

5 **DALAM MAHKAMAH RAYUAN MALAYSIA**
 (BIDANG KUASA RAYUAN)
 RAYUAN SIVIL NO. J-01(IM)(NCVC)-232-03/2018

10 **ANTARA**

KANG HAI HOLDING SDN BHD ... PERAYU
 (NO. SYARIKAT: 81076-A)

15 **DAN**

20 **1. MEGAFEST SDN BHD (DALAM LIKUIDASI)**
 (No. Syarikat: 189153-H)

25 **2. KETUA PENGARAH INSOLVENSI SELAKU**
 WAKIL SAH DAN PENGURUS DAN PENERIMA
 ESTET LIM THIAN HOCK @ LIM THIAM HOCK,
 SIMATI (DALAM KEBANKRAPAN)

3. CHONG CHEE WAI
 (NO. K/P: 701202-01-5457)

30 **4. IRENE TAY YING CHEE**
 (NO. K/P: 700305-01-5252)

5. LIM KUI YONG
 (NO. K/P: 790924-71-6057)

35 **6. SIVANANTHAM A/L MUTHU KARPAN**
 (NO. K/P: 751008-08-5799)

40 **7. TEO AH BAH**
 (NO. K/P: 531021-01-5109)

8. LIM KEWW GEE ... RESPONDEN-
 (NO. K/P: 730420-01-5781) RESPONDEN

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DI DENGAR BERSAMA

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CORAM

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**HAMID SULTAN ABU BACKER, JCA
HANIPAH FARIKULLAH, JCA
KAMALUDIN MD SAID, JCA**

GROUND OF JUDGMENT

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INTRODUCTION

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[1] There were 2 (two) appeals fixed before this Court i.e. Civil Appeal No: J-01(IM)(NCVC)-231-03/2018 (“Appeal 231”) and Civil Appeal No: J-01(IM)(NCVC)-232-03/2018 (“Appeal 232”). The Appellant in Appeal 231 is Kang Hai Holdings Sdn Bhd (“KHH”) and in the Appellant in Appeal 232 is Kang Hai Realty Sdn Bhd (“KHR”).

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BACKGROUNDS FACTS

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[2] KHH initiated Muar High Court Suit No: 22NCVC-59-06/2013 (“Suit 59”) against the 1st Respondent and 9 others. KHR initiated Muar High Court Suit No: 22NCVC-18-04/2014 (“Suit 18”) against the 1st Respondent and 9 others.

[3] The nature of claim by KHH and KHR against the Respondents are in relation to losses incurred resulting from redemption of the two properties owned by KHH (property D) and KHR (Property C)

5 whereby the said properties were a 3rd party charge to OCBC
Bank (M) Bhd as guarantee for financing facilities extended to the
1st Respondent. KHH and KHR averred that the financing
facilities was not used for the legitimate trade purposes of the 1st
Respondent but was used for the benefit of various third parties
10 including other individual name Chew Choon Fang.

[4] KHH and KHR incurred losses arising from the said redemption
and settlement with OCBC Bank (M) Bhd. KHH and KHR
respectively filed writs of summons against the 1st Respondent till
15 the 9th Respondents for tort of conspiracy for causing injury to
KHH and KHR and for breach of fiduciary duties to KHH and KHR
and to claim losses incurred.

[5] At all material times, the Respondents' position in KHH, KHR and
20 1st Respondent were as follows –

- i) Lim Thian Hock @ Lim Thiam Hock (**“the deceased Lim”**)
 the 2nd Respondent is the founder and/or owner and/or
 managing director for KHH, KHR and the 1st Respondent.
- 25 ii) The 3rd Respondent was the employee of KHH, KHR and 1st
Respondent. The 3rd Respondent was appointed as one of
the director for KHH and KHR on 20.6.2005. The 3rd
Respondent resigned from KHH and KHR on 15.9.2008. The
30 3rd Respondent was also appointed as one of the director for

5 1st Respondent. On 31.5.2005. The 3rd Respondent had resigned as 1st Respondent's director on 18.9.2008.

10 iii) The 4th Respondent was appointed as secretary for the deceased Lim. The 4th Respondent was appointed as one of the directors for 1st Respondent on 20.6.2002. The 4th Respondent had resigned from 1st Respondent on 3.5.2007. The 4th Respondent was also appointed as one of the directors for KHH and KHR on 7.1.2004. The 4th Respondent had resigned from KHH and KHR on 4.6.2007.

15 iii) During the appointment of the 3rd and 4th Respondents as the directors for KHH, KHR and 1st Respondent, the deceased Lim had given an Indemnity Letter to each 3rd and 4th Respondent.

20 iv) The 5th Respondent was the director of 1st Respondent from 3.3.2004 until 20.10.2006 and director of KHH and KHR from 7.1.2004 until 15.9.2008.

25 v) The 6th Respondent is son of the deceased Lim and the younger brother of the 9th Respondent. The 6th Respondent was the alternate director to the deceased Lim sometimes on 16.9.2010.

5 vi) The 7th Respondent was the director of 1st Respondent from 3.5.2007 until 13.2.2012 and was appointed as director of KHH and KHR from 1.2.1998 until 15.9.2008.

10 vii) The 8th Respondent was the secretary of KHH and KHR from 1.2.1993 to 15.9.2008.

viii) The 9th Respondent is the son of the deceased Lim and younger brother of the 6th Respondent. The 9th Respondent was the manager of 1st Respondent from 28.2.2005 until 15 1.10.2008.

[6] Both KHH and KHR are associated companies of the 1st Respondent. 1st Respondent is a company registered under the Malaysian Companies Act 1965. 1st Respondent is running the 20 textile manufacturing business.

[7] The deceased Lim had given a guarantee and to indemnify the 3rd and 4th Respondents from any legal liability that may incur during the appointment of the 3rd and 4th Respondents as the directors 25 and during execution of the Deceased Lim's instructions for KHH, KHR and 1st Respondent.

[8] On 8.8.2005, OCBC Bank (M) Bhd had issued a Letter Offer for Trade Facility of the amount of RM10million to 1st Respondent 30 ("1st Offer"). On 23.8.2005, 1st Respondent had issued a company

5 resolution to accept the 1st Offer and to create a third party charge
on the following properties as security for the 1st Offer:-

10 (a) an industrial land held under Lot 4980 Geran 92051, Mukim
Simpang Kanan, Daerah Batu Pahat, Negeri Johor Darul
Takzim (“Property C”);

(b) an industrial land held under H.S.(M) 2044 PTD 5417, Parit
Wah Lahu, Mukim Linau, Daerah Batu Pahat, Negeri Johor
Darul Takzim (“Property D”);

15 (c) a double storey shophouse held under H.S.(M) 8467 PTD
13678, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat,
Johor Darul Takzim (“Property E”);

20 (d) a double storey shophouse held under H.S.(M) 8468 PTD
13679, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat,
Johor Darul Takzim (“Property F”);

25 (e) a double storey shophouse held under H.S.(M) 8469 PTD
13680, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat,
Johor Darul Takzim (“Property G”);

30 (f) a double storey shophouse held under H.S.(M) 8475 PTD
13686, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat,
Johor Darul Takzim (“Property H”);

5 (g) a double storey shophouse held under H.S.(M) 8476 PTD 13687, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat, Johor Darul Takzim ("Property I");

10 (h) a bungalow house held under H.S.(M) 2377 PTD 26833, BT 4, Jalan Kluang, Mukim Simpang Kanan, Batu Pahat, Johor Darul Takzim ("Property J").

15 **[9]** On 25.8.2005, KHH had issued a company resolution approving the creation of the third party charge on Properties C, D, E, F, G, H, I and J for the 1st Offer.

[10] Although 1st Respondent had obtained the 1st Offer and 3rd party Charges were created, there was not a single withdrawal from the 1st Offer by 1st Respondent.

20 **[11]** On 18.3.2008, pursuant to the deceased Lim's application, the 1st Offer was revised from RM10million to RM5million ("Revised Offer"). The Property C and D were remained as security for the Revised Offer.

25 **[12]** KHH had agreed and approved the Revised Offer vide company resolution dated 24.3.2008. Upon the approval of the Revised Offer, 1st Respondent had withdrawn the amount of RM5 million (in batches) in order to manage and to pay the suppliers.

5 **[13]** The 1st Respondent was wound up on 2.7.2012 and the liquidator was appointed.

[14] On 11.7.2012, the deceased Lim was adjudged bankrupt and passed away on 23.1.2015.

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[15] The 5th Respondent is a bankrupt.

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[16] The 8th Respondent did not enter appearance despite the writ summon and the statement of claim were duly served on him and KHH and KHR also have made an application for a judgment on merit to be entered based on proven facts.

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[17] The 1st Respondent claims indemnity and contribution from the deceased Lim, 3rd, 4th, 5th, 6th, 7th and the 9th Respondents.

[18] The Court ordered that both civil suits to be tried jointly and documents referred to file in Suit 59 which in this appeal is Appeal 232.

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[19] The High Court after hearing the case, dismissed the Appellant's claim with costs.

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5 **DECISION OF HIGH COURT**

[20] The learned JC identified 2 (two) issues arise from KHH's and KHR's claim and having considered the totality of evidence before him, determined the issues and made his findings as follows:-

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First issue: Whether the 1st, 3rd, 4th, 6th, 7th and 9th Respondents had conspired to cause damages to KHH and KHR?

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[21] The learned JC found that KHH and KHR have failed to prove that the 3rd, 4th, 6th, 7th and 9th Respondent as well as the 2nd Respondent and the 5th Respondent had entered into an agreement to commit the fraud as alleged.

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[22] Both KHH and KHR also have failed to prove the 3rd, 4th, 6th, 7th and 9th Defendants have committed the tort of conspiracy to injure KHH and KHR.

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Second issue: Whether the 3rd, 4th, 6th, 7th and 9th Respondents had breached their fiduciary duty towards KHH and KHR?

[23] The learned JC found that KHH and KHR failed to show those Respondents aforementioned had breached their fiduciary duty towards KHH and KHR.

5 **[24]** On the balance of probabilities, the learned JC found that KHH and KHR have failed to prove their claim against the 1st, 3rd, 4th, 6th, 7th and 9th Defendants.

10 **[25]** There is no issue arising from the failure of the 4th and 6th Respondents to give evidence as KHH and KHR have failed to prove that the 4th, 6th Respondent together with the 3rd, 7th, 9th Respondents as well as the 2nd and 5th Respondents had committed the tort of conspiracy with the purpose of causing damages to KHH and KHR.

15 **[26]** It is also his finding that KHH and KHR have failed to prove that the 8th Respondent had breached his fiduciary duty and the application made by solicitors for KHH and KHR to enter a judgment against the 8th Respondent on merit is disallowed.

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THE FULL FINDING OF FACTS

25 **[27]** The 3rd and the 4th Respondents were appointed as a director of 1st Respondent, KHH and KHR. The said Letter of Indemnity issued by the 2nd Respondent to the 3rd and 4th Respondents states that the role of the 3rd and 4th Respondent shall only be as per directions of the deceased Lim and that the 3rd and 4th Respondents shall be indemnified against any claims and liability which shall arise when acting as directors. This is confirmed by

30 KHH and KHR's fifth witness, Chew Choon Fang (SP5) who

5 worked as a private secretary for the deceased Lim who had testified that the role of the deceased Lim was the main employer and that the directions given by the deceased Lim cannot be disobeyed. The learned JC found there is no overt act on the part of the 3rd and 4th Respondents which shows that 3rd and 4th
10 Respondents had entered into an agreement with the 4th Respondent, the 6th Respondent, the 7th Respondent, the 9th Respondent as well as the deceased Lim and the 5th Respondent to commit the fraud as alleged by KHH and KHR. In addition to that, the 4th Respondent had resigned as a director in 1st
15 Respondent, KHH and KHR before the revised offer was received in 2008. There is no evidence to show the involvement of the 4th Respondent in the revised offer.

[28] The learned JC found the evidence adduced by KHH and KHR
20 through SP5 and Kek Ley Lan (SP11) confirms that the 6th Respondent was not working for 1st Respondent. There is no evidence that shows the involvement of the 6th Respondent in the creation of Charge on property D and property C. There is also no evidence to show that directors of KHH and KHR had acted on
25 the instructions of the 6th Respondent when the Charges on property D and property C were created. And there is also no evidence to show that all employee of 1st Respondent had acted on the instructions of the 6th Respondent. The evidence of Lim Ah Na (SP2), SP5, and SP11 instead shows that all employees and
30 other directors in 1st Respondent acted as per the deceased Lim's

5 wishes. Evidence adduced by KHH and KHR that suggests that
the 6th Respondent was a joint signatory on the application form
that was used for the drawdown of the revised financing facility
cannot be substantiated to show that it was an overt act on the
part of the 6th Respondent which shows that the 6th Respondent
10 had entered into an agreement with the 3rd Respondent, the 4th
Respondent, the 7th Respondent, the 9th Respondent as well as
the deceased Lim and the 5th Respondent to commit the fraud as
alleged by KHH and KHR.

15 **[29]** The evidence of the 7th Respondent shows that the 7th
Respondent did not play any role and was in no way whatsoever
involved in the financing facility and the revised financing facility.
The 7th Respondent did not play an active role in KHH, KHR or 1st
Respondent because at that material time, the 7th Respondent
20 was stationed at Gua Musang, Kelantan as Plantation Senior
Manager for another company belonging to the deceased Lim, i.e.
Absolute Ascend Sdn. Bhd. The duties of the 7th Respondent as
a director in 1st Respondent as determined by the deceased Lim
were only limited to signing off resolutions of the company
25 approved by the company secretary. The evidence is supported
by the evidence of SP11. The learned JC made a finding that
there is no evidence adduced by KHH and KHR that shows an
overt act on the part of the 7th Respondent which can be inferred
as the 7th Respondent having entered into an agreement with the
30 3rd Respondent, the 4th Respondent, the 7th Respondent, the 9th

5 Respondent as well as the deceased Lim and the 5th Respondent to commit the fraud as alleged by KHH and KHR.

10 **[30]** The learned JC found the evidence adduced by KHH and KHR through SP5 and SP11 confirms that the 9th Respondent was not working for 1st Respondent. There is no evidence that shows that the involvement of the 9th Respondent in the application for financing facility and the revised financing facility granted by OCBC Bank (M) Bhd. There is no evidence that shows the involvement of the 9th Respondent in the creation of Charges on property D and property C. Further to that, there is no evidence to show that the directors of KHH and KHR had acted on the instructions of the 9th Respondent when the Charges were created on property D and property C. And also there is no evidence to show that other directors in 1st Respondent had acted on the instructions of the 9th Respondent. There was no overt act on the part of the 9th Respondent which could show that the 9th Respondent had entered into an agreement with the 3rd Respondent, the 4th Respondent, the 7th Respondent as well as the deceased Lim and the 5th Respondent to commit the fraud as alleged by KHH and KHR.

30 **[31]** The learned JC found that the 3rd Respondent had approved the resolutions pertaining to the financing facility and the revised facility. Resolutions signed by the 3rd Respondent were aimed at obtaining financing facility for the benefit of the 1st Respondent.

5 Involvement of the 3rd Respondent was based on instruction given
by the deceased Lim. The revised facility was deposited into the
1st Respondent's bank account. The act of the 3rd Respondent
signing the resolutions were for the benefit of the 1st Respondent
and not intended to injure KHH and KHR. Owing to the fact that
10 KHH and KHR have failed to prove the existence of an agreement
between the 3rd Respondent, the 4th Respondent, the 6th
Respondent, the 7th Respondent as well as the deceased Lim and
the 5th Respondent, then the execution of an agreement by the 3rd
Respondent that could have been detrimental to KHH and KHR is
15 improbable.

[32] It was also found that the 4th Respondent was not involved in
matters pertaining to the revised financing facility granted by
OCBC Bank (M) Bhd. The 4th Respondent had resigned as a
20 director of 1st Respondent, KHH and KHR before the revised offer
was received. KHH and KHR's first witness, Ng Soo Leng (SP1)
agreed in cross examination that the revised financing facility and
the drawdown of the facility only took place after the 4th
Respondent had resigned as a director. There was no action on
25 the part of the 4th Respondent that was intended to cause injury to
KHH and KHR. Owing to the fact that KHH and KHR have failed
to prove the existence of an agreement between the 3rd
Respondent, the 4th Respondent, the 6th Respondent, the 7th
Respondent, the 9th Respondent as well as the deceased Lim and
30 the 5th Respondent, then it wouldn't have been possible that the

5 4th Respondent had executed an agreement that could have caused losses to KHH and KHR.

10 **[33]** There was no action on the part of the 6th Respondent that was intended to cause injury to KHH and KHR. KHH and KHR have failed to prove the existence of an agreement between the 6th Respondent, the 3rd Respondent, the 4th Respondent, the 7th Respondent, the 9th Respondent as well as the deceased Lim and the 5th Respondent. Therefore, any execution of an agreement by the 6th Respondent which could have caused losses to KHH and KHR would be improbable. Even in the event where such agreement involving the 6th Respondent had existed, KHH and KHR have failed to prove that the 6th Respondent had executed the agreement which could have caused losses to KHH and KHR. There is no evidence which points to the fact that the 6th Respondent had withdrawn and utilized the proceeds from the revised financing facility which was deposited into the banking account held by 1st Respondent. It would be impossible for the 6th Respondent to use the money deposited in the 1st Respondent's account because all cheque books were kept by Neo Thian Chua who served at the 1st Respondent's Finance Manager.

25 **[34]** The learned JC concluded that KHH and KHR have failed to show any action taken by the 7th Respondent which was aimed at causing injury to KHH and KHR. The 7th Respondent acted on the deceased Lim's instructions. KHH and KHR have failed to prove

5 the existence of an agreement between the 7th Respondent, the
3rd Respondent, the 4th Respondent, the 6th Respondent, the 9th
Respondent as well as the deceased Lim and the 5th Respondent.
Therefore, the execution of an agreement by the 7th Respondent
that could have caused losses to KHH and KHR is improbable.

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[35] There was no action on the part of the 9th Respondent that was
intended to cause injury to KHH and KHR. KHH and KHR have
failed to prove the existence of an agreement between the 9th
Respondent, the 3rd Respondent, the 4th Respondent, the 6th
15 Respondent, the 7th Respondent as well as the deceased Lim and
the 5th Respondent. Therefore, any execution of an agreement by
the 9th Respondent which could have caused losses to KHH and
KHR would be improbable. Even in the event where such
agreement involving the 9th Respondent had existed, KHH and
20 KHR have failed to prove that the 9th Respondent had executed
the agreement which could have caused losses to KHH and KHR.
The 9th Respondent was never involved in matters pertaining to
the application for withdrawal or had withdrawn the proceeds from
the revised financing facility which was deposited into the banking
25 account held by 1st Respondent. It would be impossible for the 9th
Respondent to use the money deposited in 1st Respondent's
account because all cheque books were kept by Neo Thian Chua.

[36] It was also discovered that evidence of SP11 shows Neo Thian
30 Chua served as finance manager at the Deceased Lim's

5 companies including KHH and 1st Respondent. Neo Thian Chua retained all cheque book, handled all matters in relation to application for 1st Respondent's facilities, including all drawdowns from banks, handled the account held at OCBC Bank (M) Sdn Bhd including drawdowns. Neo Thian Chua also prepared
10 invoices used for the drawdown of the revised facility. Inevitably, the calling of Neo Thian Chua by KHH and KHR as a witness would have helped in detailing the drawdown transactions of the revised facility. However, KHH and KHR did not call Neo Thian Chua to give evidence. The Court adopts the adverse inference
15 principal against KHH and KHR under section 114(g) of the Evidence Act for failing to call Neo Thian Chua as a witness. Also there is a possibility that Neo Thian Chua is involved in the conspiracy as alleged by KHH and KHR owing to the position and role played by Neo Thian Chua in 1st Respondent. However, KHH
20 and KHR did not name Neo Thian Chua in both of these civil suits as one of the defendant despite knowing that Neo Thian Chua was the finance manager of 1st Respondent and had prepared invoices used in the drawdown of the said revised facility.

25 **[37]** The learned JC came to his finding that on a balance of probabilities, KHH and KHR have failed to prove their claim against 1st Respondent, the 3rd Respondent, the 4th Respondent, the 6th Respondent, the 7th Respondent and the 9th Respondent. In other words, the claim for tort of conspiracy to injure KHH and
30 KHR was not proven against the said Respondents.

5 **[38]** It was submitted before the learned JC that the deceased Lim, the
4th Respondent, the 5th Respondent, the 7th Respondent, the 8th
Respondent are directors of KHH and KHR and therefore they
have a fiduciary duty towards KHH and KHR. They had acted in
neglect of the best interest of KHH and KHR by causing and/or
10 allowing and have been involved in actions detrimental to KHH
and KHR. Further, the 9th Respondent had been proven to be 1st
Respondent's *de facto* director. The 9th Respondent had acted in
neglect of the interest of KHH and KHR in relation to the
properties and had therefore breached his fiduciary duty towards
15 KHH and KHR.

[39] The learned JC found the evidence adduced by KHH and KHR
cannot show how the 3rd Respondent, the 4th Respondent, the 7th
Respondent, the 8th Respondent had breached their respective
20 fiduciary duty towards KHH and KHR. There is no evidence
showing that the 3rd Respondent, the 4th Respondent, the 7th
Respondent, the 8th Respondent had acted in neglect of the best
interest of KHH and KHR. Therefore, the 3rd Respondent, the 4th
Respondent, the 7th Respondent and the 8th Respondent had not
25 breached their fiduciary duty towards KHH and KHR. KHH and
KHR have failed to prove that the 3rd Respondent, the 4th
Respondent, the 7th Respondent, the 8th Respondent had
breached their respective fiduciary duty towards KHH and KHR.

5 **[40]** It was the finding of the learned JC that evidence presented by
KHH and KHR shows that the 9th Respondent is 1st Respondent's
de facto director. There is, however, no evidence showing that the
9th Respondent had acted in neglect of the interest of KHH and
KHR. The 9th Respondent had therefore not breached his
10 fiduciary duty towards KHH and KHR. KHH and KHR have failed
to prove that the 9th Respondent had breached his fiduciary duty
towards KHH and KHR.

15 **[41]** On a balance of probabilities, the learned JC found KHH and KHR
have failed to prove their claim against 1st Respondent, the 3rd
Respondent, the 4th Respondent, the 6th Respondent, the 7th
Respondent and the 9th Respondent.

20 **[42]** The learned JC also found that indemnity and contribution claim
by 1st Respondent against the deceased Lim, the 3rd Respondent,
the 4th Respondent, the 5th Respondent, the 6th Respondent, the
7th Respondent and the 9th Respondent does not arise because it
is the court's finding that 1st Respondent is not liable for the claim
made by KHH and KHR. KHH and KHR have also failed to prove
25 that the 8th Respondent had breached his fiduciary duty towards
KHH and KHR. The application made by solicitors for KHH and
KHR to enter a judgment against the 8th Respondent on merit
was disallowed.

5 **GROUNDS OF APPEAL**

[43] KHH and KHR (“the Appellant”) in its memorandum of appeal states that the learned JC erred in law and on the facts in arriving at the decision on the following grounds –

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1. By failing to find on a preponderance of evidence that the Appellant had established liability against the:-

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- 1.1 1st Respondent for an indemnity pursuant to Section 93 and 98 of the Contracts Act 1950 for losses incurred as a result of having to redeem and discharge its property held under H.S.(M) 2044 PTD 5417, Parit Wah Lahu, Mukim Linau, District of Batu Pahat, State of Johor Darul Takzim with factory building erected thereon ("Property D") which was subject to 3rd party 1st legal charge ("Charge") in favor of OCBC Bank (Malaysia) Berhad ("OCBC") to secure the repayment of monies due and owing under financing facility ("Invoice Financing Facility") granted by OCBC to the 1st Respondent which the 1st Respondent was unable to repay;

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- 1.2 2nd - 7th Respondents for breach of their fiduciary duties to the Appellant for the wrongful creation of the Charge and for the losses resulting therefrom as a

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5 result of the Appellant having to redeem and discharge
Property D by reason of the 1st Respondents inability
to repay the monies due and owing under the Invoice
Financing Facility;

10 1.3 2nd - 6th and 8th Respondents for the tort of conspiracy to
injure by their participation in the Scheme to injure the
Appellant (as defined in the Amended Statement of
Claim) which included wrongfully encumbering
Property D and ensuring that the 1st Respondent was
15 unable to repay the monies due and owing under the
Invoice Financing Facility;

20 1.4 2nd, 3rd, 4th, 5th and 6th Respondents for breach of their
duties as directors of the 1st Respondent and the 8th
Defendant as *de facto* director of the 1st Respondent to
ensure that the affairs of the 1st Respondent were
properly administered and its property not dissipated
and exploited for their benefit to the prejudice of the
Appellant as creditor of the 1st Respondent.

25 2. In failing to consider the evidence adduced during the trial
and come to findings that:-

30 2.1 the Charge were wrongfully created. In this regard the
Honorable Judicial Commissioner failed to consider

5 the evidence led by SP1 which was corroborated by contemporaneous documents and statutory records all of which was never challenged or controverted by any of the Respondents;

10 2.2 the supporting documents for the 25 applications ("Applications") for drawdowns of monies from the Invoice Financing Facility signed by SP5, the 3rd and 4th Respondents did not reflect genuine sale transactions of the 1st Respondent and were in fact
15 fictitious as confirmed by the subpoenaed witnesses representing the 4 purported customers named in the namely SP4, SP6, SP7 and SP10. In this regard, the Honorable Judicial Commissioner erred in failing to find that the Applications were illegal and not for a
20 proper and legitimate purpose.

2.3 the 3rd and 4th Respondents (who were directors of the 1st Respondent at the material time) did not lead any evidence to show that the monies drawdown
25 pursuant to the Applications were in fact utilized for the 1st Respondent's legitimate business purposes and neither did any of the other Respondents.

2.4 a substantial portion of the funds from the drawdowns that were deposited into the 1st Respondent's
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Maybank Account No. 501039149915 ("Maybank account") were wrongfully paid to the 3rd, 5th and 8th Respondents for no legitimate purpose in the following manner:-

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2.4.1 a total of RM200,000.00 was paid to 3rd Respondent vide Maybank cheque nos. 41564, 41565, 41567, and 41568 (Exhibit D22A-D). In this regard no consideration was given by the Honorable Judicial Commissioner to the 3rd Respondent's own admission of receiving the same in previous judicial proceedings;

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2.4.2 a sum RM990,000.00 paid to 5th Respondent vide Maybank cheque no. 41444 (Exhibit 019). In this regard, the Honorable Judicial Commissioner disregarded the failure of the 5th Respondent to testify and controvert the evidence of the payment and failed to take into account the Respondent's evidence that the 5th Respondent admitted receiving the same;

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2.4.3 a total of RM990,000.00 was paid for the benefit of the 8th Respondent vide Maybank cheque nos. 41449, 41450 and 41451 (Exhibit

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P14A-C) which was transferred into his OCBC Singapore Account No. 068061 001. In this regard, the Honorable Judicial Commissioner disregarded the evidence of SPS and SP11 and failed to invoke an adverse inference against the 8th Respondent for failing to produce his bank statement.

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3. In failing to appreciate that the Appellant's cause of action against the 1st Respondent for an indemnity is premised on Section 93 and 98 of the Contracts Act 1950 and not for the tort of conspiracy to injure.

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4. In failing to address his mind and find that the Appellant suffered loss and damage as a result of having to redeem and discharge Property D by reason of the 1st Respondent's failure to repay OCBC and is entitled to be indemnified for the said loss.

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5. In finding that 3rd, 4th and 6th Defendants are not liable despite being directors of the Appellant by taking into account the following irrelevant considerations:

5.1 Letters of Indemnity issued by the 2nd Respondent to the 3rd and 4th Respondent;

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5 5.2 Evidence to show that the 3rd, 4th and 6th Respondents
 were only employees who acted under instructions;
 and

 5.3 Evidence to show that the 2nd Respondent was the main
10 employer whose instructions could not be disobeyed.

6. In applying the beyond reasonable doubt standard of proof
 and should instead have applied the balance of probabilities
 standard of proof.

15 7. In failing to appreciate that the elements of a conspiratorial
 agreement include "a combination of efforts" as per
 Renault SA v Inokom Corp Sdn Bhd & Anor (2010) 5
 MLJ 394. In this regard, the Honorable Judicial
20 Commissioner failed to take cognizance that the several
 overt acts pleaded against the individual Respondents
 amount to a combination of efforts by them for an unlawful
 purpose or by unlawful means.

25 8. In failing to adopt the approach to evaluating the several
 overt acts pleaded against the individual Respondents set
 out in ***Khoo Teng Chye v Cekal Berjasa Sdn Bhd (2015)***
 6 CLJ 449 and instead evaluated them in a blinkered and
 restrictive fashion so as to find that the overt acts did not
30 amount to an agreement.

9. In failing to find that the combination of efforts through the overt acts pleaded resulted in the Appellant being injured and suffering loss and damage and in this regard failed to appreciate and apply the *ratio* in the House of Lords decision of ***Sorrel v Smith (1925) AC 700*** and the English Court of Appeal case of ***Regina v Simmons [1969] 1 Q.B. 685***.
10. By taking into consideration the following irrelevant matters in finding that the Appellant either did not suffer loss or that it was improbable that losses occurred as a result of the pleaded over acts because:
- 10.1 there was no agreement in the first place;
- 10.2 the monies drawdown from OCBC were credited into the 1st Respondent's bank account;
- 10.3 the cheque books were kept by Neo Thian Chuan ("Neo"), the 1st Respondent's finance manager;
- 10.4 the Invoice Financing Facility was for the benefit of the 1st Respondent and not intended to injure the Appellant.

5 11. For drawing an adverse inference against the Appellant for
failing to call Neo to testify on its behalf when in fact it ought
to have been invoked against the directors of the 1st
Respondent namely the 3rd, 4th 5th and 6th Respondents
and the 8th Defendant as *de facto* director for their failure
10 to call Neo.

12. By failing to consider and give any weight to the evidence
led by the Appellant's witnesses and SD1 on the systematic
mismanagement of the 1st Respondent and the dissipation
15 and hiving off of its assets in furtherance of the Scheme.

13. In failing to find that the directors of the 1st Respondent
including the 8th Respondent as a *de facto* director owe a
duty to the 1st Respondent and its creditors and sureties
20 (which includes the Appellant) to properly administer the
affairs of the 1st Respondent and not to dissipate or exploit
its assets for their own benefit or to the detriment of its
creditors and sureties as per the *ratio* in the House of Lords
decision in ***Winkworth v Edward Baron Development Co***
25 ***Ltd (1987) 1 All ER 114.***

14. In failing to find that the 3rd, 4th, 5th, 6th and 8th Respondents
breached their duties and are liable to the Appellant's
losses which arose by reason of the 1st Respondent's

5 inability of pay OCBC on account of the wrongful dissipation
of its assets.

10 15. In misapprehending and misapplying the *ratio* in ***Syarikat
Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri
Kelantan Darul Nairn (2015) 2 CLJ 1037*** in relation to the
4th and 5th Respondents who closed their respective cases
without testifying themselves nor adducing any evidence
through any other witnesses and who did not submit a no
case to answer. The Honorable Judicial Commissioner
15 ought to have instead followed the approach in the
Federal Court decisions of ***Jaafar bin Shaari v Tan Lip
Eng (1997) 3 MLJ 693*** and ***Takako Sakao (f) v Ng Pek
Yuen & Anor (2009) 6 MLJ 751***. The Honorable Judicial
Commissioner ought to have drawn an adverse inference
20 against the 4th and 5th Respondents.

25 16. In failing to consider the effect of the 3rd Respondent
closing his case without making himself available for
continued cross examination and abandoning his
testimony mid-stream. In this regard, The Honorable Judicial
Commissioner failed to consider and follow the Federal
Court decision of ***Dr Shanmuganathan v Periasamy
s/o Sithambaram Pillai (1997) 3 MLJ 61*** and the
decision of ***Superintendent of Lands & Surveys
Bintulu v Nor Anak Nyawai (2005) 3 CLJ 555***.
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17. In failing to find that the 3rd, 6th and 8th Respondent's testimony lacked credibility and plausibility and to find the evidence adduced by the Appellant's witnesses to be credible and when considered with the contemporaneous documents to have been sufficient to discharge the Appellant's evidential and legal burden of proof.

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18. In finding that the Appellant failed to prove that the 7th Respondent breached his fiduciary duties towards the Appellant.

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19. In taking into account irrelevant matters including matters that went beyond the scope of the Respondent's pleaded defenses.

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[44] In this appeal, the Appellant maintain its stand that the creation of the 3rd Party Charges were not for the benefit of KHH and KHR. The unlawful acts were allegedly committed at different periods of time; the procurement of the Revised Facility from OCBC of which 26 fictitious transactions were undertaken in a mere 4 months, the full sum under the loan totaling up to RM5 Million had been fully

5 utilized without any intention of repaying the same. Instead, the
some of the Respondents directly benefited from the fictitious
transactions; despite knowing the dire state of 1st Respondent, the
directors of 1st Respondent took no steps to settle the
indebtedness; the divestment of 1st Respondent's assets placed
10 1st Respondent in a position where it was unable to settle its
debts; and the directors of 1st Respondent allowed 1st Respondent
to be wound up resulting in OCBC commencing foreclosure
proceedings on Property C and Property D that belonged to KHH
and KHR.

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[45] In light of the unlawful acts committed by the 2nd to 8th
Respondents against the best interest of 1st Respondent, the
actions were commenced to seek for damages based on the
liability of 1st Respondent towards KHH and KHR for redeeming
20 the charged Property C and Property D from OCBC pursuant to
the Revised Facility; the tort of conspiracy on the part of the
deceased Lim, the 3rd Respondent, the 4th Respondent, the 5th
Respondent, the 6th Respondent, and the 8th Respondent who
although at different periods were conspirators, participants
25 and/or joint tortfeasors in a Scheme with the predominant purpose
of injuring KHH and KHR by intentionally putting 1st Respondent
in a position of inability to pay its debts; and the breach of
fiduciary duties by the deceased Lim, the 3rd Respondent, the 4th
Respondent, the 5th Respondent, the 6th Respondent, and the 8th
30 Respondent (as the *de facto* director of 1st Respondent).

5 **[46]** In view of this suit brought against 1st Respondent for failing to
service the said OCBC Facility whereby KHH and KHR's
properties were in danger of being foreclosed and that KHH and
KHR had utilized its own funds to redeem those properties for
10 RM5.8million and as a result, thereof, KHH and KHR are claiming
loss and damages arising from the redemption of the said
properties, in avoiding liability arising from KHH and KHR's claim,
1st Respondent is claiming for indemnity and contribution from the
estates of the deceased Lim to 9th Respondent being the officers
of 1st Respondent as the monies drawn down from the OCBC
15 Facility obtained was alleged not utilized for 1st Respondent's
benefit or business.

[47] We heard the Appellant's submissions and also relied on the
written submissions. The Appellant submitted that the learned JC
20 erred in law and on the facts in arriving at the decision on the
grounds stated at paragraphs 43 above. By those grounds, the
Appellant submitted that this Court should intervene to correct the
decision of the learned JC and allowed this appeal. We also
heard the submissions from the Respondents and also
25 considered their written submissions which supported the finding
of facts by the learned JC.

[48] Generally, an appellate court will not intervene with the decision
of the trial court unless it can be shown that the High Court
30 arrived at a decision that was '*plainly wrong*'.

5 APPELLATE INTERVENTION

[49] A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bad findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong' (***MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428***).

[50] The jurisdiction of the Court of Appeal to intervene against a decision of the High Court has to rest on settled principles; the court should only upset a decision of the High Court where there is a clear error leading to a perverse finding or resulting in miscarriage of justice, particularly where the lower court has decided on the basis of discretion (***Merbok Hilir Bhd v Sheilh Khaled Jassem Mohammad Jassem Al-Thani & Other Appeals [2013] 8 CLJ 309 (CA)***). [See also: ***Yu Gui v Jeffrey Law Siew Su & Ors [2016] 7 CLJ 540 (CA)***; ***Bank Pertanian Malaysia Bhd v MCI Bio Tech Sdn. Bhd [2013] 9 CLJ 29 (CA)***; ***Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2013] 9 CLJ 828 (FC)***]; ***Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] MLJU 135***; ***S Quarry Sdn Bhd v Desaru Development***

5 ***Corporation Sdn Bhd & Ors [2019] 1 LNS 93; Merita
Merchant Bank Singapore Ltd v Dewan Bahasa dan
Pustaka [2014] 9 CLJ 1064; Gan Yook Chin (P) & Anor
v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1
[TAB 2]; UEM Group Berhad v Genisys Integrated Pte
10 Ltd [2010] 9 CLJ 785 [TAB 3]; and Dream Property Sdn
Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441.***

OUR VIEW

15 **[51]** To begin with, in the Appellant's Re-Amended Statement of Claim
in Suit 59 (Appeal 232) the Appellant prays for the following
reliefs:

20 i) A declaration the land Property D was wrongfully
encumbered by the 3rd Party Charge and damages to be
assessed in respect of any loss or damage suffered by the
Appellant for loss of use and/or the Appellant's entitlement of
Property D as a result of the creation of the Charge from
16.2.2006 to the date of redemption.

25 ii) A declaration that the Respondents had wrongfully conspired
to injure the Appellant by wrongfully creating the Charge over
Property D and wrongfully encumbering the same and
damages for conspiracy against all the Respondents to be
30 assessed.

5 iii) The sum of RM2, 800,000.00 for redemption of Property D
together with interest thereon at the rate of 5% per annum
from 7.2.2014 to date of full payment.

10 **[52]** It is not disputed that OCBC Bank (M) Sdn Bhd vide a letter of
offer dated 8.8.2005 had offered a financing facility of RM10
million to the 1st Respondent with the properties amongst others
property D and Property C placed as security. On 30.11.2007, the
1st Respondent issued a letter to OCBC Bank (M) Bhd requesting
15 for a restructuring of the said financing facility and to convert it
into an Omnibus Trade line account. OCBC consented to the
request made by the 1st Respondent and a revised facility from
RM10 million to RM5 million was offered. Guarantee for the
revised facility was maintained on the existing 3rd party charge on
property D and property C and on 24.3.2008, the Board to
20 Directors of KHH and KHR passed a resolution to create a 3rd
party charge on property D and property C for the revised
financing facility.

25 **[53]** The Appellant's commencement of actions was to recover losses
suffered resulting from the redemption of 2 properties namely,
Property C and Property D, owned by KHH and KHR, which were
subjected to 3rd party charges by OCBC Bank Bhd ("OCBC") as a
collateral for a trade facility *vide* Letter of Offer dated 18.03.2008
("Revised Facility") granted to the 1st Respondent.

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5 **[54]** The actions against the Respondents are for acts of conspiracy
and breach of fiduciary duties for the unlawful creation of the 3rd
party Charge of Property C and Property D to injure the Appellant.
The Appellant's cause of action against the 1st Respondent for an
indemnity is premised on Section 93 and 98 of the Contracts Act
10 1950 and not for the tort of conspiracy to injure.

15 **[55]** In the grounds of judgment, the learned JC had identified 2 (two)
issues for Court's determination. The issues are whether the 1st,
3rd, 4th, 6th, 7th and 9th Respondents had conspired to cause
damages to KHH and KHR. To determine this issue, the Court
made a finding whether the Respondents had entered into an
agreement to commit fraud in the creation of the 3rd party Charge.
The other issue is whether the 3rd, 4th, 6th, 7th and 9th Defendants
had breached their fiduciary duty towards KHH and KHR.

20 **[56]** From the above revelation of facts, our preliminary observation
shows that that KHH, KHR and 1st Respondent is controlled by the
deceased Lim and was the founder and/or owner and/or
managing director for KHH, KHR and 1st Respondent. The
controlling mind behind the creation of the 3rd party Charge on
25 KHH and KHR Properties, accepted by 1st Respondent was the
deceased Lim. In other words, as the owner and managing
director, the deceased Lim was the decision maker in the
management and business affairs of KHH, KHR and 1st
30 Respondent. The decision of the learned JC was not in the

5 Appellant's favor because the Appellant failed to prove such a meeting of minds to do an unlawful acts exists among the Respondents to injure the Appellant. It is necessary to show a meeting of minds or agreement in order to succeed.

10 **[57]** We found that the Appellant's grounds in paragraph 1.2 complaining that the learned JC erred in law and on the facts by failing to find on a preponderance of evidence that the Appellant had established liability against the deceased Lim to the 7th Respondents for breach of their fiduciary duties to the
15 Appellant for the wrongful creation of the Charge is without merit.

[58] In our view, the creation of the Charge is lawful because the Board to Directors of KHH and KHR passed a resolution to create
20 a 3rd party charge on Property D and Property C for the initial facility of RM10 million and later revised the facility to RM5 million. The Appellant knew and had approved for the properties to be given to 1st Respondent which 1st Respondent Board of Directors' resolutions was accepting the Appellant eight properties including
25 Property C and D to be charged in favor of OCBC. The submission by the Appellant that the deceased Lim to 8th Respondents had committed the unlawful acts of creating the 3rd Party Charges executed to encumber Property C and Property D is untenable and has no merit.

5 **[59]** Be that as it may, it was argued that the learned JC failed to appreciate that the elements of a conspiratorial agreement include "a combination of efforts" for an unlawful purpose or unlawful means as per ***Renault SA v Inokom Corp Sdn Bhd & Anot (2010) 5 MLJ 394*** cited by the Appellant. We considered the argument. In our view, the learned JC has made a finding of facts that the several overt acts pleaded against the individual Respondents did not amount to a combination of efforts by them for an unlawful purpose. A finding of facts is a result of evaluating the several overt acts pleaded against the individual Respondents. In view of that we did not think that the case of ***Khoo Teng Chye v Cekal Berjasa Sdn Bhd (2015) 6 CLJ 449*** referred by the Appellant to suggest that the learned JC has evaluated them in a blinkered and restrictive fashion applies.

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[60] Having perused the ground of judgment carefully, we were satisfied that the learned JC had evaluated the evidence before him and found the allegation to commit the fraud as alleged by KHH and KHR and breach of fiduciary duty or conspired in the scheme by the Respondents to do unlawful act by unlawful means for the purpose of injuring the KHH and KHR which resulted in damage to the them had not been made out because there is no evidence to prove the allegations exists. The decision is not plainly wrong.

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5 **[61]** As held by the Court of Appeal in ***SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor*** [2010] 9 CLJ 389, the tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought
10 about by unlawful means. There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs
15 must establish that there must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish: an
20 agreement between two or more persons; for the purpose of injuring the plaintiff; and acts done in the execution of that agreement resulted in damage to the plaintiff.

25 **[62]** It was also held that if the predominant purpose of the defendants is to protect or advance their own self-interest, even though damage to the plaintiff is an unintended consequence, it is not actionable. The lawful acts or unlawful means for purposes of the tort may be crimes or torts or breaches of statutory provisions. The burden of proving the existence of an agreement or
30 arrangement among the defendants is on the plaintiff and a high

5 degree of proof is required. This principle is found in ***Lum Sow Kuen v. Chuah Choong Heong & Ors [1998] MLJ 39*** which sets out the principles governing conspiracy (See: also the leading cases on the law of conspiracy, namely ***Lonrho v. Shell [1981] 2 All ER 456***, ***Lonrho v. Fayed [1991] 3 AER 303***, and ***Seagate Technology Pte Ltd & Anor v. Heng Eng Li & Anor [1994] 1 SLR 534*** and affirmed by the Singapore Court of Appeal on the issue of conspiracy and reported in [1995] 1 SLR 17 at 23-26 and the commentary in Clerk & Lindsell on Torts (17th Ed) (1995) pages 1267-1287.

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[63] What is a conspiracy? The Federal Court in ***Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors [1979] 1 MLJ 71, 72***, approved the following definition of conspiracy of Clerk and Lindsell on Torts (13th Ed) p. 817, viz: A conspiracy consists ... in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. 45 Halsbury's Laws of England (4th Ed) at para 1527, states that the essential ingredients of conspiracy are (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose though it is not necessary that each

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5 *in the nature of an express agreement, whether formal or informal. It is*
 sufficient if two or more persons combine with a common intention, or
 that they deliberately combine, albeit tacitly to achieve a common end.
 How then is this to be ascertained? As stated in R v Siracusa the
 existence of such an agreement or combination of action with a common
10 *purpose can only be inferred from overt acts.”*

[66] From the above-distilled principles and applying the same in
respect of the Respondents, the Appellant must prove that there
was an agreement or arrangement among the Respondents to
15 carry out an overt act. The learned JC made a finding that the
 evidence tendered by KHH and KHR cannot prove that the 3rd
 Respondent, the 4th Respondent, the 6th Respondent, the 7th
 Respondent, the 9th Respondent as well as the deceased Lim and
 the 5th Respondent had conspired with each other or with illegal
20 intention or by unlawful means to injure KHH and KHR. KHH and
 KHR also failed to show who Respondents aforementioned had
 breached their fiduciary duty towards KHH and KHR.

[67] It was argued that the learned JC ought to have drawn an
25 adverse inference against the 4th and 5th Respondents. The
 learned JC failed to consider the effect of the 3rd Respondent
 closing his case without making himself available for
 continued cross examination and abandoning his testimony
 mid-stream, therefore, failed to consider and follow the Federal
30 Court decision of ***Dr Shanmuganathan v Periasamy s/o***
 Sithambaram Pillai (1997) 3 MLJ 61 and the decision of

5 ***Superintendent of Lands & Surveys Bintulu v Nor Anak Nyawai (2005) 3 CLJ 555.***

10 [68] It was also argued that the learned JC had misapprehended and misapplied the *ratio* in ***Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Nairn (2015) 2 CLJ 1037*** in relation to the 4th and 5th Respondents who closed their respective cases without testifying themselves nor adducing any evidence through any other witnesses and who did not submit a no case to answer.

15 [69] We considered the arguments and found the grounds raised are without merit. The learned JC in his grounds of judgment found there is no issue arising from the failure of the 4th and 6th Respondents to give evidence as KHH and KHR have failed to
20 prove that the 4th, 6th Respondents together with the 3rd, 7th, 9th Respondents as well as the deceased Lim and 5th Respondent had committed the tort of conspiracy with the purpose of causing damages to KHH and KHR.

25 [70] We were aware of the approach in the Federal Court decisions of ***Jaafar bin Shaari v Tan Lip Eng (1997) 3 MLJ 693 and Takako Sakao (f) v Ng Pek Yuen & Anor (2009) 6 MLJ 751*** that in such case the learned JC must presumed the Appellant's evidence to be true.

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5 **[71]** The Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 at 739-740, paras 54 and 56 held that:

10 "[54] Section 101(1) provides that 'Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. 'Section 101 states that the initial burden of proving a prima facie case in his favor is cast on the plaintiff...' (Woodroffe and Amir Ali, *Law of Evidence* (19th Ed Vol 3) at p 3194). Illustration (b) to s 101 puts it beyond doubt that the

15 'burden of proof' rests throughout on the plaintiff. Section 102 provides that 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'. 'The initial onus of proving the case is always on the plaintiff' (Sarkar *Law of Evidence* 16th Ed at p 1593). Illustration (a) to s 102 puts it beyond doubt that a

20 plaintiff has the initial onus of proof ...

 [56] Thus, a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA,

25 delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:

 ... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the

30 evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other

5 *hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been discharged by the plaintiff. The legal burden of proof- a permanent and enduring burden - does not shift. A party who has the legal burden of*
10 *proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party hears the legal burden of proof.*

15 *[57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies f.1; et incumbit probation qui decit, non qui negat, Actori incibit probation. The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim Potior est condition*
20 *defendants. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof*
25 *changes sides; and he, in his turn, is bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him. Reus excipendo fit actor' (Woodroffe and Amir Ali, Vol3 at pp 3190-3191)."*

30 **[72] The Court of Appeal had recently in *Lembaga Penggalakan Pelancongan Malaysia v One Big Option Sdn Bhd* [2018] 1 MLJ 465 at 472-473 followed the decision of the apex court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri***

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Kelantan Darul Nairn [2015] 3 MLJ 609; [2015] 2 CLJ 1037

which sets out the effect of a submission of no case to answer:

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“[15] In dealing with the issue of whether the appellate court can and ought to disturb findings of fact reached by the trial court where the evidence led by the plaintiff are assumed to be true when the defendant elected not to call any witnesses, the Federal Court made the following observations at p 617 (MLJ); p 1059 (CLJ):

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*[56] The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (see **Gan Yook Chin & Anor v Lee Ing Chin & Ors [2005] 2 MLJ 10; [2004] 4 CLJ 309** and **UEM Group Genesis Integrated Engineers Pte Ltd & Anbor [2010] 9 CLJ 785**). And, the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see **Ranbaxy (Malaysia) Sdn Bhd v El Du Pont De Nemours and Company [2011] MLJU 1135; [2011] 1 LNS 16; [2011] 1 AMCR 857**). In other words, it was upon the plaintiff itself, and certainly not the defendant to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well- founded before the court grants judgment on the claim (see *The Owners Of And All Other Persons Interested In The **Ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10 [2000] 1 MLJ 449; [2000] 1 CLJ 695; Maju Holdings Sdn Bhd v Fortune Wealth (HK) Ltd & Other Appeals [2004] 4 MLJ 105; [2004] 4 CLJ 282** and **Teh Swee Lip v Jadewe/1 Holdings Sdn Bhd [2013] 6 MLJ 32;****

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[2014] 8 CLJ 451). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in Law. In this regard, in adopting the approach of the case of **Storey v Storey [1961] P 63**, Suriyadi JCA (as His Lordship then was) in **Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369** recognized this to be the case as can be seen from the following passage of His Lordship's judgment:

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There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law. And in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged".

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[73] In this case, we agreed with the learned judge reference to the case of **Syarikat Kemajuan Timbermine Sdn. Bhd v Kerajaan Negeri Kelantan Darul Naim** (supra). Although the principle is that that once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is also that all the evidence led by plaintiff must be assumed to be true. However, the fact that the Defendant led no evidence or call no witnesses did not absolve the Plaintiff from discharging its burden

5 in law. The evidence adduced by the Plaintiff must still be sufficient to prove the claim.

10 [74] It was also argued that the learned JC erred in law by applying his mind to the '*beyond reasonable doubt*' standard of proof for fraud in civil cases. We found this argument also have no merit. As seen at paragraph 54 of the judgment, the learned JC held that on the balance of probabilities, KHH and KHR have failed to prove their claim against 1st Respondent, the 3rd Respondent, the 4th Respondent, the 6th Respondent, the 7th Respondent and the 9th Respondent.

20 [75] We failed to see from the decision that it can be shown that the High Court arrived at a decision that was '*plainly wrong*'. We were satisfied that the finding of facts of the learned JC was based on the evidence before him which the appellate Court did not have the specific audio-visual advantage that a trial judge has is in respect of the assessment of the credibility of the oral evidence, being the witness examined and cross-examined before the trial judge, and the assessment of weight of such non-documentary evidence produced and examined before him. The findings of fact by the trial Judge on such evidence is entitled to great weight, and unless that finding flies in the face of the mute evidence, cannot warrant appellate intervention. (See: ***Lin Wen-Chih & Anor v Mycom Bhd (2014) 3 MLJ 691***).

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5 **CONCLUSION**

10 **[76]** Having considered the Appellant's and the Respondents' submissions and also relying on their written submissions, perusing the grounds of judgment of the learned JC and the record of appeal, we failed to see any appealable error in the judgment of the learned JC or the judgment is plainly wrong. We found the appeal has no merit.

15 **[77]** Our decision is unanimous that both the appeals are dismissed with Costs of RM2,000.00 each for 1st Respondent and the Deceased Lim's solicitors and RM10,000.00 for each set of other Respondents' solicitors subject to allocator.

Dated this: 15th June 2020

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25 ***Sgd***
KAMALUDIN MD. SAID
JUDGE
COURT OF APPEAL MALAYSIA
PUTRAJAYA

30

5 **PARTIES**

1. David Mathews and Ng Ken Yong for the Appellants
 (Messrs Mathews Hun Lachimanan)
- 10 2. Raj Shankar for the Respondent 1
 (Messrs Raj Shankar)
3. SFC Mohamad Hanafi Bin Basri for the Respondent 2
 (Malaysian Department of Insolvency)
- 15 4. Jean Lew for the Respondent 3 & 4,
 (Messrs GC Lew & Co.,)
5. Lim Jit Kiong & Ho Yit Jean for the Respondent 6
20 (Messrs JK Lim)
6. Ng Chew Hor for the Respondent 5 & 8
 (Messrs Ng, Fan & Associates)