

**DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA  
MAHKAMAH RAYUAN RAYUAN SIVIL NO: W-03-179-2005 DAN  
RAYUAN SIVIL NO: W-03-180-2005**

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**ANTARA**

10 ALLOY CONSOLIDATED SDN BHD ... PERAYU-  
ABV BUILDERS SDN BHD PERAYU

**DAN**

15 ANJARIA PROPERTIES SDN BHD ... RESPONDEN  
DATO' DR. HAJI ADAM BIN HARUN RESPONDEN

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**DALAM MAHKAMAH TINGGI DI KUALA LUMPUR  
DALAM WILAYAH PERSEKUTUAN MALAYSIA  
GUAMAN NO. S1-22-538-2001**

**ANTARA**

25 ALLOY CONSOLIDATED SDN BHD ... PLAINTIF  
ABV BUILDERS SDN BHD

**DAN**

30 ANJARIA PROPERTIES SDN BHD ... DEFENDAN  
DATO' DR. HAJI ADAM BIN HARUN

35

**CORAM: HAJI MOHD GHAZALI MOHD YUSOFF, JCA  
SULONG MATJERAIE, JCA  
AHMAD HAJI MAAROP, JCA**

## JUDGMENT

[1] This judgment concerns two related appeals — Rayuan Sivil No. W-03-179-2005 (the first appeal) and Rayuan Sivil No. W-03-5 180-2005 (the second appeal). Both appeals arose out of the suit filed by the plaintiffs (the appellants before us in both appeals) in the Civil Suit No. S1-22-538-2001, against the first and the second defendant (the first and the second respondent respectively before us).

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[2] The case pleaded by the appellants against the respondents in substance is as follows. Both the appellants were at all material times involved in the building and construction industry. The principal business of the first respondent at all material times was 15 building industry. The second respondent was at all material times the Executive Chairman of the first respondent. Between the period from or on about 18.4.95 to 7.5.96, the first respondent was commissioned by the Jabatan Kerja Raya (JKR) for the building and construction of 4 government projects (the said projects). 20 Because the first respondent was facing cash flow problems, the second respondent sought the help of one Dato' Dr. Nik Hussain Abdul Rahman (Dato' Nik Hussain) to assist in completing the said projects. Dato' Nik Hussain was the corporate representative of the first and the second appellants. As a result of a series of 25 meetings between the second respondent and Dato' Nik Hussain, an understanding was reached that the second appellant would

effectively take over the first respondent's role in the said projects. The takeover would be fronted by the first appellant as it was a bumiputra company. It was also agreed that to all intents and purposes, the first respondent would publicly remain as the contractor appointed for the said projects. It was also agreed that a sum of RM10,260,399.48 was to be paid to the second appellant for the works it was to undertake. The second appellant commenced works. At the outset, the second respondent was compelled by circumstance to deal with third party contractors who were originally engaged by the first respondent which had sum due and owing to them. The second appellant requested funds from the first respondent to settle the debts. However, the first respondent, through the second respondent, requested the first appellant to advance the sums on the understanding that these sums would be repaid. Consequently, and with the knowledge and consent of the first and the second respondents, a sum of RM1,200,000.00 was advanced by the first appellant. The second appellant used the sum to settle outstanding debts to the said third party contractors. The appellants also claimed from the respondents a sum of RM2,216,404.68, which the appellants said was expended by them on the said projects. Claim for this sum was made by the appellants to the first respondent from time to time. The appellants alleged that sometime in February 1998, the first respondent appointed contractors to replace the second appellant and/or the first appellant. The appellants contended that that constituted repudiation of the agreement between the first

respondent and the appellants. By their solicitors' letter dated 30/4/2001, the appellants accepted the repudiation and termination of the said agreement. Further, or in the alternative, the appellants averred that the first respondent was to hold monies received from JKR for the benefit of the second and/or the first appellant and to that end, the first respondent was all material times, a constructive trustee of the appellants over the said monies. The appellants prayed for an order that the first and the second respondents jointly and severally pay general damages to them. Alternatively, the appellants prayed for an order that the first and the second respondents jointly and severally, pay the sum of RM2,216,404.68 to the second appellant, and the sum of RM1,200,000.00 to the first appellant.

[3] As against the second respondent, the appellants averred that the second respondent had deceived them by stating that funds for the said projects coming from JKR would be paid to them, although he knew at all times that the first respondent would not be paying either of them. In the alternative, the appellants averred that the board of the first respondent at all times acted in concert with the second respondent and as such the first respondent had been a participant in the deception carried out by the second respondent as a joint tortfeasor. Further, or in the alternative, it was averred that the first and the second respondents had conspired to injure the first and/or the second appellant.

[4] The first and second respondents file separate statements of the defence, in which they denied liability. Essentially they denied that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was a constructive trustee for such monies as alleged because :

- (a) there was no enforceable contract whatsoever between the appellants and the first respondent; and
- 10 (b) even if there was a contract the appellants had by their conduct, been in breach of the contract.

[5] In the summon-in-chambers dated 6/11/2002, (Enc. 18), the appellants applied for summary judgments against the respondents for the following sums :

- (a) the sum of RM336,683.56 which the appellants alleged was forwarded by them to the creditors of the first respondent who were involved in the said project, and
- 20 (b) the sum of RM2,216,404.68 for the progress claims which the appellants alleged were made to the first respondent for works carried out on the said projects.

25 [6] On 10/5/2004, the Senior Assistant Registrar (SAR) of the High Court entered a summary judgment against the respondents

for part of the amount prayed for by the appellants in Enc. 18. In the summon-in-chambers dated 30/6/2004, [Enc. 38], the first respondent applied to amend its statement of defence dated 4/9/2001. In the summon-in-chambers dated 9/7/2004 (Enc. 40) 5 the second respondent applied to amend his statement of defence. On 27/8/2004, the learned SAR allowed the application in Enc. 40. The appellants appealed to the learned judge (Enc. 47). On 10/1/2005 the learned SAR dismissed the application in Enc. 38 with costs. The first respondent appealed to the learned judge 10 (Enc. 52). The learned judge heard the appeals in Enc. 47 and 52 together. On 26/10/2005, the learned judge allowed the first respondent's appeal in Enc. 52 and hence the first appeal. On the same date, the learned judge dismissed the appellants' appeal in Enc. 47 and hence the second appeal. At the outset of the hearing 15 before us, the appellants and the respondents agreed that both appeals be heard together, beginning with the second appeal.

## **THE SUBMISSIONS**

### 20 **THE FIRST APPEAL**

[7] The thrust of the submission of the learned counsel for the appellant was that the counterclaim of the first respondent was a new cause of action and that the counterclaim arose out of a cause 25 of action which was statute – barred. He submitted that in its statement of defence, the first respondent pleaded that there was

no privity of contract between it and the appellants. However, in the counterclaim the first respondent averred in the alternative that even if there was a contract between them, there was a breach of it. In this regard he argued that the breach occurred when the appellants stopped work and the first respondent put in their own workers. Elaborating on the counterclaim which he contended to be statute barred, learned counsel said neither the first respondent's statement of defence nor its counterclaim specified when the alleged breach by the appellant took place. However, he said, paragraph 15 of the appellant's statement of claim averred that the first respondent had placed its workers at the construction sites at or about February 1998, hence amounting to repudiation of the contract. Since, this was not expressly denied by the first respondent in either its statement of defence or its counterclaim, it was taken to be admitted. He contended that it was clear therefore, that cause of action on which the proposed counterclaim was made had accrued at the end of February 1998 at the latest. That, he argued, was when all material facts occurred which entitled the first respondent to sue for the remedy sought. Thus, it was submitted in his written submission that:

“according to Section 6(1)(a), Limitation Act, 1953, the limitation period for the Proposed Counterclaim would be 6 years as it is based on contract. As such, the limitation period would set in latest when the appellants purportedly breached the contract by abandoning the Projects (which is

denied) i.e. by the end of February, 2004. The Proposed Counterclaim was therefore time-barred at the time Enc. 38 was filed.

5 The learned judge erroneously allowed the amendment inserting the time-barred Proposed Counterclaim.

The Appellants submit that as the Proposed Counterclaim was time-barred, the only way that it could be allowed is if the 1<sup>st</sup> Respondent fulfilled both the requirements of Order 20 Rule 5(5), RHC :-

(a) that the new cause of action must arise from the same facts or substantially the same facts as an existing cause of action; and

(b) that the party seeking for leave to amend (i.e. the 1<sup>st</sup> Respondent) must have already pleaded an existing cause of action and sought relief from such cause of action.

In the present case, the Appellants submit that the 1<sup>st</sup> Respondent's Proposed Counterclaim fails to fulfil the second requirement of Order 20 Rule 5(5) as the 1<sup>st</sup> Respondent did not have a pleaded cause of action against the Appellants prior to its application in Enc. 38. No counterclaim was

pleaded against the appellants in the 1<sup>st</sup> Respondent's Statement of Defence, a fact expressly acknowledged by the learned judge [Record of Appeal, pg. 22).

5           Therefore, there existed no basis for the amendment inserting the Proposed Counterclaim that was clearly time-barred by the time the 1<sup>st</sup> Respondent filed Enc. 38. The learned judge failed to appreciate this fact, preferring to merely state that the Proposed Counterclaim was in  
10 accordance with the principles laid down in *Yamaha Motor Co. Ltd. v Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213. His Lordship did not refer to the applicable legal provisions in the RHC and/or the LA 1953.”

15           In this regard it was contended that section 31 of the Limitation Act 1953 had no impact upon the provision under O 20, 5(5) of the Rules of High Court 1980 (RHC).

[8]       The other point raised on behalf of the appellant was that  
20 these was an ordinate delay in filing Enc. 38 and it was not bona fide but was a contumelious afterthought. The counterclaim was filed as a tactical manoeuvre to deprive the appellants of the fruits of their successful application for summary judgment. It was also argued that the appellants would suffer prejudice that would be  
25 irremediable by costs.

[9] In reply, the learned counsel for the first respondent submitted that the counterclaim arose from the same factual matrix based upon which the statement of defence was filed. It concerned the said projects which were abandoned by the appellants, and which the first respondent had to take over and employ new sub-contractors resulting in increased costs being incurred by them. It was also contended that the counterclaim was not statute barred. In this regard, learned counsel for the first respondent submitted that the appellants were relying on the assumption that the counterclaim was statute barred when in fact there was a dispute as to the date when the first respondent took over the said projects.

## **THE SECOND APPEAL**

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[10] Essentially, in this appeal, in contending that the second respondent's counterclaim was statute-barred, the appellants relied on submission similar to that which they made in the first appeal. It was also contended by the learned counsel for the appellants that in Enc. 40 the second respondent actually made massive restructuring of its statement of defence and added a counterclaim with new causes of action. Learned counsel submitted that "the massive amendments from top to bottom of the Defence radically change the nature of the 2<sup>nd</sup> Respondent's Statement of Defence, purportedly to provide a foundation for its Proposed Counterclaim. This in turn effectively changed the 2<sup>nd</sup> Respondent defence into

another of inconsistent character. In fact, from the extensive amendments made, the Amended/defence was a completely new Defence! Such amendments should not be permitted.”

5 [11] In reply, the substance of the submission made by learned counsel for second respondent was that the second’s respondent’s counterclaim was not a new cause of action and it did not change the character of the suit as it was based on the same facts and arose out of the same transaction as the original statement of  
10 defence. Relying on section 31 of the Limitation Act 1953, it was contended that the counterclaim was not statute barred. Learned counsel also submitted that O 20 r 5(5) of RHC was not relevant to the proceeding before the court.

## 15 **DECISION**

[12] It appears to us that the real complaint of the appellants in both the appeals is the addition of the respective counterclaims which the appellants contended were statute barred and that  
20 section 31 of the Limitation Act 1953 had no application to the amendment sought by the respondents. For reasons which we will explain shortly, we cannot accept the submission made on behalf of the appellants. Under O 15 r (2) of RHC, a defendant in any action who alleges that he has any claim or is entitled to any relief  
25 or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a

separate action, make a counterclaim in respect of that matter and where he does so he must add the counterclaim to his defence. So he has a choice. He can bring a separate action or make a counterclaim. If he makes a counterclaim how do we determine  
5 whether it is statute-barred? We feel that this is where the Limitation Act 1953 comes into play. We do not agree that section 31 of the Limitation Act 1953 do not apply to this proceeding. Section 30(1) of the Act provides :

10           “This Act and any other written law relating to the limitation of actions shall apply to arbitrations as they apply to actions.”

So, section 31 of the Limitation Act 1953 is relevant and reference must be made to it. That provision is similar to section 28 of the  
15 English Limitation Act 1939. The annotation to this section in 19 Halsbury’s Statutes (Third Edition) at page 89 is as follows:

20           *“The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his plea, must prove that the set-off or counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at the time when it was pleaded.”*

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[13] Since the appellants had raised the issue of the counterclaim being barred by the Limitation Act 1953, under section 31 of the Act, they must prove that the counterclaim was barred when they commenced their action [25/6/2001]. Going by what was pleaded  
5 in the statement of claim that the cause of action had arisen at the end of February 1998, the counterclaim of the first respondent was not barred by the Act. Similarly, as will be clear later in this judgment, the cause of action relevant to the second respondent's counterclaim also had arisen at the end of February 1998. Thus,  
10 his counterclaim was also not barred by the Act. Since their counterclaims were not barred by the Limitation Act 1953, the respondent do not need to resort to O 20 r 5(5) of RHC. In our view, in the circumstances of the present appeals, in order to persuade the court to exercise its discretion under O 20 r 5(1) of  
15 RHC, the respondents need only satisfy the court the following, namely; (1) that their applications are bona fide; (2) the prejudice caused to the appellants can be compensated by costs; and (3) the amendments in Enc. 38 and Enc. 40 respectively, would not in effect turn the suit from one character into a suit of another  
20 inconsistent character. [See *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd and Ors* (1983) 1 MLJ 213, F.C.]. Yamaha Motor as well as other familiar decisions on the subject of amendment of pleadings under O 20, RHC were referred to by this court in *Abdul Johari B. Abdul Rahman v. Lim Hou Chong* (1997) 1  
25 MLJ 629. In delivering the judgment of the court, Abdul Malek Ahmad JCA (as he then was) said :

5 “The authorities strongly indicate that the courts should lean towards granting application for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments. On these considerations, we agree with the learned judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity.”

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[14] We now turn to consider the amendments applied for in Enc. 38 and Enc. 40.

15 **ENCLOSURE 38**

[15] Earlier in this judgment, we have set out in substance the case pleaded by the appellants. Three basic facts form the thrust of the appellants cause of action. The first is the commissioning of the first respondent by the JKR to carry out the said projects. The second is the meetings between the second respondent and Dato’ Nik Hussain. The third is that at the material times, the first respondent was facing cash flow problem. To reiterate, the appellants averred that arising from the series of meeting between the second respondent (the Executive Chairman of the first respondent), and Dato’ Nik Hussain, agreement was reached,

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whereby the second appellant would affectively take over the first respondent's role in the said projects, the take over would be fronted by the first appellant as it was a bumiputera company, the first respondent would, for all intents and purposes, remain publicly  
5 as the contractor appointed for the said projects, and that the appellants would be repaid out of the proceed received from the JKR. We observe that in its pleaded case, unlike the first respondent, the appellants did not make any specific reference to the role played by MTD CAPITAL BHD (MTD). This brings us to  
10 the first respondent's case as pleaded in its original statement of defence. The three basic facts forming the thrust of the appellants' case, were not disputed by the first respondent. In their original statement of defence, the first respondent admitted that there were several meetings between the second respondent and Dato' Nik  
15 Hussain, the then Executive Chairman of MTD, who was also the second respondent's friend, but denied that arising from the said meeting, agreement was reached between the appellants and the first respondent. The first respondent contended their dealing and agreement was with MTD and that the appellants were sub-  
20 contractors or agents of MTD. In this regard, the first respondent explained that the purpose of the meetings was to get Dato' Nik Hussain/MTD to assist the first respondent which was then cash strapped and unable to complete three of the said projects. According to the first respondent, in the discussion between them,  
25 although, the first respondent (through the second respondent) sought Dato' Nik Hussain's assistance as Executive Chairman of

MTD, to fund the first respondent to complete the said projects, option was also extended to Dato' Nik Hussain that if MTD desired, it could acquire the entire share capital of the first respondent. Dato' Nik Hussain expressed great interest and would explore the possibility of an acquisition by MTD. Dato' Nik Hussain also agreed to render immediate help to the first respondent to complete the ongoing projects. In the meetings it was also decided that sub-contractors would be appointed by Dato' Nik Hussain to assist in completing the projects and ultimately MTD would be responsible to the sub-contractors in the light of the proposal to acquire the equity of the first respondent.

[16] The first respondent averred that later, the second appellant requested the first respondent to hand over the contract documents of the uncompleted projects, which was duly acceded to by the first respondent. The second appellant was a sub-contractor appointed by MTD to assist the first respondent to complete the projects. Later still, in late September 1997, several persons purporting to be representatives of the second appellant moved into various project sites and directed all existing sub-contractors to immediately stop the works which were in progress. The first respondent's employees and its several sub-contractors on the sites were informed that new sub-contractors would take over shortly.

[17] Although the discussion with Dato' Dr. Nik was to seek the assistance of MTD to fund the first respondent's ongoing projects,

monies were due to the suppliers and sub-contractors who were already working on the sites. Their services were terminated by the MTD's agent who arrived at the sites and this made it imperative that all payments due to the said suppliers and sub-  
5 contractors be made promptly. An estimate of this payments was sent to MTD. MTD notified the second respondent that another subsidiary of MTD would be advancing the payments and for the first time reference was made to the first appellant. On MTD's directions, a list of the first respondent's immediate requirements  
10 were forwarded to the first appellant. The first respondent denied any knowledge of the advance of RM1,200,000.00 from the first appellant to the second appellant and that that sum was used by the second appellant to settle outstanding debts to the contractors. The first respondent admitted that works commenced at the site,  
15 but averred that the first appellant was not informed whether it was a sub-contractor or worker employed by the second appellant as agents of MTD. The first appellant was also not informed as to who would be responsible for their payment.

20 [18] On 12/12/97 the first respondent received progress claims from the second appellant which the first respondent contended did not commensurate with the work carried out by the workers who had come on the sites, and that much of the work included in the claims had been completed by the previous sub-contractors, and  
25 the second appellant had improperly included these items of work as having been undertaken and completed by them. In January

1998, the second appellant again made further progress claims which the first respondent objected. Thereafter, it became apparent that the second appellant was no longer interested in carrying on with the work. The second appellant indicated that  
5 unless progress payments were made, it would be compelled to stop work completely. The second respondent approached MTD to resolve the matter. Nevertheless, all work thereafter completely ceased. The first respondent averred that upon sudden cessation of work at the site, it was compelled to obtain assistance of another  
10 sub-contractor to complete the contracts which was by then mostly overdue. Owing to sudden cessation of the work by MTD's agents, the JKR terminated the contract on the Sekolah Rendah Pendidikan Khas which was one of the said projects. The first respondent then concluded its defence denying that the appellants  
15 were entitled to any monies or at all payable by the JKR or that the first respondent was constructive trustee for such monies as alleged because :

- 20 (a) there was no enforceable contract whatsoever between the appellants and the first respondent, and
- (b) even if there was a contract, the appellants had been in breach of the contract and had, by such breach forfeited all right to any claim for these monies or at all.

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[19] So, the alternative plea that there was no contract and if there was one, the appellants had breached it, was already part of the first respondent's original statement of defence. In its counterclaim, the first respondent repeated what he had alleged in the original statement of defence. Then, relying and following through on the plea that even if there was a contract between it and the appellants, the appellants were in breach of that contract, in the counterclaim, the first respondent averred that that the breach of contract by the appellants (by suddenly abandoning the contract works), had caused it suffer costs and damages in that it had to pay liquidated damages and other expenses on account of the delay caused by the breach, as well as cost overruns relating to the said projects. So, clearly, the counterclaim added by application in Enc. 38 was based on the same facts as pleaded in the original statement of defence of the first respondent. In this connection, reference must be made again to O 15 1(2) of RHC which allows a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and howsoever arising), instead of bringing a separate action, to make a counterclaim in respect of that matter and where he does so he must add the counterclaim to his defence. However, it is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principle claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. Thus a

counterclaim for slander cannot be maintained in a claim for money lent [See *Esso Standard Malaya Bhd v. Southern Cross Airways (M) Bhd.* (1972) 1 MLJ 168, at 170, per Raja Azlan Shah J as His Royal Highness then was)]. In the present appeal from what we  
5 have demonstrated thus far, the first respondent's counterclaim is sufficiently connected with the subject matter of the appellants' claim to make it necessary that it should be dealt with along with the appellants' claim. We are satisfied that the amendment sought by the first respondent in Enc. 38 would not in effect turn the suit  
10 from one character into a suit of another and inconsistent character.

[20] On the issue of delay, it was submitted by the learned counsel for the appellants that there was no explanation for the  
15 delay of nearly 3 years in the filing of Enc. 38 which was done after the SAR had entered summary judgment for the appellants, though for only part of its claim. Thus, it was contended on behalf of the appellants that the application in Enc. 38 was not bona fide but represented a contumelious afterthought and was filed as a tactical  
20 maneuver to deprive the appellants of the fruits of their successful application for summary judgment. We do not think so. While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay per se does not equal prejudice or injustice. [See *HSBC Bank Malaysia Bhd v. Macquarie Technologies (M) Sdn. Bhd.* (2004) 4 MLJ 398, *Wright Norma v. Overseas-Chinese Banking Corporation Ltd* (1994) 1 SLR 513]. In  
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its affidavit in reply, the first respondent explained that the SAR entered the summary judgment only for the sum of RM427,420.10 and that the SAR held that the respondent had successfully raised triable issues which should be tried in respect of the rest of the appellants' claim. Therefore the amendment in Enc. 38 was applied for to reflect the true case of the first respondent's against the appellant.

[21] We are not convinced that the application in Enc. 38 was made mala fide. In the present appeal we are satisfied that by allowing the first respondent's application in Enc. 38, the appellant will suffer no prejudice or harm that cannot be compensated by a suitable order as to costs. On the other hand, we have to consider the position of the first respondent. Its counterclaim may or may not succeed. In this proceeding we are not concerned with the merit of the first respondent's case. However, if the amendment is not allowed, the first respondent will forever be shut out from its opportunity at receiving justice. On balance, we feel that the amendment should be allowed. We therefore hold that the learned judge of the High Court did not err in making the order which had the effect of allowing Enc. 38.

[22] In the result the appeal is dismissed with costs.

**ENCLOSURE 40**

[23] In his original statement of defence, the second respondent pleaded facts and defence which were similar to that pleaded in the first respondent's statement of defence. Just as in the case of the first respondent, the three basic facts which form the thrust of the appellants' case were not disputed by the second respondent. So, what we have said in paragraphs 15, 16, 17 and 18 of this judgment also apply mutatis mutandi to the second appellant. Like the first respondent, the second respondent averred that upon sudden cessation of work at the sites, the first respondent was compelled to obtain assistance of another sub-contractor to complete the contracts which was by then mostly overdue. Owing to sudden cessation of the work by MTD's agents, the JKR terminated the contract on the Sekolah Rendah Pendidikan Khas which was one of the said projects. The second respondent then concluded its defence denying that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was constructive trustee for such monies as alleged because :

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(a) there was no enforceable contract whatsoever between the appellants and the first respondent, and

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(b) even if there was a contract, the appellants had been in breach of the contract.

[24] Like the first appellant, the alternative plea that there was no contract and that if there was one, the appellants had breached it, was already part of the second respondent's original statement of defence. Relying and following through on the plea that even if there was a contract between the first respondent and the appellants, the first appellants were in breach of that contract, in his counterclaim, the second respondent averred that the breach of contract by the appellants had caused him to suffer loss and damages in the form of loss of investment in the first respondent amounting to RM2,400,000.00, and loss of allowance of RM4,000.00 a month from January 2003 to October 2013. How the said loss and damages came about were set out in the amendment applied for in Enc. 40, particularly paragraphs 13G to 13K of the amended statement of defence. It is clear to us that the amendment in Enc. 40 including the counterclaim was actually based on the same facts as pleaded in the second respondent's original statement of defence. It is also clear to us that the second respondent's counterclaim is sufficiently connected with the subject matter of the appellants' claim so as to make it necessary that it should be dealt with along with the appellants' claim. We conclude that the amendment sought by the second respondent in Enc. 40 would not in effect turn the suit from one character into a suit of another and inconsistent character.

[25] On the issue of delay, learned counsel for the appellant submitted similar point which he raised in respect of the first

appeal. He contended that the second respondent was aware of the facts which would allow him to counterclaim against the appellant from the day it received the statement of claim, but he chose to wait until the very last moment to apply for amendment.

5 This, he submitted coupled with the lack of explanation for the delay showed that Enc. 40 was a contumelious afterthought and was not made bone fide. We do not agree. In his affidavit in reply to the appellants' affidavit in opposing Enc. 40, the second respondent's explanation's for the delay was that his former

10 solicitors did not advise him as to the counterclaim he could make against the appellants. In this regard, in *Hock Hua Bank Berhad v. Leong Yew Chin* (1987) 1 CLJ 126, the Supreme Court said :

15 *“As for the general principles for the granting of leave to amend —*

20 *“It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made ‘for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings’ (see per Jenkins L.J. in G.L. Bakar Ltd. v. Medway Building & Supplies Ltd. [1958] 1 WLR 1216, p. 1231; [1958] 3 All Er 540, p. 546).*

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5                   *'It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights .... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right'* (per Bowen L.J. in *Cropper v. Smith* [1883] 26 Ch. D. 700, pp. 710-722, with which observations A.L. Smith L.J. expressed 'emphatic agreement' in *Shoe Machinery Co. V. Cultam* [1896] 1 Ch. 108, p. 112)."

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[25] Like what we said in respect of Enc. 38, we are not convinced that the application in Enc. 40 was made mala fide. In the present appeal we are satisfied that by allowing the first respondent's application in Enc. 40, the appellant will suffer no prejudice or harm that cannot be compensated by a suitable order

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as to costs. On the other hand, we have to consider the position of the second respondent. His counterclaim may or may not succeed. In this proceeding we are not concerned with the merit of the second respondent's case. However, if the amendment is not  
5 allowed, the second respondent will forever be shut out from its opportunity at receiving justice. On balance, we feel that the amendment should be allowed. We therefore hold that the learned judge of the High Court did not err in making the order which had the effect of allowing Enc. 40.

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[26] In the result the second appeal is dismissed with costs.

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**(DATO' AHMAD BIN HAJI MAAROP)**

Judge  
Court of Appeal  
Malaysia.

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Date: 10 February 2009.

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Peguamcara bagi Perayu : Encik Arthur Wang Ming Way,  
Cik Aishah Fadin Bte Baharudin, dan  
Encik Neoh Hor Kee,  
Tetuan Arthur Wang Lian & Associates,  
Peguambela & Peguamcara,  
16<sup>th</sup> Floor, Wisma Char Yong,  
89, Jalan Ampang,  
30 50450 Kuala Lumpur.

**[Ruj: AMW/AL/1376-01)**

5 Peguamcara bagi Responden I: Encik S. S. Ravichandran, dan  
Encik Ng Chung Yee,  
Tetuan Seah Balan Ravi & Co,  
Peguambela & Peguamcara,  
Unit A, Third Floor,  
10 Wisma 1 Alliance,  
No. 1, Lorong Kasawari 4B,  
41150 Taman Eng Ann,  
Klang, Selangor Darul Ehsan.

**[Ruj: HKK/Lit/1399/2005)**

15 Peguamcara bagi Responden II: Encik James Selva, dan  
Cik Normaazah Bte Ismail,  
Tetuan Ong Kok Bin & Co,  
Peguambela & Peguamcara.  
Suite 8.01, Tingkat 8,  
20 Bangunan Lee Yan Lian,  
Jalan Tun Perak,  
50050 Kuala Lumpur.

**[Ruj: A/487]**