settling the 3rd defendant's loan reinforces that it is not a moneylending transaction. The plaintiff was asked to fund the settlement of the 3rd defendant's loan, in circumstances where it was agreed that the 3rd defendant would cease operations so as not to compete with the JV Company.

[72] The case of *Triple Zest Trading* (as cited by the Defendants) is distinguishable because it did not concern funding advanced pursuant to a joint venture agreement between commercial partners with mutual obligations, still less an advance tied to a specific commercial objective (elimination of a competing entity) forming part of the JV bargain.

[73] We are not prepared to extend *Triple Zest* to arrangements integral to a joint venture because the result is that every instance of one JV partner funding another under the JVA, for working capital, expansion, or protection of the JV's commercial position, is at risk of being struck down as illegal moneylending, notwithstanding that such funding arrangements are commonplace, commercially necessary, and expressly contemplated by the parties' own agreement.

[74] We agree with the principle contended by the defendants that illegality, even if not pleaded, should be taken cognisance of by the court. In *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 1 MLRA 213, Peh Swee Chin SCJ (delivering the judgment of the Supreme Court) held that:

> "Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to

enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal."

[75] In the instant appeal and as alluded to earlier, there is no illegality established. Hence the defendants' argument on this must also fail.

Conclusion

[76] For the reasons aforesaid, our conclusion is as follows:

(a) The Plaintiff's cause of action is rooted in the JVA, which is freely entered into between the parties. It does not attract the application of s 347 of the Companies Act 2016. Section 347 enables individuals (who are referred to as the "complainants" under s 345) to bring a lawsuit on behalf of the company when the company itself is unable or unwilling to do so.

(b) The JVA has created distinct, direct and enforceable personal obligations between the contracting parties.

(c) The rule in *Foss v. Harbottle* does not apply in the instant appeal. The plaintiff is not seeking compensation for a diminution in share value or corporate profits, but rather the return of the loan advanced to the 3rd defendant.

(d) From that perspective, the losses suffered by the plaintiff are personal and direct, arising from the breach of the terms and conditions of the JVA.

(e) The mere fact that the JVA may have also caused harm to the JV Company does not convert a joint venture partner's personal claim into a derivative one or extinguish it altogether.

(f) In any event, the alleged harm, ie. the misapplication of funds was suffered directly by the plaintiff due to breach of personal guarantees and the JVA terms. In short, the losses were independent of any injury to the JV Company's assets.

(g) In the final analysis, since a derivative action under the Companies Act does not arise, the plaintiff is fully entitled to enforce the remedy against the defendants under the JVA.

(h) The advance made by the plaintiff to the 3rd defendant company was pursuant to its contractual performance under the JVA. It is not an independent loan contract that could be construed as an illegal moneylending transaction.

[77] For the reasons set out above, we answer the leave question in the negative.

[78] We hereby allow the appeal so far as it relates to:

(a) The sum of RM1,188,691.94; and

(b) The sum of RM1,213,060.00.

[79] We agree with the Court of Appeal that the claim of RM516,972.02 is not substantiated and hereby dismiss the appeal on this claim.

[80] We maintain that the claim of RM1,000,000.00 based on personal guarantee is allowed.

[81] Costs of RM100,000.00 (subject to allocatur) to be paid by the defendants.

[82] My learned brother and sister judges, Collin Lawrence Sequerah, FCJ and Azimah binti Omar, FCJ, respectively, have read my judgment in draft and agreed with the view expressed herein.