

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: D-01-21-TAHUN 2008

RAYUAN SIVIL NO: D-01-22-TAHUN 2008

ANTARA

(1) LEMBAGA KEMAJUAN TANAH PERSEKUTUAN
(FELDA)

(2) FELDA PALM INDUSTRIES SDN BHD ... PERAYU-PERAYU

DAN

AWANG SOH BIN MAMAT DAN
353 YANG LAIN

... RESPONDEN-
RESPONDEN

**(Dalam perkara Guaman Sivill No: 22-85 Tahun 2002
di Mahkamah Tinggi Malaya di Kota Bharu)**

ANTARA

AWANG SOH BIN MAMAT DAN
353 YANG LAIN

... PLAINTIF-PLAINTIF

DAN

(1) LEMBAGA KEMAJUAN TANAH PERSEKUTUAN
(FELDA)

(2) IBRAHIM BIN ISMAIL

(3) FELDA PALM INDUSTRIES SDN BHD ... DEFENDAN-DEFENDAN

CORAM:

- (1) JAMES FOONG CHENG YUEN, FCJ
- (2) ABDULL HAMID EMBONG, JCA
- (3) ABDUL MALIK ISHAK, JCA

JUDGMENT OF ABDUL MALIK BIN ISHAK, JCA**DISSENTING****The facts**

[1] The appellants were the defendants in the High Court civil suit no: 22-85-2002.

[2] While the respondents were the plaintiffs in the High Court civil suit no: 22-85-2002. Altogether, there were a total of 354 plaintiffs in this suit. And the suit was not a representative action. I have more to say of this later.

[3] The civil suit no: 22-85-2002 was fixed for hearing before the learned judge of the High Court for two days, namely, on 13.1.2008 and 14.1.2008.

[4] The solicitor for the appellants defendants who had conduct of the matter at the High Court was one Munir Shah bin Mohd Husan (hereinafter referred to as "**Munir**"). But, unfortunately, Munir had not only resigned from the law firm of Messrs Wong Lu Peen & Tunku Alina on 19.12.2007 but he had also failed to enter the hearing dates

on the master diary with the consequent result that neither the appellants defendants nor their counsel turned up on the date of hearing before the learned judge of the High Court.

[5] On 13.1.2008, the hearing before the learned judge of the High Court proceeded in the absence of the appellants defendants and their solicitors. At the end of the hearing on 13.1.2008, the learned judge of the High Court gave judgment in favour of the respondents plaintiffs and awarded general damages in the sum of RM7.1 million, and aggravated damages calculated at 10% of RM7.1 million amounting to RM710,000.00 together with interest at 8% per annum on RM7,810,000.00 from the date of filing the writ to the date of realisation and costs which cumulatively had to be paid by the first appellant defendant and the third appellant defendant (hereinafter referred to as the “**judgment**”).

[6] The appellants defendants’ solicitors only became aware of the said judgment on the very night of 13.1.2008 when the matter was broadcasted nationwide on national television.

[7] Acting swiftly, the appellants defendants’ solicitors immediately filed on 14.1.2008 an application to set-aside the judgment in default of appearance pursuant to Order 35 rule 1(2) of the Rules of the High Court 1980 (“**RHC**”) on a certificate of urgency.

[8] On 20.1.2008, the learned judge of the High Court heard the application to set aside the judgment in default of appearance.

[9] On 28.1.2008, the learned judge of the High Court dismissed the appellants defendants' application to set aside the judgment in default of failing to appear at the trial.

[10] On the very same day – and that would be on 28.1.2008, the appellants defendants' filed the following documents at the High Court registry:

(a) a notice of appeal against the whole decision of the learned judge of the High Court vide civil appeal no: D-01-21-2008 that was delivered on 13.1.2008 (hereinafter referred to as the **“first appeal”**); and

(b) a notice of appeal against the whole decision of the learned judge of the High Court in dismissing the appellants defendants' application to set aside the judgment in default of appearance vide civil appeal no: D-01-22-2008 that was delivered on 28.1.2008 (hereinafter referred to as the **“second appeal”**).

[11] On 22.2.2008, the appellants defendants filed an application to consolidate both these two appeals – the first appeal and the second appeal, but another panel of this court dismissed the

appellants defendants' consolidation application and directed that both the appeals be heard one after another.

The respondents plaintiffs' application in enclosure 15a

[12] By this enclosure 15a, the respondents plaintiffs sought to strike out the first appeal by contending that the appellants defendants had made an election to proceed with the second appeal and was thus estopped from pursuing with the first appeal.

[13] I find myself in complete agreement with the judgment of my learned brother James Foong Cheng Yuen, FCJ in his excellent treatment and approach to enclosure 15a. His Lordship has admirably examined the law in the context of the facts of the present case and we unanimously dismissed enclosure 15a forthwith. As a matter of law there are no principles of law that require the appellants defendants to be put to an election of their rights because both these two appeals are in respect of different matters, issues and questions of law.

[14] The burden falls on the respondents plaintiffs to show that the first appeal should be struck out by showing that either the grounds of the first appeal are not capable of being argued or that the first appeal are frivolous, vexatious or an abuse of process. Only in **“clear and obvious cases”** that this panel will strike out the first

appeal. In the words of Glidewell L.J. in the case of **Burgess v. Stafford Hotel Ltd. [1990] 1 W.L.R. 1215, at page 1222:**

“The jurisdiction to make orders striking out notices of appeal is one that is just as capable of abuse as is the power to put in hopeless notices of appeal. In my view the power to strike out should be confined to clear and obvious cases.”

[15] The decisions of the learned judge of the High Court on 13.1.2008 and on 28.1.2008 are appealable. Section 3 of the Courts of Judicature Act 1964 defines the word **“decision”** to mean **“judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties”**. It cannot be denied that the decision of the learned judge of the High Court that was handed down on 13.1.2008 finally disposed of the appellants defendants’ rights before the High Court and that would entitle the appellants defendants to file in the notice of appeal which they did.

[16] Section 67(1) of the Courts of Judicature Act 1964 gives jurisdiction to this panel to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provision of this sub-section

or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[17] The decisions of the learned judge of the High Court on 13.1.2008 and on 28.1.2008 are not caught within the ambit of section 68 of the Courts of Judicature Act 1964 in that they are appealable matters which can be heard by this panel.

[18] In relation to the second appeal, I have this to say. It relates to the appellants defendants' application to set aside the judgment in default due to the absence of the appellants defendants and their solicitors and it is an interlocutory matter which finally disposed of the appellants defendants' rights before the High Court. So, the only remaining recourse for the appellants defendants would be to seek a review of the decision of the learned High Court judge by way of an appeal to the Court of Appeal by filing the required notice of appeal on 28.1.2008. That being the case, in my judgment, the requirements of section 3 of the Courts of Judicature Act 1964 read together with section 68 of the same Act have been complied with.

[19] Similar words like "**judgment, sentence, or order**" that appear in section 307(1) of the Criminal Procedure Code (Act 593) also appear in section 3 of the Courts of Judicature Act 1964 and it was held to mean in the case of **Melab bin Su v. Public Prosecutor**;

Cheak Yoke Thong v. Public Prosecutor [1984] 1 MLJ 311 as a decision which would “**finally dispose of the rights of the accused persons**” and this was approved by way of an obiter by the Supreme Court in the case of **Ang Gin Lee v Public Prosecutor [1991] 1 MLJ 498**.

[20] The marginal note to section 68 of the Courts of Judicature Act 1964 refers to “**non-appealable matters**” and it prescribes what the matters are which may not be brought before the Court of Appeal. Section 68(1)(a) of the Courts of Judicature Act 1964 makes reference to the “**amount of the claim**” and the “**value of the subject matter of the claim**” which cannot be less than RM250,000.00 (see **Yap Fook Cheong & Anor v. Burkill (Malaya) Sdn. Bhd. & Anor [1991] 3 MLJ 160, S.C.** which was judicially considered by the Federal Court in the case of **Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anor [1997] 1 MLJ 136**). In my considered view, the correct approach to understand and apply section 68 of the Courts of Judicature Act 1964 is to read sub-section (1)(a) as the dominant provision because the real purpose or object of section 68(1)(a) of the said Act is to prevent cases involving less than RM250,000.00 to be brought to the Court of Appeal without leave (**Yap Fook Cheong & Anor v. Burkill (Malaya) Sdn. Bhd. &**

Anor. (supra)). Here, the quantum was more than RM7.1 million and it was certainly appealable without the need to obtain leave of the Court of Appeal.

[21] I must reiterate that, as a matter of law, the decisions of the learned High Court judge on 13.1.2008 and on 28.1.2008 are appealable. These two appeals are distinct and different from one another. The first appeal relates to the merits of the entire suit whilst the second appeal relates to the dismissal of the appellants defendants' application to set aside the judgment in default of appearance. I cannot help but make the following observations:

- (a)** in filing the first appeal and the second appeal there was no issue of abuse of the process of the court nor have the appellants defendants waived or relinquished their rights to appeal to the Court of Appeal against both decisions of the learned High Court judge by way of separate appeals; and
- (b)** that this was not a plain case warranting a striking out of any of the appeals.

[22] The filing of enclosure 15a by the respondents plaintiffs were entirely misconceived and ought to be struck out in limine for the following reasons:

- (i) on 7.3.2008, the respondents plaintiffs filed a notice of motion to strike out civil appeal no: D-01-21-2008 in another appeal and that would be civil appeal no: D-01-22-2008;
- (ii) on 12.5.2008, the Court of Appeal dismissed the notice of appeal to strike out civil appeal no: D-01-21-2008 that was filed in civil appeal no: D-01-22-2008;
- (iii) the respondents plaintiffs' striking out application was clearly subject to the doctrine of res judicata and was tantamount to an abuse of process; and
- (iv) the respondents plaintiffs' application to strike out was clearly a ploy to circumvent the determination of the civil appeal no: D-01-21-2008 on its merits and that the proper procedure was for the respondents plaintiffs to oppose the appeal proper rather than filing an interlocutory application to strike out the notice of appeal.

[23] For all these reasons, enclosure 15a ought to be dismissed, and we so order accordingly.

The appeal proper

[24] I begin by making reference to Order 35 rule 1(2) of the RHC which states as follows:

“If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.”

[25] Now, when one party fails to appear, just like the facts which prompted the first appeal, the High Court may proceed with the trial in the absence of the party. But the party who appears before the High Court, just like the respondents plaintiffs, will have to prove their case on any issue which the respondents plaintiffs bear the burden of proof. In short, the respondents plaintiffs will have to prove their claim (**Liow Geok Lan (F) v. John Loh [1993] 3 CLJ 158; Barker v. Furlong [1891] 2 Ch. 172 at 179; and Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd. [1982] 2 M.L.J. 79**). And once the respondents plaintiffs have proved their case they are entitled to the reliefs which they claim and such other reliefs which are consistent with their claim (**Stone v. Smith [1887] 35 Ch. D. 188; and Kingdon v. Kirk [1888] 37 Ch. D. 141**).

[26] It must be emphasised that the burden of proof lies on the respondents plaintiffs to prove their claim notwithstanding the absence of the appellants defendants or their counsel.

[27] It must be borne in mind that where judgment is given in the absence of either party, the absent party, like the appellants

defendants here, may apply to set it aside under rule 2(1) of Order 35 of the RHC.

[28] I will now make reference to Order 35 rule 2 of the RHC which states as follows:

“Judgment, etc, given in absence of party may be set aside (Order 35 rule 2)

(1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just.

(2) An application under this rule must be made within 7 days after the trial.”

[29] Here, there was promptitude on the part of the appellants defendants in filing an application to set aside the judgment in default of appearance pursuant to Order 35 rule 2(2) of the RHC.

[30] It is quite obvious that rule 2 of Order 35 of the RHC complements rule 1(2) of Order 35 of the RHC. It empowers the court, here it would be the High Court, on the application of the party in default, to set aside the judgment or grant an order on such terms.

[31] Of course, any judgment or order given in the absence of a party to the suit – here it would be the appellants defendants, may be set aside at the discretion of the High Court who will examine the reasons for the party’s absence. According to the case of **Burgoine v. Taylor [1878] 9 Ch. D. 1 at 4**, where judgment was entered due to the solicitor’s absence mainly because of the solicitor’s negligence in

failing to look at the correct hearing list, the judgment may be set aside. And when that happens, according to the case of **Cockle v. Joyce [1877-78] 7 Ch. D. 56**, the terms in setting aside the judgment are usually worded to show that the party in default to pay the costs of the day which would include all costs thrown away by reason of the trial becoming abortive as well as the costs of the application to restore the case on the hearing list.

[32] And if this panel is satisfied that the party in default was prevented by sufficient cause from appearing when the suit was called for hearing on 13.1.2008 before the learned judge of the High Court and that the claim shows some merits and if justice can indeed be done by compensating the other side for any costs thrown away, this panel, with respect, is bound to set aside the judgment and order a new trial (**Buga Singh v. Koh Bon Keo [1967] 1 MLJ 16; Haji Yahia bin Ismail v. Bukah binti Mayah Pakeh, Paylak binti Saydi [1933] 7 FMSLR 86, S.C.; and Redditch Benefit Building Society v. Roberts [1940] 1 Ch 415, [1940] 1 All ER 342, C.A.**).

[33] Here, we are concerned with an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel. And because of this, different considerations apply as compared to an application to set aside a default judgment. The

predominant consideration for this panel to consider was not whether there was a defence on the merits but rather the reason as to why the appellants defendants had absented themselves, and if the absence was deliberate and not due to accident or mistake, this court would be unlikely to allow a re-hearing. There are other relevant considerations which include the prospects of success of the appellants defendants in a re-trial, the delay in applying to set aside the judgment, the conduct of the appellants defendants, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation.

[34] All these predominant considerations have been neatly set out in the judgment of Leggatt L.J., writing for the Court of Appeal, in **Shocked and another v Goldschmidt and others [1998] 1 All ER 372**. At page 381, this was what Leggatt L.J. said:

“These authorities about setting aside judgment after a trial indicate that each case depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly. But from them I derive the following propositions or ‘general indications’ as Lord Wright might have called them. (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting

aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.”

[35] Raja Azlan Shah J (as His Majesty then was) in **Buga Singh v. Koh Bon Keo (supra)** dealt with a situation where on the date of the hearing both the appellant and his counsel were absent but the respondent and his counsel were present and, in such circumstances, the learned magistrate dismissed the appellant’s case with costs. On appeal, this was what His Majesty said at page 16:

“To my mind, so long as the claim shows some merits and justice can be done by compensating the other side for any costs thrown away, then a new trial ought to be ordered. In the present case counsel for the respondent sought to argue that the claim bears no merits as it contravenes the limitation law, that is, the I.O.U. chit was executed in 1952 but action was brought in 1964. That may be so, but paragraph 4 of the statement of claim avers that in 1963 three sums of money were paid on various dates by the respondent in respect of the alleged loan. Therefore, if that averment is substantiated, the appellant’s claim may be well founded as time runs afresh from date of payment, i.e. from 1963. That is an issue to be tried and, in my judgment, contains some merits.

It is not my intention to exegesise the law on this subject but I will merely refer to the case of *Hayman v. Rowlands* [1957] 1 All E.R. 323 where Denning L.J. had this to say:

'I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits but, so long as he does so, the strength or weakness of it does not matter.'

In my view there are some merits in the claim, and justice can be done by compensating the respondent for any costs thrown away. I will allow this appeal and order a fresh trial. The appellant will have to bear all costs thrown away by the respondent."

[36] The law is settled. It is this. That although the court has an unfettered discretion to grant or refuse an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel, there must be some material on which this panel can exercise its discretion in favour of the appellants defendants. The material considerations which this panel ought to consider in granting or refusing an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel are as follows:

- (i)** whether the absence of the appellants defendants and their counsel was deliberate or due to a mistake?
- (ii)** whether there are prospects of success and merits of the appellants defendants' defence at the re-trial?

(iii) whether there was any delay in the application filed by the appellants defendants in setting aside the judgment after a trial?

(iv) whether there was any conduct on the part of the appellants defendants which would prejudice the respondents plaintiffs?

[37] I will now examine the material considerations in quick succession.

The first consideration

[38] The learned judge of the High Court arrived at the conclusion favouring the respondents plaintiffs by relying on the following authorities:

- (a) **Sri Jaya Transport Co. Ltd. v. Fernandez [1970] 1 MLJ 87, F.C.;**
- (b) **Gan Hay Chong v. Siow Kian Yuh & Anor. [1975] 2 MLJ 129, F.C.;**
- (c) **Yogananthi A S Thambaiya v. Idris Osman [2006] 1 CLJ 430, C.A.;**
- (d) **Delcont (M) Sdn. Bhd. v. Motor Sport International Ltd. (Servant Or Agents At Federal Territory Labuan) & 2 Ors. [1996] 1 CLJ 450, H.C.; and**

(e) Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors [1991] 1 MLJ 111, H.C.

[39] Upon perusal of these authorities, I must categorically say that not all the authorities relied upon dealt with an application to set aside a judgment pursuant to Order 35 rule 2 of the RHC. And the “**mistake**” of the solicitors in these authorities together with the circumstances that led to such mistake differed greatly from the present appeal at hand. A short synopsis of these authorities will now be rendered.

[40] The case of **Sri Jaya Transport Co. Ltd. v. Fernandez (supra)** concerned an application for special leave to appeal out of time under rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 – L.N. 242/63. The Federal Court held that the appellants should have applied for leave under section 68(2) of the Courts of Judicature Act, 1964 and since they have failed to do so and have not shown that there are special grounds for the court to exercise its discretion to grant them special leave to appeal out of time, the application must be dismissed.

[41] The case of **Gan Hay Chong v. Siow Kian Yuh & Anor. (supra)** concerned the application of the appellant for extension of

time to file the memorandum of appeal and to serve it on the respondents. In dismissing the appeal, the Federal Court held that the mistake of the appellant's solicitors in the circumstances of the case did not constitute a sufficient ground for granting the extension of time. It must be emphasised that the mistake referred to by the Federal Court was entirely different from the mistake by the appellants defendants' solicitors in the present appeal before this court. Delivering the judgment of the Federal Court, this was what Chang Min Tat J., had to say at page 131:

“Since the learned trial judge had, with regret, proceeded on a wrong principle, it behoves us, sitting on appeal, to examine whether the facts merit the exercise of judicial discretion in favour of the appellant. On the facts as disclosed, it does not appear possible to challenge Mr. Atma Singh's contention that he had read the 14 day period in rule 2(5) of Order XXXIX Subordinate Court Rules to run from the date of service of the appeal record on him and not from the service of the notice that the appeal record was ready but he was advised well within time by a letter dated May 28, 1973 from the solicitors for the respondents of the requirement in Order 59 rules 2(1) and (2) of the Rules of the Supreme Court and he could not really contend that he remained in ignorance of this rule. He would or should have been disabused of his earlier mistake by this later advice.”

[42] It is apparent that both **Sri Jaya Transport** and **Gan Hay Chong** cases are poles apart from the present appeal. These two cases do not relate to an application to set aside a judgment after a trial in the absence of the absent parties and their counsel. Thus, different considerations would apply and the learned judge of the

High Court had misdirected himself when he relied on these two cases.

[43] I shall now say something about the case of **Yogananthu AS Thambaiya v. Idris Osman (supra)**. That was a case where the Court of Appeal considered, inter alia, the appellants' appeal against the decision of the High Court judge in dismissing the appellants' application to set aside the judgment. The Court of Appeal was satisfied, after perusal of the written judgment of the High Court, that the trial judge's decision was correct in view of the conduct of the counsel for the appellants which was said to be contumelious and undeserving of the court's sympathy. By comparison, in the present appeal, the appellants defendants have filed the appeal expeditiously and without any delay or contumelious conduct.

[44] The plaintiff applied ex parte in **Delcont (M) Sdn. Bhd. (supra)** and obtained various injunctive orders against the defendants. The defendants applied for leave to enter conditional appearance and then filed a fresh application to set aside the issue and service of the writ. The registrar allowed the prayer and the plaintiff appealed. The appeal came up before the first High Court judge on 21.6.1995 and on that date only the plaintiff's counsel was present. The first High Court judge nonetheless heard the plaintiff

and deferred judgment to 10.7.1995 and on that date the first High Court judge made an order allowing the appeal with costs in the presence of both parties. The defendants then applied to set aside the order of the first High Court judge and argued, inter alia, that they could do so by virtue of Order 35 rule 6 of the RHC. At pages 460 to 461, Kamalanathan Ratnam JC had this to say:

“On the question of merits the applicants’ Counsel’s reason for not attending the hearing of the appeal on 21 June 1995 was because she had failed to enter the date in her diary.

In response to this Mr. Chin referred me to Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58 and to Tong Lee Hua & Anor. v. Malayan Banking Bhd. [1978] 1 MLJ 257. In both cases the mistake of a solicitor was held to be insufficient reasons for granting special leave. The applicant’s reply to these two cases is that the cases related to special leave.

In my view, failure to enter the diary is not sufficient enough grounds to satisfy me that there are merits.

In the circumstances, I dismiss the application with costs.”

[45] Factually speaking, in the present appeal, the appellants defendants not only relied on the fact that there was a mistake in the failure to enter the hearing date in the firm’s master diary as a ground for setting aside the judgment but have also advanced other grounds, of which I have more to say in a short moment.

[46] I will now briefly narrate the facts in **Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors (supra)**. In that case, the solicitors on record for the defendants

had informed the Senior Assistant Registrar that he was discharging himself from representing the defendants. It was for this reason that no counsel for the first and third defendants was present on the date of the hearing which was scheduled on 20.11.1989. And the second defendant also informed the court that he had just appointed a new counsel. Unfortunately, the solicitors on record had not made any formal application to discharge himself. It was for this reason that the court considered that the same firm of solicitors was still the solicitors on record for the defendants on 20.11.1989. The first and the third defendants applied to have their appeals reinstated and the first and the second defendants also applied to enlarge time to apply for further arguments. In dismissing the defendants' applications, Zakaria Yatim J (as he then was) aptly said at page 116 of the report:

“In the present case, when I dismissed the appeal by the first and third defendant on 20 November 1989, there was a solicitor on record but he was absent. He had not filed any affidavit to explain or to give reasons why he was absent. As stated earlier the second defendant's averment for and on behalf of the first defendant in his affidavit is inadmissible. The explanation in the affidavit on the absence of the third defendant is not sufficient ground to grant the extension of time.

In the absence of an affidavit giving sufficient grounds to justify an extension of time to enable the first and third defendants to apply for further argument, the second application was dismissed with costs.

Application dismissed.”

[47] I will now refer to the affidavit affirmed by Tunku Alina bte Raja Mohd Alias (“**Tunku Alina**”) on 14.1.2008 as seen at pages 295 to 299 at volume 2 of the record of appeal. In her affidavit, Tunku Alina sets out the reasons for the absence of the solicitors for the appellants defendants before the High Court on 13.1.2008. This was what she deposed to (in its original Malay language text):

- “2. Fail ini telah dikendalikan oleh seorang dari peguam saya bernama Encik Munir Shah bin Mohamed Husan, yang telah meletak jawatan semenjak 19/12/2007.
3. Oleh yang demikian, saya tidak mengetahui bahawa tarikh bicara bagi kes ini yakni pada 13/01/2008 dan 14/01/2008 telah tidak dimasukkan olehnya ke dalam diari firma kami (kemungkinan besar beliau telah terlepas pandang) dan dengan sebab itu, tiada peguam yang mewakili anak guam kami yakni Defendan-Defendan, pada tarikh bicara pada 13/01/2008 tersebut. Sekarang ditunjukkan dan dikemukakan kepada saya salinan dari diari firma kami bagi 13/01/2008 bertanda Ekshibit ‘TAA-1’.
4. Saya hanya diberitahu oleh anak guam saya, yang telah menalipon saya pada malam 13/01/2008 apabila berita nasional di talivisyen melaporkan bahawa Mahkamah yang Mulia ini telah memasukkan penghakiman terhadap anak guam saya. Saya terus hadir di Mahkamah pada 14/01/2008 untuk membuat pertanyaan.
5. Sesungguhnya, perkara ini adalah suatu kesilapan yang amat dikesali oleh kami, dan kami memohon maaf terhadap Mahkamah yang Mulia ini kerana tidak hadir di Mahkamah pada 13/01/2008. Saya menyatakan bahawa ketidakhadiran anak guam saya dan saya di Mahkamah yang Mulia ini pada tarikh perbicaraan adalah tidak disengajakan dan tidak dimaksudkan untuk menghina Mahkamah yang Mulia ini.
6. Kami telah membela kes ini dengan sepenuh hati dan luhur, dan tidak mungkin akan dengan sengaja engkar hadir di Mahkamah, melainkan disebabkan kesilapan yang berlaku ini. Perkara ini sesungguhnya tidak disangka oleh saya dan amat dikesali.”

[48] And finally, Tunku Alina averred as follows (in its original Malay language text):

- “11. Oleh sebab-sebab yang dinyatakan di atas, saya memohon maaf sekali lagi terhadap ketidakhadiran peguam semasa tarikh perbicaraan, dan dengan rendah hati memohon supaya penghakiman yang dimasukkan terhadap Defendan-Defendan semasa ketidakhadiran Defendan-Defendan ataupun kami sebagai peguam, diketepikan dan suatu tarikh perbicaraan baru ditetapkan.**
- 12. Saya menyatakan bahawa penghakiman ini amat memprasangkakan dan tidak adil kepada pihak Defendan-Defendan yang tidak berpeluang untuk membela tuntutan Plaintiff-Plaintif manakala jika penghakiman ini diketepikan, Plaintiff-Plaintif masih berpeluang untuk meneruskan tuntutan mereka terhadap Defendan-Defendan dalam perbicaraan penuh kes ini. Defendan-Defendan tidak akan dapat dipampaskan atas prasangka yang dialami oleh Defendan-Defendan sekiranya Defendan-Defendan tidak dibenarkan mengutarakan kesnya.”**

[49] Briefly, the reasons advanced by Tunku Alina may be stated as follows:

- (a)** that Munir – the solicitor who had charge of the matter, had resigned on 19.12.2007;
- (b)** that she did not know that the trial date for this matter scheduled on 13.1.2008 to 14.1.2008 was not entered into the firm’s master diary by Munir and every possibility it was an oversight on the part of Munir;
- (c)** consequently, no counsel for the appellants defendants was present in court on the trial date on 13.1.2008;

- (d)** that her client had telephoned her when news about the judgment entered against the appellants defendants was broadcasted live over national television on the night of 13.1.2008 and she quickly proceeded to the Kota Bharu High Court on 14.1.2008;
- (e)** that it was a regrettable mistake on the part of the solicitors for the appellants defendants and they apologise for their non-attendance on 13.1.2008 and she said that the absence of her clients in court on the date of the trial was unintentional and was not meant to show disrespect to the Honourable Court;
- (f)** that the solicitors for the appellants defendants have diligently defended the case and it was improbable that they purposely refuse to attend court and that what had happened was unexpected and regrettable;
- (g)** for the aforesaid reasons, she apologised profusely for the absence of the solicitors on the date of the hearing and pray that the judgment entered after trial in the absence of the appellants defendants and their solicitors be set aside and a new trial be ordered;

- (h) that the judgment entered after a trial in the absence of the appellants defendants was prejudicial and unfair in that the appellants defendants were deprived of defending the suit and in the event that the judgment is set aside, the respondents plaintiffs could still be afforded the opportunity to proceed with their claim by way of a full trial against the appellants defendants; and
- (i) that the appellants defendants cannot be compensated for the prejudice which they suffer in the event they are not allowed to defend the suit.

[50] I need to refer, once again, to the case of **Burgoine v. Taylor (supra)**. That was a case where the defendant was not represented at the trial of the action because his solicitors was ignorant that the action had, in fact, been transferred from one judge to another and therefore the solicitors had missed out the correct date of the trial before the new judge. That being the case, judgment was entered in favour of the plaintiff. The defendant's solicitors then proceeded to apply to set aside the judgment and the application was refused by the High Court judge who held that the solicitor had been guilty of gross negligence. On appeal, the judgment was set aside.

Jessel M.R. had this to say in a rather short judgment (see pages 4 to 5 of the report):

“We think that the order asked for by the Defendant ought to be made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors in my branch of the Court consent to such an order as is now asked, and that such an application should be opposed is to me a novelty. Still, as the Appellant was in default, he must pay the costs of the application to the Court below, but no costs of the appeal.”

[51] There is an adage which says that justice hurried is justice buried. Before the learned judge of the High Court only three witnesses were called, namely:

- (a) SP1 Awang Soh bin Mohamad (see pages 144 to 195 of the appeal record at volume 2);
- (b) SP2 Othman bin Hamat (see pages 195 to 210 of the appeal record at volume 2); and
- (c) SP3 Tuan Fakhur Razi bin Tuan Yusof (see pages 210 to 215 of the appeal record at volume 2).

[52] These three witnesses gave evidence on 13.1.2008 and thereafter the learned judge of the High Court gave judgment in favour of the respondents plaintiffs and awarded those damages as

alluded to earlier. It was a trial in the absence of the appellants defendants and their counsel. And in the words of Ralph Gibson L.J. in **Packer v Denny [1986] CA Transcript 310** as quoted by Leggatt L.J. in **Shocked and another v Goldschmidt and others (supra)** at **page 381** that:

“If a reasonable explanation is provided for the absence of the party at the hearing, and if the application is made in due time, justice normally requires that the judgment be set aside for the obvious reason that a trial is unjust if only one side is heard and the other side wishes to be heard”

[53] In **Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1**, Justice Abdul Hamid Mohamad, JCA (later the Chief Justice of Malaysia) in a dissenting judgment involving an appeal record that was not complete and the Court of Appeal by a majority dismissed the notice of motion for an extension of time to file a supplementary record of appeal to include certain evidence of the first respondent which had been inadvertently omitted in the original record of appeal and eventually the Court of Appeal, also by a majority, dismissed the appeal on the ground that there was no proper appeal before the Court, had this to say at page 7 of the report:

“The reason is not difficult to understand: the main function of the court is to do justice not just to dispose of cases. At times it is unjust to dismiss an appeal without even hearing the arguments on merits purely on the ground, that due to the

mistake of a solicitor, something that should have been done is not done.”

[54] I agree with the submissions that the appellants defendants solicitors’ oversight of the actual date of the trial before the learned judge of the High Court was a genuine mistake and not deliberate based on the following facts:

- (a)** that it is an undisputed fact that Munir who had charge of the matter had resigned on 19.12.2007;
- (b)** that it is also an undisputed fact that Munir as the solicitor did not enter the date of the hearing into the firm’s master diary;
- (c)** that the appellants defendants have defended the case diligently at all material times; and
- (d)** that the absence of the appellants defendants or its representatives (bearing in mind that the second appellant defendant by the name of Ibrahim bin Ismail had passed away on 28.8.2006) would further support the appellants defendants’ solicitors’ contention that they were not aware of the hearing date.

[55] In my judgment, the learned judge of the High Court erred in law when he failed to accept the reasons for the absence of the appellants defendants and their solicitors on the date of the hearing.

In my judgment, the mistake was genuine and truly unintentional. The absence too was not deliberate.

The second consideration

[56] The plaintiffs respondents' claim against the appellants defendants can easily be summarised in this manner:

(i) All the 354 respondents plaintiffs contended that approximately on 20.9.2001 they discovered that there was fraud and/or conspiracy to commit fraud on the part of the second appellant defendant (now deceased) or on the part of the first appellant defendant (Lembaga Kemajuan Tanah Persekutuan (Felda)) based on a document which the respondents plaintiffs found which stated that the produce, namely, palm oil bunches was to be sold to the second appellant defendant (now deceased) at 18% KPG. The respondents plaintiffs contended that they never agreed to such a standard of 18% KPG.

(ii) All the 354 respondents plaintiffs also contended that in conspiring to defraud them, the appellants defendants have altered the weighing system as well as the KPG level of the palm oil which caused the respondents plaintiffs to suffer a loss of between RM30.00 to RM50.00 per tonne of the palm oil sold to the second appellant defendant (now deceased).

[57] I will now summarise the appellants defendants' defence in this way:

- (a) The appellants defendants vehemently denied the allegations and contended that the respondents plaintiffs' palm oil produce was sold in blocks and carried by transport agents appointed by the respondents plaintiffs. And the process of weighing the palm oil was conducted in accordance with the appropriate standard by skilled and certified graders that have been certified by the "**Lembaga Minyak Sawit Malaysia**".
- (b) The appellants defendants also contended that accurate and complete records of the sale of palm oil bunches have been recorded and such recordings can be found in the accounts which were handed over to the transporters of the palm oil bunches. These transporters were a co-operative network set up by the respondents plaintiffs themselves.
- (c) That the representatives from the respondents plaintiffs have inspected the records for the sale of the palm oil bunches at the first appellant defendant's branch office and they did not register any objections.

- (d) That the assessment at 18% KPG was arrived at in order to assess the quality of the palm oil bunches to ensure that it complied with the PORLA Manual Grading Requirements.
- (e) That the appellants defendants have on numerous occasions informed the respondents plaintiffs of the poor quality of the palm oil bunches that were produced.
- (f) That the weighing equipment at the second appellant defendant's factory has been inspected by officers from the Jabatan Timbang Dan Sukat Malaysia and no problems were detected. It was for this reason that the appellants defendants contended that the allegations of fraud and conspiracy were unfounded and without merit.
- (g) The appellants defendants contended that their records are available for inspection by the respondents plaintiffs and if at all the respondents plaintiffs suffered any loss it was mainly due to the poor quality of the palm oil bunches.

[58] It must be borne in mind that the main allegations of fraud, cheating and conspiracy against the first appellant defendant hinged entirely on the actions of the second appellant defendant (now deceased) as the representative or as an agent or as an employee of the first appellant defendant. These averments were pleaded by the

respondents plaintiffs in their Amended Statement of Claim dated 18.6.2007 as seen at paragraphs 8, 14 and 16 thereof.

[59] Flowing from all these, with the demise of the second appellant defendant it would be doubtful whether the burden of proof of conspiracy, fraud and cheating have been adequately proved by the respondents plaintiffs bearing in mind that the burden of proof remains throughout on the shoulders of the respondents plaintiffs notwithstanding the absence of the appellants defendants and their counsel from court on 13.1.2008.

[60] With the demise of the second appellant defendant, the whole case against the first and the third appellants defendants cannot be sustained. The second appellant defendant as the principal conspirator has died. If a question is asked as to who had manipulated the weighing machine the answer would point to the second appellant defendant. And when the matter came up for hearing on 13.1.2008, there was no substitution of the second appellant defendant.

[61] The respondents plaintiffs made allegations of conspiracies against certain people who are not cited as parties in this suit. In his examination-in-chief, this was what SP2 Othman bin

Hamat said in answer to questions 22 and 23 as seen at pages 208 to 209 of the appeal record at volume 2:

“S22: Pada pengetahuan kamu, apakah motif konspirasi dan pakatan jahat antara Pengurus Felda Kemahang 3, Naib Pengerusi dan Pengurus Defenden Ketiga?

J: Motif mereka, dengan membeli sawit pada harga yang cukup murah, dan menjual dengan harga pasaran, akan membolehkan kilang mendapat untung yang tinggi. Dengan keuntungan yang tinggi, Pengurus akan mendapat komisyen yang besar, dan komisyen ini diagih-agih di kalangan mereka, iaitu kepada Pengurus Kilang sendiri, Pengurus Felda Kemahang 3 dan Naib Pengerusi.

S23: Setelah misteri penggunaan COP pada P2 terdedah, pernahkah kamu berjumpa dengan Pengurus Felda Kemahang 3?

J: Saya pernah bersemuka secara peribadi dengan Pengurus Felda Kemahang 3, mempersoalkan dia kenapa dia biarkan buah sawit peneroka dijual dengan harga yang tidak munasabah, sedangkan sewaktu Hamsidin ladang ini ladang terbaik, perahan mencapai KPG 20.50%, beliau jawab saya mahu cari makan. Beliau bagi tahu saya kalau saya duduk diam-diam, saya pun boleh sertai mereka.”

[62] The evidence was so unsafe, yet the learned judge of the High Court found that there was fraud and conspiracy. It must also be borne in mind that the learned judge of the High Court did not address the issue of whether the absence from court on 13.1.2008 was deliberate or otherwise.

[63] In the affidavit of reply of Wan Rohimi bin Wan Daud that was affirmed on 18.1.2008 as seen at pages 304 to 319 of the appeal record at volume 2, there was a categorical averment that the

respondents plaintiffs have abandoned their claim against the second appellant defendant. At pages 314 to 315 of the appeal record at volume 2, Wan Rohimi bin Wan Daud deposed to the following set of facts:

- “(i) Penghakiman bertarikh 13/1/2008 dalam tindakan ini hanya dimasukkan terhadap Defendan Pertama dan Ketiga sahaja dan tidak melibatkan Defendan Kedua yang telah meninggal dunia;
- (ii) Oleh itu, Plaintiff-Plaintif sebenarnya telah mengabaikan (abandon) tuntutan ini terhadap Defendan Kedua dan pendirian untuk mengabaikan (abandon) tuntutan terhadap mana-mana Defendan adalah dibenarkan oleh undang-undang;
- (iii) Tambahan pula, kausa tindakan ke atas Defendan Kedua adalah berasas tort untuk frod, konspirasi dan pecah amanah yang tidak boleh dipindahkan kepada mana-mana pewaris. Ia bukan satu tuntutan berkenaan hutang atau pemecahan mana-mana kontrak yang mengikut wasi-wasi.”

[64] It must be borne in mind that Wan Rohimi bin Wan Daud affirmed that affidavit in reply as counsel for the respondents plaintiffs.

[65] It is not the duty of the appellants defendants to substitute or add any other person after the death of the second appellant defendant. The respondents plaintiffs have decided and picked who to sue. Both the first and the third appellants defendants must act through an individual in the person of the second appellant

defendant. As a joint tortfeasor, when the second appellant defendant died, that would be the end of the matter.

[66] A company can only act through its agent. With the demise of the second appellant defendant, the issue of conspiracy would die a natural death. Without the second appellant defendant, where is the conspiracy? As the principal tortfeasor, the second appellant defendant has died and according to Wan Rohimi bin Wan Daud in his affidavit in reply, the respondents plaintiffs have abandoned the claim against the second appellant defendant. That being the case, how could the learned judge of the High Court decided the case against the appellants defendants?

The third consideration

[67] Here, there was no delay by the appellants defendants' in applying to set aside the judgment after a trial in the absence of the appellants defendants and their counsel. Delay was not an issue at all. The appellants defendants had acted promptly and timeously in filing the said application.

The fourth consideration

[68] According to the learned judge of the High Court, the respondents plaintiffs would be prejudiced if the application to set aside the judgment after trial in the absence of the appellants

defendants and their counsel was allowed because the respondents plaintiffs have suffered a long time due to the appellants defendants' actions. With respect, it was not within the purview of the learned judge of the High Court to make a finding as to the nature of the purported suffering of the respondents plaintiffs.

[69] It must be borne in mind that the respondents plaintiffs' claim was for damages. And the claim for damages must be proved by each and every one of the 354 respondents plaintiffs before the High Court. Per se "**class action**" suit does not exist in Malaysia. Each and every one of the respondents plaintiffs has a distinct and separate contract with the first appellant defendant. And this suit too was not filed in the form of a representative action. That being the case, each respondent plaintiff, in the High Court, must give evidence of the loss suffered. The reference to a period of long suffering by the learned judge of the High Court was not predicated on any cogent evidence placed before the High Court be it by way of documents or by way of oral evidence during the course of the trial in the absence of the appellants defendants and their counsel.

[70] In sharp contrast, the appellants defendants were prejudiced when they were deprived of the opportunity to defend the action. On the other hand, if the second appeal is allowed and the

case be remitted back to the High Court for a re-trial, the respondents plaintiffs would still have the opportunity to continue with their claim.

[71] It is comforting to know that the first appellant defendant has deposited RM7 million into court. According to the learned counsel for the appellants defendants that sum of money would remain there until this court orders a re-trial. The learned counsel for the appellants defendants even ventured to suggest that that sum may be put in the joint name of both solicitors, presumably as a gesture of goodwill. Finally, the learned counsel for the appellants defendants submitted that the judgment of the learned judge of the High Court ought to be set aside and a re-trial ordered and that the costs here and below be borne by the appellants defendants. Indeed all these facts should dispel any fear that the respondents plaintiffs would be prejudiced.

Analysis

[72] It seems to me that the appellants defendants are merely seeking to enforce their right to be heard and present their case and defend the action. They want to have their day in court. To deprive the appellants defendants of defending the action would be unjust and would likely lead to a real miscarriage of justice. According to the Court of Appeal of Singapore in the case of **Su Sh-Hsyu v Wee Yue**

Chew [2007] 3 SLR 673 that apart from the “**broad-ranging factors**” as set out by Legatt L.J. in **Shocked and another v. Goldschmidt and others (supra)**, another overriding consideration was added (see page 688) and that was:

“**whether there is a likelihood that a real miscarriage of justice has occurred.**”

[73] There are exceptional reasons and other countervailing factors in favour of setting aside the judgment entered after trial in the absence of the appellants defendants and their counsel. All these must be considered in order to avoid a “**real miscarriage of justice**”. In my judgment, there was an improper judicial appreciation of the evidence by the learned judge of the High Court. On this point, reference should be made to the case of **Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309, F.C.**, a decision of Steve Shim CJ (Sabah & Sarawak). There his Lordship sets out the law in this way (see page 320 of the report):

“In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase ‘insufficient judicial appreciation of evidence’ merely related to such a process. This is reflected in the Court of Appeal’s restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the

evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.”

[74] May I add that the trial court must also test the evidence of a particular witness against the probabilities of the case. And this can only be achieved if both parties attend the hearing and present their versions accordingly.

[75] The appellate court is certainly free to reverse the conclusions of the trial court if the grounds given by the trial court are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears from the evidence that the trial court in reaching its decision has unmistakably not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight of the evidence and impact of the circumstances admitted or proved **(Watt Or Thomas v. Thomas [1947] A.C. 484, House of Lords)**.

[76] But a distinction has to be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In regard to the latter case, an appellate court will more readily interfere with the trial judge’s findings of fact and expeditiously form an independent opinion than in the case of the former **(Benmax v.**

Austin Motor Co., Ltd. [1955] 1 All ER 326; and Tay Kheng Hong v. Heap Moh Steamship Co. Ltd. [1964] MLJ 87).

[77] Using these authorities as useful guidelines, I arrive at the conclusion that the learned judge of the High Court was plainly wrong when he failed to judicially appreciate the following flaws:

- (a) admitted documents that were not previously disclosed;
- (b) accepted hearsay evidence; and
- (c) failed to consider that each of the respondents plaintiffs must prove the loss suffered.

[78] I shall now consider these flaws one after another.

Admitted documents that were not previously disclosed

[79] On 13.1.2008, at the trial of the action in the absence of the appellants defendants and their counsel, the respondents plaintiffs produced:

- (a) the bundle of documents in Bundle “I” that had not been served on the appellants defendants’ solicitors nor agreed to by the appellants defendants’ solicitors prior to the trial (see the appeal record at volumes 9 to 10 at pages 1040 to 1354);
- (b) and the learned judge of the High Court admitted documents from the Common Bundle of Documents at

Bundle “G” and Bundle “H” where the authenticity and contents of the documents were disputed (see the appeal record at volume 2 at pages 144, 193 and 202); **and**

- (c) the respondents plaintiffs also produced ten (10) other exhibits without calling the makers of the said documents to attest to the veracity of the said documents (see the appeal record at volumes 7 to 10).

[80] Sections 61 to 73A of the Evidence Act 1950 (Act 56) deal with documentary evidence and these sections would surely curtail the admission of those documents which the respondents plaintiffs sought to admit. **Sarkar’s Law of Evidence, volume 1 at page 1180** carries the following germane passage which merits reproduction:

“Secondary evidence should not be accepted without a sufficient reason being given for non-production of the original (*Syed Abbas v. Yadeen*, 3 MIA 156). A document should not be considered as proved because its genuineness is not disputed by the opposite party (*Kirteebash v. Ramdhone*, BLR Sup Vol 658). The documents upon which reliance is sought to be placed must be brought on records of the case legally. Documents do not prove themselves. (*Mostt Rajwati Devi v. The Joint Director, Consolidation, Govt of Bihar, Patna*, A 1989 Pat 66, 67). Every document should first be started by some proof or other before the person who disputes that document can in any way be considered bound by it (*Reazoonnissa v. Bookoo*, 12 WR 267). A person can be allowed to depose to the receipt of letters from another or that he took certain action on them, but his evidence is no proof of the contents of the letters (*Firm Chunni v. Firm Sheo*, A 1943 A 370). A letter filed by a party may be looked into without any further proof at the instance of the opposite party (*Rudnap Export Import v. Eastern Associates Co*, A 1984 Del 20, 29). Oral admissions as to contents of a written contract are not relevant if the

document is inadmissible for want of registration (*Shk Ibrahim v. Parvata*, 8 Bom HCR 163). Whatever the law may have been before the passing of the Act, the rules contained in this enactment should now be strictly observed. 'S 61 lays down that the contents of documents may be proved either by the primary or by secondary evidence' (*Ram Pd v. Raghunandan*, 7 A 738, 743)."

[81] At the local scene, we have the case of **Chong Khee Sang v. Pang Ah Chee** [1984] 1 MLJ 377 to consider. There Shankar J. (as he then was) aptly said at page 381, and it is still good law:

"In the first place it is the duty of counsel engaged in a case to see that the documentary evidence upon which he relies is properly tendered in court and proved. After they have been proved he should also see that when admitted into evidence the documents are properly marked as required by law. Reference may be made in this connection to *Immam-Ud-Din v. Sri Ram Perbhu Dial* A.I.R. 1928 Lah. 142.

A document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as exhibit: See in this connection *Secretary of State v. Sarla Devi*, A.I.R. 1924 Lah. 548, *Feroze Din v. Nawab Khan* A.I.R. 1928 Lah. 432, 434 and *Baldeo Sahai v. Ram Chander & Ors.* A.I.R. 1931 Lah. 546, 550. Whilst these Indian authorities are only of persuasive value, the propositions which they set out are really elementary. When the hearing began in this case the old Subordinate Court Rules 1950 were in force. By the second hearing the Subordinate Court (Amendment) Rules 1980 had already come into force (vide PU(s) 106/81 on April 1, 1981) but the relevant Order 19 r. 8 and the new Order 28 Rule 14 (which has its equivalent in the Rules of the High Court Order 35 Rule 8) were all to the same effect. Documents put in evidence were to be marked as exhibits and retained by the court. But what has not been specifically stated and should be understood by all concerned is that a document cannot be admitted into evidence and marked as such until it has been properly proved."

[82] And continuing at page 382 of the same case, Shankar J.

(as he then was) had this to say:

“The issue here appears to relate to the question as to whether agreeing a document merely dispenses with proof of its existence or execution, or whether it goes further and dispenses with proof of the contents of the documents. The strictures passed by the judge in the last of the aforementioned judgments on Sharma, J. make somewhat sad reading. Certainly the law must be that once a document is included in an Agreed Bundle, it is no longer necessary to prove their existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained. That this is so may readily be appreciated when one considers 2 police reports in an Agreed Bundle each giving a diametrically opposite version of how an accident took place. The version of the accident is generally not agreed and in issue. To that extent the makers of the document may be subject to cross-examination to establish where the truth of the matter lies. So whilst it is not necessary to prove the documents, it would still be necessary to prove the truth of the contents of the documents.”

[83] It is now apparent that the learned judge of the High Court has violated the rules relating to the admission of evidence when he made a finding in favour of the respondents plaintiffs. In the absence of the solicitors for the appellants defendants on the date of the trial, a higher duty was placed on both the respondents plaintiffs and the learned judge of the High Court to abide strictly to the procedural rules relating to the admissibility of the documents that were produced and marked as exhibits so that the sanctity of the written

judgment of the learned judge would be preserved and free from attack. But sad to say, this was not done.

[84] The learned judge of the High Court freely admitted documents without calling the makers of the said documents. And documents not previously agreed to by the parties were unilaterally admitted without calling for the makers of the said documents to testify. All these are elementary and should be adhered to. For these reasons, I say that the judgment of the learned judge of the High Court is unsafe to rely upon and the second appeal should be allowed.

Hearsay evidence

[85] The notes of evidence would show that hearsay evidence was admitted contrary to the provisions of the Evidence Act 1950 (Act 56). I will now reproduce the hearsay evidence in question.

[86] For starters, I will begin by referring to the evidence of SP1 Awang Soh bin Mohamad:

(a) See the record of appeal at volume 2 at page 146:

“S.6.: Adakah pada pengetahuan kamu, peneroka-peneroka lain diberikan salinan perjanjian tersebut?”

J: Saya amat pasti peneroka-peneroka lain juga tidak dibekalkan dengan salinan perjanjian tersebut.”

(b) See the record of appeal at volume 2 at page 149:

“S.15.: Pada pengetahuan kamu, ada tak peneroka guna baja sendiri atau membeli baja di luar pengetahuan Felda?”

J: Tak ada, kerana peneroka tidak mampu. Lagipun baja Felda sudah mencukupi dan mutunya telah disahkan oleh Felda sendiri.”

(c) See the record of appeal at volume 2 at page 150:

“S.21.: Sepanjang pengetahuan kamu, adakah pernah terdapat mana-mana peneroka di Felda Kemahang 3 yang pernah dikenakan hukuman atas kesalahan menyalahgunakan baja?”

J: Sepanjang pengetahuan saya, tidak pernah ada.”

(d) See the record of appeal at volume 2 at page 161:

“S.58.: Berdasarkan Fasal 9 perjanjian ini, apakah peranan kilang sawit Felda pada waktu itu?”

J: Pada pengamatan saya, kilang sawit Felda pada waktu itu tidak membeli buah sawit peneroka, tetapi sebagai agen yang menjual hasil sawit kami dan mengambil melalui upah-upah yang dipotong seperti yang diperuntukkan melalui Fasal 9 perjanjian tersebut sahaja.”

(e) See the record of appeal at volume 2 at page 163:

“S.64.: Pada pandangan kamu, kenapa Defendan Ketiga berbuat demikian?”

J: Saya percaya sebagai sebuah entiti korporat yang hanya mementingkan keuntungan, Defendan Ketiga hanya mementingkan keuntungan dan prestasi keuntungan tahunan kilangnya sahaja. Lagi murah mereka beli buah sawit kami, mereka akan dapat lebih untung. Apabila kilang mendapat untung yang lebih, maka pekerja kilang termasuk grader di kilang, dan lebih-lebih lagi pengurus kilang akan dibayar bonus atau komisyen yang lebih tinggi.”

(f) See the record of appeal at volume 2 at page 187:

“S.127: Apakah yang kamu tahu tentang kilang?”

J: Kilang tidak dapat perahan maksimum sekiranya kerja-kerja mengukus tidak dijalankan dengan sempurna iaitu tidak mengikut masa yang ditetapkan. Buah tidak akan relai dari tandan, minyak tidak akan keluar semaksimum yang boleh. Jika berlaku kebocoran paip saluran minyak, minyak akan mengalir ke takungan buangan, alat pemerah sudah lama tidak diservis atau diganti. Perkara ini boleh menjatuhkan perahan minyak.”

[87] Next, I will refer to the evidence of SP2 Othman bin

Hamat:

(a) See the record of appeal at volume 2 at pages 204 to 205:

“S.21: Boleh kamu terangkan dengan lebih lanjut tentang konspirasi dan pakatan antara Pengurus Felda Kemahang 3, Naib Pengerusi dan Pengurus Defenden Ketiga?

J: Naib Pengerusi adalah wakil peneroka yang sepatutnya menjaga kepentingan peneroka. Pengurus Felda Kemahang 3 juga sepatutnya menjaga kepentingan peneroka. Apa yang berlaku, Naib Pengerusi dan Pengurus Felda Kemahang 3, telah berpakat dengan Pengurus Kilang untuk membeli buah sawit kami dengan harga yang tak munasabah. Oleh kerana Pengurus Felda Kemahang 3 dan Naib Pengerusi sudah sepakat dengan Pengurus Kilang, maka Pengurus Felda Kemahang 3 dan Naib Pengerusi tidak akan membuat aduan sekali pun terdapat banyak aduan dari peneroka. Bahkan mereka bertindak dengan lebih teruk lagi dengan mengarahkan COP pada P2 dibuat ke atas resit jual beli buah sawit kami.”

(b) See the record of appeal at volume 2 at pages 206 to 208:

“S.24: Boleh kamu terangkan dengan lebih jelas tentang pakatan dan konspirasi Defendan-Defendan?

J: Saya percaya mekanisma pakatan dan konspirasi mereka adalah seperti berikut:

(i) Atas hasutan dan dorongan Defendan Kedua, selaku kakitangan dan ejen Defendan Pertama,

Defendan Kedua dengan palsunya membuat akuan dalam 'Akuan Penerimaan BTS' bahawa 'Penjual mengakui hantaran mutu BTS di bawah KPG 18%'. Penjualan BTS ini adalah di atas dasar kehendak penjual dan penjual bersetuju KPG yang dibayar;

- (ii) Atas dorongan dan konspirasi Defendan Kedua selaku kakitangan dan ejen Defendan Pertama, Defendan Ketiga dengan berniat jahat menurunkan kadar KPG bertentangan dengan kadar yang sepatutnya untuk menurunkan harga setiap tan buah/hasil sawit yang perlu dibayar kepada Plaintif-Plaintif;**
- (iii) Defendan Kedua selaku kakitangan dan ejen kepada Defendan Pertama, telah berkonspirasi dengan Defendan Ketiga untuk menyalahgunakan kaedah timbangan untuk memastikan gred KPG diturunkan;**
- (iv) Defendan Ketiga membeli dan/atau Defendan Kedua mengarahkan peneroka menjual buah/hasil sawit Plaintif di bawah KPG yang sepatutnya tanpa pengetahuan Plaintif-Plaintif;**
- (v) Defendan Kedua selaku kakitangan dan ejen Defendan Pertama membuat representasi yang salah tentang hak Plaintif-Plaintif berkenaan dengan hasil jualan sawit tersebut;**
- (vi) Defendan Kedua telah mengkhianati kepercayaan yang diberikan oleh Plaintif-Plaintif dan gagal melindungi kepentingan dan kebajikan Plaintif-Plaintif;**
- (vii) Defendan Kedua selaku ejen dan kakitangan Defendan Pertama dan Ketiga telah secara bersesama dan berasingan menipu Plaintif-Plaintif serta berkonspirasi untuk menipu Plaintif-Plaintif dalam urusan jualbeli buah/hasil sawit dan telah menyebabkan kerugian kepada Plaintif-Plaintif."**

[88] It is apparent that the evidence of SP1 Awang Soh bin Mohamad hinged on circumstantial evidence and was not within his own actual knowledge. While the evidence of SP2 Othman bin Hamat sought to prove the ingredient of motive for the purported acts of cheating, conspiracy to cheat and fraud and was very speculative and was not within his own actual knowledge. What is pertinent to note is this. That there was no independent corroboration of the evidence of SP2 Othman bin Hamat.

[89] The reception of hearsay evidence can only be described in one word. Unfortunate. When a witness testifies in court about what he heard from a third party who is not called as a witness that is hearsay evidence and it is inadmissible to prove the truth of the fact stated. In **Leong Hong Khie v. Public Prosecutor And Tan Gong Wai v. Public Prosecutor [1986] 2 MLJ 206**, Seah FJ had this to say about hearsay evidence (see page 208):

“The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence. To quote Lord Normand in *Teper v. R* [1952] A.C. 480, 486:

‘The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.’

In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony."

Each of the respondents plaintiffs must prove the loss suffered

[90] All the 354 respondents plaintiffs are claiming damages and they must prove them. **McGregor on Damages, sixteenth edition, at page 236** sets out the law on damages in this way:

"A PLAINTIFF claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v. Deveridge* [1825] 2 C. & P. 109 and *Twyman v. Knowles* [1853] 13 C.B. 222."

[91] Of course, if a particular plaintiff has suffered damage that is not too remote, he must be restored, so far as money can do it, to the position he would have been in had that particular damage not occurred (**Robinson v. Harman** [1848] **English Reports 154, 1 Ex. 850**; **Sally Wertheim v. Chicoutimi Pulp Company** [1911] **A.C. 301 at 307, P.C.**; **The "Edison"** [1933] **Lloyd's List Law Reports Vol. 45. No.5, at pages 128 to 129, and Sunley (B.) And Company, Limited v. Cunard White Star, Limited** [1940] **1 K.B. 740 at 745**).

[92] In **Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360**, Edgar Joseph Jr. J. (as he then was) spoke of the general principles governing damages in these erudite terms (see page 366 of the report):

“A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant’s wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Koufos v Czarnikaw Ltd (The Heron II)* [1969] 1 AC 350.”

[93] Continuing at page 369 of the report, his Lordship Edgar Joseph Jr. J. (as he then was) had this to say:

“In this context, I am reminded of Lord Goddard’s dictum in *Bonham-Carter v Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17, namely, that:

‘Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, ‘This is what I have lost, I ask you to give me these damages’. They have to prove it.’

Accordingly, all I can do is to make an award of nominal damages of US\$500 that being the currency of the contract (see *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487) which I hereby do.”

[94] In **Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777**, Edgar Joseph Jr. FCJ, speaking for the Federal Court, again quoted, with approval the

passage from Lord Goddard in **Bonham Carter v. The Hyde Park Hotel, Ltd. [1948] WN 89.**

[95] Finally, Abdul Malek Ahmad, JCA (who later rose to be the President of the Court of Appeal) in **Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65**, at page 85 had this to say:

“As to the question whether the defendant has proved its loss, the learned trial judge said that the law is clear that the burden of proving both the facts and the amount of damages lies on the person seeking damages before he can recover them, citing *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 and *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.”

[96] The primary purpose of awarding damages is to compensate the aggrieved party for the harm done to him. Whereas the secondary purpose of awarding damages is to punish the wrongdoer and this is done by imposing what is known as exemplary damages or punitive damages or vindictive damages or retributory damages (**Bell v. The Midland Railway Company [1861] English Reports 142, 10 C.B. (N.S.) 287 at 308; Cassell & Co. Ltd. v. Broome And Another [1972] A.C. 1027; and Rookes v. Barnard And Others [1964] A.C. 1129**).

[97] Exemplary damages would normally be ordered when the conduct of the wrongdoer has been outrageous as to merit such a

punishment. Thus, when the conduct of the wrongdoer discloses malice, cruelty, fraud, insolence, etc, then exemplary damages would be ordered.

[98] The learned judge of the High Court wrote his judgment in the Malay language and the English language translation has been provided to this court. I shall refer to the English language translation of the learned judge's judgment. In regard to the evidence of SP3 Tuan Fakhrur Razi bin Tuan Yusof, this was what the learned judge of the High Court had to say:

“PW3 then gave evidence on the calculations of the losses sustained by the Plaintiffs due to the deception and conspiracy by the Defendants. According to PW3 all 354 Plaintiffs sustained losses of RM7,146,291.00 in total. The basis of the calculation is the difference in the price of fruit per tonne which ought to have been paid to the settler multiplied by the total number of tonnes of fruit actually sold to the Felda factory. The formula is the actual price of palm fruit per tonne according to the quality of the fruit less (-) the price of palm fruit per tonne according to the grade valuation by the Felda factory multiplied (x) by the total volume.

The grade of palm fruit valued by the Felda factory was in the region of KPG 17.5%. The price per tonne of palm fruit was RM250. KPG 1% is equivalent to RM14.28 (250/17). The grade valued by the Felda factory was KPG 17.5%. The KPG ought to have been graded as 21%. The difference in the KPG which ought to have been paid to the Plaintiffs is 21% - 17.5% = 3.5%. Total loss for the year 1997 is 56.27 x 21,166.67 – RM1,191,048.52 (56.27 is the price difference. 21,166.67 is the volume in tonnes). The loss incurred by the Plaintiffs for the years 1997-2002 is RM1,191,048.52 x 6 years = RM7,146,291.12.

The Court finds that the sum of the calculations done by PW3 is simple, clear and correct.”

[99] And the learned judge of the High Court proceeded to state that:

“6. For the first issue, the Court is of the view that the Plaintiffs have succeeded in proving their claim against the Defendants.

7. In respect of the second issue, the Court accepts the calculations done by PW3. The calculation is simple, reasonable and convincing. Therefore the Court allows the Plaintiffs’ claim as per the calculation done by PW3.”

[100] It can be surmised that the learned judge of the High Court had accepted wholesale the testimony of SP3 Tuan Fakhrur Razi bin Tuan Yusof in regard to the respondents plaintiffs’ claim for damages. His Lordship accepted the testimony of SP3 that the alleged discrepancy in the price of oil palm fruit bunches per tonne at the rate of RM250 per tonne when there was no documentary evidence for this amount for three years from 1997 to 2000 before the learned judge. I wonder where did SP3 get the rate of RM250 per tonne from. It seems to me that SP3 wrote down the figure of RM250 per tonne, so to speak, and threw them before the learned judge of the High Court and asked to be given that amount without proving it. That cannot be right.

[101] In fact, there was no documentary evidence before the learned judge of the High Court to support the actual loss or estimated loss suffered by each individual respondent plaintiff.

[102] The learned judge of the High Court also failed to take into account the failure of the learned counsel for the respondents plaintiffs to call each individual respondent plaintiff to give evidence of the actual loss alleged to be suffered by each individual respondent plaintiff bearing in mind that individually each of them would have suffered a different quantum of loss. It must be borne in mind that individually each of them may have different grades of fruits that have been harvested.

[103] For all these reasons, the learned judge of the High Court misdirected himself during the course of the trial and he failed to “**judicially appreciate the evidence**” that was put before him.

[104] As promised, I will now say something about representative action. Order 15 rule 12 of the RHC makes reference to representative proceedings and it is worded as follows:

“12 Representative proceedings (O 15 r 12)

(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court

appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.”

[105] The present action should have been filed in the form of a representative action under Order 15 rule 12 of the RHC bearing in mind that there are 384 respondents plaintiffs. The first respondent plaintiff in the Amended Statement of Claim goes by the name of Awang Soh bin Mamat bearing identity card number 510914-03-5139. The respondents plaintiffs first witness was SP1 and his name is Awang Soh bin Mohamad bearing identity card number 510914-03-5139. It appears that two persons are having the same identity card number. Awang Soh bin Mamat may be the same person as Awang

Soh bin Mohamad but there is no evidence to this effect. However, relying on the Amended Statement of Claim it should be Awang Soh bin Mamat. See the Amended Statement of Claim at page 52 of the appeal record at volume 1 as well as the notes of evidence at page 144 of the appeal record at volume 2.

[106] Be that as it may, SP2 Othman bin Hamat is listed as respondent plaintiff number 304 in the Amended Statement of Claim at page 71 of the appeal record at volume 1. While SP3 Tuan Fakhrur Razi bin Tuan Yusof is listed as respondent plaintiff number 101 in the Amended Statement of Claim at page 58 of the appeal record at volume 1.

[107] Nowhere in the Amended Statement of Claim is there an assertion that these three witnesses SP1, SP2 and SP3 are representing the other remaining respondents plaintiffs as required under Order 15 rule 12 of the RHC. Inter alia, it is for these reasons that I hold that the action was not a representative action.

[108] Order 15 rule 12 of the RHC envisages a situation where one action would determine the rights of a number of persons against another party called the defendant. According to Lord Shand in **The Duke of Bedford v. Ellis And Others [1901] A.C. 1 at 14**, where numerous persons have “**the same interest in one cause or**

matter” then “one or more of such persons may sue or be sued on behalf or for the benefit of all persons so interested”. In **Tan Kwor Ham & Ors v Pengurusan Danaharta Bhd & Ors [2003] 4 MLJ 332**, Low Hop Bing J. (now JCA) held, inter alia, that a representative action is regulated by Order 15 rule 12 of the RHC.

[109] There are four requirements to rule 12 of Order 15 of the RHC. Firstly, there must be numerous persons involved. Secondly, there must be the same common interest in regard to the subject matter. Thirdly, the relief sought must not be personal but must be beneficial to the class as a whole. Fourthly, the parties represented must be of a defined class and it is not difficult to determine whether a person is a member of that class. See **Markt & Co., Limited v. Knight Steamship Company, Limited, Sale & Frazar v. Knight Steamship Company, Limited [1910] 2 K.B. 1021 at 1040; Palmco Holding Bhd. v. Sakapp Commodities (M) Sdn. Bhd. & Ors. [1988] 2 M.L.J. 624; and Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427.**

[110] The Amended Statement of Claim makes no reference to Order 15 rule 12 of the RHC. This was not the case where SP1 together with SP2 and SP3 are suing the appellants defendants on behalf and for the benefit of the other respondents plaintiffs. That

being the case, each of the 384 respondents plaintiffs should testify in court bearing in mind that each of them may have different grades of fruits that have been harvested and, consequently, each one of them too may have different quantum of damages.

Conclusion

[111] For the reasons adumbrated above, I would allow this appeal and I make an order that the costs incurred below and here to be borne by the appellants defendants. I also set aside all the orders of the learned judge of the High Court and a re-trial is hereby ordered before another judge of the High Court. Deposit to be returned to the appellants defendants.

[112] As a matter of courtesy I have shown my draft judgment to James Foong Cheng Yuen, FCJ and Abdull Hamid Embong, JCA.

26.6.2009

Dato' Abdul Malik bin Ishak
Judge, Court of Appeal
Malaysia

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