

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA  
(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. 01(f)-15-2008 (W)

ANTARA

1. NV MULTI CORPORATION BERHAD
2. NV ALLIANCE SDN. BHD
3. NIRWANA MEMORIAL PARK SDN. BHD.
4. NIRWANA MEMORIAL PARK (JOHOR) SDN. BHD.
5. NIRWANA MEMORIAL PARK (KUCHING) SDN. BHD.
6. NIRWANA MEMORIAL PARK (KLANG) SDN. BHD.
7. NV MULTI RESOURCES SDN. BHD.  
(Dahulu dikenali sebagai NIRWANA MEMORIAL PARK  
(MELAKA) SDN. BHD.
8. ASIA PREMIER PROPARTNERS SDN. BHD.  
(Dahulu dikenali sebagai NIRVANA MEMORIAL PARK (PENANG)  
SDN. BHD.
9. NIRVANA MEMORIAL PARK (SABAH) SDN. BHD.
10. NIRVANA MEMORIAL PARK (SHAH ALAM) SDN. BHD.
11. NIRVANA MEMORIAL PARK (SIBU) SDN. BHD.  
.....PERAYU-PERAYU

DAN

SURUHANJAYA SYARIKAT MALAYSIA ..... RESPONDEN

[Dalam Perkara Mahkamah Rayuan Malaysia  
Rayuan Sivil No. W-01-41-2005

Antara

Suruhanjaya Syarikat Malaysia ..... Perayu

Dan

1. NV Multi Corporation Berhad
2. NV Alliance Sdn. Bhd.
3. Nirwana Memorial Park Sdn. Bhd.
4. Nirwana Memorial Park (Johor) Sdn. Bhd.
5. Nirwana Memorial Park (Kuching) Sdn. Bhd.
6. Nirwana Memorial Park (Klang) Sdn. Bhd.
7. Nirwana Memorial Park (Melaka) Sdn. Bhd.
8. Nirwana memorial Park (Penang) Sdn. Bhd.
9. Nirwana Memorial Park (Sabah) Sdn. Bhd.
10. Nirwana Memorial Park (Shah Alam) Sdn. Bhd.
11. Nirwana Memorial Park (Sibu) Sdn. Bhd. ....Responden-  
Responden]

[Dalam Perkara Mahkamah Rayuan Malaysia  
Rayuan Sivil No. W-02-523-2006

Antara

1. NV Multi Corporation Berhad
2. NV Alliance Sdn. Bhd.
3. Nirwana Memorial Park Sdn. Bhd.
4. Nirwana Memorial Park (Johor) Sdn. Bhd.
5. Nirwana Memorial Park (Kuching) Sdn. Bhd.
6. Nirwana Memorial Park (Klang) Sdn. Bhd.
7. Nirwana Memorial Park (Melaka) Sdn. Bhd.
8. Nirwana memorial Park (Penang) Sdn. Bhd.
9. Nirwana Memorial Park (Sabah) Sdn. Bhd.
10. Nirwana Memorial Park (Shah Alam) Sdn. Bhd.
11. Nirwana Memorial Park (Sibu) Sdn. Bhd. ....Perayu-Perayu

Dan

Suruhanjaya Syarikat Malaysia ..... Responden]

[Dalam Perkara Mahkamah Tinggi Malaya Di Kuala Lumpur  
Saman Pemula No. D5-21-40-2004

Dalam perkara tafsiran seksyen-seksyen  
84 dan 91 Akta Syarikat 1965

Dan

Dalam perkara Aturan-Aturan 7 dan 27  
Kaedah-Kaedah Mahkamah Tinggi 1980

Antara

1. NV Multi Corporation Berhad
2. NV Alliance Sdn. Bhd.
3. Nirwana Memorial Park Sdn. Bhd.
4. Nirwana Memorial Park (Johor) Sdn. Bhd.
5. Nirwana Memorial Park (Kuching) Sdn. Bhd.
6. Nirwana Memorial Park (Klang) Sdn. Bhd.
7. Nirwana Memorial Park (Melaka) Sdn. Bhd.
8. Nirwana memorial Park (Penang) Sdn. Bhd.
9. Nirwana Memorial Park (Sabah) Sdn. Bhd.
10. Nirwana Memorial Park (Shah Alam) Sdn. Bhd.
11. Nirwana Memorial Park (Sibu) Sdn. Bhd. ....Plaintif-Plaintif

Dan

Suruhanjaya Syarikat Malaysia ..... Defendan]

CORUM:

Richard Malanjum, CJSS  
Hashim b. Dato' Hj. Yusoff, FCJ  
James Foong Cheng Yuen, FCJ

## GROUNDS OF JUDGMENT

### Introduction

[1] In order to fully appreciate the contents of this judgment, the facts are to be disclosed first followed by the issues and then the analysis of the law.

### Facts

[2] The 1<sup>st</sup> plaintiff is a public listed company. The rest of the plaintiffs are directly or indirectly owned by the 1<sup>st</sup> plaintiff.

[3] The plaintiffs are involved in the business of cemetery development by providing services to the public to acquire burial lots and compartments for storage of urns containing ashes of the cremated on lands developed by the plaintiffs. These lands developed by them are known as memorial parks. In these parks, aside from burial lots and columbaria structures for storage of urns there are also temples, chapels, rest and parking areas.

[4] To acquire a burial lot or an urn compartment in these parks, a purchaser is required to execute a standard form of contract. There is one for burial plot and another for urn storage. Aside from some minor variations, the terms and conditions for these purchases are virtually identical.

[5] The agreement commences with "I agree to purchase the licence for the burial plot (or urn compartment) indentified hereunder at the purchase price specified herein upon the terms:..." Below this, are the particulars of the purchaser, the purchase price, maintenance fees and the burial plot or storage number of the urn compartment. On the following page are 14 conditions for burial plot and 12 for urn compartment. I shall highlight some in respect of burial plots.

Condition 1: "The burial plot is purchased free from all encumbrances and shall continue to do so".

Condition 3: "A certificate of purchase duly signed by or on behalf of the Vendor shall be issued as evidence of ownership of the burial lot. Such certificate will have to be produced whenever interment is required".

Condition 4: "In the event the burial lot herein is not available for interment for whatever reason, the Vendor will make available an alternative plot for the Purchaser similar to that purchased herein and the Purchaser shall not be entitled to any claim, compensation or damages whatsoever".

Condition 6: "The Purchaser may at any time in writing nominate a beneficiary for the plot and may from time to time revoke the nomination and appoint another person to be his beneficiary being the person for whom the plot is intended for interment. Where no person has been nominated the Purchaser shall be deemed to be the beneficiary of the plot".

Condition 8: "The plot shall be sold together with the right to the Purchaser in common with the Vendor and the purchasers of all other plots to use the roads, common areas and other facilities and amenities appurtenant to the enjoyment of the plot".

Condition 9: "The Vendor or its appointed trustee will maintain the plot and the entire development known as "Nivana" in an orderly manner with requisite landscaping".

Condition 10: "After the land has been fully developed the Vendor will transfer the same including the plot subject to the sale and purchase herein to its trustee to be held by such trustee upon trust for the Purchaser in common with all purchasers having interests therein".

Condition 13: "The Purchaser is at liberty at any time to transfer his rights to the plot subject to the Purchaser furnishing the certificate of ownership and paying a fee that may be prescribed provided that at the time of transfer no interment shall have been effected on the plot".

[6] With regards to storage of urns the following are the pertinent variations:

Condition 5: "The Purchasers and his invitees shall have free and unhindered access to the compartment and the care park area and other areas designated for worship in common with other licencees and all persons having the same or similar rights".

Condition 8: "The Vendor may at any time transfer the columbarium in which the compartment is comprised together with the land upon which the columbarium is erected to the Vendor's trustee to be held by such trustee upon trust for the Purchaser in common with all purchasers having interest therein after the land has been fully developed".

Condition 9: "The Purchaser is at liberty to transfer his rights to the compartment subject to the Purchaser furnishing the certificate of purchase and paying a fee that may be prescribed provided that at the same time of transfer the compartment is vacant".

## The Requirement

[7] Section 91 (1) of the Companies Act 1965 (the Act) provides:

"A person shall not issue or offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest unless at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed (emphasis added)."

[8] Associated with the deed are:

[9] Section 85 – 87 of the Act which state that the deed shall only be approved if: (a) the Companies Commission of Malaysia (the defendant) grants the approval; and (b) the Minister on the recommendation of Bank Negara (Central Bank) has approved the trustee or representative to act as such.

[10] Section 88 of the Act demands minimum covenants to be included in an approved deed.

[11] Section 92 of the Act requires the management company to keep a register of the holders of interest under the approved deed.

[12] Section 93 of the Act insists that the management company shall annually lodge with the defendant returns and information relating to the holders interests.

[13] Section 95 of the Act says that where the management company is in liquidation or has failed to comply with the deed to the prejudice of holders of interests, the trustee or representative shall summon a meeting of the holders.

[14] Section 97 of the Act specifies that the trustee may be held liable for their actions or omissions.

[15] Then in section 94, the Act imposes an imprisonment of up to 5 years or a fine of RM100,000 for those who contravene the relevant provisions.

[16] Since the word "interest" in section 91 of the Act is pertinent, section 84 (1) of the Act provides an interpretation.

"Interest" means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent –

- (a) in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere;
- (b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to except profits rent or interest from the efforts of the promoter of the enterprise or a third party...
- (c) in any time-sharing scheme; or and
- (d) in any investment contract, whether or not the right or interest is evidenced by formal document and whether or not the right or interest relates to a physical asset, but does not include ....
- (e) (not applicable to our case)
- (f) (not applicable to our case )
- (g) (not applicable to our case)

(h) (not applicable to our case)"

## The High Court

[17] Uncertain whether these requirements are applicable to them, the plaintiffs applied to the High Court at Kuala Lumpur for:

1. A declaration that the plaintiffs' business is not within the meaning of "interest" in section 84 (1) of the Act.
2. A declaration that an approved deed under Part IV, Division 5 of the Act is not required for the plaintiffs to offer their services to the public.
3. A declaration that by offering the plaintiffs' services to the public without an approval deed under Part IV, Division 5 of the Act, the plaintiffs do not contravene section 91 of the Act.

[18] The High Court after referring to various cases decided by the Australian's courts which has a similar provision to section 84 of the Act found:

"The Plaintiffs' business is not an "interest" within the meaning of limb (a) because there is no profit available for the Purchaser to participate. The mere right to use the facilities developed by the Plaintiffs is not a participation in the assets of the Plaintiffs.

Limb (b) is not available because there is no common enterprise whereby the Plaintiffs and the Purchasers are both involved to gain benefit. In this respect, the Purchasers do not contemplate any profit because the Standard Agreements do no (not) have the term to guarantee profit or rent. Further, there is no subsequent transaction to be performed by the Purchaser besides the purchase of the right to use the urn compartment as well as the burial plots as stipulated in the Standard Agreements.

Limb (c) is also not applicable because the Plaintiffs' business is not understood to be the time-sharing scheme. There is no "two or more period" in which the Purchasers can occupy the property of the Plaintiffs. The Purchasers may use the urns compartments and burial plots allotted to them perpetually.



The Standard Agreements are not investment contracts because they do not contemplate pecuniary return to the Purchasers”.

[19] Dissatisfied with this decision, the defendant appealed to the Court of Appeal.

#### The Court of Appeal

[20] The Court of Appeal allowed the appeal and set aside the orders granted by the High Court. The judgment of this Court is reported in (2008) 5 MLJ 61.

[21] Insisting that the word interest should be given a wide meaning, the Court of Appeal found the interpretation adopted by the High Court too narrow and restrictive. For limb (a) of section 84 (1) of the Act, the Court of Appeal felt that they “do not think it is necessary for the purchasers to show that the Respondents’ (the plaintiffs’) business attracts any profit to which they may participate. Profit and participating in it is but one limb of the ingredients stated in that definition section. In our view, the ingredients as stated in s. 84(1) of the Act are to be disjunctively read”. Then it concluded by saying that under “s. 84 (1) (a), the ingredient of an ‘interest in any asset of business undertaking or scheme’ does not, in our view, carry with it the prospect to derive some profit by way of dividend”.

[22] In respect of limb (b) of s. 84 (1) of the Act, the Court of Appeal found the “Respondents’ argument that there is no objective in the present case for depriving profits between the purchasers and the Respondents also cannot be accepted. As earlier stated, the profit element need not be considered in deciding whether the Respondents’ enterprise fall under limb (b) meaning of interest”.

[23] It is also the opinion of the Court of Appeal that the standard agreements between the plaintiffs and the purchasers do not provide

an outright sale of the burial plots or urn compartments as insisted upon by the plaintiffs.

### Question posed to the Federal Court

[24] Dissatisfied with the judgment of the Court of Appeal, the plaintiffs applied for leave to appeal to the Federal Court. Leave was granted on a sole question of law:

“Whether the business of the Appellants (plaintiffs) as Memorial Park operators which consists of, inter alia, the sale of burial plots and urn compartments fall within the meaning of section 84 of Part IV Division 5 of the Companies Act, 1965 thereby requiring compliance with the provisions therein”.

### Analysis

[25] Except for one Malaysian authority: *Ratus Mesra Sdn Bhd v Shaikh Osman Majid & ors* (1999) 8 CLJ 499, which is a libel action making some reference to section 84 of the Act in passing and of very little assistance to this case, there is a virtually no common law authority in this country on this important question of law that attempts to protect the public against possible losses in a free market enterprise. On the contrary, in Australia section 76 (1) of the Australian Companies Act 1961 which is *pari materia* to our section 84 (1) of the Act, has been deliberated in a variety of circumstances culminating in enlightening judgments on this point of the law. Thus, there is a tendency, as observed in the courts below, to borrow what has been decided in Australia for application here. While analogy can be illuminating, there is the danger that the decisions which are, after all mere examples, may induce the observer to believe that they define the limits of the scope of the definition – see Macrossan J comment in *R v Commons* (1986) 10 ACLR 873 @ 876. Bearing this in mind, I shall try not to be influenced by any preconception as to the intended policy behind statutory provision but to look to the words of the provision itself to ascertain the meaning.

[26] It is common ground that the word “interest” in section 84 (1) of the Act be given a wide meaning. The rationale is found in the judgment of Mason J in the Australian case of *Softwood Forests Pty Ltd & ors v Attorney General (NSW)* 36 ALR 257:

“That a very wide meaning should be given to ‘interest’ is attested by the exclusion from the statutory definition of shares and debentures (para (d)), interests in life insurance policies (para (e) and, subject to some qualification, interests in partnership agreements (para (f)). The presence of the power to exempt by regulation other rights of interests from the definition (para (g)) is also of telling significance”.

Limb (a) of section 84 (1) of the Act

[27] With regards to limb (a) of section 84 (1) of the Act, the plaintiffs argued before us that purchasers who entered into the standard agreements with them do “not enter into contracts that give rise to a right to participate in the profits of the Appellants’ (plaintiffs’) business undertaking or scheme or the right to participate in the assets of the Appellants’ business undertaking or scheme”. There is no financial gain or expectation of a dividend for the purchase. They are not entitled to a share or interest in the business or to take part in the profits earned by the plaintiffs from the sale of the burial plots and compartments to keep the urn. Tackling with the word “assets” included in limb (a) of section 84 (1) of the Act, the plaintiffs maintained that these purchasers would not receive any financial gain from the plaintiffs. In support, the Australian case of *Butterworth & anor v Lezemo Pty Ltd & anor* (1983) 8 ACLR 737 was cited.

[28] Limb (a) of section 84 (1) of the Act reads

“interest” means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere...”

[29] Naturally, to decide on this, we must first ask ourselves whether there is a “financial or business undertaking or scheme”; like the approach undertaken by Mason J in *Australian Softwood Forest v AG* (supra). But what constitutes “financial or business undertaking”? Jenkinson J in the Australian case of *Wade v A Home Away Pty Ltd* (1981) VR 475 @ 492 is of the view that it should be a commercial enterprise in a systematic and regular way with a view of a profit. As for “scheme” Mason J in *Softwood Forest v AG* defines it as “some programme, or plan of action... There is nothing in the notion of an undertaking or scheme that requires or implies that there is joint participation in everything comprised in the plan or that there must be a share or pooling of profit or receipts”. I am of the view that though the objective of a financial or business undertaking is profit, scheme on the other hand may not necessarily require the presence of this element. But one may argue that the preceding words include the mention of “profits”. Indeed it is so but the next word that follows is “assets” which must be read disjunctively from the word “profits”. Participating in assets may not necessarily involve profit; benefit, perhaps. So there is no necessity that profits must be present in a scheme to qualify under limb (a) of section 84 (1) of the Act. This brings me to the next argument of the plaintiffs which stresses on the non participation of the purchasers in the assets of the plaintiffs.

[30] The plaintiffs have argued that the “participation” in assets of an undertaking or scheme only extend to mere use of such assets and not owning them. Participation according to them involves something more than mere use. The Australian case of *Streeter v Pacific-Seven Pty Ltd* (1985) 9 ACLR 790 was cited in support of this proposition. I do not dispute this. In this instance, the burial plots or the urn compartments are only used when there are interments. Perhaps, it is this reason that the plaintiffs use the word “licence” instead of an outright sale in the standard agreements. But if one were to examine

the terms and conditions of the standard form agreements and considering the nature that they are burial plots, and storage spaces for urns, these involve the use of the lands in perpetuity. It is very unlikely that the graves on the burial plots sold would be exhumed or moved elsewhere. The permanency of these remaining on the lands must be the foremost consideration of the plaintiffs and the purchasers when they entered into the standard form agreements. In fact this is reflected in the agreements itself with the appointment of a trustee to operate the parks once they are fully developed. This is a clear indication of the purchasers' participation in the assets of the plaintiffs, not for profits, perhaps, as I have said, but for benefits. So the presence of the necessary element of profits in the purchasers' participation, which the plaintiffs laid great stress on to qualify "interest" in limb (a) of section 84 (1) of the Act, is unacceptable.

[31] For reasons aforesaid, it is my opinion that the "interest" acquired by the purchasers of the standard form agreements fall within the statutory definition of limb (a) of section 84 (1) of the Act.

Limb (b) of section 84 (1) of the Act

[32] Though it is not necessary for me to examine limb (b) of section 84 (1) of the Act in the light of my conclusion in connection with limb (a), I shall do so for completeness and the fact that both parties have submitted extensively on it.

[33] Limb (b) of section 84 (1) of the Act specifies:

"Interest" means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to except profits rent or interest from the efforts of the promoters of the enterprise of a third party..."

[34] So the first question one has to address in respect of this limb is whether the purchasers had acquired a right to participate in any

common enterprise and secondly, whether it was one in respect of which they were led to expect profits, rent or interest from the efforts of the plaintiffs.

[35] The first pertinent factor we have to deal with here is “common enterprise”. This term has been defined by Mason J in the Australian Softwood Forest case (supra) as:

“The argument is that in order to constitute a “common enterprise” there must be a joint participation in all the elements and activities that constitute the enterprise. I do not agree. An enterprise may be described as common if it consists of two or more closely connected operations, on the footing that one part is to be carried out by A and other by B, each deriving separate profit from what he does, even though that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise”.

[36] The plaintiffs argued that the contracts they entered into with the purchasers are not for a common enterprise. There is no participation by the purchasers and that each burial plot purchased ceases to be an asset of the plaintiffs.

[37] I disagree with this contention. In my opinion the plaintiffs and the purchasers did participate in a common enterprise. They are closely connected in the sense that the purchasers after making the initial payment are also required to pay for the maintenance charges. For this, they expect not only the burial lots and storage spaces for urns to be made available for each interment but also the facilities that go with it to be maintained properly. Many of these purchasers are anticipated to return from time to time to pay their respects to those buried in the purchased burial plots or at the columbarium where the urns are kept and they expect these and other facilities provided in the parks to be well kept at all times. The higher standard of maintenance in these parks developed by the plaintiffs as

compared to those operated by the authorities also provide comfort to the purchasers knowing that the dead buried or whose ashes are stored there are securely guarded in a clean, pleasant and well maintained environment. In fact, this forms part of the plaintiffs' undertaking under the standard form agreements. Memorial parks that are safe, orderly and well maintained are attractive to the public. Thus, under these circumstances, both parties have a mutual interest to ensure the success of this common enterprise. It is therefore wrong to say that the transaction between the purchasers and the plaintiffs is a one-off transaction. The efforts of the plaintiffs are of a continuing nature and do not stop at the sale of the burial plots or spaces in the columbarium. They continue thereafter with the purchasers paying for the up-keeps and maintenance costs. This continuing efforts of the plaintiffs as promoters are an integral factor to the success of this common enterprise.

[38] The next question that follows is whether the common enterprise is one which the purchasers were led to expect profits, rent or interest from the efforts of the plaintiffs. In the Australian Softwood Forest case Mason J only refers to the common enterprise with each party deriving a separate profit from what it does. "Profit" has been defined in an Australian case of *Waldon v MG Securities* (1975) VR 508 @ 529 which deals with s. 76 of the Australian Companies Act:

" One of the definitions of "profit" given in the Oxford English Dictionary is "that which is deprived from or produced by some source of revenue". Webster defines it as "income of invested property – it includes any benefit or advantage accruing from the management use or sale of property or from the conduct of business", Dr. Johnson defines it as "Gain-pecuniary advantage". It is in this sense that the word should be construed in this definition".

[39] Subsequent Australian authorities dealing with this limb (*Hamilton v Casnot Pty Ltd* (1981) 5 ACLR 279 and *Butterworth v Lezemo* (supra)) have also ruled that the common enterprise in

which the purchasers participated in will lead to expect profits. But the Court of Appeal in this instant case disagrees with this limitation. The Court of Appeal in fact states that “the profit element need not be considered in deciding whether the Respondents’ (plaintiffs’) enterprise fall(s) under limb (b) meaning of ‘interest’”. Then the Court of Appeal went on to say: “‘Interest’ here must as we have earlier stated, be given a wide ordinary meaning to mean ‘a benefit, advantage or share’ and not confined to merely a financial gain, yield, profit or dividend”.

[40] I cannot subscribe to this wide interpretation by the Court of Appeal with the inclusion of factors that are not even specified in section 84 (1) of the Act. Firstly, the word “interest” must be interpreted as defined in section 84 (1) of the Act. No new elements should be added to what is stated in this provision. Secondly, the profit element cannot be totally excluded from this limb. It is, but one of the factors necessary to justify the fulfillment of this limb. Aside from “profits” under this limb there are also “rent” or “interest” from the efforts of the promoters of the enterprise of a third party. In the factual matrix of this case, I would consider the purchasers were led to an “interest” from the efforts of the promoters of the enterprise. “Interest” in this case would be the benefits derived by the purchasers in securing the burial plots or storage spaces for the urns and the continuous maintenance of these together and other facilities provided in the parks. With this element of “interest” present, the plaintiffs’ objection to the inclusion of this limb of section 84 (1) of the Act to their project must fail.

Limb (c) and (d) of section 84 (1) of the Act

[41] Since the defendant has conceded that these two limbs are not applicable to this case, I shall not proceed to deliberate them.



## Conclusion

[42] For reasons aforesaid, I dismiss this appeal with costs and the deposit for this appeal to the defendant towards account of costs. The orders of the Court of Appeal are hereby affirmed.

Dated 08 June 2010

(TAN SRI JAMES FOONG)

Judge

Federal Court of Malaysia

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