

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: W-02-35-2005**

ANTARA

O.S.K. & PARTNERS SDN BHD PERAYU

DAN

ASSETS INVESTMENTS PTE LTD RESPONDEN

**(DALAM MAHKAMAH GUAMAN No: D8(D3)-22-543-93
DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR**

ANTARA

ASSETS INVESTMENTS PTE LTD PLAINTIF

DAN

O.S.K. & PARTNERS SDN BHD DEFENDAN)

CORAM:

**GOPAL SRI RAM, J.C.A.
RAUS SHARIF, J.C.A.
ZAINUN ALI, J.C.A.**

JUDGMENT OF
ZAINUN ALI, J.C.A.

Having had the benefit of reading the judgment of my learned brothers, Gopal Sri Ram JCA and Raus Sharif JCA, I am in agreement with both of them in allowing this appeal.

However I would like to add my own observation in this case. There are several areas of the law here which are worth further engagement. However, I shall do no more than focus on one aspect only. This relates to the non-appreciation of evidence by the learned judge (on a slightly different dimension than that taken by my learned brother, Gopal Sri Ram, JCA).

It concerns the failure of the learned judge to properly construe the purport and intent of Section 86, Securities Industry Act, 1983, as countenanced in the Respondent's claim. This is connected to there being no judicial appreciation of the evidence with regard to his evaluation of both PW1's and DW1's testimony, pointing

towards their credibility and evidential proof in the light of Section 86, Securities Industry Act.

The Respondent's action was based on implied terms of an oral contract and representation allegedly made by the Appellant about a company called Qwinzy at a meeting. Oral representation was also alleged to have been made about UIFF over the telephone in May 1992. The Respondent's claims is that the representation formed the basis of a tort action on the Hedley Byrne principle.

The court had to assess the evidence of two crucial, witnesses, i.e. PW1 and DW1.

My view is the judge's finding that PW1 was the more credible of the two witnesses in the light of the evidence, showed that his assessment was obfuscated, for it went against the weight of evidence. This defect clearly calls for appellate intervention. (See **Teo Ai Choo v Leong See Hain [1986] 2 MLJ 221**).

A fortiori when a statutory duty of care falls to be considered under Section 86, Securities Industry Act 1983.

BACKGROUND FACTS

Even if the facts of this case have been carefully prepared by my learned brother Raus Sharif JCA, significant portions need be highlighted.

Briefly it all begun when a company called Konsortium Enterprise (M) Sdn. Bhd. (“Konsortium”), controlled by one Dick Chan, applied to the Appellant for margin financing.

Appellant declined the request. However the Appellant through its servants, one Freddy Yap (Yap) and Steven Ho (Ho) told one Andrew Goh (Goh) from Konsortium, of an alternative means of obtaining finance i.e. an asset swap transaction. This is to be done through a loan broker in Hong Kong, known as Qwinzy Corporate Services Ltd (Qwinzy). Konsortium agreed to this proposal. Upon

being contacted by the Appellant, Qwinzy said that this facility can be arranged.

Basically an asset swap transaction is the business of the selling of shares to lenders/buyers, who has an option to buy back the shares. The condition for buy-back is for the seller to pay monthly option instalments upon full release of the fund, to keep the option alive.

Thus what Qwinzy is offering is probably a kind a debt finance which brings into focus some legal principles not otherwise central to corporate or company or even contract law. Qwinzy in fact, is an asset swap broker for third party principals whose identities were not known to the Appellant (at least at the initial stage).

For its part in getting the parties together (Konsortium and Qwinzy) with the Appellant as “introducer”, the Appellant would charge a management fee of 1% of the value of the transaction.

Negotiations were had. Konsortium had to make the necessary application to the Central Bank (Bank Negara Malaysia) which, however, rejected Konsortium's application.

Though Konsortium wanted to withdraw from the said transaction, Goh asked Yap whether an alternative method of obtaining finance is available. Discussions between parties culminated in Dick Chan putting the Respondent in place of Konsortium, to take over where Konsortium left off. Dick Chan had predicted that the Respondent as an offshore company (Singapore) operating in Kuala Lumpur, might have a better chance of obtaining Bank Negara's approval in the asset swap transaction.

Dick Chan's calculated move paid off. Bank Negara duly approved the Respondent's application in its proposal to enter into an asset swap transaction with Qwinzy.

For the record, it is significant that at least from 15.5.92 up to 21.5.92, the Appellant did not know of nor was it aware of the

existence of the Respondent, until such time when Goh informed the Appellant that the Respondent will replace Konsortium in the transaction with Qwinzy.

On 21.5.92 Respondent made an application to Qwinzy for the sale and purchase of Metroplex Bhd shares.

However the relationship of this ménage a trois (i.e. Appellant, Qwinzy and Respondent) did not last for very long.

A change came about when Qwinzy introduced its third party principals to participate in the asset swap transaction. Qwinzy introduced the United Islamic Investment Foundation (UIIF) and Oxbridge Investment Ltd (Oxbridge) where either one of these principals would be a contracting party with the Respondent.

After a flurry of negotiations, UIIF (not Qwinzy) became the contracting party with the Respondent. For its part, the Appellant was paid its fee.

Noting the sequence of events, it is shown that the Respondent had placed their application to Qwinzy on the asset swap transaction (i.e on 21.5.92) prior to receiving the literature regarding Qwinzy and its third party principals. The Respondent received these brochures only on 23.5.92 from the Appellant.

A Sale and Purchase Agreement was signed between the Respondent and UIIF (with Qwinzy being the figure behind UIIF) on 3.7.92.

The Respondent paid its monthly 'option' instalments but the fifth cheque paid by the Respondent to UIIF ran into some 'technical' difficulty. The name UIIF was apparently wrongly spelt by the Respondent which led UIIF to reject the said cheque. UIIF declared a breach by the Respondent which it said allowed it to terminate the Agreement.

As evidence indicated, the Appellant was not privy to the contract entered into between the Respondent and UIIF. After the

Sale and Purchase Agreement, parties (Respondent and UIIF) dealt directly with each other. The draft was not prepared by nor was it shown to the Appellant before sending it to UIIF, It was also not delivered by the Appellant to UIIF.

In fact it is PW1's evidence that DW1 was notified of the rejection of the draft only after 14.1.93 so DW1 cannot be said to have knowledge implied or otherwise under Section 86 Securities Industry Act.

What is critical is to scrutinize the testimony of both PW1 and DW1, and testing them against the facts as they unfold.

It is a fact that a meeting was held on 9.4.92 between Mr. Yap and Steven Ho (for the Appellant) and Mr. Goh and Ms. Lo (for Konsortium). Mr. Goh alleged that Mr. Yap represented inter alia, that Qwinzy is reputable and, financially sound and that the Appellant had successfully negotiated several transactions for public listed companies in Malaysia with Qwinzy. Mr. Goh further alleged

that Mr. Yap subsequently, in May, had also assured him of the financial standing and integrity of Qwinzy, including that of UIIF.

Mr. Yap however, denied all of the above. Looking at the fact, what is discernible is that Mr. Yap had sent the brochures relating to Qwinzy, UIIF and Oxbridge to Mr. Goh on 23.5.92.

In denying the above, Mr. Yap said that alternatively, if at all such representations were made, they were based on the literature regarding the same, which he sent on 23.5.92.

PW1's testimony as disclosed, both in examination and under cross-examination did not add up to the facts.

In cross-examination, PW1 said that DW1 made representation to him over the telephone about UIIF, before 21.5.92.

But PW1's witness statement indicated otherwise; that the first time he knew about UIIF was on 25.5.92 when DW1 delivered him the UIIF brochure. At paragraph 23 PW1 said:-

“... The first time I knew about the identities of the parties in the transaction was when we receive the brochure.”

PW1 went on to confirm that the brochures on UIIF did nothing to induce the Respondent into entering the Sale & Purchase Agreement with UIIF on 3.7.92 (my emphasis).

PW1 went on to say that the UIIF brochure contained no financial representation that would induce the Respondent entering the Sale & Purchase Agreement with UIIF on 3.7.92.

PW1 however testified that he persuaded Dick Chan to go on with the transaction “since it is on the same terms and conditions as that of Konsortium” and that “.... we rely on Yap's representations.”.

But what exactly was Yap (DW1's) representations alleged to have been made during the meeting and what exactly did DW1 represent to PW1 about UIIF before 25.5.92?

As it is undisclosed what was DW1's assurances or representations (since Dick Chan was not called to testify) and there is nothing by way of financial assurance in the UIIF brochure either, one is hard pressed to see how 'knowledge' can be attributed to DW1, implied or otherwise, in view of Section 86 Securities Industry Act, 1983.

Section 86, Securities Industry Act, 1983 reads as follows:-

“S.86 A person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilising the market price of securities if, when he makes the statement or disseminates the information –

- (a) he does not care whether the statement or information is true or false; or
- (b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.”.

PW1 went on to say that he would not have proceeded with the application had it not been for the assurance and representation given him by Yap.

PW1 made another gaffé. He said that “at all times prior to the submission of the application, Yap never told me to undertake any investigations on the parties. Neither did Yap nor anyone from OSK ever said to me that it was my responsibility to conduct any inquiries on the identity of the parties”.

In my view, it is reasonable for the Appellant to expect that the Respondent would not rely on its statement without obtaining independent legal advice. This is all the more critical since UIIF contained no financial statement.

On the part of DW1 his evidence clearly showed the extent of the Appellant’s involvement. Though admitting there was a meeting between him, Goh and Lo, that meeting only concerned matters

relating to interest rates, structure of asset swapping and Appellant's introduction fee.

At the same meeting, only the advertisement copies of the Investors Digest about the facility was passed on to the Respondent. The Appellant denied that prior to the signing of the agreement he had said that in his opinion Qwinzy was a reputable corporation.

Though the Appellant admitted saying that Qwinzy had concluded deals with the Appellant where the Appellant's job was to introduce parties to one another, it was just that. Nothing more, nothing less

Mr. Yap went on to say that thereafter the parties dealt directly with each other.

It is noted that if at all DW1 had made representations, these were made about Qwinzy and not UIFF. Qwinzy was not the contracting party, but UIIF.

In so far as I am concerned, the Respondent had not proven that no assurances or representation were proven to have been made and no information was disseminated that is false or misleading in a material particular, by the Appellant, likely to induce the Respondent.

It can in fact be said, from the evidence that if at all there was any inducement, it was self-induced by the Respondent's party.

Given that Yap's "representations" were about Qwinzy (and not UIIF), if at all, and that particulars of UIIF featured only after 21.5.92 when brochures were sent (so there was no clear statement or information which is false or misleading in a material particular by the Appellant) there is also nothing in the avowed financial objections of UIIF which could have induced the Respondent, the testimony of PW1 was certainly less than credible.

In any case what could have been the “inducement” capable of galvanizing the Respondent into action in entering into the Agreement in this case?

If it is the “lower interest and higher margin” aspect of the facility which he himself said was an important factor for him to consider, the Respondent’s position was clearly self-serving.

This is a case of self-inducement where even if there was reliance, it was unreliable reliance.

In fact, in cross-examination, PW1 said:-

“The inducement to the plaintiff (Respondent) was the strong financial standing with US10 billion paid up. At the time I read this, my impression is that the foundation was in the process of being organized. I was also impressed by the brochure of the Board of Governors being known Muslim scholars...”

Clearly on the Respondent’s part, the inducement was self-imposed.

Reading the brochure the way he did was unreliable reliance.

As observed in **James McNaughton Paper Group Ltd v Hicks**

Anderson & Co Ltd [1991] 2QB 113:-

“One should therefore consider whether and to what extent the advisee was entitled to rely on the statement to take the action that he did take. It is also necessary to consider whether he did in fact rely on the statement, whether he did use or should have used his own judgment and whether he did seek or should have sought independent advice. In business transactions conducted at arm’s length it may sometimes be difficult for an advisee to prove that he was entitled to act on a statement without taking any independent advice or to prove that the advisor knew, actually or inferentially, that he would act without taking such advice.”

Since inducement has always been a requirement for misrepresentation, at least in the general law of contract, would the assurance given by DW1 on Qwinzy and the brochure sent after 21.5.92 about UIIF have a positive effect in influencing the Respondent?

Would the assurances about Qwinzy and brochures on UIIF be only within the knowledge of the Appellant, or one that would lead the Respondent to believe in it completely, inducing him to

underestimate the risk, as if it does not exist? Was there any influence shown, by the Appellant?

In this context, it can be said that “influence” in its ordinary meaning is to affect or alter. Lord Lloyd for the minority in **Pan Atlantic Co Ltd v Pine Top Insurance Co Ltd [1994] 3 All E R 581** said that in the commercial sense, it is often used to mean ‘assessment’ as in the term “market assessment”.

To my mind, if I were to properly understand the reasoning of Lord Lloyd (although this is an insurance case and his is a minority judgment) nothing can be properly described as “influencing” anything unless it does actually have a positive effect on behavior.

Based as it were, on the entire intercourse between the Appellant and the Respondent, I fail to see how it is proven that an Appellant as “adviser” had actual or inferential knowledge of the relevant factors’.

Though the judge made a finding of fact that there exist such knowledge on the part of the Appellant and that the representations he made was the knowledge that they are likely to be relied on for that purpose, (see **Mc Naughten Ltd v Hicks Anderson & Co. [1991] 2QB 115** his finding was against the weight of evidence as manifested by the testimony of both PW1 and DW1 where he chose to rely heavily on the evidence of PW1.

Even if it transpired at a subsequent date that the statement or information was false or misleading when PW4 himself admitted them to be so, it was not reasonably foreseeable for the Appellant to have known this fact.

Since reliance was placed on Section 86 Securities Industry Act, 1983 by the Respondent no fault can be attributed to the Appellant when none of the critical ingredients have been met and proven.

In view of the above and findings of credibility of the trial judge I believe appellate intervention is in order.

Dated this day 10th day of December 2007

(DATUK ZAINUN BINTI ALI)
Judge
Court of Appeal
Malaysia.

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