A

GLOBAL VENTURES NETWORK SDN BHD v. LOKMAN DATO' MOHD KAMAL & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-2119-12-2015 &
W-02(NCVC)(W)-182-01-2016]
7 DECEMBER 2017

C ***TORT:*** *Conspiracy – Conspiracy to defraud – Allegation of – Claim for monies paid in investment scheme – Whether wrongful means of conspiracy – Whether predominant intentions must be proven – Whether there was agreement to defraud – Whether there was lack of privity of contract – Whether claim for conspiracy proved*

D The first defendant in the High Court was a company which had approved permits while the appellant ('third defendant') was a company dealing with luxury cars. The second defendant was the Managing Director of the first defendant whereas the fourth and fifth defendants were director and Company Secretary in the third defendant. The sixth defendant, as alleged E by the respondent ('plaintiff'), was an individual representing and with the ostensible authority of the first and third defendants, conspired with all the other defendants to defraud him *vide* an investment scheme involving the import and sale of luxury cars with guaranteed returns and profits. The plaintiff claimed that he invested in this scheme through an agreement dated F 9 November 2012 made between the plaintiff and the sixth defendant and paid two sums totalling RM2,450,000 to the third and sixth defendants. When the cars did not arrive, the sixth defendant issued two cheques of RM180,000 and RM300,000, purportedly as returns of the investments. Unfortunately, both cheques were dishonoured. The plaintiff claimed a G refund of his investments and the promised returns of profits together with other ancillary reliefs. The first and second defendants denied liability arguing that there was no privity of contract between them and the plaintiff, and that they had no knowledge of the alleged arrangements. The defendants, on the other hand, counterclaimed for abuse of process. Likewise, the third H and fourth defendants, also on the basis of lack of privity of contract. The trial judge found that (i) the claim of conspiracy was not proved against the first, second and sixth defendants as the plaintiff had failed to establish the existence of an agreement between them to defraud the plaintiff; (ii) there was a lack of privity of contract to attach any liability against the first and second defendants; (iii) the plaintiff should have carried out an independent I verification or investigation of the sixth defendant's position in the first defendant instead of assuming that the sixth defendant was an authorised representative of the first defendant; (iv) the sixth defendant was merely a

broker who had introduced potential buyers for cars sold by the first defendant; and (v) the third defendant had, by conduct, given ostensible authority to the sixth defendant to act on its behalf. The judge also rejected the third defendant's claim that the monies that were paid into its account were meant for a development of land. Accordingly, at the conclusion of hearing, the claim was allowed only against the third and sixth defendants with the third defendant's costs to be borne by the fourth defendant. The claim against the remaining defendants was dismissed as was the first and second defendants' counterclaim. The third defendant appealed *vide* the first appeal, whilst the plaintiff's appeal which was only in respect of the decision against the first defendant, was the second appeal.

Held (allowing plaintiff's appeal against first defendant; dismissing third defendant's appeal)
Per Mary Lim JCA delivering the judgment of the court:

(1) The trial judge was plainly erroneous in rejecting the claim on the basis of a lack of privity of contract. The plaintiff's claim against the defendants was never founded on contract but on the tort of conspiracy. The trial judge ought to have properly appreciated the pleaded case, and evaluate all the evidence led when considering whether the claim of conspiracy was proved. What the trial judge did was to examine the claim from where or with whom did the plaintiff have a contractual relationship, and having found that it was not with the first defendant but with the third defendant, proceeded to dismiss the claim against the first defendant. In so doing, the trial judge failed to take into account many material and relevant pieces of evidence led by the plaintiff which stood unexplained. (para 17)

(2) The trial judge fell into error in not considering further whether the conspiracy alleged was one of 'simple conspiracy' or conspiracy to injure; or conspiracy where unlawful means have been used, often referred to as 'wrongful means conspiracy'. Had the trial judge examined the issue, the trial judge would have concluded from the pleaded case that the tort of conspiracy under scrutiny was one of conspiracy by unlawful means. The law on 'wrongful means conspiracy' did not require the plaintiff to prove that there had been a predominant intention on the part of the defendants to injure the plaintiff. The very utilisation of unlawful means, *ie*, to cheat or to defraud, by its very nature, was sufficient to render the defendants liable, regardless of their predominant intention. (paras 18 & 19)

(3) In the tort of conspiracy, the element of agreement does not necessarily refer to an agreement in writing or of the formal nature generally understood in commercial or contractual arrangements. What the plaintiff needed to show was the existence of a combination of efforts of the alleged co-conspirators. In the pleaded case of the plaintiff, the

allegation of conspiracy involved the whole investment scheme which was nestled not just in the agreement of 9 November 2012 but in the involvement and roles of the various defendants, especially the first defendant. In this regard, the trial judge had failed to take into account material evidence that clearly proved evidence of conspiracy on the part of the first defendant. (paras 21 & 23)

(4) It is undisputed that the plaintiff invested in the scheme, that he paid a total sum of RM2,450,000; but he received no cars and no returns. The person who approached the plaintiff with the scheme was the sixth defendant who claimed that he represented and had the ostensible authority of the first and third defendants to be part of this investment scheme agreement. Not only did the sixth defendant not step forward to tell his side of the story or to deny the plaintiff's allegations, although he conducted his own trial, the plaintiff's allegations were found proved. There was no appeal by the sixth defendant. (para 26)

(5) There was ample evidence to find that the sixth defendant had apparent and ostensible authority to act for the first defendant such as to bind the first defendant to the sixth defendant's deeds and actions. The various acts undertaken by the sixth defendant in the present appeals amounted to representations by conduct which bound the first defendant. These acts done by the sixth defendant supported the contention that there was apparent or ostensible authority given to the sixth defendant in relation to the plaintiff's claim. (paras 40 & 41)

(6) All the pieces of material and relevant evidence were more than sufficient to find evidence of conspiracy not just of the third and sixth defendants but also of the first defendant. The trial judge ought to have weighed all the evidence against that which was led by the defendants before he reached his conclusion. Had he properly evaluated and weighed the material and relevant evidence, His Lordship would have reached quite a different conclusion and decision. Consequently, the claim against the first defendant ought to have been allowed. (para 43)

(7) There were merits in the plaintiff's appeal. There was sufficient evidence to find that the claim as pleaded and to infer that the sixth defendant had the ostensible authority to act for the first defendant, who was not an innocent party to the whole investment scheme. The trial judge was plainly wrong in reaching the conclusions that he did in respect of the first defendant. (para 44)

(8) The third defendant was put on inquiry when the large sums were paid in; that it had a duty to inquire and return the monies. When it failed to so, it was reasonable for the trial judge to conclude that the third defendant knew that the monies were intended for the investment scheme agreement which the third defendant had conspired with the

sixth defendant to put in place in order to cheat and defraud the plaintiff. Consequently, the trial judge was fully justified and correct in rejecting the third defendant's contention that the monies were intended for investment in some development of land. (paras 46 & 47)

Bahasa Malaysia *Headnotes*

Defendan pertama di Mahkamah Tinggi adalah sebuah syarikat yang meluluskan permit sementara perayu ('defendan ketiga') adalah sebuah syarikat yang berurusan dengan kereta mewah. Defendan kedua adalah Pengarah Urusan defendan pertama manakala defendan keempat dan kelima adalah pengarah dan setiausaha syarikat bagi defendan ketiga. Defendan keenam, seperti yang didakwa oleh responden ('plaintif') adalah individu yang mewakili dan mempunyai kuasa zahir defendan pertama dan ketiga, berkonspirasi dengan semua defendan lain untuk menipu plaintif melalui satu skim pelaburan yang melibatkan import dan penjualan kereta mewah dengan pulangan terjamin dan keuntungan. Plaintif mendakwa bahawa dia melabur dalam skim ini melalui perjanjian bertarikh 9 November 2012 yang dibuat antara plaintif dan defendan keenam dan membuat dua bayaran berjumlah RM2,450,000 kepada defendan ketiga dan keenam. Apabila kereta-kereta tersebut tidak tiba, defendan keenam mengeluarkan dua cek berjumlah RM180,000 dan RM300,000 sebagai pengembalian pelaburan. Malangnya, kedua-dua cek tersebut telah ditolak. Plaintif menuntut untuk pengembalian pelaburannya dan pulangan keuntungan yang dijanjikan bersama dengan relif-relif sampingan lain. Defendan pertama dan kedua menafikan liabiliti dengan menegaskan bahawa tiada priviti kontrak antara mereka dan plaintif, dan bahawa mereka tidak mempunyai pengetahuan tentang perjanjian tersebut. Defendan-defendan, sebaliknya, menuntut balas bagi penyalahgunaan proses. Begitu juga, dengan defendan ketiga dan keempat, berdasarkan ketiadaan priviti kontrak. Hakim bicara mendapati bahawa (i) tuntutan konspirasi tidak dibuktikan terhadap defendan pertama, kedua dan keenam kerana plaintif gagal membuktikan kewujudan perjanjian antara mereka untuk menipu plaintif; (ii) tiada priviti kontrak untuk mengaitkan apa-apa liabiliti terhadap defendan pertama dan kedua; (iii) plaintif sepatutnya menjalankan pengesahan atau penyiasatan bebas terhadap kedudukan defendan keenam dalam defendan pertama dan bukannya menganggap bahawa defendan keenam adalah wakil defendan pertama; (iv) defendan keenam hanyalah seorang broker yang memperkenalkan pembeli berpotensi untuk kereta yang dijual oleh defendan pertama; dan (v) defendan ketiga telah, melalui tingkah laku, memberi kuasa zahir kepada defendan keenam untuk bertindak bagi pihaknya. Hakim bicara juga menolak tuntutan defendan ketiga bahawa wang yang dibayar ke dalam akaunnya dimaksudkan untuk suatu projek pembangunan baru. Sehubungan itu, pada akhir pendengaran, tuntutan hanya dibenarkan terhadap defendan ketiga dan keenam dengan kos defendan ketiga ditanggung oleh defendan keempat. Tuntutan terhadap defendan yang

A selebihnya ditolak sama seperti tuntutan balas defendan pertama dan kedua. Defendan ketiga merayu melalui rayuan pertama, sementara rayuan plaintif, hanya berkenaan dengan keputusan terhadap defendan pertama, adalah rayuan kedua.

B **Diputuskan (membenarkan rayuan plaintif terhadap defendan pertama; menolak rayuan defendan ketiga)**
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara jelas terkhilaf dalam menolak tuntutan tersebut berdasarkan ketiadaan priviti kontrak. Tuntutan plaintif terhadap defendan-defendan tidak pernah diasaskan pada kontrak tetapi pada tort konspirasi. Hakim bicara sepatutnya menghargai kes yang dikemukakan dengan baik, dan menilai semua keterangan yang dikemukakan ketika mempertimbangkan sama ada tuntutan konspirasi terbukti. Apa yang dilakukan oleh hakim bicara adalah untuk memeriksa tuntutan dari mana atau dengan siapa pihak plaintif mempunyai hubungan kontrak, dan setelah mendapati bahawa ia bukan dengan defendan pertama tetapi dengan defendan ketiga, menolak tuntutan terhadap defendan pertama. Dengan berbuat demikian, hakim bicara tidak mengambil kira bukti material dan relevan yang dikemukakan oleh plaintif yang kekal tidak dijelaskan.

(2) Hakim bicara terkhilaf kerana tidak mempertimbangkan dengan selanjutnya sama ada konspirasi yang dikatakan itu adalah salah satu 'konspirasi mudah' atau konspirasi untuk mencederakan; atau konspirasi di mana cara yang menyalahi undang-undang telah digunakan, sering disebut sebagai 'konspirasi cara yang salah'. Sekiranya hakim bicara meneliti isu ini, hakim bicara akan menyimpulkan dari kes yang diplidkan bahawa tort konspirasi yang dipersoalkan adalah tort konspirasi cara yang salah. Undang-undang tentang 'konspirasi cara yang salah' tidak memerlukan plaintif untuk membuktikan bahawa terdapat niat utama di pihak defendan untuk mencederakan plaintif. Penggunaan cara yang salah iaitu untuk menipu, dengan sifatnya, cukup untuk menyebabkan defendan-defendan bertanggungan, tanpa mengira niat utama mereka.

(3) Dalam tort konspirasi, elemen perjanjian tidak semestinya merujuk kepada perjanjian secara bertulis atau bersifat formal yang umumnya difahami dalam urusan komersial atau kontrak. Apa yang perlu ditunjukkan oleh plaintif adalah kewujudan gabungan usaha yang dikatakan sebagai alegasi konspirasi bersama. Dalam kes plaintif yang diplidkan, dakwaan konspirasi melibatkan keseluruhan skim pelaburan yang terletak tidak hanya dalam perjanjian 9 November 2012 tetapi dalam penglibatan dan peranan defendan-defendan, terutama defendan pertama. Sehubungan ini, hakim bicara gagal mengambil kira keterangan material yang jelas membuktikan konspirasi pada pihak defendan pertama.

(4) Tidak dipertikaikan bahawa plaintif telah melabur dalam skim, bahawa dia membayar sejumlah wang sebanyak RM2,450,000; tetapi tidak menerima kereta dan tiada pulangan. Orang yang berjumpa dengan plaintif berkaitan dengan skim tersebut adalah defendan keenam yang mendakwa bahawa dia mewakili dan mempunyai kuasa zahir daripada defendan pertama dan ketiga untuk menjadi sebahagian daripada perjanjian skim pelaburan tersebut. Bukan sahaja defendan keenam tidak mengetengahkan versi cerita pihaknya atau untuk menafikan tuduhan plaintif, walaupun dia menjalankan perbicaraannya sendiri, tuduhan plaintif adalah terbukti. Tiada rayuan oleh defendan keenam.

(5) Terdapat keterangan yang mencukupi bahawa defendan keenam mempunyai kuasa jelas dan zahir untuk bertindak bagi defendan pertama yang mengikat defendan pertama kepada perbuatan dan tindakan defendan keenam. Pelbagai tindakan yang diambil oleh defendan keenam dalam rayuan sekarang adalah perwakilan dari segi kelakuan yang mengikat defendan pertama. Tindakan-tindakan ini yang dilakukan oleh defendan keenam menyokong hujahan bahawa terdapat kuasa jelas atau zahir yang diberikan kepada defendan keenam berhubung dengan tuntutan plaintif.

(6) Kesemua bahan dan keterangan material yang relevan itu lebih daripada mencukupi untuk membuat dapatan bahawa terdapatnya konspirasi bukan sahaja daripada defendan ketiga dan keenam tetapi juga defendan pertama. Hakim bicara sepatutnya menimbang semua keterangan yang dikemukakan oleh defendan-defendan sebelum mncapai kesimpulannya. Sekiranya hakim bicara menilai dengan betul dan menimbang bahan dan keterangan relevan, hakim bicara akan mencapai kesimpulan dan keputusan yang berbeza. Oleh itu, tuntutan terhadap defendan pertama sepatutnya dibenarkan.

(7) Terdapat merit dalam rayuan plaintif. Terdapat keterangan yang mencukupi untuk mendapati tuntutan seperti yang diplidkan dan menyimpulkan bahawa defendan keenam mempunyai kuasa untuk bertindak bagi defendan pertama, yang bukan pihak yang tidak bersalah terhadap keseluruhan skim pelaburan. Hakim bicara secara jelas terkhilaf dalam mencapai kesimpulan berkaitan defendan pertama.

(8) Defendan ketiga disoal siasat apabila jumlah wang yang besar telah dibayar; bahawa ia mempunyai kewajipan untuk menyiasat dan mengembalikan wang itu. Apabila gagal berbuat demikian, adalah munasabah bagi hakim bicara menyimpulkan bahawa defendan ketiga mempunyai pengetahuan bahawa wang tersebut dimaksudkan untuk perjanjian skim pelaburan yang defendan ketiga telah berkonspirasi dengan defendan keenam untuk menipu plaintif. Oleh itu, hakim bicara wajar dan betul dalam menolak hujahan defendan ketiga bahawa wang tersebut dimaksudkan untuk pelaburan dalam beberapa pembangunan tanah.

Case(s) referred to:

Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case [1985] 1 CLJ 533; [1985] CLJ (Rep) 64 FC ***(refd)***

Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd & Another [1964] 1 All ER 630 ***(refd)***

Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***

Tekital Sdn Bhd v. Sarina Kamaludin & Ors [2012] 1 LNS 774 HC ***(refd)***

Wu Yang Construction Group Ltd v. Zhehiang Jinyl Group Co Ltd [2006] 4 SLR 451 ***(refd)***

(Civil Appeal No: W-02(NCVC)(W)-2119-12-2015)

For the appellant - Aiznin Sairi Sulaiman & Tajul Anuar Zubairi; M/s Ramli Shahrir & Tajul

For the respondent - David Gurupatham & Wan Azmir Wan Majid, Nor Hazira Abu Haiyan & Deepa Mogan; M/s Hafarizam Wan & Aisha Mubarak

(Civil Appeal No: W-02(NCVC)(W)-182-01-2016)

For the appellant - David Gurupatham, Wan Azmir Wan Majid, Nor Hazira Abu Haiyan & Deepa Mogan; M/s Hafarizam Wan & Aisha Mubarak

For the respondent - Ramesh N Puranachandran & Nur Sazarina Said; M/s Ramesh Yum & Co

[Editor's note: For the High Court judgment, please see Lokman Dato' Mohd Kamal v. Panther Car Co (Malaysia) Sdn Bhd & Ors [2016] 1 LNS 615 (varied).]

Reported by Sandra Gabriel

JUDGMENT

Mary Lim JCA:

Introduction

[1] These two related appeals which arose from the same trial, were heard together. For ease of understanding, we shall refer to the parties as they were before the High Court.

[2] The plaintiff's claim before the High Court was against six defendants. The plaintiff alleged that these six defendants conspired to defraud him under an investment scheme agreement to import and sell cars. The plaintiff subsequently withdrew his claim against the fifth defendant who was the company secretary of the third defendant but he proceeded to a full trial against the remaining defendants.

[3] At the conclusion of hearing, the claim was allowed but only against the third and sixth defendants with the third defendant's costs to be borne by the fourth defendant. The claim against the remaining defendants was dismissed as was the first and second defendants' counterclaim.

[4] The third defendant appealed *vide* the first appeal, Civil Appeal No: W-02(NCVC)(W)-2119-12-2015; whilst the plaintiff's appeal which is only in respect of the decision against the first defendant, is the second appeal, Civil Appeal No.: W-02(NCVC)(W)-182-01-2016. There are no cross-appeals in both appeals.

[5] Upon hearing learned counsel for the respective parties, we affirmed the decision of the High Court in respect of the third defendant and dismissed the first appeal. In respect of the second appeal, we found merits in the arguments raised. Consequently, we allowed the appeal, set aside the orders of the High Court in respect of the first defendant and entered judgment against the first defendant. These are our reasons.

Brief Facts

[6] There were six defendants in the original action. The fist defendant is a company which has approved permits or APs while the third defendant is a company dealing with luxury cars. The second defendant is the Managing Director of the first defendant whereas the fourth and fifth defendants are director and company secretary in the third defendant. The sixth defendant, on the other hand is an individual. He and the second defendant are related.

[7] The plaintiff claimed that the sixth defendant, an individual, representing and with the ostensible authority of the first and third defendants, conspired with all the other defendants to defraud him *vide* an investment scheme involving the import and sale of luxury cars with guaranteed returns and profits. The plaintiff claimed that he invested in this scheme through an agreement dated 9 November 2012 made between the plaintiff and the sixth defendant. Under this agreement, the plaintiff would sell luxury cars that were imported through the first defendant, the party with the APs. The plaintiff paid two sums totalling RM2,450,000 to the third and sixth defendants.

[8] Under the agreement, the cars were expected to be imported into Malaysia by February 2013. When the cars did not arrive, the plaintiff inquired with the sixth defendant in March 2013. He was told that the cars were still with the Customs Department awaiting the issuance of APs. The sixth defendant further assured the plaintiff that he, the plaintiff could expect returns on his investment by June. In June and August 2013, the sixth defendant issued two cheques of RM180,000 and RM300,000, purportedly as returns of the investments. Unfortunately, both cheques were dishonoured.

[9] The plaintiff decided to call on the second defendant, the first defendant's managing director to discuss his investment. The plaintiff went with his father. At that meeting, the second defendant told the plaintiff and his father that the sixth defendant was not a permanent staff of the first defendant, that he will settle the matter, and that he will make a police report

to that effect to protect the reputation of the first defendant which had been tarnished by the sixth defendant's acts. No police report was lodged. The plaintiff finally never got the cars or his investments, or any of his money back. He then sued alleging that the defendants had colluded amongst themselves to defraud him in the aforesaid investment. The plaintiff claimed a refund of his investments and the promised returns of profits together with other ancillary relief. The plaintiff sought to lift the corporate veil in order to make the second and fourth defendants personally liable.

[10] The first and second defendants denied liability arguing that there was no privity of contract between them and the plaintiff, and that they had no knowledge of the alleged arrangements. These defendants have counterclaimed for abuse of process. Likewise, the third and fourth defendants, also on the basis of lack of privity of contract.

[11] The plaintiff called seven witnesses including himself; the second defendant testified on behalf of himself and the first defendant and called another witness, one Mohd Fazlan Ahmad Tarmuzi (DW2); while the third and fourth defendants testified through the fourth defendant and one Jafrei Nordin (DW4). The sixth defendant did not take the stand nor did he call any witnesses to testify on his behalf although he personally conducted the trial on his own behalf.

Decision Of The High Court

[12] The learned judge found the claim of conspiracy not proved against the first, second and sixth defendants, finding from the pleadings and the evidence led that the plaintiff had failed to establish the existence of an agreement between them to defraud the plaintiff. The learned judge further found, as against the first and second defendants, that there was a lack of privity of contract to attach any liability. In the learned judge's view, the fact that the first defendant's name is mentioned in the agreement "cannot be equated to mean that there is contractual nexus between the plaintiff and the first defendant. The unilateral inclusion or mention of the first defendant in the agreement of 9 November 2013 cannot mean that the first defendant is a party to the contract. No one representing the first defendant had executed the said agreement."

[13] The learned judge found that the plaintiff should have carried out an independent verification or investigation of the sixth defendant's position in the first defendant instead of assuming that the sixth defendant was an authorised representative of the first defendant. The learned judge accepted the second defendant's testimony that the sixth defendant was "merely a broker who had introduced potential buyers for cars sold by the first defendant." The learned judge rejected the plaintiff's argument of agency that the sixth defendant had apparent authority of the first defendant to act for the first defendant in relation to the agreement.

[14] In contrast, the learned judge found ample evidence against the third and sixth defendants; that the agreement was made by the sixth defendant on behalf of the third defendant. According to the learned judge, the fact that the sixth defendant asked the plaintiff to draw the cheques payable to the third defendant's bank account and had in fact deposited the cheques into the third defendant's account, with the knowledge and concurrence of the fourth defendant, shows that the third defendant had by conduct, given ostensible authority to the sixth defendant to act on its behalf. The learned judge however, was not prepared to lift the corporate veil in order to impose personal liability on the fourth defendant.

[15] Because the monies were paid into the third defendant's account, the learned judge found that the third defendant had a duty to enquire if the monies were received for proper purposes; otherwise it had a duty to return the monies. As far as the learned judge was concerned, even if the third defendant was an innocent victim, which His Lordship did not find to be the case, "it cannot be denied that the third defendant had allowed its bank account to be used in such a manner so as to facilitate the perpetration of a fraud. On the facts, it would be wholly inequitable to absolve the third defendant of any culpability." Had the third defendant enquired, the learned judge found that it could possibly have prevented the fraud being committed by the sixth defendant. The learned judge also rejected the third defendant's claim that the monies that were paid into its account were meant for a joint venture project in Bandar Enstek.

[16] The third defendant has appealed (the first appeal) and so has the plaintiff, but only in relation to his claim against the first defendant (the second appeal). The appeals are confined to the matters on appeal.

Decision Of This Court

[17] It is our considered opinion that the learned judge was plainly erroneous in rejecting the claim on the basis of a lack of privity of contract. The plaintiff's claim against the defendants was never founded on contract but on the tort of conspiracy - see paras. 7 to 22 of the statement of claim. As for that aspect of the claim, the learned judge had found this allegation proved only as against the third and sixth defendants; hence the appeals. In this regard, we also found misapprehensions on the law and on the facts that required appellate intervention. We found that the learned judge ought to have properly appreciated the pleaded case, and evaluate all the evidence led when considering whether the claim of conspiracy was proved. What the learned judge did was to examine the claim from where or with whom did the plaintiff have a contractual relationship, and having found that it was not with the first defendant but with the third defendant, then proceeded to dismiss the claim against the first defendant. While that contractual aspect may have thrown some light as to how and who was involved in the scheme,

it was but one aspect of the whole investment scheme agreement. That aspect was a good place to start, but it was only a start and should have been the start and not the conclusion of the learned judge's evaluation and consideration. In so doing, the learned judge failed to take into account many material and relevant pieces of evidence led by the plaintiff which stood unexplained and unaccounted for by the defendants and which proved, quite satisfactorily the pleaded case of conspiracy.

[18] As the learned judge quite rightly recognised, in order to make out a case of conspiracy, the plaintiff would need to establish that there was an agreement between two or more persons to injure the plaintiff; and that the acts done in execution of that agreement resulted in damage to the plaintiff. However, the learned judge fell into error in not considering further whether the conspiracy alleged was one of "simple conspiracy" or conspiracy to injure; or conspiracy where unlawful means have been used, often referred to as "wrongful means conspiracy". That is an important and necessary question that the learned judge had to ask himself and of the parties as it will determine the applicable principles. The principles which are applicable depend very much on the specific allegations of conspiracy that are pleaded in the statement of claim. In *Wu Yang Construction Group Ltd v. Zhehiang Jinyl Group Co Ltd* [2006] 4 SLR 451, 491, the court expressed that:

> [75] It is apposite to note that the actual principles of law relating to the tort of conspiracy are none too clear. What is clear is that there are traditionally, two separate and distinct aspects or ways of applying the tort of conspiracy. As might have been surmised, the legal principles with respect to each aspect are somewhat different.
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> [76] There is, first, the situation where unlawful means have been used (also known as "wrongful means conspiracy"). The relevant law in this context appears to be straightforward. In particular, there is no need for the plaintiff concerned to prove that there has been a predominant intention on the part of the defendant to injure it. It would appear that the very utilisation of unlawful means is, by its very nature, sufficient to render the defendants liable, regardless of their predominant intention. This would appear to be both logical as well as just and fair, especially if we bear in mind the fact that the central core, as it were, of the tort of conspiracy hinges on the proof that the conspiracy is somehow unlawful and that the plaintiff is entitled to succeed provided that it can prove that it has suffered damage.
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> 77. Secondly, there is the situation where lawful means have been used (also known as "simple conspiracy" or "conspiracy to injure"). Unlike the first category referred to briefly in the preceding paragraph, this second category requires that the plaintiff prove that there has been a predominant intention on the part of the defendants to injure it (see the leading House of Lords decision of *Lornho plc v. Fayed* [1992] 1 AC 448 ("*Lornho*")). This additional element is required simply because, without it, the alleged conspiracy would be devoid of any element of

unlawfulness. It is precisely because there is a predominant intention on the part of the defendants to injure the plaintiff that the plaintiff is entitled to succeed provided (again) that it (the plaintiff) can prove that it has suffered damage. It is this concerted predominant intention to injure that renders the conduct of the defendants, which would otherwise have been lawful, unlawful or illegitimate. As Lord Bridge of Harwich, who delivered the substantive judgment of the House in *Lornho* (with which the other law lords agreed), observed (at 465-466):

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action **for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious**. But when the conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful. (emphasis added)

[19] We found that had the learned judge examined that critical issue, the learned judge would have concluded from the pleaded case that the tort of conspiracy under scrutiny was one of conspiracy by unlawful means. The law on "wrongful means conspiracy" does not require the plaintiff to prove that there has been a predominant intention on the part of the defendants to injure the plaintiff. The very utilisation of unlawful means, that is to cheat or to defraud, by its very nature, is sufficient to render the defendants liable, regardless of their predominant intention. After all, the learned judge recognised that the plaintiff's allegation was that the whole investment scheme was set out to cheat or defraud the plaintiff. And, insofar as such a claim against the third and sixth defendants is concerned, the learned judge had no problems finding the claim proved; the only issue in this appeal is whether the first defendant was also involved:

> ... I find that there is ample evidence to found a case against the 3rd and 6th defendants, but none so against the 4th defendant. The evidence shows that the agreement dated 9.11.2013 was made by the 6th defendant on behalf of the 3rd defendant.

[20] Although the learned judge concluded that the entire claim against the first and second defendants failed because the plaintiff had failed to establish any such agreement between these defendants and the sixth defendant to defraud the plaintiff, His Lordship did not elaborate on his reasons for so concluding. It would however, appear that the learned judge reached this conclusion because he was very much persuaded by the principle of privity of contract, that there was none between the first defendant and the plaintiff when the agreement dated 9 November 2012 was examined. And, this, with respect, is where we see the learned judge is in error.

[21] In the tort of conspiracy, the element of agreement does not necessarily refer to an agreement in writing or of the formal nature generally understood in commercial or contractual arrangements. In *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394, p. 49 (CLJ); p. 406 (MLJ), the Court of Appeal opined that:

> [33] It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. **'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators**. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar will have to make for the Kangoo project.
>
> [34] It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement. (emphasis added)

[22] Nallini Pathmanathan J (as she then was) in the case of *Tekital Sdn Bhd v. Sarina Kamaludin & Ors* [2012] 1 LNS 774; [2012] 8 MLJ 734, further elucidated:

> [93] In *Clerk & Lindsell on Torts*, (18th Ed), at chapter 24, the author states in relation to the element of 'agreement' as follows:
>
> > … Of the various words used to describe a conspiracy, 'combination' has been preferred on the ground that 'agreement' might be thought to require some agreement of a contractual kind, whereas all that is needed is a combination and common intention, (see *Belmont Finance Corp v. Williams Furniture Ltd (No 2)* [1980] 1 All ER 393. But judicial descriptions still speak of 'concerted action taken pursuant to agreement' … But there must be combination; lack of overt acts or an uncommunicated intention to join a conspiracy may show there has not been effective combination … A company, being a separate legal person can conspire with its directors; and the knowledge of the company may be found in the person (usually a director) who has management control (as its *alter ego*) for the transaction or act in question …
>
> [94] From the foregoing passage it is evident that it is not necessary that evidence of any form of contractual agreement be produced. It is sufficient that there is evidence produced that the defendants acted in combination, which is the case here. I have set out in this judgment in relation to each of the defendants why I have concluded that they acted in combination and with common intention.
>
> [95] …

[96] In *Renault SA v. Inokom Corp Sdn Bhd & Anor And Other Appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32 the Court of Appeal had occasion to consider the salient features of a claim founded on the tort of conspiracy. They quoted, *inter alia*, from the Common Law Library relating to Precedents of Pleadings:

> … The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v. Vibart* [1963] 1 QB 234, affirmed [1963] 1 QB 528). Pleading. The statement of claim should describe who the several parties and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy and it must then proceed to set forth, with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy, and lastly, it must allege the injury and damages occasioned to the plaintiff thereby (The Common Law Library - No. 5 - Precedents of Pleadings - s 26 - Conspiracy) …

[23] Hence, what the plaintiff needed to show was the existence of a combination of efforts of the alleged co-conspirators. In the pleaded case of the plaintiff, the allegation of conspiracy involves the whole investment scheme which was nestled not just in the agreement of 9 November 2012 but in the involvement and roles of the various defendants, especially the first defendant. In this regard, we found that the learned judge had failed to take into account material evidence that clearly proved evidence of conspiracy on the part of the first defendant.

[24] The plaintiff called witnesses who testified to this scheme and the involvement of the defendants. The plaintiff called first, one Kelvin Tong Teng Hoe (PW1), a director of a company called Extreme Supercars Sdn Bhd, which trades in international/imported and local used cars. It was this witness who first introduced the plaintiff to the sixth defendant having dealt with the first defendant through the sixth defendant. This witness testified on how the cars were to be imported by the first defendant. In fact, PW1 testified that there were other cars which had previously been imported by the first defendant under similar arrangements, that "that's how trust were built and that's why we started with this particular car" - see cross-examination by the sixth defendant who conducted the trial himself; and a second round of cross-examination by learned counsel for the first and second defendants. This witness provided important corroborative evidence of the existence of an arrangement involving the several parties as alleged by the plaintiff. Unfortunately, his material testimony was not taken into account at all by the learned judge.

[25] PW1 also testified that the sixth defendant, a nephew of the second defendant had a proper office in the first defendant and that the staff of the first defendant referred to the sixth defendant as "the current manager" of the first defendant, that "he is the right person to talk to because he is the influential one and the person that can assist us in importing cars." Monies were paid to the sixth defendant and that it was PW1's understanding that the money will then be paid to the first defendant, though how the sixth defendant would set about doing that, he would not know. Again, this testimony was relevant and material to the existence of not just an investment scheme agreement involving the sixth defendant, but involving the first defendant, without whose APs, cars, and premises, the whole scheme would not have been successfully enacted.

[26] It would appear that the learned judge believed the plaintiff, that there was a conspiracy to cheat and defraud him by the defendants. He only did not believe that the conspiracy involved the first, second and fourth defendants. His Lordship believed that it was only the third and sixth defendants who had conspired to cheat and defraud the plaintiff. It would also appear that the learned judge had accepted the testimony of the second defendant, that he had no knowledge of this written agreement and that he had not received the monies paid by the plaintiff. The money was not paid to the first defendant but to the third and fourth defendants. The second defendant was only approached after the deal had gone sour.

[27] The learned judge seems to have overlooked that the whole scheme alleged by the plaintiff was about the import and sales of luxury cars with guaranteed returns and profits. This is evident when the 9 November 2012 agreement is examined properly:

> Global Ventures Network Sdn Bhd (815543-H) 9 November 2012
> 17-3, Jalan Mesra Niaga,
> Taman Mesra Batu 13
> Jalan Cheras
> 43000 Kajang
> Selangor
> Attention: Mr. Ahmad Hanif Solhi bin Omar
>
> Dear Mr. Ahmad,
>
> We hereby confirm the list of cars to be purchase through Panther Car Co. (Malaysia) Sdn Bhd as follow:
>
> Costing and Profit
>
> (a) Audi Q7 3.0 TDI (2011) x 2 units
>
> (i) Car Cost: RM220,000 (£44,000 x 5)
>
> (ii) AP & Shipping: RM45,000
>
> (iii) Duty: RM130,000
>
> Total Cost; RM395,000

Expected selling price: RM440,000 (Margin RM45,000) per car

2 cars: RM220,000 x 2 = RM440,000

(b) Audi A8 4.2 LWR

(i) Car Cost: RM210,000 (£42,000 x 5)

(ii) AP & Shipping: RM45,000

(iii) Duty: RM174,000

Total Cost: RM429,000

Expected Selling Price: RM500,000 (Margin RM71,000)

(c) Aston Martin Rapide (2011) x 1 unit

(i) Car Cost: RM475,000 (£95,000 x 5)

(ii) AP & Shipping: RM45,000

(iii) Duty: RM414,000

Total Cost: RM934,000

Expected selling price: RM1,050,000 (Margin RM116,000)

(d) Lamborghini Gallardo LP560 (2010) x 1 unit

(i) Car Cost: RM550,000 (£110,000 x 5)

(ii) AP & Shipping: RM45,000

(iii) Duty: None

Total Cost: RM595,000

Expected selling price: RM750,000 (Margin 155,000)

(e) Ferarri 458 x 1 unit

(i) Car Cost: RM775,000

(ii) AP & Shipping: RM45,000

(iii) Duty: RM480,000

Total Cost: RM1,300,000

Expected selling price: RM1,600,000 (Margin 300,000)

The above list consist of total cost per unit of the car and the expected profit margin which you undertake are achievable.
The total of the all the above car total RM2,450,000.
Payment paid on the 9th November 2012 rents through CIMB RM425,000
Balance RM2,025,000 to be paid.

Thank you

Yours Sincerely,

Lokman bin Dato' Mohd Kamal Teh

To be confirmed,

Ahmad Hanif Solhi b Omar
810616-06-5211

[28] It is undisputed that the plaintiff invested in the scheme, that he paid a total sum of RM2,450,000; but he received no cars and no returns. The person who approached the plaintiff with the scheme was the sixth defendant who claimed that he represented and had the ostensible authority of the first and third defendants to be part of this investment scheme agreement. Now, not only did the sixth defendant not step forward to tell his side of the story or to deny the plaintiff's allegations, although he conducted his own trial, the plaintiff's allegations were found proved. There is no appeal by the sixth defendant.

[29] According to the plaintiff's claim, the sixth defendant is not a car salesman but a person authorised to speak and transact for the first and third defendants. The investment scheme agreement saw at least one car imported and that was an Aston Martin imported for one Ramasamy before there were no further cars supplied.

[30] To counter the plaintiff's case was the first and second defendants' version - in the words of the second defendant, the sixth defendant was a "mere broker who introduced potential buyers for cars sold by the first defendant."

[31] On this, we find that the learned judge had failed to consider that the sixth defendant was in fact related to the second defendant, the Managing Director of the first defendant, that he had office space in the first defendant's showroom, and that he was referred to as the "current manager" of the first defendant, that "he is the right person to talk to because he is the influential one and the person that can assist us in importing cars." These seemingly innocuous factors were relevant and indicative of the role played by the sixth defendant in relation to the first defendant; that he was, in truth, and in reality, not a "mere broker who introduced potential buyers for cars sold by the first defendant" but someone who had a fairly substantial role to play in the first defendant. It is highly unlikely that such a "mere broker", as described by the second defendant, would have been given the mandates and degree of authorisation to act on behalf of the first defendant as the sixth defendant did.

[32] Although the sixth defendant was a broker, he had the mandate to sign as the first defendant's representative and more significantly, as director in a sub-tenancy agreement dated 28 February 2013 to rent land or space on behalf of the first defendant for the purpose of the first defendant's purposes. The land located at Centre Point Bandar Utama, Lot 125 Lebuh Bandar Utama, Petaling Jaya was rented for exhibition purposes by the first defendant - see pp. 723 to 727 (exh. P2). This document was not challenged at the trial. In fact, Mohd Yuzamil bin Mohd Yunus, a Director of Piramid Azim Sdn Bhd, the main tenant with whom the first defendant sub-tenanted the land, testified as PW3. This witness testified that the land was tenanted for use as showroom space "for demo and exhibition".

[33] The plaintiff further tendered letters exchanged between the first defendant and the Malaysian Royal Customs Department, and with the Road Transport Department around the same period. These letters, written by Mohd Fazlan bin Ahmad Tarmuzi (DW2), who is the second defendant's son and a director of the first defendant, showed various arrangements made by the first defendant to use the land as sub-tenanted by the sixth defendant including seeking the permission of the Customs Department to take 20 of its cars from the licensed warehouse "for demo and exhibition" at that sub-tenanted place - see pp. 680 to 686. This sub-tenanting of the land at Centre Point cannot be the act of a mere broker. According to PW3, the sixth defendant signed the tenancy agreement as the first defendant's director and even paid the deposit for the rental. Although both DW1 (the second defendant) and DW2 had no knowledge of this sub-tenancy agreement, it remains unchallenged and independent evidence of the role played by the sixth defendant; that the land rented and where the deposit was paid for by him for the first defendant, was indeed utilised by the first defendant for the first defendant's purpose and no other.

[34] There is further evidence of the importance and role of the sixth defendant in the first defendant in the letters sent by the first defendant to the Road Transport Department. In those letters, the first defendant advised that the sixth defendant was its authorised representative in matters relating to the trade plates to be used for the cars on sale.

[35] The status of the sixth defendant as 'mere broker' is further disproved by a letter dated 9 October 2012, signed by the second defendant to the Immigration Department. In this letter, the second defendant advised the Immigration Department that the sixth defendant is authorised to represent him in matters before the department - see p. 721.

[36] Further, the learned judge failed to have regard to the fact that the import and sales of the luxury cars could not have come to pass unless and until there was an entity with the APs. Without the APs, there would have been no imported luxury cars to begin with. The only entity in this arrangement with the APs is the first defendant. The third defendant, a company dealing with luxury cars, did not have the requisite APs. It became finally, the conduit for the receipt of monies paid by the plaintiff.

[37] We cannot agree with the learned judge that the plaintiff was wrong in assuming that the sixth defendant was an authorised representative of the first defendant because the sixth defendant had an office space in the first defendant's showroom in Ampang. It was the learned judge's view that the plaintiff ought to have made separate or independent inquiries as to the sixth defendant's status and capacity in relation to the first defendant. Because the plaintiff failed to do so and in the absence of any evidence to the contrary,

the sixth defendant could not be said to be an authorised agent or representative of the first defendant, to the extent that the sixth defendant may enter into agreements on behalf of the first defendant. The learned judge found the pleadings and the evidence "devoid of any such apparent authority. In the circumstances, the plaintiff's argument of agency would necessarily fail."

[38] With respect, we disagree. Given the various pieces of evidence as alluded to above and the evidence of PW1 who had testified on the existence of such arrangements, it was reasonable for the plaintiff to have reached the assumptions and conclusions as he did about the sixth defendant. As mentioned, the sixth defendant was no ordinary "mere broker" but was one related to the second defendant, given substantial mandates and was quite involved in the running and management of the first defendant, matters which are generally left to the directors of a company and not a "mere broker". The first defendant's bank statements showed substantial payments to the sixth defendant. These payments go beyond payments or transactions ordinarily conducted and involving a mere part-time employee or broker. These payments included an advance of a substantial sum of money to London.

[39] The plaintiff had further shown that the cars to be imported were in fact imported through the APs applied for and held by the first defendant and applied for by the second defendant - see pp. 744 to 746 of the record of appeal.

[40] We find that the learned judge had erred when he found that the sixth defendant lacked authority to act for the first defendant. Based on the evidence as cited above, there is ample evidence to find that the sixth defendant had apparent and ostensible authority to act for the first defendant such as to bind the first defendant to the sixth defendant's deeds and actions - see the Federal Court's decision in *Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case* [1985] 1 CLJ 533; [1985] CLJ (Rep) 64; [1985] 1 MLJ 350. In this case, the Federal Court applied the English Court of Appeal's decision in *Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd & Another* [1964] 1 All ER 630 where the distinction between an actual and an apparent or ostensible authority was adequately explained. For the purpose of the present appeals, it is the court's remarks on ostensible or apparent authority which are of relevance:

> An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To

> the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract, it is irrelevant whether the agent had actual authority to enter into the contract.
>
> In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is, all that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that, apparent authority, or upon the representation of the agent, that is, warranty of authority. **The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, ie, by permitting the agent to act in some way in the conduct of the principal's business with other persons**. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has normally "actual" authority to entire into. (emphasis added)

[41] The various acts undertaken by the sixth defendant in the present appeals amount to representations by conduct which bind the first defendant. These acts done by the sixth defendant support the contention that there was apparent or ostensible authority given to the sixth defendant in relation to the plaintiff's claim.

[42] We further found that the learned judge had not put any stock to the meeting between the plaintiff, his father (PW5) and the second defendant held after the plaintiff had confronted the second defendant claiming for a refund of his investments. The learned judge failed to take into regard that there was never any denial by the second defendant of the existence of the investment scheme agreement or even of the sixth defendant's actions, or that he and thereby the first defendant did not seek to distance themselves from the sixth defendant's actions. Instead, there was admission by the second defendant who told the plaintiff that he would "settle this"; but nothing was done. There was also no police report lodged by the first and second defendants. Such conduct and action or omission is not consistent with the claim of absence of knowledge of the scheme or the involvement of the first defendant.

A **[43]** We are of the unanimous view that all these pieces of material and relevant evidence were more than sufficient to find evidence of conspiracy not just of the third and sixth defendants but also of the first defendant. The learned judge ought to have weighed all the above evidence against that which was led by the defendants before he reached his conclusion in the B manner that he did. Had he properly evaluated and weighed the material and relevant evidence that we have discussed above, His Lordship would have reached quite a different conclusion and decision. Consequently, the claim against the first defendant ought to have been allowed.

[44] For all the reasons set out above, we unanimously found merits in the C plaintiff's appeal. There was sufficient evidence before the learned judge to find that the claim as pleaded and to infer that the sixth defendant had the ostensible authority to act for the first defendant, who we did not find to be some innocent party to the whole investment scheme. The learned judge was plainly wrong in reaching the conclusions that he did in respect of the first D defendant.

[45] As for the claim against the third defendant, we are in full agreement with the learned judge that there is more than sufficient evidence to support the plaintiff's contention that the third defendant had a very definite role in the whole conspiracy. The monies were paid into the third defendant's E account by the plaintiff and such monies were paid pursuant to the investment scheme agreement. Such payments were properly accounted for by the plaintiff. PW6, the plaintiff himself had actually testified that he had prepared the payments in the first defendant's name but was asked to change that to the third defendant's, a company where the sixth defendant's sister F (the fourth defendant) as its director. The sixth defendant had also admitted to such receipt and purpose as claimed by the plaintiff.

[46] We further agree with the reasons reached by the learned judge that in respect of the third defendant, this defendant was put on inquiry when the large sums were paid in; that it had a duty to inquire and return the monies. G When it failed to so, it was reasonable for the learned judge to conclude that the third defendant knew that the monies were intended for the investment scheme agreement which the third defendant had conspired with the sixth defendant to put in place in order to cheat and defraud the plaintiff.

[47] Consequently, the learned judge was fully justified and correct in H rejecting the third defendant's contention that the monies were intended for investment in some development of land in Bandar Enstek, Nilai, Negeri Sembilan.

I

Conclusion

[48] Accordingly, the appeal by the plaintiff against the first defendant is allowed and the appeal by the third defendant is dismissed. The decision of the learned judge in respect of the first defendant is set aside and judgment in the terms pleaded at para. 26(ii) together with interest at the rate of 5% per annum from today to the date of realisation is entered against the first defendant.

[49] We further ordered costs of RM5,000 subject to the payment of allocator fee to be paid to the plaintiff. The respective deposits are further to be refunded to both the plaintiff and the third defendant.

[50] The decision of the learned judge is accordingly varied.