

MALAYSIA  
IN THE HIGH COURT IN SABAH & SARAWAK  
AT KOTA KINABALU  
CIVIL SUIT 22-271-2001

5

IAY & ASSOCIATES - PLAINTIFF

V

10

LEMBAGA PELABUHAN-PELABUHAN  
SABAH - DEFENDANT

15

IN OPEN COURT  
THE 6TH DAY OF JANUARY 2006

**J U D G M E N T**

20 ***Introduction***

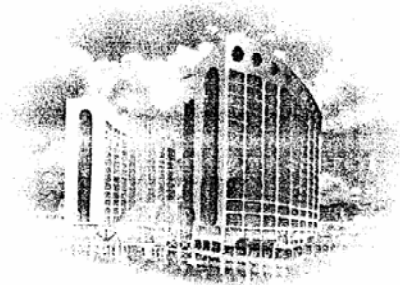
On 18 September 2001 the Plaintiff, IAY & Associates (suing as a firm) sued the Defendant Lembaga Pelabuhan-Pelabuhan Sabah, for the sum of RM35,851,300.00 for damages. The allegation against the Defendant was: “.....the Defendant had in breach of contract  
25 wrongfully repudiated the said approval, the said Project and the draft joint-venture agreement and power of attorney accepted by the Defendant.”

***Facts of case***

30 The Plaintiff was a partnership firm and held a trading licence in 1997 but not thereafter. It then put up a 25-page proposal which cover-page generally described what the proposal is about, viz:-

PROPOSED JOINT VENTURE DEVELOPMENT  
OF  
K.K. PASSENGER TERMINAL & MARINA CENTRE  
AT  
EXISTING OLD WHARF (GODOWN NO. 5)  
WITH  
SABAH PORTS AUTHORITY  
KOTA KINABALU, SABAH

APRIL 1997



PROPOSED BY:

IAY & ASSOCIATES  
P. O. BOX 22897  
DAMAI COMMERCIAL CENTRE  
LUYANG  
88789 KOTA KINABALU  
TEL: 088-439599  
H/P : 010-8107534

In April 1997 the Plaintiff was able to procure the following letter issuing out of the Sabah Ministry of Communication and Works :-

FAX: 239852

Telegram: "MINWORKS KOTA KINABALU"

BIL.

RUJ: MCW/DM/20

Tolong salinkan bil. kami dalam jawapan surat ini.  
(Please quote this reference in any reply to this letter)



KEMENTERIAN PERHUBUNGAN DAN  
KERJA RAYA  
(MINISTRY OF COMMUNICATION  
AND WORKS)  
88999 KOTA KINABALU,  
SABAH, MALAYSIA.

25 April 1997

Pengerusi  
Lembaga Pelabuhan-Pelabuhan Sabah  
Kota Kinabalu.

Tuan,

PROPOSED DEVELOPMENT OF KOTA KINABALU PASSENGER  
TERMINAL & MARINA CENTRE AT EXISTING OLD WHARF (GODOWN  
NO:5) WITH SABAH PORTS AUTHORITY.

Selaras dengan kuasa saya selaku Menteri Perhubungan dan Kerja Raya  
yang tersebut di Seksyen 73 (1), Ordinan Pelabuhan-Pelabuhan Sabah, saya  
bersetuju untuk diluluskan permohonan IAY & ASSOCIATES, untuk  
melaksanakan projek seperti tersebut di atas.

Sila ambil tindakan sewajarnya.

YB DATUK HAJAH DAYANG MAHANI TUN PENGIRAN AHMAD RAFFAE  
Menteri Perhubungan dan Kerja Raya

and concerning the proposal of the Plaintiff. The particular provision of  
the Sabah Ports Authority Enactment 1981 under which the minister  
purported to act reads:

5

73.(1) The Minister may give to the Authority directions of a general  
character, not inconsistent with the provisions of this Enactment, as to the  
exercise and performance by the Authority of its functions, and the  
Authority shall give effect to any direction so given.

10

Though there was an attempt on behalf of the Plaintiff to suggest that the Plaintiff had by that time given a copy of the proposal to the Defendant, I am inclined to believe that it was only given to the minister to procure her approval. That it was given to the minister by the Plaintiff can also be gathered from the 5 April 1999 letter of the Defendant to the permanent secretary of a ministry adverting to a proposed development having been submitted by the Plaintiff to the minister. In so far as the same having been given to the Defendant at that time, I am inclined to accept the evidence of Mohammed Sahid Bin Hj Nawab Khan, the then secretary to the board of directors of the Defendant, that it was not so. This stands to reasons because the Plaintiff had approached the minister instead of dealing directly with the Defendant regarding his proposal knowing full well, in my view, that his proposal would be rejected for the reason that another company had been approved for the project which minutes, reproduced below, will show. Furthermore, the absence of any document to show that they have already by 11 August 1997 forwarded the Defendant the proposal bear testimony to the fact that it was not sent given the wealth of letters that were exchanged between the parties and that accompanied documents that were being forwarded. What the Plaintiff had successfully done was to bypass the Defendant by obviously working top down, that is on the minister, to procure the said letter to more or less direct the Defendant to accept the Plaintiff as the entity to develop the port area while there was another company called Universal Apex Sdn Bhd that was already approved by the Defendant. The following minutes (in Malay) of the Defendant's board meeting held on 8 August 1997, would bear out that fact:

**PERKARA V MINIT 229/97**

**Cadangan 'Development Of Kota Kinabalu Passenger Terminal & Marina Centre At Existing Old Wharf (Godown No. 5) With Sabah Ports Authority' Oleh IAY & Associates**

**Rujukan: Kertas Kerja Lembaga Bil. 2/229/97**

**Rujukan Fail: LPS/034/03**

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A. Mesyuarat mempertimbangkan kertas kerja ini dan mengambil maklum bahawa:

- 1) kertas kerja ini bertujuan memperoleh keputusan terhadap dua permohonan iaitu syarikat Universal Apex Sdn Bhd dan IAY & Associates untuk memaju kawasan pelabuhan lama di Pelabuhan Kota Kinabalu sebagai pusat pengkalan penumpang dan marina;
- 2) Kementerian Kerajaan Tempatan sebelum ini memutuskan untuk memindah semua jeti bagi kapal kecil terletak berdekatan Hotel Hyatt di Kota Kinabalu ke kawasan jeti lama pelabuhan Kota Kinabalu;
- 3) Mesyuarat Ke-204 pada 10 Disember 1996 bersetuju menerima cadangan syarikat Universal Apex Sdn Bhd tertakluk syarat yang akan ditetapkan oleh Lembaga dan pihak pengurusan telah mengeluarkan 'letter of intent' kepada syarikat tersebut berpandukan keputusan Mesyuarat Ke-204; dan
- 4) Menteri Perhubungan dan Kerja Raya telah mengarah pelantikan IAY & Associates dengan menggunakan kuasa seksyen 73(1) Enakmen Lembaga Pelabuhan Pelabuhan Sabah 1981 melalui surat bilangan MCW/DM/20 bertarikh 25 April 1997.

B. Mesyuarat mengambil perhatian bahawa:

- 1) memandangkan syarat yang akan ditetapkan dalam 'letter of intent' kepada syarikat Universal Apex Sdn Bhd belum lagi dikeluarkan serta dipersetujui oleh kedua pihak maka pelantikan berkenaan boleh dianggap sebagai belum disempurnakan;
- 2) memandangkan Menteri Perhubungan dan Kerja Raya telah menggunakan kuasanya melalui seksyen tersebut maka pihak Lembaga terikat dengan arahan pelantikan IAY & Associates oleh Menteri berkenaan;
- 3) pelantikan IAY & Associates ini mungkin boleh diadakan antara lain secara 'trade off' di mana syaratnya melibatkan keperluan syarikat tersebut membiayai kos cadangan projek pembangunan kawasan pelabuhan Kota Kinabalu yang dianggarkan RM15.4 juta bagi kegunaan sebagai kawasan simpanan kontena; dan
- 4) cadangan pembangunan kawasan lama pelabuhan Kota Kinabalu ini perlu diadakan secara usaha sama dengan Lembaga.

C. Mesyuarat membincangkan perkara ini dan bersetuju meluluskan cadangan IAY & Associates untuk membangunkan kawasan pelabuhan lama Kota Kinabalu secara usaha sama dengan Lembaga. Keputusan ini berdasarkan peruntukan seksyen 73(1) Enakmen Lembaga Pelabuhan Pelabuhan Sabah terhadap pelantikan ini dikuatkuasakan oleh Menteri Perhubungan dan Kerja Raya.

Dengan keputusan ini, IAY & Associates dikehendaki mengemukakan cadangan pembangunan dan kewangan secara terperinci bagi cadangan pembangunan ini untuk tindakan Lembaga.

Dengan ini, keputusan Mesyuarat ke-204 untuk mempelawa Universal Apex Sdn Bhd mengemukakan cadangan pembangunan ini kini dibatalkan.

The relevant part of those minutes talked of (1) the Defendant having  
5 on 10 December 1996 resolved to accept a proposal of Universal Apex  
Sdn Bhd to develop the old port, (2) but that the minister then directed  
the Defendant to accept the Plaintiff by the minister's April 25 letter  
which the Defendant felt bound to accept and they resolved to cancel  
the offer given to Universal Apex Sdn Bhd, (3) that the development by  
10 the Plaintiff would be on a joint-venture basis and (4) that the Plaintiff  
be requested to submit detail development plan and financial plan.  
Those minutes also reveal the intention of the Defendant when it wrote  
the following letter to the Plaintiff on 11 August 1997:



LEMBAGA PELABUHAN-PELABUHAN SABAH

BANGUNAN IBU PEJABAT LPPS, JALAN TUN FUAD, TANJUNG LIPAT, BEG BERKUNCI NO. 2005,  
88617 KOTA KINABALU, SABAH, MALAYSIA.  
TEL: 088-256155, 088-252140 FAX: 088-223036



Bil Kami : LPS/034/03

11 Ogos 1997

Pengurus  
IAY & Associates  
P.O. BOX No. 22897  
88789 Kota Kinabalu

**PROPOSED DEVELOPMENT OF KOTA KINABALU PASSENGER  
TERMINAL & MARINA CENTRE AT EXISTING OLD WHARF (GODOWN  
NO. 5 WITH SABAH PORTS AUTHORITY**


Kami rujuk surat tuan kepada Kementerian Perhubungan dan Kerja Raya bertarikh 23 April 1997 berkenaan perkara di atas.

Sila maklum bahawa Mesyuarat Lembaga Ke-229 pada 7 Ogos 1997 meluluskan cadangan syarikat tuan untuk membangunkan kawasan pelabuhan lama Kota Kinabalu secara usaha sama dengan Lembaga Pelabuhan Pelabuhan Sabah.

Berikutan keputusan ini, sila kemukakan cadangan pembangunan tuan bagi kawasan tersebut yang terperinci kepada Lembaga Pelabuhan-Pelabuhan Sabah untuk tindakan selanjutnya.

Sekian, terima kasih.

Yang benar  
LEMBAGA PELABUHAN-PELABUHAN SABAH

  
[ MOHD. SAHID H.J. NAWAB KHAN ]  
Pmk. Setiausaha  
b.p. Pengurus Besar


s.k Kementerian Perhubungan dan Kerja Raya  
Bangunan Jabatan Kerja Raya  
88999 Kota Kinabalu

*M.S.M.K.Ling*

On October 15, the Plaintiff through its consultant submitted the first  
5 draft of a joint venture agreement. Other drafts followed and were  
forwarded to the Defendant through its lawyers on December 5, 1997,  
February 9, 1998, February 26 and March 17. The 5th draft agreement  
together with the power of attorney were accepted by the Defendant's



board on 31 December 1998 unconditionally, argued the Plaintiff, as stated in the following memorandum:

 **Lembaga Pelabuhan-Pelabuhan Sabah** 23


LPP24

PEJABAT: <b>Pengurus Besar</b>	PEJABAT: <b>Setiausaha Lembaga</b>
TARIKH: <b>13/1</b>	RUJUKAN KAMI: <b>LPP600-11/1/4 Jld 2</b>
	TARIKH: <b>6.1.99</b>

**Laporan Kedudukan Cadangan Pembangunan Terminal Feri Dan Pusat Marina Di Pelabuhan Lama Kota Kinabalu Secara Usaha Sama Antara IAY & Associates Dengan Lembaga**

Mesyuarat Lembaga Ke-243 pada 31 Disember 1998 bersetuju menerima penilaian tanah 2.65 ekar di pelabuhan lama Kota Kinabalu bagi projek ini pada kadar RM5.8 juta atau RM50.24 satu kaki persegi bagi tujuan jumlah bank guarantee dalam surat perjanjian projek ini seperti yang disyorkan oleh Jawatankuasa Pelaburan Projek Lembaga. Mesyuarat juga meluluskan draf surat perjanjian dan draf surat kuasa wakil bagi projek ini yang dikemukakan oleh jawatankuasa berkenaan.

Pengurusan diarah mengemukakan cadangan pembangunan usaha sama ini serta draf surat perjanjian dan draf surat kuasa wakil bagi projek ini kepada Kementerian Perhubungan & Kerja Raya untuk kelulusan berdasarkan kehendak Statutory Bodies [Supplementary Provisions] Enactment 1997.

  
**[MOHD SAHID HJ NAWAB KHAN]**  
Setiausaha Lembaga

s.k. Fail Sulit dan Fail BD

*MSHNK/pil*

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However, the penultimate paragraph of that memorandum made reference to an instruction to refer the draft agreement and power of attorney pursuant to the minister for approval under the provisions of the Statutory Bodies (Supplementary Provisions) Enactment 1997. That

document is an internal communication and was not extended to the Plaintiff. What was communicated to the Plaintiff was the following 25 January 1999 letter:



**LEMBAGA PELABUHAN-PELABUHAN SABAH**

BANGUNAN IBU PEJABAT LPPS, JALAN TUN FUAD, TANJUNG LIPAT KARUNG BEG BERKUNCI NO: 2005, 88617 KOTA KINABALU, SABAH, MALAYSIA.  
TEL: 088-256155, 088-252140 FAX: 088-223036

Bil. Kami: LPPS600-11/1/4 Jld 2

25

25 Januari 1999

**IAY & Associates**  
**P.O. Box 22897**  
**88789 Kota Kinabalu**

Tuan

**PROPOSED DEVELOPMENT OF KOTA KINABALU PASSENGER TERMINAL & MARINA CENTRE AT EXISTING OLD WHARF [GODOWN NO. 5] WITH SABAH PORTS AUTHORITY**

We refer to your previous letter reference IAY/PA/003/ISK/98 dated 11 November 1998 regarding the above matter.


Please be informed that the Authority after having considered your valuation of the 2.65 acres of land area for the proposed joint-venture project at RM3.5 million and the valuation by the Authority at RM8.0 million has decided to fix the valuation of the said land area at RM5.8 million. This valuation is for the purpose of determining the bank guarantee amount as stipulated in the draft joint-venture agreement between you and the Authority.

Please indicate whether you are in agreement to the revised valuation of the said land area at RM5.8 million or otherwise in order to enable the Authority to pursue the matter further.

In the meantime, details of the proposed project including the draft joint-venture agreement and the draft power of attorney which have been accepted in principle by the Authority will now be submitted to the State Government for approval and you will be advised of the outcome in due course.

Thank you.

Yang benar  
LEMBAGA PELABUHAN-PELABUHAN SABAH

  
[MOHD SAHID HJ NAWAB KHAN]  
Setiausaha Lembaga  
b.p. Pengurus Besar

MSHNK/pll

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From that letter it can be gathered that the parties had yet to agree to the valuation of the land and the Defendant counter-proposed a new sum of

RM5.8 million while indicating that the draft agreement and draft power of attorney have to be approved by the state government. The Plaintiff replied on 12 February 1999 to agree to the RM5.8 million valuation and no protest was made that the matter had to be approved  
5 by the state government. The value of the land was for the purpose of a performance bond to be issued in favour of the Defendant and for an amount equivalent to the value of the land.

In the meantime, on 31 December 1997 the Statutory Bodies  
10 (Supplementary Provisions) Enactment 1997 came into force and it contains the following provision:

8.(1)(e) A statutory body shall not, without the prior written approval of the  
15 Cabinet enter into any joint-venture agreement involving land vested in the statutory body or alienated to it by the State Government for the purposes of the execution of its duties or the discharge of its functions under the State law pursuant to which it is incorporated;

The Defendant then sought the approval of the ministry concerned and  
20 was told by a letter dated 9 December 1999 that the ministry had decided not to agree to the proposed development. This resulted in the following 14 December 1999 letter from the Defendant to the Plaintiff putting an end to the proposal:-

Bil. Kami: LPPS600-11/1/4 Jld 2 ✓

14.12.99

SEGERA

IAY & Associates  
P.O. Box 22897  
Damai Commercial Centre, Luyang  
88789 Kota Kinabalu

REGISTERED

Tuan

**PROPOSED DEVELOPMENT OF KOTA KINABALU PASSENGER  
TERMINAL & MARINA CENTRE AT EXISTING OLD WHARF [GODOWN  
NO. 5] WITH SABAH PORTS AUTHORITY**

Please refer to our previous letter reference LPPS600-11/1/4 Jld 2 dated 25 January 1999 regarding the above matter.

Please be informed that the joint-venture proposal between IAY & Associates and the Authority to develop the Kota Kinabalu old port area which was previously accepted in principle by the Authority was subsequently submitted to the Ministry of Infrastructure Development for approval as required under the the existing government ruling on joint-venture proposals involving the private sector and any state government statutory body.

The Ministry after having considered the proposal has decided not to approve the proposed joint-venture project.

In view of the above decision, we regret to inform you that the proposed joint-venture project between IAY & Associates and the Authority as submitted by you will now be considered as terminated.

Thank you.

Yang benar  
LEMBAGA PELABUHAN-PELABUHAN SABAH



**[MOHD SAHID HJ NAWAB KHAN]**  
Setiausaha Lembaga  
b.p. Pengurus Besar

s.k. Setiausaha Tetap  
Kementerian Pembangunan Infrastruktur  
Tingkat 7, Bangunan Jabatan Kerja Raya  
Jalan Sembulan  
88999 Kota Kinabalu

*Issues*

The Plaintiff's case is premised on the existence of a contract between the Plaintiff and the Defendant which the Plaintiff alleged the Defendant had breached. In this regard the Plaintiff's learned counsel in his opening address had said that the contract came into existence when the Defendant accepted the proposal on 7 August 1997 and which acceptance was communicated to the Plaintiff by the August 11 letter 1997 or alternatively on 17 March 1998 when the Defendant approved the 5th draft agreement forwarded by the Plaintiff. This is the opportune place to consider when the alleged contract had been concluded. By August 8 the Defendant had resolved to accept the proposal of the Plaintiff as referred to in the minister's April 23 letter but no reference whatsoever was made to the 25-page detail proposal and instead the Defendant in their August 11 requested from the Plaintiff a detailed proposal. The Plaintiff had argued that contract had arisen as a result of the communication of the August 11 letter by the Defendant to the Plaintiff. Now, s 7 of the Contracts Act requires the acceptance of a proposal to be absolute and unqualified. Surely, even assuming that the 25-page detailed proposal was in the hands of the Defendant when they wrote the August 11 letter, it could only mean that those proposals were not accepted absolutely and unqualifiedly. The request for a detailed proposal could only mean a rejection of the proposal already put forth by the Plaintiff. That being the case, no contract has arisen. In fact, no contract has arisen because there was no proposal yet before the Defendant but only the direction of the minister

to appoint the Plaintiff. That is why the Defendant had asked for the detailed proposal to be submitted to the Defendant.

It was then contended that the contract came into existence on 17  
5 March 1998. It will be recalled that 5 draft agreements in all were put forward by the Plaintiff which means that the Defendants had rejected the proposals contained in the previous four drafts leaving the 5<sup>th</sup> and final draft where the Plaintiff through their advocates had this to say (reproducing the letter)-

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**KOH GILONG & ASSOCIATES**  
Peguambela & Peguamcara / Advocates & Solicitors  
2<sup>nd</sup> Floor, Lot 3, Jalan Tugu, Kg. Air, 88000 Kota Kinabalu, Sabah, Malaysia.  
Locked Bag 73, 88997 Kota Kinabalu, Sabah, Malaysia.  
Tel: (088) 215101, 213406, Fax: (088) 215311

許吉隆  
大律師  
行

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Koh Gio Chee  
MBA (York),  
LL.B. (Hons.), B. Comm. (Melb.)

Annin @ Ann Gilong  
LL.B. (Hons.) (Melb.)  
Barrister-at-Law (Malik Temple)

(PLEASE QUOTE OUR REFERENCE IN ALL CORRESPONDENCE)

Your Ref: LPPS600-11/1/4  
Our Ref: KGA/CO/2/98/Kk  
17 March 1998

The General Manager  
Sabah Ports Authority  
Bangunan Ibu Pejabat LPS  
Jalan Tun Fuad  
Tanjung Lipat  
Kota Kinabalu

BY HAND

Lembaga Pelantikan, Jabatan Sabah  
Pejabat Urusetia  
18 MAR 1998  
DITERIMA

**Attn: Encik Mohd. Sahid Hj. Nawab Khan**

Dear Sir,

**JOINT VENTURE AGREEMENT & POWER OF ATTORNEY  
BETWEEN SABAH PORTS AUTHORITY AND IAY & ASSOCIATES**

---

Pursuant to the agreement reached at the meeting held today at your office, we are pleased to enclose herewith amended Draft Agreement for final approval by your Board.

Kindly acknowledge receipt on the duplicate of this letter.

Thank you.

Yours faithfully,

*YGC*

*Board papers 9/236/98*

It will be noticed that the Plaintiff themselves said that the draft agreement was “for final approval” of the Defendant which approval can only be demonstrated by the Defendant’s seal on the agreement which had not taken place. The Plaintiff had argued, relying on  
5 *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108 and *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754, that notwithstanding that term there was by then already a concluded contract. It is useful to remind myself of what was  
10 held in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd* (the other two cases being not necessary for consideration for the purposes of this case for the reasons which will be apparent hereafter) which are, *inter alia*, that:

15

- 20 (1) The existence of an agreement depends upon the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties conduct having regard to the surrounding circumstances and the object of the contract. The court will generally apply an objective or reasonable man test.
- 25 (2) Merely because the parties contemplate the preparation of a formal contract, that would not prevent a binding contract from coming into existence before the formal contract is signed. However, when an arrangement is made ‘subject to contract’ or ‘subject to the preparation and approval of a formal contract, it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged.
- 30 (3) Having regard to the fact that the letter did not contain details such as what ‘the appropriate indemnity clauses’ were, together with its vital qualifying clause, ‘subject to the following terms and conditions’, the present case fell within the principle in *Crossley v Maycock* that if an agreement is made subject to certain conditions, then until those  
35 conditions are accepted, there is no enforceable final agreement.

5 (4) On its true construction, the letter did not constitute a contract binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract. It was a letter of intent, ie an expression in writing of a party's present intention to enter into a contract at a future date.

(5) .....

10

Since the surrounding circumstances and object of the contract are relevant consideration, I will now examine them. The land concerned upon which the Plaintiff sought to develop for its proposal is land vested in the Defendants pursuant to the following vesting:





**STATE OF SABAH**  
**SECOND SUPPLEMENT**  
 TO THE  
**GOVERNMENT GAZETTE**

*Published by Authority*

Vol. XXIV] KOTA KINABALU, THURSDAY, JUNE 12, 1969 [No. S 11

No. S 27 [No. MCW. 204/3/5  
 THE SABAH PORTS AUTHORITY ENACTMENT, 1967  
 (Enactment No. 9 of 1967)

VESTING OF STATE LANDS—SABAH PORTS AUTHORITY

In exercise of the powers conferred upon the Yang di-Pertua Negara by section 21 of the Sabah Ports Authority Enactment, 1967, the State Lands described in the Schedule hereto are hereby vested in the Sabah Ports Authority, subject to the following terms and conditions:—

(1) the Sabah Ports Authority shall surrender the said lands to the Yang di-Pertua Negara at any time when called upon to do so:

Provided that where any part of the said lands has been sold, leased or otherwise dealt with or alienated any surrender of such land to the Yang di-Pertua Negara shall be subject to the rights of any person deriving title or interest from the Sabah Ports Authority;

(2) the Sabah Ports Authority shall not sell, lease or otherwise alienate the said lands without the prior approval of the Yang di-Pertua Negara.

SCHEDULE

Locality	Description	Plan No.	Area
Kota Kinabalu	Survey Lot	01123928	290 acres
Wharf	No. 01200468 01200452		(Approximately) 12694 sq. ft.

358

The areas coloured red, brown, dark brown, blue, green, yellow (excluding the area coloured yellow hatched red) on plan No. 01123928 which is deposited in the office of the Director of Lands and Surveys, Kota Kinabalu.

Dated at Kota Kinabalu, this 3rd day of June, 1969.

By His Excellency's Command,

DATO PANG TET TSHUNG,  
 Minister of Communications and Works.

So, the condition upon which the Defendant held the land (and still hold it) is that they cannot “sell, lease or otherwise alienate” the land without the prior approval of His Excellency, the Head of State, Sabah. Therefore any contract that involves the sale of the land or any part

thereof without the prior permission of His Excellency, which effectively means the government of the day since His Excellency by convention only acts on the advice of the government, would necessarily be illegal as being against public policy since it went  
5 against the express condition lawfully imposed by His Excellency under the relevant enactment. Furthermore, it is expressly provided in clause 4.1. (a) that the draft agreement is conditional upon, among others, the Defendant being able to successfully apply for a portion of the land to enable the Plaintiff to develop the same. The Defendant had  
10 in fact sought the approval of the government ministry concerned but was not successful. By March 1998 the Statutory Bodies (Supplementary Provisions) Enactment 1997 was in force and the enactment prohibits the Defendant from entering into any joint venture and from providing any security for loan without the prior written  
15 approval of the Cabinet (see s 8(1) (a) and (e) and 10(c)). Therefore, if the contract was to have come into existence on 17 March 1998 then the contract would be caught by those provisions rendering them illegal as there was no prior approval of the Cabinet. From all the circumstances I have referred to it must have been the intention of the  
20 Defendant to seek the approval of the government for the approval of the joint venture and hence until that approval was forthcoming the parties have not intended there to be a binding contract. The Plaintiff must have realized this as they have by their advocates' March 17 letter asked for the final approval of the Defendant. A fortiori when the  
25 Defendant cannot deal with the land in the manner proposed by the Plaintiff and which involved a disposal of part of the land without the prior consent of His Excellency. Another way of looking at this case is

that given the circumstances and facts I have set out earlier it was the intention of the parties that the necessary approval from the government be first obtained before the contract can come into existence and since the approval was refused there is no contract which  
5 the court can enforce. (See *Crossley v Maycock* (1874) 43 LJ Ch 379).

Other issues raised do not call for consideration since what I have decided is sufficient to dispose of the case herein.

10 ***Conclusion***

The Plaintiff's claim is dismissed with costs to the Defendant.

15

Justice Datuk Ian H.C. Chin

Note: The trial was held on January 3 & 4, 2006.

For Plaintiff: Sugumar Balakrishnan & Natasha Balakrishnan  
5 Advocates: Sugumar & Co

For Defendant: Datuk Mohamed Bazain Idris, State Attorney-General  
Mohd Saifurraze Hussin, State Counsel  
Dyku Fazidah Hatun Pb Hj Bagul, State Counsel

10