

**DALAM MAHKAMAH RAYUAN MALAYSIA**  
**(BIDANG KUASA RAYUAN)**  
**RAYUAN SIVIL NO. W-02-35-2005**

ANTARA

O.S.K. & PARTNERS SDN BHD ... PERAYU

DAN

ASSETS INVESTMENTS PTE LTD ... RESPONDEN

**(DALAM PERKARA GUAMAN SIVIL NO: D8(D3)-22-543-93**  
**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR)**

ANTARA

ASSETS INVESTMENTS PTE LTD ... PLAINTIF

DAN

O.S.K. & PARTNERS SDN BHD ... DEFENDAN

CORAM: GOPAL SRI RAM, J.C.A.  
RAUS SHARIFF, J.C.A.  
ZAINUN ALI, J.C.A.

## **JUDGMENT OF RAUS SHARIF, JCA**

1. This is an appeal directed against the order of the High Court Kuala Lumpur entering judgment for the plaintiff for losses suffered following a share swap transaction in the sum of RM26,984,728.75 together with interest and costs.
  
2. The factual background against which this appeal rests is as follows. Konsortium Enterprise (M) Sdn. Bhd. (“Konsortium”), a company associated with the plaintiff, approached the defendant, a company carrying on business as stock brokers, for a loan of RM10 million in the form of a margin facility against the security of shares in Metroplex Berhad. Metroplex Berhad is company listed on the Kuala Lumpur stock exchange.
  
3. A meeting was then held on 9 April 1992 between Mr. Freddy Yap (“DW1”), and Steven Ho (“Steven”), on behalf on the defendant and Mr. Andrew Goh (“PW1”) and Mrs. Lo Yin Fun (“YF Lo”), on behalf of Konsortium. At this meeting DW1

informed that the defendant was not able to offer the margin facility but it could arrange for a loan through a loan broker in Hong Kong, Qwinzy Corporate Services Limited (“Qwinzy”) by way of an asset swap transaction. It would involve the sale of Metroplex shares to lenders/buyers to be introduced by Qwinzy with an option to Konsortium to repurchase the shares within a stated period. To keep alive the repurchase option against buyers/lenders, option installment fees are payable monthly by Konsortium commencing from the date of full release of the funds. For the arrangement, the appellant would charge a management fee of 1% of the net value of the asset swap.

4. After the meeting, Konsortium proceeded to apply for the asset swap facility. PW1 filled the application form which was given by the defendant. The application form was signed by Mr. Chan Teik Huat (“Chan”), the person who controlled Konsortium, and one other person. However, to proceed further, an approval of Bank Negara Malaysia (BNM) was

necessary. Hence, on 30 April 1992, Konsortium wrote to BNM for permission.

5. On 15 May 1992, BNM rejected Konsortium's application for permission. To get around BNM's disapproval, the plaintiff, a Singapore company operating in Kuala Lumpur was then used to replace Konsortium. On 21 May 1992, the plaintiff submitted the application form for the asset swap facility to Qwinzy through the defendant. On 26 May 1992, Qwinzy wrote to the plaintiff informing that it had secured approval for the plaintiff's application. The letter was sent to the defendant which then forwarded it to the plaintiff.
  
6. On 3 July 1992, a Sale and Purchase Agreement in relation to the asset swap transaction was entered into between United Islamic Investments Foundation (UIIF) and the plaintiff. Under the Sale and Purchase Agreement, the plaintiff agreed to sell 23 million Metroplex shares valued at RM0.73 per share and subject to an option granted in favour of the plaintiff to

repurchase the shares upon the terms and conditions set out therein.

7. Between 8 July 1992 to 1 October 1992, the Metroplex shares were duly delivered to UIIF or to Qwinzy on its behalf by or on behalf of the plaintiff in pursuant to its obligation under the Sale and Purchase Agreement. In accordance with the terms thereof, a total sum of HK32,559,738.75 was paid to the plaintiff for the Metroplex shares by UIIF or Qwinzy on its behalf. Upon the full release of the total sum, management fee of 1% of the net value of the asset swap was thereafter paid to the defendant.
  
8. The plaintiff, in order to keep the option to repurchase the shares valid is obliged to pay UIIF a monthly option installment of HK326,663.88 for 36 months. The plaintiff made 5 monthly option installments of HK326, 663.88 each from November 1992 to March 1993. However in one of the monthly option installments, the plaintiff had incorrectly spelt UIIF in a bank

draft. Qwinzy then on behalf of UIIF, by a letter dated 14 January 1993 declared the option to repurchase the shares had become void under the Sale and Purchase Agreement as the bank draft was unacceptable.

9. On 27 April 1993, the plaintiff's solicitors gave separate notices to UIIF, Qwinzy and few others including the defendant that the plaintiff would be instituting legal proceedings against them respectively. On 24 May 1993 the plaintiff commenced action against UIIF, Qwinzy and several other parties in Hong Kong High Court (Hong Kong's Action). On 27 May 1993, the plaintiff commenced the present action against the defendant at the High Court Kuala Lumpur.
10. On 24 August 1995, the plaintiff entered into a consent judgment with respect of its claim against UIIF, Qwinzy and other parties in the Hong Kong's Action. However, in Malaysia the plaintiff continued to pursue its action against the

defendant. The claims against the defendant were on the following causes of action:-

- (a) Breach of implied terms of contract by the defendant in carrying out a reasonable duty of care; and/or
  - (b) Failure by the defendant to discharge its duty of care in tort to exercise reasonably duty of care in its dealings and relationship between plaintiff and defendant resulting in negligence.
11. It is the plaintiff's case that as the result of the negligent, misrepresentations and assurances which were given by the defendant to the plaintiff, the plaintiff has suffered substantial losses calculated to the sum of RM81,988,482.11.
12. The case was originally heard by Ariffin Jaka J (as he then was). He recorded all the evidence but recused himself before delivering judgment. The case was taken over by Abdul Wahab

Said Ahmad J (trial judge) who recalled all the witnesses for clarification of the printed evidence taken by Ariffin Jaka J.

13. On 17 December 2004, the learned trial judge held that the defendant owed a duty of care to the plaintiff both in contract and tort and the defendant had breached its duty. Accordingly, he gave judgment in favour of the plaintiff but only for the sum of RM26,984,728.75 together interest and costs. Hence, this appeal by the defendant.
14. The plaintiff in turn cross appealed seeking the quantum of damages awarded be revised to RM81,988, 482.11, as being the amount of damages which naturally arose and was suffered by the plaintiff. In addition, the plaintiff was also claiming for a sum of RM294,100.00 for wasted management time, which was not awarded by the learned trial judge.
15. A number of issues were raised in this appeal but the core issue really is whether the defendant owed the plaintiff a duty of

care either in contract or tort and whether or not the defendant had breached its duty.

### Duty of care under contract

16. It is the contention of the plaintiff that a contract exists between the plaintiff and the defendant to procure and manage the asset swap transaction with a third party for the plaintiff with the management fee as the consideration. According to the plaintiff, the terms and evidence of such contract may be read from the exchange of correspondences between the plaintiff and the defendant relating to the procurement of the asset swap transaction. And although there is no express terms of the contract to that effect, it is contended that following well established principles, the court may imply a term into a contract to give it business efficacy.

17. The defendant refuted the existence of any such contract with the plaintiff. To the defendant, its relationship with the plaintiff

was merely as introducer to Qwinzy and not the financial adviser to manage the asset swap transaction for the plaintiff. Thus, its duty to the plaintiff was only up to the stage of release of the funds.

18. The learned trial judge accepted the plaintiff's submission and ruled as follows:-

“Plaintiff must prove that there existed a contractual relationship between the parties. In the absence of express terms in a written formal agreement, such a relationship can be gleaned from the intention of the parties. In this case, I find that the correspondence between the parties had sufficiently evinced this fact. The terms of the agreement as implied from the said correspondence stipulated that the defendant, for a

management fee' would procure and manage an asset swap transaction with a third party.”

19. The “correspondence between the parties” referred to by the learned Judge, is the letter from the defendant dated 29 May 1992 (“the letter”). The letter *inter alia* stated –

“With reference to your letter dated 21 May 1992, we have finalised the arrangement of the above Asset Swap with Qwinzy Corporation Services Ltd. Enclosed herewith are their Letter of Offer dated 26 May 1992 for your attention.

For the above arrangement we will be charging you 1% on the net value of the Asset Swap as Management Services rendered.”

20. It is my respectful view that the learned trial judge was wrong to imply from the letter that the defendant for a management fee would procure and manage an asset swap transaction with a third party. Such a finding is clearly contrary to the written words of the letter. The words used in the letter were in the past tense i.e. 'have finalised' and "services rendered". It can only mean that the defendant had completed their job and hence seeking for the fee for the job done. And it should be noted that the letter makes no suggestion that the fee will cover future activities or obligations. There was also no response from the plaintiff to dispute or clarify the letter and the hard fact is, the fee was paid by the plaintiff to the defendant upon the full release of the total sum by UIIF to the plaintiff. This fact points to the fact that the relationship between the plaintiff and defendant was only up to the release of the funds. The role of the defendant in their relationship with the plaintiff was a mere introducer and not as a financial adviser to the plaintiff.

21. My above view is further supported by the plaintiff's own witness who confirmed that the ambit of the relationship between the plaintiff and the defendant was up to the stage of releasing the funds. PW1 during cross-examination said:-

“I agree that OSK is under an obligation to plaintiff for the management service which would include resourcing and arranging the facility and also on the negotiation of the terms and up to the stage of releasing of funding.”

In re-examination, PW1 re-confirmed the above where he said:-

“The 1% means management services which would include resourcing and arranging the facility and also on the negotiation of the terms and up to the stage of releasing of fund.”

22. Clearly, from the above, that duty of the defendant cannot be enlarged beyond the release of the funds. But the learned trial judge decided otherwise. In doing so, he relied on the evidence of Amir Sharifuddin bin Johan (PW4). But PW4 is a self-confessed perjurer and the author of the scam. His testimony against the defendant in Malaysia was the result of a bargain made with the plaintiff in the Hong Kong's Action. The bargain struck between the plaintiff and PW4 were as follows:-

- (i) PW4 to keep his residence in Hong Kong;
- (ii) Plaintiff to discontinue the Hong Kong's Action against PW4's employee;
- (iii) PW4 to testify for the plaintiff against the defendant;
- (iv) A consent judgment entered only against five parties in the Hong Kong's Action for the sum of HK\$185,206.00 and plaintiff is not entitled to recover against the other 10

defendants in the consent judgment, which include PW4's wife.

23. It is my respectful view that the learned trial judge's reliance of PW4's evidence in enlarging the scope of defendant's duty was unjustified. It is crystal clear that PW4 is a self confessed liar and 'bought' witness. PW4 admitted in evidence that he was the author of the fraud. In his evidence in 1995, during cross examination, he admitted he had perjured in Hong Kong. In re-examination, he also said –

“I created a falsehood in my affirmation in the Hong Kong Action in order to cover the lies in the brochures.”

24. Thus, there is no justification for the learned trial judge to elevate PW4, a bought witness, who had a purpose of his own in conjunction with the plaintiff, to a credible witness. Hence, PW4's evidence of enlarging the scope of the defendant's duty

that of “financial advisor” as opposed to an “introducer” should have been disregarded by the trial judge. Clearly, there is no factual foundation for PW4’s thinking that the defendant was the plaintiff’s financial adviser. For the learned trial Judge to accept PW4’s thinking, and to ignore the other compelling evidence is a classic case of a finding which is very much against the weight of evidence. This Court has a duty to interfere with such findings. (See **Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97**).

25. Thus, it is my respectful view that on the evidence recorded in this case, the ambit of the defendant’s duty was only to the stage of release of the funds. Once the funds were released, the defendant owe the plaintiff no further duty. There is no implied contract between the plaintiff and the defendant to manage the asset swap transaction between the plaintiff and Qwinzy. The defendant was merely an introducer and not as a financial advisor to the plaintiff. The defendant owed the plaintiff no duty of care on the asset swap transaction between

the plaintiff and UIIF. Thus, the question that the defendant had breached its duty of care under contract does not arise.

### Duty of care in tort

26. The learned trial judge found as a fact that the defendant had made oral representations that Qwinzy was financially strong and the persons running Qwinzy were honest, reliable and were of high integrity. According to him, the representations were made to the plaintiff through PW1. After making the said findings, the learned trial Judge concluded:-

“The defendant is expected to exercise reasonable skill, care and judgment in carrying out its duties for the plaintiff. It is their duty to ascertain the representation made by Qwinzy before assuring the plaintiff. The defendant should ascertain with reasonable certainty the accuracy of facts

transmitted to the plaintiff. The defendant also must exercise reasonable care and judgment when giving advice. These duties of care in law are as profound in **Hedley Byrne and Heller** and applied in **MIMB v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia**. The defendant themselves do not have competent knowledge of the mechanics of the asset swap. It is from this breach of duty that the defendant is liable for the loss incurred.”

27. With utmost respect, I have no hesitation in accepting the well established principle of law as profound by the House of Lords in **Hedley Byrne and Co. Ltd. v Heller & Partners [1963] 2 AER 576 (Hedley Byrne)** which was applied by this Court in **Malaysian International Merchant Bankers Bhd. v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam**

**Malaysia [2001] 1 MLJ 375 (MIMB).** The principle in Hedley

Byrne, read as follows:-

“If in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in the circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on and the person asked chooses to give the information or advice without so clearly qualifying his answer as to show that he does not accept responsibility then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care

an action for negligence will lie if damage results.”

28. The question now is whether the above principle is applicable to the facts of the present case. I do not think so. No doubt the principle in Hedley Byrne was applied in **MIMB** but it was decided on the facts. The facts in **MIMB** are these. Certain representations were made by the merchant bank to Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia (LBPAPTIM) which induced them to invest in a company. The representations given (orally as well as from documents) were that the director of the company had guaranteed a dividend of 24% per annum and the company was a respectable company and a sound financial standing. Subsequently, it was discovered that the director's guarantee of 24% dividend per annum was in fact false. It also turned out the company was in fact of not a sound financial standing and subsequently went into receivership. Hence, rightly in that case, the merchant

banker was held to be negligent and liable for the loss suffered by the LBPAPTIM.

29. However, this not the situation in the present case. This case is not a case where the plaintiff made investments and lost money in a business or a project that failed. This case is a case where the plaintiff and UIIF entered into a financial arrangement governed by terms of contract whereby the plaintiff was required to service monthly option installments. The terms were negotiated between Qwinzy, its lawyers in Singapore and the plaintiff's in-house legal team. It was a contract between the plaintiff and UIIF. The parties to the contract dealt directly with each other.

30. In this case it was the plaintiff which did not spell UIIF in the bank draft correctly. This started the train of events. Qwinzy/UIIF took advantage of the plaintiff's mistake to declare that the option payment was not paid. These were events totally unconnected with, and beyond the contemplation of the

defendant's action. And it is not the plaintiff's case that the defendant was part of the decision-making process to reject the bank draft.

31. It is my respectful view that the cause of the plaintiff's alleged loss had nothing to do with the financial soundness or otherwise of UIIF and Qwinzy. It bears no correlation to the ultimate cause of the plaintiff's loss. This is a case where PW4 wanted to get out of the deal as Metroplex Berhad shares arose substantially, thereby resulting in substantial potential loss to Qwinzy. The opportunity arose because of the technicality in respect of the bank draft. These actions, by no stretch of imagination can be regarded as connected to the defendant's purported action. The inability of the plaintiff to exercise its option to buy back the shares and thus suffered loss could not be attributed to the defendant. Thus, the question of the defendant being liable for negligent, misstatement under the doctrine of **Hedley Byrne** does not arise. The defendant

cannot be in breach of any duty in tort and thus cannot be liable for the loss suffered as alleged by the plaintiff.

32. For the above reasons, the defendant's appeal is allowed. The plaintiff's cross appeal is dismissed. The costs in this Court and the Court below must be borne by the plaintiff. The deposit in Court shall be refunded to the defendant.

Dated 18 October 2007.

Raus Sharif  
Judge  
Court of Appeal Malaysia

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