

**IN THE COURT OF APPEAL MALAYSIA  
(APPELLATE JURISIDCTION)  
CIVIL APPEAL NO. W-02-398-2006**

BETWEEN

**YOONG SZE FATT ..... APPELLANT**

AND

**PENKALEN SECURITIES SDN. BHD..... RESPONDENT**

**(DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
(BAHAGIAN DAGANG)  
GUAMAN NO. D2-22-1159-1999**

ANTARA

**PENKALEN SECURITIES SDN. BHD ..... PLAINTIF**

DAN

**1) YOONG SZE FATT ..... DEFENDAN-  
2) DATO' WONG YEON CHAI ..... DEFENDAN)**

**CORAM:**

**LOW HOP BING, JCA  
HELILIAH MOHD YUSOF, JCA  
ABDUL MALIK HJ. ISHAK, JCA**

**LOW HOP BING, JCA**  
**(DELIVERING JUDGMENT OF THE COURT)**

**I. APPEAL**

[1] This appeal by the appellant (“the defendant”) is directed against the decision of the learned High Court judge who had allowed the respondent’s (“the plaintiff’s”) claim for the sum of RM2,927,621.70 with interest against the defendant, and dismissed the defendant’s counterclaim for RM2million, with costs (collectively “the entire judgment”).

[2] On 23 January 2009, we dismissed the appeal and affirmed the entire judgment of the Court below. Our grounds now follow.

**II. SUBMISSION OF NO CASE TO ANSWER**

[3] The first issue, raised by plaintiff’s learned counsel Mr Tharmaiden Singh (Mr Wong Guo Lun with him), is a question of law. It concerns the legal implications of the defendant’s submission of no case to answer, coupled with the intention not to call witnesses. It was submitted that, in the circumstances, all evidence adduced in the plaintiff’s case must be presumed to be correct, on the basis of **Wasakah Singh v Bachan Singh (1931) 1 MC 125**; **Jaafar bin Shaari & Anor (suing as administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor (1997) 3 MLJ 693 SC**; and **Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor (2006) 6 MLJ 229 CA**.

[4] Defendant's learned counsel, Haji Sulaiman bin Abdullah (assisted by Mr Stanley S.Sinnappen) offered no response to the above submission.

[5] In our judgment, it is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be correct: per Gopal Sri Ram, JCA in *Jaafar bin Shaari, supra* at p.712, citing *Wasakah Singh, supra*. This principle has found similar expression in a number of judgments handed down in the motherland of common law. These cases include **Alexander v Rayson (1936) 1 KN 169; Boyce v Wyatt Engineering (2001) EWCA Civ.692; Miller (t/a Waterloo Plant) v Cawley (2002) EWCA Civ. 1100; and Benham Limited v Kythirra Investments Ltd (2003) EWCA Civ 1794.**

[6] With this principle uppermost in our mind, we proceeded to consider the evidence led by the plaintiff in the Court below, which culminated in the finding of facts.

### **III. FINDING OF FACTS**

[7] After a full trial, the Court below arrived at a finding of facts which may be unfolded below.

**[8]** The plaintiff is a stock broking company and a member of the Kuala Lumpur Stock Exchange (KLSE), now Bursa Malaysia. The defendant was the plaintiff's client who had through his employer one Dato' Wong Yeon Chai opened trading account No: 273077 with the plaintiff ("the account") in which the defendant had placed a sum of RM2million for the purpose of trading in shares and securities (collectively "the shares").

**[9]** The defendant's employer is not an appellant herein. The trading of the shares pursuant to the account is subject to the terms and conditions contained in the agreement which was brought into existence ("the agreement") vide the defendant's application for the account. It is also subject to the rules and regulations of the KLSE.

**[10]** The material terms and conditions thereof, *inter alia*, are to the following effect:

- (1) The defendant undertakes to make immediate payment for delivery of the shares purchased on his behalf (cl.6);
- (2) The defendant authorizes the plaintiff to sell or buy shares and undertakes to indemnify the plaintiff against all losses in such events (cl.9);

- (3) The defendant agrees to pay all charges and interest rates imposed by the plaintiff at the plaintiff's discretion (cl. 11);
- (4) The defendant authorizes the plaintiff to debit the account for the purchase of shares (cl.15); and
- (5) All orders made through the phone shall not be revoked or withdrawn and shall be confirmed by the defendant.

**[11]** It is the plaintiff's practice to record the client's instructions to purchase shares on a manual "business done" slip which is then passed on to the plaintiff's back room staff who would then key into the system the confirmation of the instructions.

**[12]** The plaintiff had, on 19 November 1997, purchased 602,000 shares for the defendant under the account pursuant to the instructions given by the defendant's employer on the defendant's behalf to the plaintiff's remisier (PW2).

**[13]** When the defendant received the contract notes and contra statements sent by the plaintiff to the defendant's home address provided by the defendant in his application for the opening of the account, in relation to the aforesaid purchase of shares, the defendant had not raised any protest or query with the plaintiff.

He had not complained to the plaintiff that he had never allowed his employer to utilize the account.

[14] At all material time prior to the plaintiff's commencement of the action against him in the High Court, the defendant had chosen to remain silent in relation to the contract notes and contra statements which were sent to him. He had never asserted that the purchase was not his transaction, nor had he responded to the plaintiff's letter of demand dated 28 November 1997 which was also sent to him at his home address.

[15] At the close of plaintiff's case, the defendant submitted that the he had no case to answer, and elected not to adduce any evidence.

#### **IV. SHARE PURCHASE**

[16] The defendant's contention is that the defendant had never instructed the plaintiff, the plaintiff's remisier or any third party to purchase the shares pursuant to the defendant's account, and so the plaintiff has failed to prove its claim against the defendant and that the defendant has in turn established the counterclaim against the plaintiff.

[17] The plaintiff argued that the defendants' pleaded position was one of unsubstantiated denial.

[18] In our judgment, the terms and conditions, contained in the agreement which the defendant and the plaintiff had brought into existence consequent upon the defendant's application to the plaintiff to open the account with the deposit of RM2million to enable him to trade in shares listed on the KLSE, are legally binding on the parties viz the defendant and the plaintiff herein: **Sarawak Secutiries Sdn Bhd v Andy Chan Chiaw Guan (2000)7 CLJ 364 HC.**

[19] While it is true that there was no evidence of the defendant personally instructing the plaintiff's remisier to trade in the shares, there was indeed undisputed evidence that the defendant's employer had on behalf of the defendant instructed the plaintiff's remisier (PW2) to purchase the shares pursuant to the account. The purchase of the shares had been transacted by the defendant's employer on behalf of the defendant. This would attract the application of cl.6 of the agreement.

[20] After having received the contract notes and contra statements from the plaintiff, the defendant had never protested nor queried the plaintiff thereon. There was also no complaint by the defendant that he had not allowed his employer to utilize the account. He was completely oblivious to the plaintiff's letter of demand. The defendant's conduct or absence of response speaks volumes against the defendant. The silence, indeed the omission, by the defendant in this regard is deafening.

[21] In our judgment, if the defendant had really nothing to do with the account or the trading of the shares by his employer through the account, which is flushed with an enormous amount of RM2million, the defendant as a reasonable man would no doubt have at the earliest opportunity raised a complaint, protest or query with the plaintiff in relation to the contract notes, contra statements and letter of demand sent to his home address. He had not done so. It is now too late in the day to deny liability after the commencement of the suit, *a fortiori*, in this appeal. The defendant's conduct certainly calls for the application of the doctrine of estoppel.

[22] In **The Poh Wah v Seremban Securities Sdn Bhd (1996) 1 MLJ 701 CA**, the wife who had helped her husband to trade in shares vide the husband's contract with Seremban Securities Sdn Bhd, despite the Mareva injunction against the husband, by signing all the cheques in her cheque book, had her defence and counterclaim struck out. The Court of Appeal through the judgment of Gopal Sri Ram, held, *inter alia*, that the wife by her actings, would have led a reasonable man to believe that she had given her husband a carte blanche to act on her behalf. His Lordship applied the doctrine of estoppel which is a flexible doctrine by which Courts seek to do essential justice between litigating parties: see **Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd (1995) 3 MLJ 331, 344 FC**.

**[23]** In **RHB-Cathay Securities Ptd Ltd v Ibrahim Khan & Other Actions (1999) 3 SLR 464**, the defendants maintained share trading accounts with the plaintiff's dealer. The defendant had traded in their accounts through the dealer and incurred substantial contra trading losses. The defendants claimed that the trades in the accounts were unauthorized and were transacted by the dealer without their knowledge. The defendants were sent, *inter alia*, numerous contract notes and contra statements. The defendants did not dispute any of these trades until proceedings were commenced against them. The plaintiff averred that the defendants had full knowledge of all the trades and were estopped from denying them. Chan Seng Onn JC of the Singapore High Court allowed the plaintiff's claim, on the grounds, *inter alia*, that the defendants' stunning silence after receiving the contract notes and contra statements would constitute an estoppel at law which precluded their denial of the trades.

## **V. CONCLUSION**

**[24]** On the foregoing grounds, we are of the unanimous view that the learned trial judge had arrived at a correct finding of facts and had rightly applied the law. We therefore dismissed the defendant's appeal with costs. We affirmed the entire judgment of the Court below. Deposit to the plaintiff-respondent on account of taxed costs.

**[25]** My learned sister, Heliliah binti Mohd Yusof, JCA has read this judgment in draft and has expressed her concurrence with it. My

learned brother Abdul Malik bin Haji Ishak, JCA has also agreed with my judgment in draft and has further indicated that his Lordship would write a separate supporting judgment.

T.T

**DATUK WIRA LOW HOP BING**

Judge

Court of Appeal Malaysia,  
PUTRAJAYA

Dated this date 11 day of February 2009

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## **REFERENCE:**

1. **Wasakah Singh v Bachan Singh (1931) 1 MC 125;**
2. **Jaafar bin Shaari & Anor v Tan Lip Eng & Anor (1997) 3 MLJ 693 SC;**
3. **Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor (2006) 6 MLJ 229 CA;**
4. **Alexander v Rayson (1936) 1 KN 169;**
5. **Boyce v Wyatt Engineering (2001) EWCA Civ.692;**
6. **Miller (t/a Waterloo Plant) v Cawley (2002) EWCA Civ. 1100;**
7. **Benham Limited v Kythirra Investments Ltd (2003) EWCA Civ 1794;**
8. **Sarawak Secutiries Sdn Bhd v Andy Chan Chiaw Guan (2000)7 CLJ 364 HC;**
9. **The Poh Wah v Seremban Securities Sdn Bhd (1996) 1 MLJ 701 CA;**
10. **Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd (1995) 3 MLJ 331, 344 FC; and**
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