

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. W-02-747 TAHUN 2002**

ANTARA

BELDEU SINGH ... PERAYU

DAN

DR. KENNETH ANDREW ... RESPONDEN

**(Dalam Perkara Mahkamah Tinggi Kuala Lumpur
(Bahagian Dagang)
Guaman No. (S6) S1-22-356-95)**

ANTARA

BELDEU SINGH ... PLAINTIFF

DAN

DR. KENNETH ANDREW ... DEFENDAN

CORAM:

**LOW HOP BING, JCA
ABU SAMAH BIN NORDIN, JCA
SULAIMAN BIN DAUD, JCA**

LOW HOP BING, JCA
DELIVERING THE JUDGMENT OF THE COURT

I. APPEAL

[1] Parties are referred to in their capacities in the High Court.

[2] On 29 August 2002, the Kuala Lumpur High Court dismissed with costs the plaintiff's claim for £122,500 against the defendant. The plaintiff has now appealed to this Court.

[3] In the instant appeal, it is necessary for us to examine two conflicting versions of the evidence adduced at the trial, and the view of the learned trial judge relating thereto.

II. PLAINTIFF'S VERSION

[4] The plaintiff was introduced to the defendant some time between 26 and 29 July 1993 by one Dr. Paul Temporal (PW3), at the lobby of the Shangri-la Hotel, Kuala Lumpur, where the defendant mentioned the Real Estate Investment Trust (REIT) to the plaintiff and asked the plaintiff to find investors for the REIT. The plaintiff told the defendant that he (the plaintiff) would try. The plaintiff added that he would require a commission based on 2.5% of the funds placed in the REIT and an additional 0.5% annual fee for the duration of utilization of the funds by the REIT. The plaintiff said that the defendant had agreed to this suggestion, except that for the 0.5% annual fee, which the defendant would revert to the plaintiff later.

Meanwhile, the defendant would send the plaintiff more information on the REIT. The defendant did so a week later, by sending the plaintiff a two-page information. The plaintiff then testified that he had secured an investment of USD5,000,000 (£3.5 million) before the end of October 1993. The learned trial judge found that the plaintiff's evidence that he would require a commission of 2.5% was contrary to para 3 of his statement of claim in which the plaintiff averred that "the defendant proposed a commission of 2.5% on funds procured for the Real Estate Investment Trust (REIT) in the United Kingdom to the Plaintiff."

[5] The plaintiff's evidence then touched on the demand for payment of the commission vide his solicitor's letters dated 4 August, 19 September and 4 October 1994 addressed to BW Corporate Finance Ltd (BWCF) in London. In response to the plaintiff's said letters of demand, BWCF's solicitors replied and denied having entered into any agreement with the plaintiff and rejected the plaintiff's claim. Upon BWCF's denial and rejection, the plaintiff then made a demand on the defendant. The learned trial judge had evaluated the plaintiff's evidence in this regard and held that the plaintiff's demand on the defendant was "an afterthought contrived by him when faced with the documentary evidence staked against him".

[6] In relation to the additional 1% commission, the plaintiff had testified in the previous proceedings in the same action before another High Court judge, that "(For the) fund from Germany in London after 31 October 1993, I am not entitled to additional

commission of 1%”, and that the funds were deposited in the United Kingdom on 12 November 1993 i.e after 31 October 1993. The plaintiff reaffirmed this self-defeating evidence in subsequent proceedings in the same action, before the instant High Court judge who therefore found that by the plaintiff’s own evidence, the plaintiff has failed to prove that there was in fact an agreement between the plaintiff and the defendant relating to the commission and that, in any event, the funds were deposited well after the end of October 1993.

[7] PW3 testified for the plaintiff that the defendant had not entered into any agreement of any kind in respect of payment of fees to Beldeu Singh, but later contradicted himself when he said that this “does not change in any way my conviction that the Defendant and the Plaintiff had entered into an agreement regarding REIT Commission.” On the basis of PW3’s own contradiction, the learned trial judge found that “In the circumstances, the evidence of PW3 in this regard is highly questionable.”

III. DEFENDANT’S VERSION

[8] In the statement of defence, the defendant denied any agreement to pay the plaintiff the alleged 2.5% commission and the additional 1% commission regarding the placement of funds in the REIT.

[9] The defendant testified that his first meeting with the plaintiff was at PW3’s office and not at the Shangri-la Hotel. The defendant was introduced to the plaintiff by PW3. Because of the plaintiff’s

position in Arab-Malaysian Eagle Assurance Bhd. (“AMEAB”), the defendant was considering AMEAB for the REIT. The defendant felt that it was wrong to offer the commission to the plaintiff. The relevant evidence of the defendant reads as follows:

“At no time did I ever propose paying a commission to the Plaintiff. At no time in July 1993 did the Plaintiff ask for a commission. I am cautious in my dealings with people and would not enter into any business arrangement on a rushed 30 minutes acquaintance especially if that person, like the Plaintiff, is an employee of a company and would possibly be putting himself in a position of conflict.”

[10] The defendant then met other senior officers of AMEAB to whom he proposed the investment in the REIT. Through AMEAB’s General Manager, Encik Amarudin bin Tajudin (PW2), a meeting was arranged between the defendant and three other persons viz the Chairman of AMEAB, PW3 and one Dato’ Azlan.

[11] The defendant tendered as evidence his facsimile dated 17 August 1993 to PW3 in which he stated, inter alia, that the REIT was to be used for AMEAB. In another facsimile, dated 22 August 1993, to PW3, the defendant stated, inter alia, that there was no question of any fee being paid to the plaintiff. The second fax followed the meeting between the plaintiff and the defendant in London on the same date. When cross-examined, PW3 admitted having received this fax, and did not at any time question its content.

[12] The defendant also testified that he did not owe Beldeu Singh any money and had never entered into any agreement directly or indirectly with the defendant; and that no contract ever existed between them.

IV. FINDING OF HIGH COURT

[13] After hearing, assessing and considering the evidence adduced by the plaintiff and the defendant and having regard to the parties' pleadings, contemporaneous documents and records, the learned trial judge accepted the defendant's version and held, on a balance of probabilities, that the plaintiff had failed to establish his case against the defendant.

V. ANY MISDIRECTION?

[14] Learned counsel Mr Haris Ibrahim (assisted by Mr Neoh Hor Kee and Ms Karamjit Kaur) argued that the High Court had misjudged the credibility of the plaintiff's witnesses and that would justify appellate interference.

[15] Mr Trevor George de Silva of counsel for the respondent urged this Court to refrain from any interference, especially in matters arising from finding of facts.

[16] After considering the aforesaid submissions and the finding of the learned trial judge, the elementary question for determination in the instant appeal may be identified as follows:

“Given the two sharply conflicting versions in the evidence adduced respectively for the plaintiff and the defendant, does the learned trial judge’s acceptance of the defendant’s version and the rejection of the plaintiff’s version constitute such a misdirection as to warrant appellate interference?”

[17] In the light of the aforesaid backdrop, it is the duty of the learned trial judge to assess and consider the evidence in order to accept one version and reject the other. This is consistent with the salutary approach set out by Chang Min Tat FJ (as he then was) for the Federal Court in ***Tindok Besar Estate Sdn Bhd v Tinjar Co (1979) 2 MLJ 229***, ie to refer to and rely on the witness’ acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case, and that plausibility should never be mistaken for veracity. This approach was applied by James Foong J (now FCJ) in ***Industrial Concrete Products Bhd v Concrete Engineering Products Bhd (2001) 2***

MLJ 332 at p 349-H and by me in ***Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor* (2006) 5 CLJ 307 HC.**

[18] We are mindful of the fact that an appellate court does not have the audio visual advantage which the trial court has, in seeing, hearing and assessing the witnesses at the trial. Hence, an appellate court is not likely to reverse or depart from the trial judge's finding save where he has misdirected himself: See e.g. ***Owners of Steamship Hontestroom v Owners of Steamship Sagaporack* (1927) AC 37, 47 HL; *China Airlines v Maltran* (1996) 2 MLJ 517, 527E, 527I and 528A-B FC; *Powell and Wife v Streatham Manor Nursing Home* (1935) AC 243, 250 HL** which was followed in ***Chow Yee Wah & Anor v Choo Ah Pat* (1978) 2 MLJ 41, 42 PC.**

[19] We find that the learned trial judge had meticulously embarked on a careful judicial appreciation and assessment of the evidence adduced at the trial, and assessed, weighed and, for good reasons, accepted the evidence adduced for the defendant as credible. There is nothing plainly wrong here, and there is no reason for us to resort to appellate interference: See ***Eu Boon Yeap & 2 Ors v Ewe Kean Hoe* (2008) 1 AMR 10, 42 CA; *Lee Ing Chin @ Lee Teck Seng & 4 Ors v Gan Yook Chin (P) & Anor* (2003) 2 AMR 357 CA; and *Gan Yook Chin & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* (2004) 6 AMR 681 FC.**

V. CONCLUSION

[20] In the circumstances, the answer to the above question is in the negative. We hold that the plaintiff's appeal is devoid of merits. It is dismissed with costs. The decision of the High Court is affirmed. Deposit to the defendant on account of the costs.

DATUK WIRA LOW HOP BING

Judge
Court of Appeal Malaysia
PUTRAJAYA

Dated this 9th day of July 2009

COUNSEL FOR APPELLANT:

Mr Haris Ibrahim, Mr Neoh Hor Kee and
Ms Karamjit Kaur
Tetuan H. Karamjit And Co
Peguambela & Peguamcara
No. 11-3, 3rd Floor
Jalan 11/48A
Sentul Raya Boulevard
Off Jalan Sentul
51000 Kuala Lumpur

COUNSEL FOR RESPONDENT:

Mr Trevor George de Silva
Tetuan Lee Ong & Kandiah
Peguambela & Peguamcara
Suite 2.07-Suite 2.10
2nd Floor, Wisma Mirama
Jalan Wisma Putra
50460 Kuala Lumpur

REFERENCE:

Tindok Besar Estate Sdn Bhd v Tinjar Co (1979) 2 MLJ 229

Industrial Concrete Products Bhd v Concrete Engineering Products Bhd (2001) 2 MLJ 332

Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor (2006) 5 CLJ 307 HC

Owners of Steamship Hontestroom v Owners of Steamship Sagaporack (1927) AC 37, 47 HL

Powell and Wife v Streatham Manor Nursing Home (1935) AC 243, 250 HL

Chow Yee Wah & Anor v Choo Ah Pat (1978) 2 MLJ 41, 42 PC

China Airlines v Maltran (1996) 2 MLJ 517, 527E, 527I and 528A-B FC

Eu Boon Yeap & 2 Ors v Ewe Kean Hoe (2008) 1 AMR 10, 42 CA

Lee Ing Chin @ Lee Teck Seng & 4 Ors v Gan Yook Chin (P) & Anor
(2003) 2 AMR 357 CA

Gan Yook Chin & Anor v Lee Ing Chin @ Lee Teck Seng & Ors (2004) 6
AMR 681 FC