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**DALAM MAHKAMAH RAYUAN MALAYSIA
BIDANGKUASA RAYUAN
RAYUAN SIVIL NO. W-02- 431-2006**

ANTARA

1. SANMARU OVERSEAS MARKETING SDN BHD

B

2. YEOH JIN BENG ... PERAYU-PERAYU

DAN

1. PT INDOFOOD INTERNA CORP.

2. PT SANMARU FOOD MANUFACTURING CO LTD

3. PT INDOFOOD SUKSES MAKMUR TBK

**... RESPONDEN-
RESPONDEN**

C

**(Dalam Perkara Guaman Sivil No. D4-22-1 149-1993
di dalam Mahkamah Tinggi Malaya di Kuala Lumpur**

Antara

1. PT Indo Food Intema Corp.

D

2. PT Sanmaru Food Manufacturing Co Ltd

3. PT Indofood Sukses Makmur Tbk ... Plaintiff-Plaintif

Dan

1. Far East Food Industries Sdn Bhd (dalam likuidasi)

2. Sanmaru Overseas Marketing Sdn Bhd

3. Yeoh Jin Beng ... Defendan-Defendan)

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**CORUM : ZALEHA ZAHARI, HMR
ABDUL MALIK ISHAK, HMR
ABU SAMAH NORDIN, HMR**

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JUDGMENT OF ZALEHA ZAHARI, JCA

I have read the judgment in draft of my brother, Dato' Abdul Malik Ishak, and would like to state my reasons for dismissing this appeal.

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In this judgment parties will referred to as they appear in the High Court.

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By civil suit filed on 13.10.1993 PT Indo Food Interna Corp (the 1st Plaintiff), and PT Sanmaru Food Manufacturing Co (the 2nd Plaintiff), applied for the following orders: The

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Defendants to take all necessary steps to record the transfer of "Indomie" trade to the Plaintiffs in accordance with Deed Assignment dated 26.9.1990. Delivery up of products bearing the trade marks "Indomie", "Top Mie", "Pop Mie", "Nutrimi-Yin Duo" (in Chinese) and "Indomie Mi Goreng" by the Defendants

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to the Plaintiffs. Delivery up of all samples, pamphlets, advertising material and other material documents and papers whatsoever sent to the Defendants by the Plaintiffs and relating to the Plaintiffs' business which the Defendants may have in their possession or control including all separate books of accounts and record kept or maintained by the Defendants. The Defendants be restrained from selling or in any way dealing with products of the Plaintiffs bearing the trade marks "Indomie", "Top Mie", "Pop Mie", "Nutrimi-Yin Duo" (in Chinese) and

A “Indomie Mi Goreng”. Damages with interest at 8% per annum from 13.10.1993 to the date of realization.

Judgment in default of defence was entered against Far East Food Industries Sdn Bhd (in liquidation) (the 1st Defendant), on 12.5.1994 for failure to file a defence. The 1st Defendant has been wound up by Order of Court dated 17.10.1997 and the Official Receiver appointed as Liquidator. The 1st Defendant has taken no part in the trial and is not a party to this appeal.

Several interlocutory applications were filed by both parties prior to trial of which the following requires mention. On 22.10.2002, the Plaintiffs' solicitors filed an application on behalf of the 1st and 2nd Plaintiffs and P.T. Indofood Sukses Makmur Tbk (“Sukses Makmur”) to substitute Sukses Makmur for the 1st and 2nd Plaintiffs, on the ground that Sukses Makmur had taken over all of the rights and liabilities of the 1st and 2nd Plaintiffs pursuant to a merger in Indonesia in 1994.

The 2nd and 3rd Defendants opposed this application for substitution on the ground that there was insufficient evidence before the Court and therefore unclear as to what were the rights, obligations, assets and liabilities of the 1st and 2nd Plaintiffs which had been transferred to Sukses Makmur under the merger. This application to substitute Sukses Makmur for

A the 1st and 2nd Plaintiffs was dismissed by the Court on 25.4.2005. It is common ground that the appeal against this decision of the High Court dated 25.4.2005 to the Court of Appeal was subsequently withdrawn by the Plaintiffs.

Having failed in the application for substitution, Sukses
B Makmur then, on 26.6.2005, filed an application under O. 15 of the Rules of the High Court 1980 (the Rules) to be joined as a Plaintiff to the action, which application was also opposed by the 2nd and 3rd Defendants. The High Court vide order dated 20.7.2005 allowed this application and Sukses Makmur was joined as a party to the action as the 3rd Plaintiff. The 2nd and
C 3rd Defendant's appeal against this decision of the High Court dated 20.7.2005 to the Court of Appeal vide Appeal No. W-02-968-2005, was dismissed. The Court of Appeal ruled that the issue of joinder should be determined at trial.

D The Plaintiffs' claim for the assignment of trade Mark No. M/100816, S/32614 and No. SAR/27,663 for the "Indomie" mark (collectively referred to as "the Indomie" mark) in Class 30 in Malaysia from the 2nd Defendant to the 1st Plaintiff is based on the following grounds. The 2nd Defendant pursuant to the Deed of Assignment dated 26.9.1990 (the Deed of Assignment) had agreed to assign the "Indomie" mark to the 1st Plaintiff for a
E consideration of 10 dollars. Alternatively the 2nd and 3rd Defendants hold the "Indomie" mark in Malaysia as constructive

A trustees for the 1st Plaintiff and are required to transfer the “Indomie” mark to the 1st Plaintiff as and when they are directed to do so by the Plaintiffs.

The 2nd and 3rd Defendant denied holding the “Indomie” trade marks as constructive trustees for the 1st Plaintiff. They
B claimed that the 2nd Defendant at all material times is the legal and beneficial owner of the "Indomie" trade mark and to having acquired all of the goodwill, reputation and benefit of the said trade mark. The 2nd and 3rd Defendants pleaded that the 2nd Defendant had agreed to sell the “Indomie” trade mark to the 1st Plaintiff (and not at the direction of the 1st Plaintiff) and pursuant
C to a side letter dated 25.7.1990 (the side letter) the agreed consideration was USD680,000.00 as stated in the side letter and that the 1st Plaintiff was in breach of the said contract by failing to pay the sum of US\$680,000.00.

D The High Court Judge’s Findings

The Judge’s findings on the Agreed Issues for Determination will be taken in the following order.

On Issue C, whether the 3rd Plaintiff was properly joined as a party, the learned Judge’s finding was :

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“4. The issues whether the corporate restructuring has been completed or not are merely side issues easily resolved or

A made irrelevant to the determination of this action on the merits of the alleged assignment which is the subject matter of this action, by the inclusion of P.T. Indofood Sukses Makmur Tbk as the 3rd Plaintiff, rather than to replace the 1st and the 2nd Plaintiffs, so that any decision applies to the Plaintiffs jointly and severally, and completion of their merger remains a matter between the Plaintiffs in Indonesia.

B That cannot be of any concern to the Defendants in Malaysia and the disposal of this action since ultimately the sharing of the fruits, if any, of litigation in this action is a matter *inter se* between the Plaintiffs.

5. The addition of P.T. Indofood Sukses Makmur Tbk as the 3rd Plaintiff involves no delay or additional cost. In the event the 1st and the 2nd Plaintiffs are correct, they are entitled to the addition of the 3rd Plaintiff. On the other hand, seeking to confine the Plaintiffs to the 1st and 2nd Plaintiffs may result in judgment obtained by the 1st and 2nd Plaintiffs being attacked at execution stage by collateral proceedings that the 1st and 2nd Plaintiffs no longer exist.

D 6. Joinder of all three Plaintiffs in this action is not a case of having the wrong parties, but instead is to ensure that all the parties are before the Court. The only concern of the Court is that trial proceedings do not become an exercise in futility. By ensuring that all relevant parties are put before the Court, and any order for or against the three Plaintiffs are made upon them jointly and severally, this action can be dealt with and disposed of without duplicity or multiplicity of proceedings, and with finality.”

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A On Issue A, as to what was the agreed consideration for the assignment of the “ Indomie” trade mark registered in Malaysia from the 2nd Defendant to the 1st Plaintiff, whether RM10.00 as contended by the Plaintiffs or US\$680,000.00 as contended by the 3rd Defendant, the learned Judge first considered the 2nd and 3rd Defendants contention that there was an alleged common practice upon the advise of tax advisers to state a nominal amount upon such assignment and his finding was as follows:

C “15. There is no evidence adduced of a common practice to state a nominal sum upon such assignments. Further, that it is for tax reasons together with the explanation of an agreement to keep actual consideration private and confidential, cannot for reasons of public policy, be accepted on their own as sufficient or probative evidence, since it would be encouragement of such practices to defraud the revenue. See *Lim Yoke Kian & Anor v. Castle Development Sdn Bhd* [2004] 4 CLJ 443 (CA). It is one thing to recognize that parties may in fact engage in such practices, but it is another for the Courts to endorse it by accepting it as evidence of much probative value.”

E 16. The issue before the Court is whether there is in fact such a side letter containing such an agreement. It is the Defendant who seeks to show there is such an agreement. A consideration that militates against finding there is such an agreement is that an agreement to defraud the revenue laws would be illegal. The role of the Courts is

A to give effect to the agreement between the parties and would therefore seek to avoid giving an interpretation that would make an agreement illegal without clear evidence.”

B In making a considered decision on Issue A and B, as to (the consideration payable for the Assignment of the “Indomie” trade mark and whether the 3rd Defendant is a nominee or agent of the Plaintiffs or a constructive trustee of the “Indomie” trade mark for the benefit of the 1st Plaintiff and whether the 2nd Defendants is a constructive trustee of the “Indomie” trade mark for the benefit of the Plaintiffs), the Judge considered the 2nd and 3rd Defendants’ claim that a side letter existed relating to an agreement to pay US\$680,000.00 for executing the Deed of Assignment and arrived at the following findings :

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D “20. If such an important document as a side letter which is worth USD680,000.00 to the Defendants compared to the assignment at USD10.00, is enclosed, one would expect the covering letter to refer or mention the side letter if enclosed. The reasons given for having two separate documents does not apply to a mere covering letter to forward such documents. Yet no mention of the side letter was made in the covering letter that purportedly forwarded it. Indeed the covering letter of 25.7.1990 is inconsistent with the testimony above of the 3rd Defendant. Hence, the testimony of the 3rd Defendant must be treated with some caution, including whether the purported side letter produced by the Defendants is a copy of the side letter.

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21. With no other direct evidence of a side letter, the sub-

A stratum of the defence disappears, with the result it must collapse, unless the Defendants could lean for support on other, albeit indirect, evidence to prove such side letter existed.”

On whether there was any indirect evidence of such a side letter the Judge held :

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C “24. The silence on the payment of USD680,000.00 for the assignment is inconsistent with there being a side letter to that effect. Even if the matter was held in abeyance because of an injunction by Boustead, one would ordinarily expect it to be raised when the injunction was lifted. The 3rd Defendant’s letter of 18.9.1992 to Hadi Wijaya does not contain any mention of the side letter. Nor is there any evidence that as a result of the letter from Hadi Wijaya, the 3rd Defendant took the matter up with Hendy Rush with whom the side letter was purportedly agreed.”

D On the 2nd and 3rd Defendants contention that the Plaintiffs should have called Hendy Rusli as their witness the Judge’s ruling was:

E “34. The notarised Affidavit of Hendy Rusli was put before the Court. Its authenticity was never challenged. He denied receiving the side letter. He said he believed it to be a concocted document. It is the Defendants who would seek him to confirm there was a side letter containing such an agreement in order to establish its defence. He was not

A called as a witness by the Plaintiffs as he had left the employment of the Plaintiffs, resided in Jakarta and said that available to come as a witness. Since he cannot be compelled to appear before this Court, section 114(g) of the Evidence Act 1950 should not be applied and therefore no inferences adverse to the Defendants should be drawn either from his affidavit or the non-calling of Hendy Rusli by the Defendants, and since the Affidavit of Hendy Rusli has not been tested by cross-examination, the Court exercises caution, by examining for corroboration by other evidence before accepting any part of it for either party. In this case, the findings of the Court in relation to the existence of non-existence of the side letter have not relied upon the Affidavit of Hendy Rusli at all.

C 35. Indeed, since it is the Defendants who contend that the consideration of USD680,000.00 was discussed and agreed upon between the 3rd Defendant and Mr. Hendry Rusli, the latter representing the 1st Plaintiff, the onus is upon the Defendants. Apart from the testimony of the 3rd Defendant, there is no other evidence of discussion and agreement for a consideration of USD680,000.00 for the assignment or that any such proposal came from Mr. Hendy Rusli or the Plaintiff for the benefit of the 2nd Defendant. The covering letter said to be sent when the assignment and the side letter were forwarded did not support the Defendants' version. Since the testimony of the 3rd Defendant is contradicted by his own evidence, the occasion did not arise for the Plaintiffs to have to call Hendy Rusli to deny any such alleged agreement in a purported side letter.

A On Issue B paragraph 2, (whether the 3rd Defendant was an employee of the Indofood Group of companies and taking instructions from the Group) the Judge finding was :

B “39. The assignments were signed by the 3rd Defendant as General Manger/Director of the 2nd Defendant. On 19.8.1992 the 3rd Defendant wrote to Indofood International Division a Regional General Manager ASEAN under the letterhead of the 1st Defendant. While there is nothing to prevent the owner of the shares of a company from being employed by the company, the designated general manager or regional general manager indicates that he is an employee of the 1st and 2nd Defendants. Then there was constant communication with the 1st Plaintiff for administrative matters, including his terms of employment. On the totality of the evidence before the Court, the actions of the Defendants show that they were conducted on the basis that the 1st and 2nd Defendants were part of the Indofood group.”

D The Judge then in respect Issue B paragraph 2 made a finding of fact, that the 2nd Defendant held the “Indomie” mark in Malaysia in its name on constructive trust for the 1st Plaintiff and was required to transfer the “Indomie” mark to the 1st Plaintiff as and when directed to do so by the 1st Plaintiff.

E The Judge summarized his findings and his conclusion on Issues A and B are as follows:

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“40. To summarise, the finding of this Court is that the assignments themselves are not disputed, but recordal of the assignments of the “Indomie” mark had been withdrawn by the 2nd Defendant, who only well after the retraction of the recordal and after the commencement of this action seek to maintain there was a breach by the 1st Plaintiff of an

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agreement incorporated in a purported side letter, to pay USD680,000.00 as consideration for the assignment to the 1st Plaintiff of the mark “Indomie” registered in the name of the 2nd Defendant. The Defendants’ assertion of the existence of that side letter and agreement therein is not borne out either by direct evidence or indirectly by inference from surrounding facts and circumstances. The Defendants,

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therefore, failed to discharge the onus that is upon them to prove upon a balance of probabilities that there is an agreement between the 1st Plaintiff and the 2nd Defendant to pay the latter USD680,000.00 as consideration. Since there is no evidence of any side letter containing an agreement to pay USD680,000.00 to the 2nd Defendant there was no

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reason for the 2nd Defendant to direct Shearn Delamore & Co not to proceed with the recordal of the assignment which had been executed and submitted for recordal to their solicitors by the 2nd Defendant.

41. It is clear that the issue of payment of USD680,000.00 before recordal of assignment never arose when the 2nd Defendant engaged Shearn Delamore & Co to effect the assignment. It is equally clear that it was the 3rd Defendant himself who had represented that the recordal could not be effected because of an injunction by Boustead.

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A That was on 18.9.1992 since the injunction had been lifted there was no longer any impediment to recordal of the assignment of the mark “Indomie”. At no point until this action was the reason of non-payment of USD680,000.00 given for refusal to proceed with the assignment. Indeed upon the 2nd Defendant having executed the assignment, neither the 2nd nor the 3rd Defendants had any further personal role in the recordal of the assignment except to act on behalf of the 1st Plaintiff to engage solicitors to proceed with the recordal of the assignments. In instructing the retraction the Defendants acted without authority of the 1st Plaintiff. These conclusions support the finding that at all times the 2nd Defendant held the registration of the mark “Indomie” in its name under a constructive trust.”

C On Issue D, in dealing with the 2nd and 3rd Defendant’s allegation that the Plaintiffs were guilty of prolonged, inordinate and inexcusable delay in not filing Summons for Directions and/or setting this action down for trial, the Judge held-

D “43. Indeed the summons for directions would have served little purpose since the action could not be brought to trial until the interlocutory applications were disposed off, including applications to strike out certain portions of the Affidavit of the 3rd Defendant and to strike out the Defence.

....
....

E 44. The Court finds no merit in these submissions of the Defendants on these procedural issues and holds that in the particular circumstances of this case, the defence of delay

A and laches is not sustainable since while the delay is prolonged, it is in all the circumstances not inordinate or inexcusable, and the Plaintiffs are not entirely to blame.

45. While a defendant is entitled to defend itself, in this case every possible objection and issue appear to be raised when the merits involve only the question of the nature of the assignment which was executed, delivered, submitted to solicitors for recordal of the assignment and subsequently retracted by, the 2nd Defendant. The matter was pursued, action was filed and has been before the court.”

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On the issue of costs, and the 2nd and 3rd Defendants contention that the case did not involve complex issues of law and fact and the Plaintiffs have not given any good reasons why this is a proper case to issue a certificate for two counsels, the Judge was of the view that-

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47. ... had the Defendants sought more senior and experienced counsels, this case would have proceeded to the issues on merits more expeditiously and economically. The full record of proceedings in the trial file would show that the defence was not conducted with a view to obtaining a fair and just decision in an expeditious and economical manner, but sought to raise issues at every turn and stage. The Plaintiffs' counsel had to thread a very fine line between keeping the case focused on the issue of merits, yet at the same time to answer each and every argument raised on every possible issue. Indeed the Court had to act firmly at case management stage to bring this case to trial, and in the trial to bring it to a

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A close. The Court finds that this case warrant the award of costs for two lawyers.”

The Judge then entered judgment for the Plaintiffs in terms of prayers A, B, D, E and G of the Amended Statement of Claim.

B It is now necessary to consider whether the trial Judge was right in his findings and in arriving at the conclusions which he did on the agreed issues for determination. I don't propose to set out the background facts as these have been exhaustively set out in the judgment of my brother, Dato' Abdul Malik Ishak.

C DECISION

Issue C

D I will deal with Issue C first.

E On the 2nd and 3rd Defendants contention that there is no clear evidence as to the alleged rights, obligations, assets and liabilities of the 1st and 2nd Plaintiffs which had been transferred to the Sukses Mamur, the majority of the corporate merger documents relied on by the Plaintiffs including those exhibited in the Affidavit of Ignatius Andy Andria dated 19.2.2003 have been reviewed by the Defendants' own Indonesian law expert, Linda Widyati, who, by affidavit affirmed on 4.11.2003 confirmed that

A Sukses Makmur would have taken over all the assets, rights and obligations, including all legal actions of, inter alia, the 1st and 2nd Plaintiffs as a result of the merger.

The trial judge was of the view that the inclusion of Sukses Makmur as the 3rd Plaintiff, rather than replace the 1st and 2nd Plaintiffs, was appropriate as any decision made would apply to the Plaintiffs jointly and severally. That completion of the merger was a matter between the Plaintiffs in Indonesia and that cannot be of any concern to the Defendants in Malaysia since ultimately, the sharing of the fruits of litigation in this action is a matter inter se between the Plaintiffs. I agree with these views expressed by the learned Judge.

On the allegation that the joinder of Sukses Mamur was barred by limitation, the powers of the Court under O. 20 r. 5, read together with O.15 r 6, of the Rules include the power to give leave to add a party or to amend any pleading even after the expiry of any relevant period of limitation (sub-rule (2)) or to add a new cause of action (sub-rule 5). O. 20 r. 5 states as follows :

(1) *Subject to Order 15 Rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend the writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*

A (2) *Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.*

B (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

C (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

D (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

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A Further, in the present case, the Plaintiffs are claiming to recover trust property from the Defendants. By virtue of section 22(1) of the Limitation Act, 1953, an action by a beneficiary comes within the circumstances stated in paragraph (a) or (b) of section 22, i.e. there is no period of limitation.

B In respect of the Appellants' Counsel submission that the 1st and 2nd Plaintiffs having been dissolved and liquidated as at March 1984 and no *locus standi* before the High Court, nor on appeal before this Court, the Liquidator of the 1st Plaintiff, Hadi Widjaya, by Affidavit affirmed on 22.5.2003 in the joinder application, averred that "*the process of liquidation has not been*
C *entirely completed.*" A similar statement was made by the Liquidator of the 2nd Plaintiff, Aufrans, in his affidavit, also affirmed on 22.5.2003.

D Similar to Malaysian company law, there is clearly a difference between a company that is in liquidation (and managed by a liquidator) and a company that is dissolved (not requiring any management). In the instant case, the 1st and 2nd Plaintiffs were merely under liquidation, they are therefore entitled to sue.

Issue A and B

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In determining these two issues the learned Judge had

A clearly examined the contemporaneous documents exchanged between the parties and their solicitors from 25.7.1990 to 24.3.1993. The Judge was clearly right in ruling that the onus lies on the 2nd and 3rd Defendants to prove their defence that the consideration for the assignment of the "Indomie" trademark was US\$680,000.00.

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The Judge arrived at the findings which he did and ruled in favour of the Plaintiffs based on the following documents. The covering letter under the letterhead from the 1st Defendant dated 25.7.1990 (signed by the 3rd Defendant) addressed to "P.T. Indofood Inters Corp" to the 1st Plaintiff for attention of

C Mr. Henry Rusli enclosing 2 Deeds of Assignment and Forms of Authorisation of Agent reads as follows: .

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"Please find enclosed two Deed of Assignments for transfer of the above Trade Mark Registration in Class 30 in Malaya, Sabah & Sarawak and in Brunei together with two authorisation forms for your signature.

Kindly attach the Common Seal on the Deed of Assignment and return all the documents for our further action

Thank you and regards.

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Yours faithfully
FAR EAST FOOD INDUSTRIES SDN BHD
Sgd
YEOH IN BENG

A General Manager"

On 26.9.1990, the Deeds of Assignment were executed by both parties, with 3rd Defendant signing on behalf of 2nd Defendant. The Deed of Assignment expressly states that the consideration is RM10.00.

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There is then a letter dated 2.10.1990 from Shearn Delamore & Co. to the 2nd Defendant enclosing an Invoice for services rendered with regard to the Assignment in question. The 1st Defendant then issued a note to 1st Plaintiff enclosing Shearn & Delamore's invoice. The 1st Plaintiff subsequently paid this invoice. Indofood Group then issued letter dated 29.1.1991 to the 1st and 3rd Defendant enquiring as to the progress of the transfer of the trademark. The 1st Defendant issued letter dated August 1992, (signed by the 3rd Defendant) to 1st Plaintiff enclosing "Indomie" trade mark registration certificate.

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The question of assignment re-emerged on 26.8.1992 when Hadi Wijaya from Indofood Group wrote to the 1st and 3rd Defendant enquiring as to the status of the transfer of the "Indomie" trade mark as follows:

"Dear Yeoh,

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Please advise me asap the status of the "Indomie" Trademark M/100816 under "the name of Sanmaru

A Marketing Overseas which is suppose-to be transfer to P.T. INDOFOOD INTERNA CORPORATION.

Up to date we haven't received any documents confirming the transfer except for the Invoice of Shearn Delamore dated 23rd October 1990.

Yours truly,

B Sgd
Hadi Wijaya"

The reply from the 1st Defendant signed by the 3rd Defendant by letter dated 18.9.1992 to Indofood Group was :

"Attn: Mr. Hadi Wijaya

Dear Sir,

C We refer to the trademark of Indomie in Malaysia and wish to inform that Sanmaru Overseas Marketing is still the registered owner of the said trademark for Malaysia and Brunei.

D I believe the High Court Injunction taken by Boustead in 1991 in view of the payment dispute which has now been resolved has prevented any transfer of the trademark.

Thank you.

Yours faithfully,

FAR EAST FOOD INDUSTRIES SDN BHD

E Sgd

YEOH JIN BENG
Regional General Manager-Asean "

A On 16.2.1993 Indofood Group inquired from Messrs Shearn & Delamore as to the status of the Assignment of the "Indomie" mark as follows:

"RE: INVOICE NO. A 70072

B Please advise us accordingly the status of the assignment of "Indomie & Device" trademark from Sanmaru Overseas Mkt Sdn Bhd which was supposed to be transferred to PT. Indofood Interne Corp as stipulated in your invoice No. A 70072 dated 23th October 1990.

C We request your direct explanation to us since we understood that all assignment documentation already been properly executed and submitted to you accordingly.

Your prompt reply will be very much appreciated.

Yours truly

D Sgd.
Hadi Wuijaya".

The reply from Messrs Shearn Delamore & Co to Indofood Group, vide letter dated 24.3.1993 states as follows:

" I refer to your letter of 16th February, 1993.

E Our records show that our instructing clients are Sanmaru Overseas Marketing Sdn. Bhd.

A In the light of the solicitor – client relationship we would advise that you communicate with them on this matter. Suffice it for us to say that our records show that the pending recordal of the Assignment has been retracted."

B The first reference to the sum of US\$680,000.00 was made by the 3rd Defendant in an affidavit affirmed on 26.10.1993 (about 3 years after the alleged agreement between him and one Hendy Rusli) filed in an interlocutory injunction proceedings after the Writ in this civil suit was issued on 13.10.1993. In that Affidavit, the 3rd Defendant exhibited a letter dated 25.7.1990 which he claimed was sent to Hendy Rusli where reference was made to an alleged agreement reached with the said Hendy Rusli. The second paragraph of the side letter purportedly reads as follows:

C "I have discussed and persuaded the shareholders of SOM to agree to your proposal to buy over the Indomie trade mark and device for a total consideration of US\$680,000.00 (United States Dollars Six Hundred and Eighty Thousand Only)."

D Hendy Rusli in an affidavit in reply affirmed on November 1993, denied receiving such a letter implying denial of the existence such an agreement.

E Cesar De La Cruz (PW1) in his capacity as a member of the management committee of the Salim Group overseeing its

A investment in the food division, testified he never saw the side letter at the time. PW1 referred to the sworn Affidavit of Hendy Rusli where at paragraphs 6(a) and 6(c) Hendy Rusli stated that *“Exhibit YJB-6 (the side letter) is a document which I never received and I assume to be an afterthought I am advised and verily believe that the exhibit YJB-6 (the side letter) is a*

B *concocted document”*. The authenticity of the side letter was clearly challenged by the Plaintiffs from the time of its first appearance as an exhibit in the Defendants’ Affidavit affirmed on 26.10.1993.

The Appellants’ Counsel submitted that the trial Judge

C erred in finding that there was no evidence of any side letter containing an agreement to pay US\$ 680,000.00 by reason as the 3rd Defendant had given oral evidence to that effect. It was argued that in the absence of any evidence to contradict the 3rd Defendants testimony, the 3rd Defendant’s evidence must be

D held to be unchallenged. According to the Appellants’ Counsel the trial Judge had erred in not invoking section 114(g) Evidence Act 1950 against the Plaintiffs for failure to call Hendy Rusli as a witness, and that it must be presumed that had Henry Rusli given evidence his evidence, would support the Defendants’ version.

E Why Hendy Rusli was not called as a witness was, as testified by PW1 at trial, because Hendy Rusli was no longer in

- A the Plaintiffs employ, resides in Jakarta and not able to be present in Malaysia. The Respondent's Counsel in reply argued that the authenticity of Hendy Rusli's affidavit of 9.1.1993 was not challenged by the Defendants and the affidavit has been admitted as part of the body of evidence during trial. Hendy Rusli's affidavit has been referred to by the Plaintiffs during the
- B cross examination of "D37". It is then up to the trial Court to determine the truth of the contents of this affidavit in totality with the other evidence. [See *Jaafar bin Shaari & Anor v Tan Lip Eng & Anor*, (1997) 4 CLJ 529 per the judgment of Peh Swee Chin FCJ at p. 706, paras G-I and p. 707].
- C The trial Judge's ruling on this issue was that an adverse inference should not be drawn against the Plaintiff for failure to call Hendy Rusli as a witness as there is no evidence of any withholding or suppressing of evidence on the part of the Plaintiffs. That, it cannot be presumed, that if Hendy Rusli, if
- D called, would give evidence unfavourable to the Plaintiffs. The position taken by the trial Judge was, as to the existence or non existence of the side letter that he would not be relying upon the Affidavit of Hendy Rusli but would be undertaking an analysis of the evidence presented before the Court. Based on the totality of the evidence before him the Judge's finding was that the Defendants had failed to prove the existence of the alleged side
- E letter and had accordingly failed to establish their defence.

- A The Judge's assessment of the credibility of the 3rd Defendant, whether the 3rd Defendant had the capacity to enter into such an oral agreement during that period with Hendy Rusli, based on the documents before him, by reason of the degree of integration and close managerial control exercised by Jakarta over the day to day operations of its Malaysian subsidiaries and the 3rd Defendant's freedom to manage matters in Malaysia was limited as Jakarta's permission had to be obtained even for routine matters, arrived at the conclusion that parties had conducted themselves on the basis that the 1st and 2nd Defendants were part of the Indofood Group.
- B
- C The Judge then rejected the 3rd Defendant's (a middle-ranking employee in the Group) contention that he was negotiating at arms length and was in a position to reach an oral agreement with a superior officer in the corporate hierarchy, Hendy Rusli, which agreement required the Indofood Group to
- D pay US\$680,000.00 to him.

The approach adopted by the learned Judge on this issue was clearly right and he was fully justified for the reasons advanced in the judgment in arriving at the conclusion which he did on this issue.

- E The 3rd Defendant's unequivocal admission that the alleged oral agreement between himself and Hendy Rusli was

A intended to conceal the true consideration of US\$680,000.00 in order for the 2nd Defendant to avoid disclosing receipt of these monies to defraud revenue was rejected by the Judge on the ground that this defence cannot be upheld as the Court would in so doing, be countenancing an illegal act of the 2nd Defendant. [See *Lim Yoke Klan & Anor v Castle Development Sdn Bhd* (2000) 4 MLJ 443 the Court of Appeal considered *Lim Kar Bee v Duofortis Properties(M) Sdn Bhd* (1992) 2 MLJ 281 a scheme devised by a tax consultant to avoid payment of estate duty].

The evidence the 2nd Defendant instructing Shearn Delamore & Co to proceed with the filing of the signed Assignment documents with the Registry (notwithstanding the alleged non-receipt of the USD680,000.00) was indeed significant. The fact was that the 3rd Defendant continued for some 2 1/2 years thereafter to represent to the Plaintiffs that the recordal of the assignment was pending. By this conduct, the Judge was therefore right in finding that the Defendants' version does not represent the truth, is neither credible nor believable and the Judge in rejecting it.

The transfer of the Indomie trade-mark registered in Malaysia from the 2nd Defendant to the 1st Plaintiff, from PW2's testimony, demonstrates that it is not as an isolated agreement. It forms part of a complex joint venture agreement between two

A of Indonesia's largest corporate groups. Just as the consideration for the Indonesian assignments was nominal - (10,000 rupiah), so too was the consideration for the Malaysian assignment. Logic would suggest that in such circumstances the consideration would be nominal.

B The Deed of Assignment was executed by both parties on 26.9.1990. The Deed states that the consideration of 10.00 was "paid by the Assignees (the 1st Plaintiff) to the Assignors (the 2nd Defendant), the receipt whereof the Assignors hereby acknowledge". The 2nd Defendant is estopped from denying that the Plaintiff had paid the declared consideration of RM10.00. In

C such circumstances, pending the registration of the assignment of the trademark, the position in equity was described in *Lysaght v. Edwards* (1876) 2 Ch D 499 by Lord Jessel M.R. as follows:

D "It appears to me that the effect of a contract for sale has been settled for more than two centuries; ... What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possessions. It must, therefore, be considered to be established that the vendor is a

E

A constructive trustee for the purchaser of the estate from the moment the contract is entered into”

This equitable principle was accepted by the Federal Court in *Temenggong Securities Ltd v. Registrar of Titles* (1974) 2 MLJ 45, with H.S. Ong F.J. observing:

B “In our view there can be no doubt as to the position in law. As was said by Jesse! M.R. in *Lysaght v Edwards*

C The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat”

D The Federal Court decision in *Temenggong Securities* was upheld by the Privy Council on appeal, but this passage was not commented upon.

E It follows that from 26.9.1990, the 2nd and/or 3rd Defendants were holding the Indomie trade-mark in Malaysia as constructive trustee for the benefit of the Plaintiff. In these circumstances the High Court was right to find on a balance of probabilities to conclude on Issue A and B that the agreed consideration was RM10.00, and that the 2nd and 3rd Defendants acted wrongfully and in breach of agreement in

A failing to complete the transfer. He was also right in concluding that the 2nd and 3rd Defendants were holding the “Indomie” trade-mark in constructive trust for the benefit of the Plaintiffs.

Issue D

B I am in agreement with the Judge that the Defendants had contributed to the delay in disposal of the action by raising procedural objections and issues. By reason of the numerous interlocutory applications (and appeals to the Court of Appeal) filed on behalf of both parties in this suit, it was not open for the Defendants to level such accusations against the Plaintiffs of
C being guilty of inordinate delay in setting this suit for trial. On the contrary, it was the Defendants, particularly in the few months leading up to the commencement of trial on 24.10.2004, intent to prevent the commencement of trial, including unsuccessfully making stay applications in the Court of Appeal. The learned
D Judge was therefore right in finding that the Plaintiffs are not guilty of conduct disentitling them to relief by reason of delay and/or laches.

Costs

E The award of costs is discretionary. The Judge considered it appropriate in the circumstances of this case to award costs for two counsel. The Judge had applied the right

A principles and there is no reason for this Court in exercise of its appellate jurisdiction to interfere with the exercise of that discretion.

Conclusion

B The reasoning of the trial Judge in arriving at the findings and the conclusions which he did were cogent and in accord with the evidence. Having had the audio-visual advantage of having seen and heard the witnesses, having duly considered the evidence and the probabilities of the case taken as a whole, taking into consideration the documents presented, and the
C circumstances of the case, I am in agreement with his findings and conclusion.

The appeal is dismissed with costs. The deposit to Respondents to account of taxed costs.

D

ZALEHA ZAHARI
Judge
Court of Appeal
Malaysia

Dated : 28.1.2009

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A Note:

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