



WRIT OF SUMMONS

MALAYSIA

IN THE HIGH COURT OF SABAH AND SARAWAK AT KOTA KINABALU

SUIT NO. K22-271- OF 2001

BETWEEN

IAY & ASSOCIATES [Suing as a Firm]

PLAINTIFF

AND

LEMBAGA PELABUHAN-PELABUHAN SABAH

DEFENDANT

**YANG AMAT ARIF TAN SRI DATUK STEVE SHIM LIP KIONG,
P.S.M., P.J.N., J.B.K., K.M.N., P.P.B., CHIEF JUDGE OF THE HIGH
COURT IN SABAH AND SARAWAK IN THE NAME AND ON BEHALF
OF DULI YANG MAHA MULIA SERI PADUKA BAGINDA YANG
DIPERTUAN AGONG**

To: LEMBAGA PELABUHAN-PELABUHAN SABAH
Bangunan Ibu Pejabat LPPS
Jalan Tun Fuad, Tanjung Lipat
88400 Kota Kinabalu

WE COMMAND you that within ten (10) days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in a cause at the suit of IAY & ASSOCIATES of Rooms 445-446, 4th Floor, Wisma Sabah, Jalan Tun Razak, 88000 Kota Kinabalu, Sabah and take notice, that in default of your so doing the Plaintiff may proceed therein to judgment and execution.

WITNESS MR GABRIEL GUMIS HUMEN REGISTRAR OF THE HIGH COURT IN
SABAH AND SARAWAK the

day of 18 SEP 2001 2001.




MESSRS SUGUMAR & CO
ADVOCATES FOR THE PLAINTIFF



SENIOR ASSISTANT REGISTRAR
HIGH COURT IN SABAH AND
SARAWAK AT KOTA KINABALU

MEMORANDUM TO BE SUBSCRIBED ON THE WRIT

This writ may not be served more than twelve (12) calendar months after the above date unless renewed by order of Court.

The Defendant may appear hereto by entering an appearance either personally or by an advocate at the Registry of the High Court.

A Defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for RM5.00 with an addressed envelope to the Deputy Registrar, High Court at Kota Kinabalu

STATEMENT OF CLAIM

1. In the exercise of the statutory power vested in the Minister of Communication and Public Works, Sabah under Section 73 (1) of Sabah Ports Authority Enactment 1981 [Sabah No. 17 of 1981], the Minister of Communication and Public Works, Sabah agreed to approve the application of the Plaintiff to carry out the Purposed Development of Kota Kinabalu Passenger Terminal & Marina Centre at the Existing Old Wharf (Godown No. 5) in Joint-Venture with the Defendant (hereinafter referred to as “the said Project”) as evidenced by letter dated 25.04.1997 from the Minister of Communication and Public Works, Sabah to the Defendant.

2. By letter dated 11.08.1997 the Defendant informed the Plaintiff that on 07.08.1997 the Board of Directors of the Defendant at its 229 Board Meeting approved the Plaintiff’s application to carry out the said Project (hereinafter referred to as “the said approval”).

3. The Plaintiff and the Defendant agreed that the said Project shall comprise a Domestic and International Marine Passenger Terminal, Shopping Mall and Indoor Children Amusement Park and a Budget Hotel (hereinafter referred to as “the Development”). It was further

agreed that the Defendant shall be entitled to 15% of the net income from the Development and 20% of the income from the operation of the passenger ferry terminal to be operated by a new company to be formed by the Plaintiff and the Defendant. It was also agreed between the parties that the Development shall comprise the following features:-

Domestic and International Marine Passenger Terminal

- arrival & departure berth/quay for passengers
- cargo dispatch/custody center
- facilities for Immigration & Custom
- private pleasure craft berthing facilities
- food centre
- handicraft/business centre
- banking facilities
- amusement & music centre
- multi-storey office complex
- multi-storey carpark
- taxi stand etc. & tour bus terminal

Shopping Mall & Indoor Children Amusement Park

- American style multi-storey shopping mall
- 1st floor children amusement park
- food court
- etc.

Budget Hotel

- 120 - 200 room budget hotel
- health centre

4. At the Defendant's Project Investment Committee Meeting held on 17.03.1998 the Plaintiff and the Defendant discussed and agreed on the terms and conditions to be incorporated in the joint-venture agreement and requested the Plaintiff to prepare and submit a draft joint-venture agreement and draft power of attorney for the Defendant's approval which the Plaintiff duly submitted to the Defendant and the Defendant duly accepted vide letter dated 25.01.1999. The Plaintiff shall refer to the draft joint-venture agreement and power of attorney at the trial of this action.
5. Pursuant to a meeting held between the Plaintiff and the Defendant held on 30.04.1998 the Defendant requested the Plaintiff to submit to the Defendant documentation for the application of a title for the port area to be used for the said Project for the Defendant's endorsement and signing. The Defendant further requested the Plaintiff to prepare artist impression of the said Project and a detailed outline of the existing said Project site within the port area. The Plaintiff duly complied with both the aforesaid requests.
6. By letter dated 06.08.1998 the Defendant requested the Plaintiff to submit 2 sets of land application forms for approximately 2.65 acres of

land area and approximately 3.60 acres of sea frontage area which was duly submitted by the Plaintiff to the Defendant.

7. Pursuant to the Defendant's letter dated 25.01.1999 the Plaintiff and the Defendant agreed to the revised valuation of the said land area at RM5.8 Million for the purpose of the determining the bank guarantee amount as stipulated in the draft joint-venture agreement.
8. On 14.12.1999 the Defendant informed the Plaintiff that the Ministry of Infrastructure Development had decided not to approve the said Project and that the said Project is considered as terminated. In the circumstances, the Defendant had in breach of contract wrongfully repudiated the said approval, the said Project and the draft joint-venture agreement and power of attorney accepted by the Defendant.
9. At all material times, the Plaintiff was able and willing to carry out its obligations under the said approval, the said Project and the draft joint-venture agreement and power of attorney accepted by the Defendant.
10. Sometime in early January 2000 the Defendant approved the said Project to Pembinaan Megah Mutiara Sdn Bhd.
11. By reason of the aforesaid, the Plaintiff has suffered loss and damage.

PARTICULARS

A (i)	Professional fees incurred in preparation of artist impression of the Development	RM7,500.00
(ii)	Preparation of detailed outline of the existing project site within the port area	RM10,000.00
(iii)	Professional fees for preparation of Report and Valuation of existing old wharf (Godown No. 5)	<u>RM 5,250.00</u>
		<u>RM22,750.00</u>

B **Loss of Net Income
from the Development:**

Market value of the Development	RM 184,215,000.00
Less: Development cost	RM 147,372,000.00
Net Profit	RM 36,843,000.00
Plaintiff's entitlement of Net Profit (85%)	<u>RM 31,316,550.00</u>

**Loss of Annual Income for 10 years
from operation of passenger ferry
terminal:**

Small boat parking @ 10,800 x RM10	RM 108,000.00
Boats from Labuan & Brunei @ 3,600 x RM50	RM 180,000.00
Private Yachts @ 7,200 x RM30	RM 216,000.00
Cruise Vessels @ 60 x RM1,000	RM 60,000.00
Plaintiff's annual entitlement from income (80%)	RM 451,200.00
Plaintiff's 10 years entitlement	<u>RM4,512,000.00</u>

AND THE PLAINTIFF claims:-

- a. The sum of RM35,851,300.00:
- b. Statutory interest on the sum of RM35,851,300.00 at the rate of 8% per annum from the date of Judgment to the date of full payment:
- c. Costs: and
- d. Further and/or better relief as this Honourable Court deems fit to grant.

Dated this 18th day of September 2001.


MESSRS SIJUMAR & CO.
Advocates for the Plaintiff



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SUIT NO. K22-271 OF 2001

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IAY & ASSOCIATES
[Suing as a Firm]

... PLAINTIFF

AND

LEMBAGA PELABUHAN-PELABUHAN SABAH

... DEFENDANT

DEFENCE

1. The Defendant denies that the Plaintiff is the proper party to bring and/or to continue the present action against the Defendant and the Defendant will rely on the provisions of Order 77 rule 2 of the Rules of the High Court 1980.
2. Save that there was a letter issued by the Ministry of Communication and Works to the Defendant on 25 April 1997 in respect of the proposed development of the Kota Kinabalu Passenger Terminal & Marina Centre at the Existing Old Wharf (Godown No. 5) as alleged in paragraph 1 of the Statement of Claim, the Defendant denies that the contents of the letter amounted to an agreement by the Minister of Communication and Public Works to approve the said Project as alleged therein or at all.
3. The Defendant also denies that the Minister has the power to agree and/or to approve the said Project under Section 73(1) of the Sabah Ports Authority Enactment 1981 (Sabah No. 17 of 1981) as alleged in paragraph 1 of the Statement of Claim or at all. The Defendant will say that under Section 73(1) of the Sabah Ports Authority Enactment 1981 (Sabah No. 17 of 1981), the Minister is only empowered to give directions of a general character, not inconsistent with the provisions of the Enactment, as to the exercise and performance by the Defendant of its functions.
4. Paragraph 2 of the Statement of Claim is not admitted.


5. The Defendant being a statutory body is prohibited from entering into any joint venture agreement involving any land vested in it or alienated to it by the State Government except with the approval of the Cabinet as provided under Section 8(1)(e) of the Statutory Bodies (Supplementary Provisions) Enactment, 1997 (No. 9 of 1997). The proposed joint venture agreement was subject to the approval of the Cabinet because it involved the proposed joint venture development of part of the land vested in the Defendant by the State Government under Government Gazette No. GNS 27/69.
6. The Defendant being a statutory body may not guarantee or provide any form of security for any loan, liability or obligation, contractual or otherwise, of any of its holding or subsidiary or related companies except with the prior written approval of the Cabinet as provided under Section 10(c) of the Statutory Bodies (Supplementary Provisions) Enactment, 1997 (No. 9 of 1997). Under the proposed joint venture agreement, the Defendant was required to give a power of attorney to IAY & ASSOCIATES SDN. BHD. to negotiate with banks and financial institutions for the purpose of raising bridging and end financing for the said Project and to execute the Memorandum of Charge, Facility Agreements and all requisite documents on behalf of the Defendant.
7. Save that a proposed joint venture agreement for the development of the K.K. Passenger Terminal & Marina Centre at Existing Old Wharf (Godown No. 5) was submitted to the Defendant by Herman Lee & Associates Sdn. Bhd. on behalf of its client, IAY & ASSOCIATES SDN. BHD. on or about 15 October 1997, paragraph 3 is not admitted.
8. Save that there was a meeting held on 17 March 1998 between a representative of the alleged Plaintiff, Encik Iskandar Malik, and the Defendant as alleged the paragraph 4 of the Statement of Claim, the Defendant denies that it had agreed on and/or had accepted the terms and conditions to be incorporated in the proposed joint venture agreement and the power of attorney as alleged therein or at all.
9. Copies of the amended proposed joint venture agreement and power of attorney were submitted to the Defendant by Messrs. Koh Gilong & Associates, a firm of advocates and solicitors acting for IAY & ASSOCIATES SDN. BHD. and/or for the purported Plaintiff but at all material times these were all draft copies only as the purported Plaintiff knew that the said Project as well as the terms and conditions of the draft

joint venture agreement and draft power of attorney were subject to the approval of the Cabinet or the State Government.

10. By its letter dated 25 January 1999 the Defendant had merely informed the alleged Plaintiff that details of the proposed project including the draft joint venture agreement and the draft power of attorney have been accepted in principle by the Defendant and that the same will be submitted to the State Government for its approval.
11. The purported Plaintiff acknowledged in writing on 13 February 1999 that the processes would take a very long time and the Plaintiff requested for permission to take possession, to carry out repairs to the buildings and to build a recreation and seafood restaurant at the jetty.
12. The Defendant informed the purported Plaintiff in writing on 27 March 1999 that it could not allow the purported Plaintiff to carry out repairs and modification works at the jetty until the Defendant has received the approval from the Ministry of Infrastructure Development for the said Project.
13. Paragraphs 5, 6 and 7 of the Statement of Claim are admitted save that the Defendant will say that the said Project and the draft joint venture agreement and draft power of attorney were all subject to the approval of the Cabinet.
14. Save that the Defendant had informed the alleged Plaintiff in writing on 14 December 1999 that the proposed joint venture was not approved by the Ministry of Infrastructure Development as alleged in paragraph 8 of the Statement of Claim, the Defendant does not admit that it had wrongfully repudiated the said approval, the said Project and the terms of the draft joint venture agreement and power of attorney as alleged therein or at all.
15. Paragraph 9 of the Statement of Claim is not admitted.

16. Paragraph 10 of the Statement of Claim is denied and the Defendant will say that Pembinaan Megah Mutiara Sdn. Bhd. was merely awarded a building contract to design and build a proposed landing point for boat and ferry services at the Kota Kinabalu Port. A building contract for the said works was signed between the Defendant and Pembinaan Megah Mutiara Sdn. Bhd. on 20 October 2000 for the contract sum of RM2,842,590.00 only.
17. Paragraph 11 of the Statement of Claim is not admitted by the Defendant.
18. Save as is herebefore expressly admitted, the Defendant denies each and every allegation contained in the Statement of Claim as if the same were here set out and specifically traversed.

DATED this 10th day of January, 2002.


.....
Messrs. Chew, Adnan & Razi
Advocates for the Defendant

This Defence is filed on the day of January 2002 by Messrs. Chew, Adnan & Razi, Advocates for the Defendant, whose address for service is at Suite 1-6-E8&E9, 6th Floor (Zone E), CPS Tower, No. 1 Jalan Centre Point, 88000 Kota Kinabalu, Sabah, Malaysia.



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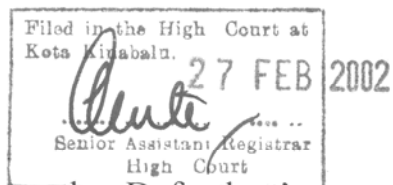
PLAINTIFF

AND

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DEFENDANT

REPLY



1. The Plaintiff joins issue with the Defendant on the Defendant's Defence save insofar as the same consists of admissions.
2. In reply of the paragraphs 1 of the Defence, the Plaintiff states that Order 77 rule 2 of the Rules of High Court 1980 has no application to the facts of the suit herein and the Defendant's contention therein is misconceived in law.
3. In reply to paragraphs 2 and 3 of the Defence, the Plaintiff reiterates and repeats paragraph 1 of the Statement of Claim and states that the letter dated 25.04.1997 constituted a statutory direction/agreement by the Minister of Communication and Public Works to approve the said Project and such direction/agreement must be complied by the Defendant.

4. In reply to paragraph 5 of the Defence, the Plaintiff reiterates and repeats paragraphs 2 and 6 of the Statement of Claim and states that Section 8 (1) (e) of the Statutory Bodies (Supplementary Provisions) Enactment 1997 has no application to the facts of this case as the impugned land has neither come into existence nor vested in or alienated to the Defendant.
5. In reply to paragraph 6 of the Defence, the Plaintiff states that Section 10 (c) of the Statutory Bodies (Supplementary Provisions) Enactment 1997 has no application to the facts of this case as the Defendant is not required to guarantee or provide any form of security for any loan, liability or obligation, contractual or otherwise, of any of its holding or subsidiary or related companies.
6. In reply to paragraphs 9 and 13 of the Defence, the Plaintiff reiterates and repeats paragraph 4 of the Statement of Claim and states that the Joint Venture Agreement and the Power of Attorney were not, under any written law, subject to the approval of the Cabinet or the State Government.
7. In reply to paragraphs 12 and 14 of the Defence, the Plaintiff states that the said Project is not required to receive approval from the Ministry of Infrastructure Development under any written law and by virtue of the fact that the relevant minister had given the requisite statutory direction as evidenced by letter dated 24.04.1997 and the Defendant's Board had on 07.08.1997 approved the Plaintiff's application to carry out the said Project.

8. In reply to paragraph 10 of the Defence, the Plaintiff states that the contract awarded to Pembinaan Mega Mutiara Sdn Bhd was substantially the same as the said Project.
9. Wherefore, the Plaintiff prays for the reliefs set out in the Statement of Claim.

Dated the 27th day of February 2002.



MESSRS SUGUMAR & CO.
Advocates for the Plaintiff

This Reply is filed by Messrs Sugumar & Co., Advocates for the Plaintiff, whose address for service is at 8th Floor, Central Post Office Tower, 26 Jalan Tun Razak, 88000 Kota Kinabalu.