IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 02(f)-36-05/2018(B)
CIVIL APPEAL NO. 02(f)-37-05/2018(B)

BETWEEN

VEHENG GLOBAL TRADES SDN BHD
[Co. No: 119835-W] .. APPELLANT

AND

1. **AMGENERAL INSURANCE BERHAD**
   [Co. No: 44191-P]
   (Formerly known as Kurnia Insurance (Malaysia) Berhad)
2. **SUN LIFE MALAYSIA TAKAFUL BERHAD**
   [Co. No: 689263-M]
   (Formerly known as CIMB AVIVA Takaful Berhad)

.. RESPONDENTS

In the Court of Appeal, Malaysia
(Appellate Jurisdiction)
Civil Appeal No. B-02(NCVC)(W)-404-03/2016

BETWEEN

1. **AMGENERAL INSURANCE BERHAD**
   [Co. No: 44191-P]
   (Formerly known as Kurnia Insurance (Malaysia) Berhad)
2. **SUN LIFE MALAYSIA TAKAFUL BERHAD**
   [Co. No: 689263-M]
   (Formerly known as CIMB AVIVA Takaful Berhad)

.. Appellants

AND

1. **VEHENG GLOBAL TRADES SDN BHD**
   [Co. No: 119835-W]
2. **RHB ISLAMIC BANK BERHAD**
   [Co. No: 680329-V] .. Respondents

(Consolidated With)
[In the Court of Appeal, Malaysia
(Appellate Jurisdiction)
Civil Appeal No. B-02(NCVC)(W)-405-03/2016

BETWEEN

1. AMGENERAL INSURANCE BERHAD
[Co No: 44191-P]
(Formerly known as Kurnia Insurance (Malaysia) Berhad)
2. SUN LIFE MALAYSIA TAKAFUL BERHAD
[No. Syarikat: 689263-M]
(Formerly known as CIMB AVIVA Takaful Berhad)
.. Appellants

AND

1. VEHENG GLOBAL TRADES SDN BHD
[No. Syarikat: 119835-W]
2. RHB ISLAMIC BANK BERHAD
[No. Syarikat: 680329-V] .. Respondents

(Consolidated with)
[In the Court of Appeal, Malaysia
(Appellate Jurisdiction)
Civil Appeal No. B-02(NCVC)(W)-580-04/2016

BETWEEN

1. VEHENG GLOBAL TRADES SDN BHD
[No. Syarikat: 119835-W]
2. RHB Islamic Bank Berhad
[No. Syarikat: 680329-V] .. Appellants

AND

1. AMGENERAL INSURANCE BERHAD
[No. Syarikat: 44191-P]
2. SUN LIFE MALAYSIA TAKAFUL BERHAD
[No. Syarikat: 689263-M]
(Formerly known as CIMB AVIVA Takaful Berhad) .. Respondents

[In the Matter of the High Court of Malaya at Shah Alam
In the State of Selangor Darul Ehsan, Malaysia
Civil Suit No.: 22A(NCVC)-78-2011

BETWEEN

1. VEHENG GLOBAL TRADES SDN BHD
[Co. No: 119835-W]
2. RHB ISLAMIC BANK BERHAD
[Co. No: 680329-V] .. Plaintiffs

AND

1. AMGENERAL INSURANCE BERHAD
[Co No: 44191-P]
(Formerly known as Kurnia Insurance (Malaysia) Berhad)
2. SUN LIFE MALAYSIA TAKAFUL BERHAD
[No. Syarikat: 689263-M]
(Formerly known as CIMB AVIVA Takaful Berhad) .. Defendants]

CORUM

ZAHARAH BINTI IBRAHIM, HBM

DAVID WONG DAK WAH, HBSS

RAMLY HJ ALI, FCJ

BALIA YUSOF HJ WAHI, FCJ

ALIZATUL KHAIR BINTI OSMAN KHAIRUDDIN, FCJ

JUDGMENT OF THE COURT

Introduction

1. These are two appeals before us, namely Civil Appeal No. 02(f)-36-05/2018(B) (Appeal No. 36) and Civil Appeal No. 02(f)-37-05/2018(B) (Appeal No. 37). Both

appeals involve the same appellant, Veheng Global Traders Sdn Bhd (the Insured) and the same respondents, AmGeneral Insurance Berhad and Sun Life Malaysia Takaful Berhad (the Insurers). Both appeals are against the decisions of the Court of Appeal given on the 19.12.2017.

2. Appeal No. 36 relates to the decision of the Court of Appeal on the issue of liability, where the Court of Appeal ruled that the Insurers were entitled to avoid and repudiate the Insured's claim for breaches of conditions under the insurance policies in question. Appeal No. 37 relates to the issue of quantum, where the Court of Appeal set aside the decision of the High Court ordering the Insurers to pay the amount claimed as prayed for by the Insured.

3. The Insurers had earlier avoided and repudiated liability in respect of a fire insurance claim submitted by the Insured on the ground that the claim was

exaggerated and fraudulent, and also that there were breaches of policies warranty by the Insured. The High Court found in favour of the Insured and allowed the Insured's claim against the Insurers on the ground that the Insurers were liable under the insurance policies in question. On appeal by the Insurers, the Court of Appeal set aside the decision and order made by the High Court both on liability and quantum. Hence the present appeals before us.

Brief facts

4. The Insured, at the material time was in the business of import and export of used car parts. At the material time, it took out the following (4) insurance policies (the Policies) with the Insurers:

(i) Fire Insurance Material Damage Policy No. HB-0-08-H-000005 (on stock) for the period from 01-07-2008 to 30-06-2009 (FMD Policy 005);

(ii) Fire Insurance Damage Policy No. HB-0-08-H-000006 (on Renovation and Equipment) for the period from 01.07.2008 to 30.06.2009 (FMD Policy 006);

(iii) Fire Consequential Loss Policy No. HB-07-H000-189 (Gross Profit Consequential Loss) on increased costs of working for the period from 16.08.2008 to 15.08.2009 (FLC Policy 189);

(iv) Fire Consequential Loss Policy No. HB-0-07-H000733 (Gross Profit Consequential Loss) for the period from 19.12.2008 to 18.12.2009 (FCL Policy 733).

5. On 05.01.2009, a fire broke out at the Insured's premises at Lot 711, Jalan Batu Tiga, Rasau, Section 16, 40200 Shah Alam. The Insured submitted its claim for the insurance monies under all the 4 Policies, as a result of the fire.

6. The Insurers denied liability and repudiated the policies on the grounds, *inter alia*, that the fire was deliberately caused by the Insured either by itself or through a servant or agent; and that the claim under the Policies was deliberately exaggerated and fraudulent and thereby amounting to a breach of Condition 15 of the FMD Policies and Condition 12 of the FCL Policies. The Insurers also contended that there were breaches of the FEA Warranties by the Insured in making the claim. The Insured filed an action in the High Court to recover the sum due under the Policies.

7. The High Court, after full trial, allowed the Insured's claim against the Insurers. The Insurers appealed to the Court of Appeal against both decisions on liability and quantum.

8. The Court of Appeal unanimously allowed the Insurers' appeals, *inter alia* on the following grounds:

"[68] It is now clear that as long as the insurers can prove one of the limbs of Condition 15 or Condition 12 has been breached, the insurers are entitled to repudiate liability in respect of the entire claim. The common law duty of good faith has been enshrined in Condition 15 and Condition 12, and as such, the learned judge has failed to give sufficient judicial appreciation of this position in law and in failing to hold that the first respondent's claim is tainted with dishonesty resulting in the breach of Condition 15 and Condition 12 and the duty of good faith. These legal principles must be upheld and applied so that it will deter and prevent claims that are tainted with dishonesty or fraud. I find no difficulty whatsoever in holding on the strength of these well

recognized principles that the erroneous findings of the learned judge ought to be overturned. It is settled in our law that where the appellants alleged in their defence that the fire on the insured premises was deliberately started by the first respondent, the claims brought by the first respondent are fraudulent or deliberately exaggerated and thus had breached Conditions 15 and 12 of the FMD and FCL Policies respectively, the appellants have to prove that particular fact as required by s 101 of the Evidence Act 1950 on the balance of probabilities. This is the threshold that the appellants' evidence must attain in order to be successful at the trial.

[69] For the reasons that I have given, I am satisfied in the end that the appellants

have on the balance of probabilities successfully tipped the scale in their favour when they have proved that the first respondent has breached Condition 15 of the FMD Policies and Condition 12 of the FCL Policies on the grounds and for the reasons alluded to above.

[182] In the present appeals, I am convinced and satisfied that the findings of the learned Judge are plainly erroneous. There are real compelling reasons to intervene as the findings, reasons and conclusions of the learned Judge demonstrate a clear misapprehension of the applicable principles and a "demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence"; quite aside from

misapprehension of the applicable legal principles.

[193] The breaches of the FEA Warranties examined were breaches of material terms of the Policies and the appellants had, contrary to the findings of the learned Judge, satisfactorily proved such breaches on a balance of probabilities – see New India Assurance Co Ltd v Pang Piang Chong & Anor [1971] 1 MLRH 523; [1971] 2 MLJ 34. There was clear evidence of material non-disclosure or non-disclosures of material facts. The state of the fire-fighting system, that it was defective and that there were breaches of the General Requirements, were known to the first respondent at all material time before the fire. That state and certainly the breaches would certainly influence the

appellants on whether to run the risk, and at what premium. In the face of such evidence, it would be difficult to deny that these were all material facts that would seriously have impacted on the appellants' decision to run the risk or provide the policies upon which the first respondent have made its claims – see Arterial Caravans Ltd v Yorkshire Insurance Co Ltd [1973] 1 Lloyd's Reports 169.

[194] With such overwhelming evidence of breaches of the FEA Warranties, the appellants are entitled to rely on Condition 9(a) of the FMD Policies and Condition 8(c) of the FCL Policies to avoid liability under the policies. In addition, the FCL Policies do not respond once the FMD Policies are

not engaged. This is evident from the Preamble to the FCL Policies."

Leave Questions of this Court

9. On 03.05.2018, leave to appeal to this Court was granted to the Insured on the following questions of law:

(i) whether the standard of proof on a balance of probabilities for fraud cases in civil proceedings as laid down in Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1 is applicable to trials concluded pre-Sinnaiyah but judgment thereof was pending and delivered post-Sinnaiyah? ("Standard of Proof");

(ii) where a party litigant has been acquitted of fraud by the trial court, is it open to the Court of Appeal to reverse that finding and

to make a positive finding of fraud against him having regard to the rule laid down in Akerhielm v De Mare [1959] AC 789? ("Appellate Fraud");

(iii) whether the principle laid down in Agapitos v Agnew [2003] QB 556 to an exaggerated claim as vitiating an insurance policy is still good law having regard to the decision of the UK Supreme Court in Versloot Dredging BV v HDI Gerling Industrie Versincherung AG [2016] 4 All ER 907? ("Exaggerated Claim");

(iv) whether the contextual approach to the interpretation of contracts laid down by the Federal Court in Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn

Bhd [2010] 1 MLJ 597 is to be applied only where there is ambiguity as to the natural meaning of the contract? ("Contextual Interpretation"); and

(v) where an insurer under a tariff fire policy exercises his right to salvage under the said policy, can he simultaneously repudiate the said policy having regard to the decision of Privy Council in Yorkshire Insurance Company Limited v Craine [1922] 2 AC 541? ("Right to Salvage").

Our decision

Question (i) on "Standard of Proof"

10. **We will first deal with question (i) relating to "Standard of Proof" in civil cases involving allegation of fraud. The Court of Appeal has elaborately dealt with this issue in its judgment. Citing the decision of this Court in Sinnaiyah & Sons Sdn Bhd v Damoi Setia**

Sdn Bhd [2015] 5 MLJ 1 **which was delivered on 10.08.2015 as an authority. In that case, the Federal Court has realigned the position of the law in Malaysia on the standard of proof on fraud in civil cases. At paragraph 49 of the judgment in Sinnaiyah, it was held *inter alia*:**

> ***"It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts.'"***

11. Learned counsel for the Insured argued before us that the learned trial judge, after full trial of 44 days, had delivered his decision on 29.01.2016 which negative fraud in favour of the Insured, applying the standard of proof applicable pre-Sinnaiyah, that is on beyond reasonable doubt, notwithstanding the decision of Sinnaiyah was already delivered and reported by then; and the conclusion of the trial of this case was before the decision of Sinnaiyah delivered on 10.08.2015. Learned counsel highlighted the caveat placed by the Federal Court in that case that the decision shall only apply to Sinnaiyah's case "and to future cases and should not be utilized to set aside or review past decisions involving fraud in civil claims."

12. Learned counsel also submitted that the development of the law on this particular issue should not prejudice the parties as the present case was pleaded, prepared and tried based on the old

standard of proof beyond reasonable doubt; and therefore it is grossly unfair to change the degree of persuasion required for discharging the burden at the appellate stage bearing in mind that the Court of Appeal does not have the audio visual benefits of the trial proper.

13. At paragraph 27 of his written submission, learned counsel submitted that *"A fortiori, if the principle in Sinnaiyah were to be extended to appeal cases notwithstanding the conclusion of trial pre Sinnaiyah, it would have a retrospective effect within the prospective overruling. We cannot afford to have a prospective overruling with a retrospective effect on substantive law. It inevitably results in great injustice to litigants who had availed themselves to our court for justice.*"

14. Learned counsel for the Insurers, highlighted in his submissions (with which we agree), that this

question has already been answered recently, clearly and unequivocally in the affirmative by this Court in Ling Peek Hoe & Anor v Ding Siew Ching and another appeal [2017] 5 MLJ 385 and Letchumanan Chettiar Alagappan @ L A Ilagappan & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697. In Ling Peek Hoe & Anor., this Court ruled that 'prospective overruling' of law by an apex court applies to cases arising in future only and it does not affect cases that have attained finality i.e. those cases that have already exhausted their appeal process within the court system.

15. **In Letchumanan Chettiar Alagappan (supra) this Court, through the judgment delivered by Jeffrey Tan FCJ, has precisely affirmed the trite legal position on this issue in the following passage:**

> ***"The law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals***

that have been brought timeously but have not yet been concluded (Cadder v Her Majesty's Advocate per Lord Hope) and to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is excluded from cases already finally determined (Cadder v Her Majesty's Advocate per Lord Rodger). That is the common law position. There was no departure in Sinnaiyah from the common law position when the court said 'we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilized to set aside or review past decisions involving fraud in civil claims.' The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases

which have reached a terminal end. The ruling in Sinnaiyah was not in the prospective only form. Sinnaiyah applies to all cases that have not been finally determined, including all pending appeals, except that in the instant appeal, it does not matter."

16. Apparently the effect of "prospective overruling" by an apex court which applies to "future cases" has been clarified and extended in Lin Peek Hoe (supra) to include its applicability to all cases that have not been finally determined as well as cases pending appeal within a court system. This settled position has been adopted and followed in the cases of Dato' Prem Krishna Sohgal v Muniandy Nadason & Ors [2018] 2 MLJ 693; and Maheswari Eliathamby & Anor [2018] MLRAU 1. As clearly said by Jeffrey Tan FCJ in Letchumanan Chettiar Avagappan (supra) *"that is the common law position. There was no departure in Sinnaiyah from the common law position"*. **The ruling**

in Sinnayiah (supra) is not to be applied to past cases which have attained finality upon reaching their terminal end.

17. In the present appeal, the decision of the High Court was delivered post–Sinnaiyah. The trial started on 12.06.2013 and was concluded on 12.03.2015, before Sinnaiyah was delivered by this Court on 10.08.2015. In other words, the decision of this case was still pending before the High Court when the new law on the standard of proof for civil fraud came into effect. It has not reached its finality yet. The learned High Court judge had clearly erred in applying the old standard of proof when delivering his decision on 29.01.2016. The Court of Appeal has correctly allowed the appeal by the Insurers by adopting the post-Sinnaiyah position i.e. the standard of proof on the balance of probabilities.

18. We can do no better than what has been aptly described by Idrus Harun JCA , in delivering the judgment of the Court of Appeal on this issue, when His Lordship said (at paragraph 25 of the judgment):

> ***"[25] Sinnaiyah therefore is now the state of the law, even prior to the decision of the learned judge on 29.01.2016, and as such, His Lordship as with this Court, would be bound by the said decision. In Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, the Federal Court at page 14 authoritatively held that-***
>
> > ***"if the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court***

conflict on a point of law, the later decision therefore, for the same reasons, prevail over the earlier decisions".

19. **Based on the above reasoning, we will answer Question (i) in the affirmative i.e. that the standard of proof on a balance of probabilities for fraud cases in civil proceedings where fraud is alleged as laid down in Sinnaiyah (supra) is applicable to trials concluded pre-Sinnaiyah but judgement thereof was pending and delivered post-Sinnaiyah. That is the law applicable to the present case.**

Question (ii) on "Appellate Fraud"

20. **This question deals with an issue of law which has already been established and settled: i.e. that appellate courts can and will exercise appellate intervention with the decision of a trial court, if the trial court is shown to be plainly wrong in arriving at its decision particularly where there is insufficient**

judicial appreciation of evidence, facts and the law. This is not a novel issue.

21. This question relates to the decision of the learned High Court judge who held that, in a case where an Insurer made an allegation of fraud against the Insured, the burden proving fraud was on the Insurer. The learned judge, in his decision, applying the standard of proof pre-Sinnaiyah of beyond reasonable doubt, negative fraud on the ground that the Insurer had failed to discharge the said burden. However, on appeal, the Court of Appeal, applying the post-Sinnaiyah standard of proof, reversed the burden and held that it was for the Insured to prove that it was not a case of fraud, i.e. it was not a case of self-inflicted arson. The Court of Appeal ruled that the Insured has failed to sufficiently discharge the burden, and accordingly the appeal by the Insurers was allowed and the Insured's claim against them was dismissed.

22. Learned counsel for the Insured in his written submission, at paragraph 31, submitted:

> ***"This is a case in which the trial judge clearly had audio-visual advantage and employed it when coming to his findings. The settled principle, almost inviolate, is that where a trial court has acquitted a party of fraud, the Court of Appeal should not find him guilty of what is called "appellate fraud". This type of case is set apart from the usual line of cases where a judge has failed to take advantage of having seen and heard the witnesses."***

23. Learned counsel further submitted:

> ***"We say that the evidence in support of the High Court's said finding is overwhelming. The Respondents' own evidence concluded there was no evidence to implicate the Appellant's directors on arson. This evidence was***

overlooked in its entirety by the Court of Appeal. The loss adjuster conducted extensive investigation with the intention to implicate the Appellant's directors and yet, they conceded that what they had, was merely strong suspicion of self-inflicted arson."

24. Learned counsel argued that the Court of Appeal, in this case, cannot make a finding of fact premised on mere suspicion as the High Court did not decide the issue of fraud in a vacuum, absent of any concrete evidence establishing the particular fact in issue; on the contrary, the evidence of the loss adjuster's report expressly absolved the Insured from any indictment of fraud. To learned counsel, the positive finding of fraud against the Insured by the Court of Appeal was not supported by evidence; and contrary to the well-established law of evidence, the Court of Appeal erred when it shifted the burden of disproving fraud to the Insured when the Insurers failed to

discharge their burden of proving fraud in the first place.

25. **Learned counsel for the Insurers submitted that there are numerous cases cited that appellate courts have the power and duty to exercise appellate intervention in holding there was fraud in numerous instances where the trial judge may have 'acquitted' a litigant of fraud. The cases cited, among others,** include: **Central Bank of India Ltd v Guardian Assurance Co Ltd [1936] 1 MLJ 131 (Privy Council); Gian Singh & co Ltd v Banque De LÍndochine [1974] 2 MLJ 177 (Singapore Court of Appeal affirmed by Privy Council); Gan Yook Chin & Anor v Lee Ing Chin & Ors [2005] 2 MLJ 1 (Federal Court)**; **UEM Group Berhad v Genisys Intergrated Engineers Pte Ltd [2010] 9 CLJ 785 (Federal Court); Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kin (Personal** representative of the estate of **Chen Weng Sun, deceased) [1997] 2 MLJ 45 (Federal Court); Takako**

Sakao v Ng Pek Yuen [2010] 1 CLJ 381 (Federal Court); and **Letchumanan Chettiar Alagappan (supra) (Federal Court).**

26. **Learned counsel further submitted that the above cited cases clearly show that an appellate court can intervene and make a finding of fraud where the trial judge has 'acquitted' a party or has declined to hold that there was fraud. There is no prohibition on an appellate court making a finding of 'appellate fraud'; and the categories in which appellate interference is warranted is not closed and instances in which findings of facts by the trial courts were reversed by the appellate courts are too copious to cite.**

27. **The case of Akerhielm v De Mare (supra) as stated in this question posed before us, was cited and applied by Gopal Sri Ram JCA (as His Lordship then was) in Abu Bakar bin Ismail v Ismail bin Husin [2007] 4 MLJ 489, where he refused to find fraud on the part of**

the 4th defendant on the basis that the trial judge had found no fraud and said that he was most reluctant to find what lawyers call "appellate fraud" on the part of the 4th defendant. However, it is noted that Raus Sharif, JCA (as his Lordship then was) in the same case (Abu Bakar bin Ismail) refused to apply Akarheilm and found that fraud of the 2nd defendant, as an agent of the 4th defendant, could be imputed on the 4th defendant.

28. **In Malaysia, it is well settled that an appellate court will not, generally speaking, interfere with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.** (see: **UEM Group Berhad v Genisys Integrated Engineers Pte Ltd (supra)**. This Court has made it clear in **Ang Heik Seng @ Ang Yeok Seng (supra)** that *"on the issue of fraud, it is the duty of this*

court to examine the evidence independently and come to our own findings either in agreement or otherwise with the findings of the trial judge ….”

29. In Sinnaiyah (supra) as well as Letchumanan Chettier Alagappan (supra), both the trial court and the Court of Appeal applied the wrong standard of proof of beyond reasonable doubt and found that fraud had not been established. The Federal Court disagreed with their findings of ‘no fraud’ on the ground that the wrong standard of proof was applied; and substituted the findings with its own ‘appellate fraud’ based on the correct standard of proof for fraud in civil proceedings, on a balance of probabilities.

30. In determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law or the established evidence, the appellate court is perfectly entitled to examine the process of evaluation of the evidence by the trial

court. That is the necessary process which must be done by the appellate court in order to appreciate, assess, weigh and ultimately for good reasons, arrive at its decision either accepting or rejecting the whole or any part of the evidence available before it and to decide independently either to accept or not, the decision or findings of the trial court. Thus, the appellate court is fully entitled to come to its own findings and to set aside the findings of the trial court on the issue in question, if need be, in appropriate situations. (see: **Gan Yook Ching & Anor v Lee Ing Chin & Ors (supra)**).

31. In the present case before us, we have read and re-read the judgment of the Court of Appeal together with all the relevant records of the proceedings, particularly the notes of evidence as well as other related documents. We are satisfied that the Court of Appeal in its judgment has meticulously gone through the evidence adduced in court and the Court

of Appeal has correctly held that there was sufficient evidence to show that the fire in question was 'self-inflicted' and deliberately caused by the Insured or with the connivance of the Insured.

32. From the facts and circumtances of the case, taken together with the compelling circumstantial evidence, we agree that the Insured's involvement in setting up the fire as found by the Court of Appeal was not without foundation. The circumstantial evidence, which was so closely associated with the facts in issue, enabled the Court of Appeal to come its own decision on the issue of fraud on self-inflicted arson. This effort by the Court of Appeal can clearly be gathered from the following passages as appeared in paragraphs 46, 60 and 61 of its judgment:

> ***"[46]. ... There is without question clear evidence as outlined from above from which can be conclusively inferred that***

the intruders were familiar with the insured premises and had prior knowledge of where the elements of the security system were located, where and how to gain access throughout the building and how best to neutralize any threat of identification. There can be little doubt that only the perpetrators familiar with the building layout, security arrangement, site conditions and office contents could set fire on the premises where the entire process took a mere 20 to 30 minutes."

[60] Having anxiously considered the entire evidence on this point, the first respondent's case of deliberate fire by its competitor is a probable concoction to which no degree of credence ought to be attached to its claim that the arson could

not possibly be linked to it. I am satisfied that the fire and loss was occasioned by the unlawful and willful act or connivance of the first respondent.

[61] … It would suffice for me to say that this is the appellant's pleaded case which is proved, not merely by circumstantial evidence as contended by learned counsel for the first respondent, but by strong circumstantial evidence. In any event, the first respondent admitted that the fire was due to arson and since I have rejected the allegation that the fire was caused by the first respondent's competitor, the circumstantial evidence points conclusively to the first respondent or its servant or agent as the perpetrator who through its willful act of connivance set the insured premises on fire thereby

occasioned the loss and damage to the premises and stock of auto parts therein. By reason of the unlawful act committed by the first respondent, I hold that the appellants were entitled to repudiate the policies and the claims therefore must fail on this ground alone. This conclusion, is in my judgment, sufficient to dispose of this appeal."

33. Based on the above reasoning, we will answer Question (ii) in the affirmative, i.e. where a party litigant has been 'acquitted' of fraud by the trial court, the Court of Appeal, in an appropriate situation as stated above, can reverse that finding and make a positive finding of fraud on its own.

Question (iii) on "Exaggerated Claim"

34. In Agapitos v Agnew [2003] QB 556, the English Court of Appeal laid down the principle that: where

there is an exaggerated or fraudulent insurance claim, the law forfeits not only that which is known to be untrue, but also any genuine part of the claim; the effect of the fraudulent claim is that, once it is determined that part of a claim is false, the rest is forfeited, without it being essential to determine whether or not that rest itself related to genuine loss.

35. **Mance LJ. in Agapitos (supra)** opined that a fraudulent claim exists where the insured claims knowing that he has suffered no loss, or only a lesser loss than that which he claims (or is reckless as to whether this is the case). The basic element of 'fraud' as cited by Mance LJ. in that case was that 'fraud' was not mere lying; it was seeking to obtain an advantage, generally monetary, or to put someone else at a disadvantage by lies and deceit, and it would be sufficient to come within the definition of fraud if there was evidence to show that deceit had been used to secure payment or quicker

payment of the money than would have been obtained if the truth had been told.

36. The UK Supreme Court, on the other hand, in **Versloot Dredging BV and Another v HDI Getting Industrie Versic Cherung AQ and other [2016] 4 All ER 907** held that the fraudulent claims rule applied to a wholly fabricated claim, an exaggerated claim and even to the genuine part of an exaggerated claim if the whole was to be regarded as a single claim. However, the said rule did not apply to justified claims supported by collateral lies. In that case the court made a distinction between a fraudulently exaggerated claim and a justified claim supported by collateral lies where the insured was trying to obtain no more than the law regarded as his entitlement, and the lie was irrelevant to the existence or amount of that entitlement. A policy of deterrence did not justify the application of the fraudulent claims rule in this situation. The extension of the fraudulent claims

rule to collateral lies was a step too far and disproportionately harsh to the Insured, going further than any legitimate commercial interest of the Insurer could justify.

37. **Lord Hughes in Versloot Dredging (supra) however, maintained that the fraudulent claims rule was an important element in the insurance industry which must be preserved. In his Lordship's conclusion, he said:** ***"... that the fraudulent claims rule is of considerable importance and must be preserved, but that its extension to collateral lies ("fraudulent device") is not based on sound authority and would result in a remedy disproportionate to the breach of duty involved."***

38. **The rationale for maintaining the fraudulent claims rule has been emphasized by Lord Hughes in that case in the following words:**

"[94] There is no doubt that the purpose of the fraudulent claims rule is to discourage fraud, having regard to the particular vulnerability of insurers. This rationale has frequently been reiterated. In Galloway v Guardian Royal Exchange (UK) Ltd [1999] Lloyd's Rep IR 209 at 214, it was expressed thus by Millett LJ:

> ***"The making of dishonest insurance claims has become all too common. There seems to be a widespread belief that insurance companies are fair game, and that defrauding them is not morally reprehensible. The rule which we are asked to enforce today may appear to some to be harsh, but it is in my opinion a necessary and salutary rule which deserves to be better known by the public. I for my part would be most unwilling to dilute it in any way."***

And in The Star Sea [2001] 1 All ER (Comm.) 193, [2003] 1 AC 469 (at [62]) Lord Hobhouse said this: 'The logic is simple. The fraudulent

insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.' This latter formulation of the justification for the rule, which has often been repeated, gives rise to the commonly used shorthand that the fraudulent insured must not be allowed a 'one-way bet'. It was the principal argument relied upon by the insurers in The Aegeon and in the present case for the inclusion of collateral lies within the rule.

[95] The need for such a rule, severe as it is, has in no sense diminished over the years. On the contrary, Parliament has only recently legislated to apply a version of it to the allied social problem of fraudulent third party personal injuries claims. Section 57 of the Criminal Justice and Courts Act 2015 provides that in a case where such a

claim has been exaggerated by a 'fundamentally dishonest' claimant, the court is to dismiss the claim altogether, including any unexaggerated part, unless satisfied that substantial injustice would thereby be done to him. Parliament has thus gone further than this court was able to do in* Summers v Fairclough Homes*.

[96] Severe as the rule is, these considerations demonstrate that there is no occasion to depart from its very long established status in relation to fraudulent claims, properly so called. It is plain that it applies as explained by Mance LJ. in* The Aegeon [2002] 1 All ER (Comm.) 714, [2003] QB 556 (at [15] – [18]*). In particular, it must encompass the case of the claimant

insured who at the outset of the claim acts honestly, but who maintains the claim after he knows that it is fraudulent in whole or in part. The insured who originally thought he had lost valuable jewelry in a theft, but afterwards finds it in a drawer yet maintains the now fraudulent assertion that it was stolen, is plainly within the rule. Likewise, the rule plainly encompasses fraud going to a potential defence to the claim. Nor can there be any room for the rule being in some way limited by consideration of how dishonest the fraud was, if it was material in the sense explained above; that would leave the rule hopelessly vague."

39. It must be noted that the issue for determination before the UK Supreme Court in Versloot Dredging (supra) was whether the fraudulent claims rule at common law applied to justify claims supported by collateral lies. The court in that case was dealing with the position of the rule at common law which was later restated in section 12 of the Insurance Act 2015 (UK). However in the present appeal before us, the Insurers' defence in repudiating liability on the fire insurance claim filed by the Insured was based on a breach of Condition 15 of the FMD Policies and Condition 12 of the FCL Policies. This is a case under contract, not under common law. Therefore the decision in Versloot Dredging (supra) may not have any effective influence on the outcome of the present appeal before us. The determination on the fraudulent claim in the present case must be considered within the context of the general principles of the law of contract based on the terms

of the relevant conditions in the Policies. That determination is consistent with the remark made by Lord Sumption in Versloot Dredging (supra) in the following words:

> ***"But I am inclined to agree with the view expressed by Lord Hobhouse in The Star Sea [2001] 1 All ER (Comm) 193, [2003] 1 AC 469 (at [50], [61]-[62]) that once the contract is made, the content of the duty of good faith and the consequences of its breach must be accommodated within the general principles of the law of contract. On that view of the matter, the fraudulent claims rule must be regarded as a term implied or inferred by law, or at any rate an incident of the contract. The correct categorization matters only because if it is a manifestation of the duty of utmost good faith, then the effect of s 17 of the 1906 Act is that the whole contract is voidable ab initio upon a the***

contractual analysis, the right to avoid the contract for breach of the duty must depend on the principles governing the repudiation of contracts, and avoidance would operate prospectively only."

40. In the present case, the Court of Appeal, in its evaluation of the whole evidence in total based on established principles in interpretation of contract and breach of contract, had applied the correct approach of 'fraudulent claim', not on 'collateral lies' as formulated in Versloot Dredging (supra). Based on that evaluation, the Court of Appeal had come to a correct finding that the Insured had indeed utilized false or forged documents in order to obtain benefits under the Policies. The Insured's claim was clearly a fraudulent claim. The Insured claim had never been a "justified claim" on collateral lies. We agree with the following findings of the Court of Appeal, as at paragraph (82) of the judgment:

> ***"It is my judgment that the appellants have succeeded in proving that some of the documents submitted [Veheng] were false or forged. ... As such, on the false documents alone, [Veheng's] claim is fraudulent and ought to be dismissed based on the breach of Condition 15 of the FMD Policies and Condition 12 of the FCL Policies and [Veheng's] common law duty to act in good faith ..."***

41. The Insurers in this case were entitled to repudiate the Insured's claim based on the Latin maxim of *"Dura lex sed ita scripta est"* which means "it is harsh, but it is the law". Therefore, if the Insured makes any claim knowing the same to be false or tainted with elements of fraud with regard the amount or otherwise, the claim under the policy becomes void and all claims thereunder shall be forfeited.

42. With the above elaboration, we have sufficiently answered Question (iii): that the principle in Agapitos (supra) is still good law, at least in this country.

Question (iv) on "Contextual Interpretation"

43. On this question, learned counsel for the Insured submitted as follows:

> **"The fourth question concerns the interpretation of contract where in this case, the discounts on the premium payable under the FMD policy";**
>
> **"The respondent say that the breach of FEA Warranties by the appellant entitling them to avoid the fire material damage policy no. 005";**
>
> **"The appellant contended that the FEA Warranties were not applicable for want of consideration since no discount was given on**

the premium payable. In any event, there was no breach of the warranties";

"The policy expressly provides for no discount. This is reflected by the zero rated on the column of "ldg/disc" (loading/discount) of the policy in relation to each of the four FEA Warranties";

"The Court of Appeal erred in holding that there was a discount at a rate of 0.133283% of the FMD 005";

"This rate of 0.133283% was not the discount given in respect of FEA Warranties. It was used to calculate the premium of RM53,313.20 payable on the sum insured of RM40,000.00;"

"The Court of Appeal effectively re wrote and improved the contract in favour of the respondents despite the clear and unambiguous wordings in respect of the absent

discount for the FEA Warranties being zero rated;" and

"Question 4 should be answered in the affirmative."

44. Learned counsel for the Insurers submitted that it was never the Insured's pleaded case that the contracts of insurance in this case were ambiguous; and that parties are bound by their pleadings. Learned counsel contended that both DW2 and DW9 had given evidence that discounts on the premiums had actually been given for the FMD Policies; and there is no doubt that the FEA Warranties form part of the contract of insurance.

45. This question relates to the payment of premium in an insurance policy. It is the consideration required of the Insured in return for which the insurer undertakes his obligation under a contract of insurance. The amount or adequacy of the premium

in relation to the risks run is a matter for the insurer, rather than the court. (see: Mac Gillivray on Insurance Law (12th Ed para 7-002).

46. In interpreting clauses in an insurance policy, the court usually falls back on the words actually used in the terms and conditions of the policy including on the issue of premium and try to give effect to those words. (see: In re George and Goldsmiths and General Burglary Insurance Association Ltd [1899] 1 QB 595).

47. In the present case, the Court of Appeal had applied the correct rule of construction or interpretation on this matter i.e. the court must give effect to their plain and ordinary meaning and uphold the sanctity of the contract. The FEA Warranties have been enshrined in the FMD Policies. The Insured's action in this case is based on the FMD Policies. As the terms of the FEA

Warranties form part of the FMD Policies the Insured is bound by the FEA warranties.

48. **In Berjaya Times Squares Sdn Bhd, (the case cited in this question) the facts and the basis for determination are different from the present case. There, the Court adopted the contextual approach in interpreting the contract in question on the ground that the terms of the contract in that case were ambiguous, which involves two inconsistent clauses within a sale and purchase agreement of a property. In the present case, the Court of Appeal has clearly found that the wordings of the Policies in question were clear and unambiguous. Therefore the test in Berjaya Times Squares Sdn Bhd has no application here.**

Question (v) on "Right to Salvage"

49. **This question relates to the issue of the Insurers 'right to salvage'. It arose in the Insured's cross-**

appeal relating to the tender exercise carried out by the adjusters under Condition 14 of the FMD Policies.

50. As a matter of fact, the Insurers had exercised their right to salvage of the damaged stocks pursuant to Condition 14. The Insurers invited bids for the purchase of the damaged stock. The proceeds from the sale of the damaged stocks amounting to RM1,640,000.00 were paid to the Insured.

51. Learned counsel for the Insured complained that notwithstanding the Insurers having exercised their right under Condition 14 of the Policies, the Insurers proceeded to repudiate their liability under the Policies. Learned counsel submitted that the Insurers ought not to be allowed to repudiate their liability but at the same time exercise their right of salvage as provided under the policies; the Insurers cannot approbate and reprobate. They are estopped from avoiding the policies after having acted under

the same by exercising their right to salvage. This is in accordance with the principle laid down by the Privy Council in Yorkshire Insurance Company Ltd v Craine [1922] 2 AC 541.

52. For better understanding of the issue, we reproduce Condition 14 of the FMD Policies, which states:

> ***"On the happening of any loss or damage to any of the property insured by this Policy, the Company may:-***
>
> ***(a) Enter and take possession of the building or premises where the loss or damage has happened;***
>
> ***(b) Take possession of or require to be delivered to it any property of the Insured in the building or on the premises where the loss or damage has happened;***

(c) Keep possession of any such property and examine, sort, arrange, remove, or otherwise deal with the same; and

(d) Sell any such property or dispose of the same for account of whom it may concern.

The powers conferred by this Condition shall be exercisable by the Company at any time until notice in writing is given by the Insured that he makes no claim under the Policy or, if any claim is made, until such claim is finally determined or withdrawn, and the Company shall not by any act done in the exercise or purported exercise of its powers hereunder, incur any liability to the Insured or diminish any right to rely upon any of the Conditions in this Policy in answer to any claim."

53. Learned counsel for the Insurers submitted that based on the clear wordings of Condition 14, the Company (the Insurers) shall not by any act done in the exercise or purported exercise of its powers hereunder, incur any liability to the Insured or diminish any right to rely upon any of the Conditions in this Policy in answer to any claim; and that although the adjusters had assisted the Insured in the tender exercise, that cannot be a waiver of any breach under the FMD Policies; and further all correspondence between the adjusters and the Insured including those relating to the tender exercise were marked "without prejudice" and/or "without admission of liability". The Insured had actively participated in the sale of the damaged stocks and accepted the proceeds of the salvage, with full knowledge that the adjusters were at all times acting on a *"without prejudice"* basis to the Insurers' liability under the Policies.

54. **The Court of Appeal distinguished the facts in Yorkshire (supra) from the facts of the present case. The Court of Appeal was of the view that the facts and circumstances in the present case are vastly different from those presented in Yorkshire (supra). Unlike Yorkshire (supra) the Insurers here did not take possession of the Insured premises but only took the damaged stocks and sold them with full participation of the Insured. There is also a material difference between Condition 12 as relied upon by the court in Yorkshire (supra) and Condition 14 in the present case.**

55. **In Yorkshire (supra), the respondent (Craine) Insured goods in his business premises against fire under an Insurance Policy issued by the Insurance company. The Policy contained a condition that the Insured was to give notice of any loss or damage under the Policy forthwith and within a specified time was to deliver**

detailed particulars; failure to observe this condition was to preclude the Insured from recovering. There was a further condition, under the head "salvage" by which the Insurer Company, so long as a claim was not adjusted without incurring any liability, might take possession of the premises and of any goods thereon at the date of the fire, with power to sell the goods. A fire having occurred, the Insured gave notice forthwith. Before the expiration of the time specified for the delivery of the particulars, the Insurer Company took possession pursuant to the said condition; they remained in possession for 4 months, but did not sell the goods. Particulars were delivered by the Insured but after the specified period. The Privy Council held that, in action upon the policy concerned, the Insurer Company was precluded from relying upon the failure to deliver the particulars within the time specified.

56. The Pricy Council in its judgment made the following remarks:

> ***"It may well be that it would be just and fair and businesslike to empower each company to exercise all or any of those powers while the amount of the claim of the assured was not adjusted; but it would be most oppressive and un-business like to enable them after they had exercised these or any of these powers to say to the assured, your claim did not comply with all the terms of condition 11, therefore, though we have taken possession of your premises and sold your property, we will pay you nothing under the policies."***

57. In that case, the Privy Council was dealing with the interpretation of Condition 12 of the Policy in question, which provides:

> ***"12 – SALVAGE. On the happening of any loss or damage, the Company may, so long as the***

claim is not adjusted without thereby incurring any liability: (A) Enter, and take, and keep possession of the building or premises where the loss or damage has happened. (B) Take possession of, or require to be delivered to it, any property of the insured in the building or on the premises at the time of the loss or damage. (C) Examine, sort, arrange, or remove all or any of such property. (D) Sell or dispose of, for account of whom it may concern, any salvage or other property taken possession of or removed. In no case shall the Company be obliged to undertake the sale or disposal of damaged goods, nor shall the insured under any circumstances have the right to abandon to the Company any property, damaged or undamaged, whether taken possession of by the Company or not. Entry upon or taking possession of the premises by the Company

shall not be taken as recognition of abandonment by the Insured."

58. It must be noted that the facts in Yorkshire (supra) are different and can be distinguished from the present case. The Insurer, there took possession of the fire site for 4 months, but did not sell any of the goods as salvage. In the present case, the Insurers never took possession of the Insured's premises which remained with the Insured at all material times. In the present case, there was actually a tender exercise carried out and goods worth RM1.64 million were sold as salvage with full participation of the Insured and the Insured accepted and kept the monies from the tender exercise. The adjusters in that case, did not mark their correspondence with the Insured with *"without prejudice"* or "*without admission of liability",* as being done in the present case. These differences are relevant in determining

the outcome of the Insurer's liability under the Policies.

59. As stated earlier, Yorkshire (supra) deals with the interpretation of Condition 12 of the Policy. That condition is not the same with Condition 14 of the FMD Policies in the present case before us. The said Condition 12 in that case did not contain the important proviso as found in Condition 14 of the FMD Policies, which is:

> ***"… the company shall not by any act done in the exercise or purported exercise of its powers hereunder, incur any liability to the Insured or diminish any right to rely upon any of the conditions in this Policy in answer to any claim."***

60. On the above reasoning, we are of the view that the principle as applied by the Privy Council in Yorkshire (supra) cannot be relied upon by the court in the present case. It has no application to the present

case. Based on the facts and the conditions of the FMD Policies in this case, the answer to Question (v) should be in the affirmative.

Conclusion

61. In the upshot, based on the authorities and legal principles cited above, we are constrained to dismiss Appeal No. 36. In view of that dismissal, Appeal No. 37 on quantum, cannot stand and must also fall. Therefore both appeals are dismissed with costs. We affirm and uphold the decisions of the Court of Appeal, in both appeals.

Dated: **13TH MAY 2019**

sgd

RAMLY HJ ALI
JUDGE
FEDERAL COURT
MALAYSIA

Solicitors

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Cases Referred to:

1. **Sinnaiyah & Sons Sdn Bhd v Damoi Setia Sdn Bhd [2015] 5 MLJ 1**

2. **Ling Peek Hoe & Anor v Ding Siew Ching and another appeal [2017] 5 MLJ 385**

3. **Letchumanan Chettiar Alagappan @ L Allagappan & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697**

4. **Dato' Prem Krishna Sohgal v Muniandy Nadason & Ors [2018] 2 MLJ 693**

5. **Maheswari Eliathamby & Anor [2018] MLRAU 1**

6. Central Bank of India Ltd v Guardian Assurance Co Ltd [1936] 1 MLJ 131 (Privy Council)

7. Gian Singh & co Ltd v Banque De LÍndochine [1974] 2 MLJ 177 (Singapore Court of Appeal affirmed by Privy Council)

8. Gan Yook Chin & Anor v Lee Ing Chin & Ors [2005] 2 MLJ 1 (Federal Court)

9. UEM Group Berhad v Genisys Intergrated Engineers Pte Ltd [2010] 9 CLJ 785 (Federal Court)

10. Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kin (Personal representative of the estate of Chen Weng Sun, deceased) [1997] 2 MLJ 45 (Federal Court)

11. Takako Sakao v Ng Pek Yuen [2010] 1 CLJ 381 (Federal Court)

12. Abu Bakar bin Ismail v Ismail bin Husin [2007] 4 MLJ 489

13. Agapitos v Agnew [2003] QB 556

14. Versloot Dredging B.V and another v HDI Getting Industrie Versic Cherung AQ and other [2016] 4 All ER 907

15. Galloway v Guardian Royal Exchange (UK) Ltd [1999] Lloyd's Rep IR 209 at 214

16. In re George and Goldsmiths and General Burglary Insurance Association Ltd [1899] 1 QB 595)

17. Yorkshire Insurance Company Ltd v Craine [1922] 2 AC 541

Other References:

1. Mac Gillivray on Insurance Law (12th Ed para 7-002)