

IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)

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
(2) DATO' WONG YEON CHAI ... DEFENDAN-DEFENDAN

CORAM:

- (1) LOW HOP BING, JCA
- (2) HELILIAH MOHD YUSOF, JCA
- (3) ABDUL MALIK BIN ISHAK, JCA

JUDGMENT OF ABDUL MALIK BIN ISHAK, JCA

INTRODUCTION

[1] I have read the judgment in draft of my learned brother Low Hop Bing, JCA and I would like to add my own reasons for dismissing this appeal with costs and thereby affirming the entire judgment of the High Court.

[2] For convenience, I shall refer the parties in the same manner as they were referred to in the High Court. Thus, the appellant by the name of Yoong Sze Fatt will be referred to as the first defendant. While the respondent by the name of Pengkalen Securities Sdn Bhd will be referred to as the plaintiff. The second defendant by the name of Dato' Wong Yeon Chai was not a party in this appeal.

To the heart of the matter

[3] Essentially the plaintiff's claim was for the sum of RM2,927,621.70 calculated as at 28.2.1999 being contra losses and accrued interest that arose from share trading activities conducted by or on behalf of the first defendant by way of an individual account number 273077 (hereinafter referred to as the "**trading account**")

that was opened by the second defendant in favour of the first defendant.

[4] The plaintiff as a stock broking company and as a member of the Kuala Lumpur Stock Exchange carried on the business of stock broking. The first defendant was the client of the plaintiff and had a trading account with the plaintiff.

[5] The first defendant had placed in his trading account a sum of RM2 million so as to enable him to trade in shares and securities. It was this sum of RM2 million that formed the Counterclaim of the first defendant.

[6] The plaintiff succeeded in establishing its entitlement to its claim by proving the following set of facts:

- (a)** that the trading account was opened by the first defendant upon the terms as set out in the Individual Account Opening Form (hereinafter referred to as the **“agreement”**);
- (b)** that trades were conducted on the trading account of the first defendant which had resulted in losses; and
- (c)** that the first defendant stood liable for the losses incurred on his trading account by virtue of those terms as set out in

the agreement as well as his knowledge and consent pertaining to the trades conducted on his trading account.

[7] The terms and conditions relating to the trading account were binding on the first defendant because he agreed to be bound by it (**Chai Then Song v. Malayan United Finance Bhd. [1993] 2 CLJ 641**; and **Sarawak Securities Sdn Bhd v. Andy Chan Chiaw Guan; Fabian Eh Ng (Third Party) [2000] 7 CLJ 364**). Inter alia, the material terms and conditions that have been agreed to by the first defendant upon signing the agreement may be stated as follows (see page 256 of the appeal record):

- (a) by clause 6 of the agreement, the first defendant undertook to make immediate payment for delivery of securities purchased **on his behalf**;
- (b) by clause 9 of the agreement, the first defendant authorised the plaintiff to sell-out or buy-in securities as may be required to clear the first defendant's position and, once again, the first defendant undertook to indemnify the plaintiff against all losses; and
- (c) by clause 11 of the agreement, the first defendant agreed to pay all charges and interest rates imposed by the plaintiff at the plaintiff's discretion.

[8] Evidence was led to show that transactions were conducted on the trading account which led to an overall loss on the said account. This fact was established through the evidence of Chua Yew Leong (**PW1**) and the contract notes that were tendered showed that trades were indeed conducted. It must be borne in mind that this piece of evidence went unchallenged because there was no cross-examination of Chua Yew Leong (**PW1**) and, consequently, it must be taken to be admitted by the first defendant (**Sivalingam a/ Periasamy v Periasamy & Anor [1995] 3 MLJ 395 at 400**).

[9] The first defendant's answer to the plaintiff's claim was rather simple. That he was not the one who instructed those trades that resulted in the losses and that the second defendant, who was not a party in this appeal, was said not to have been authorised by the first defendant to trade on his (first defendant's) behalf.

[10] Unfortunately, the first defendant elected not to testify and neither has he led any evidence to support his wild assertions.

[11] There was evidence emanating from Leong Bik Ngan (**PW2**) to show that the first defendant knew or ought to have known that his trading account was being traded upon. That evidence would be as follows:

- (a) the contract notes and the contra statements were sent to the first defendant's home address;
- (b) the first defendant remained silent and did not complain to the plaintiff that his trading account was being utilised for trades or that the contract notes which were sent to him were not his transaction; and
- (c) the letter of demand dated 28.11.1997 was sent to the first defendant at his home address, yet the first defendant did not contact the plaintiff to dispute the plaintiff's letter of demand.

[12] Having failed to protest to the transactions or usage of his trading account, the first defendant must now be estopped from denying the losses arising from the trades conducted on his trading account. According to the case of **Peyman v Lanjani and others [1985] Ch 457, [1984] 3 All ER 703, C.A.**, a party will not be held to be estopped unless his conduct is unequivocal. Thus, in **Herman v Royal Exchange Shipping Co and Patton, Jr & Co [1884] Cab & El 413**, the court held that after accepting freight on goods shipped under bills of lading in their printed forms, certain persons were estopped from saying that the ship was not theirs, that the master was not their agent and that the contract was not with them. In

Gwyther v. Boslymon Quarries, Ltd. [1950] 2 KB 59, [1950] 1 All ER 384, a person entitled to payments from which the payer had wrongfully deducted tax, without objection from the payee was estopped from demanding payment of the amount of tax wrongfully deducted for which the payer had accounted to the Inland Revenue. In **Thomas v. Brown [1875-76] 1 Q.B.D. 714 at 722**, a party was estopped by conduct when investigating title from denying the existence of the contract. In **Else v. Barnard [1860] 28 Beav. 228**, a purchaser was estopped from objecting that the sale was not by auction. In **Wright v. John Bagnall & Sons, Limited [1900] 2 Q.B. 240, C.A.**, an employer who admitted statutory liability to pay compensation was estopped from raising the defence that the claim was not brought within the prescribed time. In **Burgoyne & Co., Ltd. and P.B. Burgoyne v. A. H. Godfree & Co. [1904] 22 RPC 168, C.A.**, the conduct of a shipper in selling wine branded with his name prevented him from complaining of the act of a purchaser in selling it as the shipper's wine. In **Jackson v. Knutsford Urban District Council [1914] 2 Ch. 686 at 696**, after having entered into a bargain by which they agreed not to object to part of a building being treated as an obstruction, the plaintiffs were estopped from alleging that no part of the building was an obstructive building. In **Yorkshire**

Insurance Company, Limited And Others v. Craine [1922] 2 A.C. 541, P.C., insurers, taking possession under a salvage clause in a fire insurance policy, were estopped from relying on non-fulfilment of the requirements of an independent condition as to delivery of particulars of the claim. In **Dunn v Shanks [1932] NI 66 C.A.**, the former owner of a business who had omitted to give notice of the transfer of the business and continued to attend to it was estopped from denying that he was the owner. In **Hopgood v. Brown [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223, C.A.**, the successor in title of a landowner who permitted an adjoining owner to encroach over a boundary with a permanent erection was estopped from claiming damages in respect of such encroachment.

[13] The law journals are replete with authorities on estoppel by conduct. It must be emphasised that parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are definitely estopped from afterwards setting it up (**Oakland Metal Co., Ltd. v. Benaim & Co., Ltd. [1953] 2 Q.B.D. 261, [1953] 2 All ER 650; Toronto Railway Company v. Corporation Of The City Of Toronto [1904] A.C. 809 at 815, P.C.; Thomas Tyerman v. Sarah Smith [1856] 6 Ellis and Blackburn 719; Fortunatus Edmund Andrews v. John Elliott**

[1855] 5 Ellis and Blackburn 502, affirmed in [1856] 6 E & B 338, Ex Ch; Shrager v. Basil Dighton, Limited, And Others [1924] 1 K.B. 274, C.A.; and Oakland Metal Co., Ltd. v. D. Benaim & Co., Ltd. [1953] 2 QB 261, [1953] 2 All ER 650).

[14] Now, with the failure of the first defendant to testify or to lead any evidence, the probability of the case falls in favour of the plaintiff. The first defendant had either:

- (a)** instructed the trades; or
- (b)** had given authority to the second defendant to trade on his behalf; or
- (c)** willingly consented to his trading account to be utilised by the second defendant; or
- (d)** did not monitor his trading account and merely disputed the contract notes and the contra statements that were sent to him.

[15] It must be borne in mind that the contract notes and the contra statements which were produced before the High Court were not challenged nor disputed by the first defendant. That being the case, it would be appropriate to hold that the first defendant had in fact accepted the losses incurred on the trading account in its entirety **(Sivalingam a/l Periasamy v Periasamy & Anor (supra))**.

[16] Having considered the arguments of counsel on both sides and the authorities cited by them, I am of the opinion that the following guidelines may be taken as well settled. At the close of the plaintiff's case, the first defendant chose to submit that there was no case to answer and preferred not to call witnesses. It was a perilous course to take simply because all the evidence adduced by the plaintiff must be presumed to be correct. It is a sound general rule that a judge should not consider a submission of no case to answer unless the defendant (here the first defendant) agrees not to call any evidence, whatever the outcome of the submission. Thus, where a defendant is put to his election and elects not to call evidence, just like the present appeal, the result is this. That the trial is in effect truncated and the question for the judge to consider is whether the plaintiff has established his case by the evidence called on the balance of probabilities. If the plaintiff has done so, then the judgment should be given to the plaintiff. If the plaintiff has not done so, then the judgment should be given to the defendant. If the judge chooses the latter course of action and give judgment to the defendant, the judge may indeed be of the view that there is no case for the defendant to answer. But such a judgment should not be

given unless the judge finds that the plaintiff has not established his case by the evidence adduced on the balance of probabilities.

[17] I shall now refer to the case of **Benham Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794, [2004] C.P. Rep. 17, C.A. (Civ Div)**. The facts may be stated as follows. A property company (D) retained estate agents (C). C summarily dismissed one of their senior employees (X) on the ground that he took a secret profit on a particular transaction involving D. C brought a claim against D for commission for that transaction. D denied C's principal allegations. C's claim was weakened by the facts that (i) no agency agreement in writing for the transaction existed, and (ii) for obvious reasons, C were unable to call X as a witness. At the close of C's evidence, D submitted that there was no case to answer. The judge ruled that (a) this was an exceptional case in which it was appropriate to rule on the submission without putting D to elect not to call evidence, and (b) the judge acceded to D's submission and (c) consequently, dismissed C's claim with costs.

[18] The Court of Appeal allowed C's claim. In answering the question of in what exceptional circumstances may or should a judge consider a submission of no case without putting the defendant to his election?, the Court of Appeal held (a) rarely, if ever, should a judge

trying a civil action entertain a defendant's submission of no case to answer without requiring the defendant to elect not to call evidence, and (b) this was not an exceptional case because the judge was wrong to conclude that nothing in D's evidence would affect the view taken of C's case because the judge should have recognised that were their submissions were to fail, then D might (i) call evidence that would prove helpful to C's case, or (ii) fail to call witnesses who might be expected to have material evidence thereby enabling the court to draw inferences in C's favour (**Wisniewski v. Central Manchester Health Authority [1998] Lloyd's Rep. Med. 223, C.A.**).

[19] In dealing with a submission of no case to answer, what test should the judge apply? The Court of Appeal in the **Benham's case** said that the test was whether or not on the evidence adduced by the plaintiff, the plaintiff has "**a real prospect of success**". However, the Court of Appeal conceded that what is meant by that test is not as clear as it might be. Simon Brown L.J. explained that where D's witnesses clearly have material evidence to give on the critical issue in the action the test of whether C has "**a real prospect of success**" may be re-formulated as "**have the claimants (plaintiffs) advanced a prima facie case to answer, a scintilla of evidence in support of the inference for which they contend,**

sufficient to call for an explanation from the defendant?” His Lordship added that the fact that C’s case may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by D’s evidence, or by adverse inferences to be drawn from D’s not calling any evidence, would not allow it to be dismissed on a no case submission. The Court of Appeal concluded that it was apparent that the judge had approached the question by asking whether or not C had established their case on a balance of probabilities and in the circumstances had clearly applied the wrong test.

[20] Back home, on the subject of the submission of no case to answer we have the classic case of **Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229, C.A.**, which also made reference to the **Benham’s case**. My learned brother Low Hop Bing, JCA also referred to **Subry bin Hamid** in his well written judgment.

[21] Suffice for me to say that when a submission of no case to answer has been made and coupled with the submission that no witnesses will be called, it gives rise to these unrebuttable implications:

- (a) the outcome to the question of whether there is a case to answer would be that all evidence led by the plaintiff must be presumed to be correct; and
- (b) so the burden falls on the first defendant to call evidence to rebut the plaintiff's case and the first defendant's failure to do so in the absence of reasonable explanation will trigger an adverse inference to be drawn against the first defendant under section 114(g) of the Evidence Act 1950.

[22] As against the plaintiff's pleaded case, the first defendant's pleaded case was generally one of unsubstantiated denials coupled with a Counterclaim for the refund of the deposit monies to the tune of RM2 million. Since the evidence led by the plaintiff must be presumed to be true, the plaintiff has therefore satisfied the requirements under section 101 of the Evidence Act 1950. It therefore falls on the first defendant to prove his defence under section 101 of the Evidence Act 1950. The first defendant too has to introduce such evidence as is necessary to discharge that burden under sections 102 and 103 of the Evidence Act 1950. As I said earlier, the first defendant chose a perilous course of action and his failure to call evidence would result in an appropriate adverse inference to be drawn against him. Thus, the allegations by the first

defendant that there were other sets of account opening forms were nothing more than a mere fabrication. And it must be held that the first defendant had consented to or otherwise permitted the second defendant to utilise his trading account to trade in securities which ultimately result in contra losses which are now the subject matter of the plaintiff's claim. It must also be held that the relevant documents marked as exhibits "P1", "P2" and "P18" were indeed executed by the first defendant. And that the relevant contract notes, contra statements and statements of accounts were indeed sent by the plaintiff and received by the first defendant and no one else.

[23] It must be emphasised that the first defendant produced a purported handwriting expert's report and tendered peculiarly through the first defendant's trial counsel to prove the first defendant's contention that he did not sign the account opening form.

[24] Anuar CJ Malaya in **Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61 at page 85** referred to the Supreme Court of India's decision in **Murarilal v. State of M.P. AIR 1980 SC 531 at page 534** which carried the following passages:

"But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses – the equality of credibility or incredibility being one which an expert shares with all other witnesses – but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of

conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher.”

[25] There is an article entitled “**Sources of Error in Forensic Handwriting Evaluation**” reported in the **Journal of Forensic Sciences**, volume 40, No: 1, January 1995 at page 78

which carries the following germane write-ups:

“Handwriting examination is generally considered, by friends and critics alike, to be more subjective than the other crime laboratory specialties in that it relies more on experienced judgment than on quantifiable data. If we accept this premise, it would follow that it should be all the more important to adhere to agreed-on principles so as to preserve the greatest degree of objectivity and, thereby, accuracy.

Three particular problem areas seem to cause most of the errors in handwriting cases, whether they involve signatures, handwritten texts, or handprinting. They are (1) failure to properly evaluate differences; (2) failure to detect significant movement characteristics; and (3) the use of self-serving exemplars.”

[26] In so far as handwriting is concerned, even lay witnesses who are familiar with the writing of the person in question may give evidence as to the identity of the writer (**Alfred Ernest Derrick [1910] 5 Cr. App. R 162**). Of course, evidence relating to handwriting by experts are most welcome although the form in which they give evidence will be different. According to the case of **The Queen v. Silverlock [1894] 2 QB 766, 771**:

“the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?”

[27] It is the duty of the court to satisfy itself that the **“expert”** is indeed an expert specially qualified, armed with the necessary skill and experience and has a vast knowledge in the field of enquiry carried out by him. The court would also want to know the duration of time the **“expert”** has engaged himself in his field of expertise and whether that is his only occupation and in which court he has testified. Generally, the court is interested to know the expert’s background. The purpose is simply to show the competency of the expert. It is for these reasons that the expert will be asked about his general and technical education together with the special studies which he may have undertaken.

[28] Competency of the expert may be shown by drawing attention to the ways in which the expert has been recognised as an authority in his field. Thus, the expert may allude to the schools, associations and seminars where he has lectured and whether he has been bestowed with special honours or degrees by prominent universities. And publication of writings in recognised journals is also

good evidence of the extent of the expert's competency. In short, the "expert" must be a qualified person.

[29] Lord Wilberforce in **Whitehouse v. Jordan And Another** [1981] 1 WLR 246 at 256 H to 257 A aptly said:

"While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."

[30] Section 51 of the Evidence Act 1950 states that whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant. The courts have said, time and again, that a bare expression of opinion has no evidentiary value at all (**Sim Ah Song & Anor. v. Rex** [1951] MLJ 150; **Lai Yong Koon v. Public Prosecutor** [1962] MLJ 327; and **Public Prosecutor v Yiau Swee Tung** [1999] 3 MLJ 353). Brown, Acting CJ in **Sim Ah Song & Anor. v. Rex** (supra) at page 151 aptly said:

"The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the Court lacks, the Court is in no better position than it was before to determine the question which it is its duty to determine, and if the Court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the Court."

[31] So, the court must be vigilant and must satisfy itself that the “**expert**” is indeed an expert specially qualified. Here, the “**expert**” report tendered by the first defendant’s trial counsel failed to comply with the simple preliminary requirements of establishing the “**expert’s**” qualifications and for this reason, it should be disregarded.

[32] To compound the matter further, the “**expert**” had passed away prior to the trial of the matter and his death had affected the admissibility of the “**expert’s**” report sought to be relied upon by the first defendant.

[33] As an opinion evidence, the expert must come to court to give evidence. Section 60(1)(d) of the Evidence Act 1950 states that direct oral evidence must be given in respect of the opinion of any person. Thus, in the absence of such direct evidence from the “**expert**” his report cannot in law be admissible as evidence. The lack of opportunity to cross-examine the “**expert**” on his report is another ground to disregard the “**expert’s**” report.

[34] The sample or specimen signatures mentioned in the “**expert**” report are certainly incapable of independent verification. These sample or specimen signatures have not been “**admitted or**

proved to the satisfaction of the court” within meaning of section 73 of the Evidence Act 1950.

[35] The **“expert”** report suggests that the sample or specimen signatures relied upon by the **“expert”** were provided by the first defendant’s solicitors and this would squarely fall into the category of **“self-serving exemplars”**.

[36] Given all these shortcomings, the High Court was not in a position to hold that the sample or specimen signatures relied upon by the **“expert”** were in fact that of the first defendant nor was the High Court in a position to satisfy itself, as required by law, and based on observation that it was **“safe”** to accept the opinion of the **“expert”** (**Dr. Shanmuganathan v Periasamy s/o Sithambaram Pillai (supra)**). The High Court had correctly disregarded the **“expert”** report.

[37] The allegation that the first defendant’s signature on the agreement was forged was not considered by the High Court. It must be borne in mind that the allegation of forgery was not pleaded in the first defendant’s defence. This allegation was merely **“put”** to the plaintiff’s witness (see pages 43 and 97 of the appeal record). A perusal of the first defendant’s defence especially at paragraph 4 would show that the first defendant admitted opening the subject

account but disputed utilising or authorising trades on the said account. Be that as it may, even if the first defendant's allegation of forgery were to be accepted, the first defendant still bears the burden of proving the same (see **Eon Bank Bhd v Hotel Flamingo and Another Case [2005] 1 MLJ 712 at page 722**, the decision of my learned brother Low Hop Bing, J (now JCA)). As demonstrated, the only evidence tendered by the first defendant to prove the alleged forgery by way of an "**expert**" report was inadmissible.

[38] The first defendant's Counterclaim for the sum of RM2 million was rightly rejected by the High Court. Since the first defendant led no positive evidence in support of his Counterclaim, he cannot deny his earlier sworn statement made during interrogatories that he has no knowledge of the sum of RM2 million (see pages 26 and 27 of the appeal record).

[39] Finally, I will now say something about the finding of facts by the High Court which has been alluded to by my learned brother Low Hop Bing, JCA. An appellate court will not readily interfere with the finding of facts arrived at by the trial court. It is trite law that the primary task of evaluation of the evidence and the function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. In this appeal to the High Court.

And the appellant court is under a duty to intervene with the finding of facts by the trial court where the trial court has so fundamentally misdirected itself that a reasonable man may safely say that no reasonable court which had properly directed itself and asked the right questions would have arrived at the same conclusion (**Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 3 AMR 2430 at 2440, [1997] 2 MLJ 373, C.A. at 379 D-E; Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 AMR 1353, [1995] 2 MLJ 153, C.A. at 171H-173A; Associated Tractors Sdn Bhd v Woo Sai Wa [1997] 5 MLJ 441 at 450 F-H; and Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 AMR 410 at 417, [2006] 3 MLJ 131 at paragraph 18, [2006] 2 CLJ 337 at paragraph 18, C.A.**).

[40] The case of **Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 2 AMR 6, [2003] 1 MLJ 567, [2003] 1 CLJ 585, C.A.**, sets out certain categories in which appellate interference may be warranted. It would be ideal to set out, briefly, instances where the finding of facts by the trial court was reversed by the appellate court:

(a) non-consideration or insufficient or no judicial appreciation of material evidence constitutes “**insufficient judicial appreciation of relevant evidence**” (**Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1, F.C.**);

(b) where the audio visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord well with the probabilities of the case (**Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998] 3 AMR 2641 at 2655, [1998] 2 MLJ 478 at 486 C-D, [1998] 2 CLJ 879, C.A.; Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals [2004] 6 AMR 319, [2004] 4 MLJ 105, [2004] 4 CLJ 282, C.A.; and Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2004] 6 AMR 781, [2005] 2 MLJ 1, [2004] 4 CLJ 309, F.C.**);

(c) where the facts were misapprehended and the wrong principles of law were blindly applied by the trial judge (**Lim Chor Ching & Anor v Idris Abdul Karim (and Anor Appeal) [1998] 3 AMR 3182, [1998] 3 CLJ Supp 145 at 156 a-g**);

- (d) where there was a failure to assess the evidence with the documents at hand and view it against the probabilities of the case (**Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong [2004] 4 AMR 591, [2004] 4 CLJ 1, C.A.**);
- (e) where there was a failure to consider the relevancy of contemporaneous documents (**Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC at 37**); and
- (f) where the finding of facts was contrary to the documentary evidence (**Associated Tractors Sdn Bhd v Woo Sai Wa (supra) at 451 C**).

[41] In the present appeal, I see no reason to intervene or interfere with the finding of facts arrived at by the High Court.

[42] I am in total agreement with the views expressed by my learned brother Low Hop Bing, JCA. For all these reasons, I now make those orders that were made by his Lordship.

[43] I too have shown this supporting judgment in draft to my learned brother Low Hop Bing, JCA and his Lordship has kindly agreed with it.

2 April 2009

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

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