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Nautilus Tug & Towage Sdn Bhd v Nautical Supreme Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-182–01 OF 2022
HANIPAH FARIKULLAH FCJ, MARIANA YAHYA AND WONG KIAN KHEONG JJCA
17 JANUARY 2025

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Companies and Corporations — Directors — Duties and responsibilities — Breach of duty — Appellant claimed second and third respondents breached statutory and fiduciary duties owed — Whether there were breaches of duties by second and third respondents — Companies Act 2016 ss 211, 213, 214, 217 & 218

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Evidence — Inference — Non-sinister inference rule — Application of — Whether non-sinister inference rule should be applied

E

Tort — Conspiracy — Conspiracy to injure appellant — Appellant claimed first and second respondents conspired to injure by lawful and/or unlawful means and third respondent was co-conspirator in conspiracy — Whether respondents committed tort of conspiracy to harm appellant — Whether appellant suffered actual loss or damage

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The appellant's ('plaintiff') shareholders were: (a) the first respondent ('first defendant') who held 20% of the shares; and (b) Azimuth Marine Sdn Bhd ('AMSB') who held 80% of the shares. The first defendant nominated the second and third respondents ('second defendant' and 'third defendant') as non-executive directors of the plaintiff; they were also directors of the first defendant. The plaintiff was a special purpose vehicle for a project with Vale Malaysia Minerals Sdn Bhd ('Vale') involving the construction, ownership, and operation of seven harbour tug boats. A harbour tugs services agreement was signed with Vale, and by way of a Baltic and International Maritime Council standard ship management agreement, the plaintiff appointed Azimuth Ship Management Sdn Bhd ('ASM') to manage the boats. A banking facility was obtained from Export-Import Bank of Malaysia Bhd ('bank'). The plaintiff entered into a sale and purchase agreement with Shin Yang Shipyard Sdn Bhd ('Shin Yang') for the purchase of seven tug boats to be chartered to Vale. The plaintiff later entered into an agreement for advisory services with the first defendant. It was executed in recognition of the assistance provided by the first defendant in: (i) securing the harbour tugs services agreement; and

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(ii) establishing and maintaining goodwill with Vale and Vale's group of companies and all relevant government authorities for the purpose of the operations of the plaintiff's business. Until the delivery of the seventh tug boat by Shin Yang to the plaintiff, the plaintiff shall pay a monthly sum of US$7,000 to the first defendant. The plaintiff filed a suit against the first to third defendants for: (A) conspiracy to injure the plaintiff by lawful and/or unlawful means by the first and second defendants; (B) dishonestly assisting, aiding, abetting and/or was an accessory to the conspiracy by the third defendant ie co-conspirator; and (C) breaches of statutory and fiduciary duties by the second and third defendants. The plaintiff claimed that the conspiracy aimed either to displace AMSB and ASM from the project or to force AMSB to buy the first defendant's shares at an extortionate sum far in excess of the true value of the shares. The High Court in dismissing the suit: (1) adopted the non-sinister inference and rejected the sinister inference ('non-sinister inference rule'); (2) could not make an inference that the first and second defendants had the intention, let alone a predominant intention, to commit the tort of conspiracy to injure the plaintiff; and (3) the defendants did not cause any actual loss or damage to the plaintiff. The High Court also found that: (a) as the plaintiff could not prove the alleged conspiracy, the third defendant could not be liable to the plaintiff as a co-conspirator; and (b) as there was no intention to injure the plaintiff, the second and third defendants could not have breached the duties owed to the plaintiff. Hence, this appeal.

Held, dismissing the appeal:

(1) The non-sinister inference rule should not be applied. The Evidence Act 1950 ('the EA') did not provide for the non-sinister inference rule. Nor was the non-sinister inference rule stipulated in s 69 of the Courts of Judicature Act 1964 ('the CJA') or any other provision in the CJA. The Court of Appeal could draw any inference of fact which did not involve the credibility of a witness. Hence, the Court of Appeal was not bound by the non-sinister inference rule (see para 17).

(2) There was no proof on a balance of probabilities that the second and third defendants had breached s 132(1) of the Companies Act 1965 ('the CA 1965') and s 213(1) of the Companies Act 2016 ('the CA 2016'). Their conduct showed that they had acted for a proper purpose, in good faith and in the best interest of the plaintiff. The third defendant's state of mind in supporting the conduct of the second defendant could only be for a proper purpose, in good faith and in the best interest of the plaintiff. Additionally, the plaintiff had not succeeded to discharge its legal and evidential burden under ss 101(1), (2) and 102 of the EA to prove on a balance of probabilities that the alleged breaches of duties had been committed. Next, the second and third defendants had not made any

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'business judgment' with regard to the plaintiff. Hence, there could not be any room to apply s 214(1) of the CA 2016 on the second and third defendants (see paras 25, 27 & 29).

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(3) As there was no proof of the commission of the alleged breaches of duties, the plaintiff could not prove that the first and second defendants had conspired to harm the plaintiff by illegal means. As such, the third defendant could not be a co-conspirator to any tort of conspiracy by the first and second defendants to injure the plaintiff by unlawful means (see para 32).

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(4) The learned High Court judge did not err in making an inference that the defendants did not conspire to injure the plaintiff by lawful means. Thus, it could not be inferred that the defendants had the pre-dominant intention to cause loss to the plaintiff. Accordingly, the first and second defendants could not have committed the tort of conspiracy to injure the plaintiff by lawful means; and the third defendant could not be a co-conspirator with the first and second defendants to injure the plaintiff by valid means. The High Court's legal error in applying the non-sinister inference rule did not affect the merits of the High Court's decision in any manner and was therefore immaterial in this appeal according to s 72 of the CJA (see paras 35–36).

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(5) The learned High Court judge had not erred in deciding that the plaintiff's actual loss/damage had not been proven because: (a) the harbour tugs services agreement remained intact. There was no proof that the relationship between the plaintiff and Vale had been adversely affected in any manner; and (b) the plaintiff's facility was not terminated by the bank. In any event, the plaintiff had not discharged the legal and evidential burden to prove on a balance of probabilities that the plaintiff's actual loss/damage had been incurred due to the commission of the tort of conspiracy to injure the plaintiff by the defendants. Alternatively, the 'causa causans' of the plaintiff's actual loss/damage was not the defendants' conduct, let alone the tort of conspiracy committed by the defendants to injure the plaintiff in a lawful manner (see paras 38–40).

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[Bahasa Malaysia summary

Pemegang saham perayu ('plaintif') adalah: (a) responden pertama ('defendan pertama') yang memegang 20% saham; dan (b) Azimuth Marine Sdn Bhd ('AMSB') yang memegang 80% saham. Defendan pertama mencalonkan responden kedua dan ketiga ('defendan kedua' dan 'defendan ketiga') sebagai pengarah bukan eksekutif plaintif; mereka juga merupakan pengarah bagi defendan pertama. Plaintif adalah sebuah syarikat bertujuan khas untuk projek dengan Vale Malaysia Minerals Sdn Bhd ('Vale') yang melibatkan pembinaan, pemilikan, dan pengoperasian tujuh bot tunda pelabuhan. Perjanjian perkhidmatan kapal tunda pelabuhan telah ditandatangani dengan Vale, dan

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melalui perjanjian pengurusan kapal standard Baltic and International Maritime Council, plaintif melantik Azimuth Ship Management Sdn Bhd ('ASM') untuk menguruskan bot-bot tersebut. Kemudahan perbankan telah diperoleh daripada Export-Import Bank of Malaysia Bhd ('bank'). Plaintif telah memeterai perjanjian jual beli dengan Shin Yang Shipyard Sdn Bhd ('Shin Yang') untuk pembelian tujuh bot tunda yang akan dicarter kepada Vale. Plaintif kemudian menandatangani perjanjian untuk perkhidmatan penasihat dengan defendan pertama. Ia dilaksanakan sebagai pengiktirafan terhadap bantuan yang diberikan oleh defendan pertama dalam: (i) mendapatkan perjanjian perkhidmatan kapal tunda pelabuhan; dan (ii) membina dan mengekalkan nama baik dengan Vale serta kumpulan syarikat Vale dan semua pihak berkuasa kerajaan yang berkaitan untuk tujuan operasi perniagaan plaintif. Sehingga penghantaran bot tunda ketujuh oleh Shin Yang kepada plaintif, plaintif akan membayar jumlah bulanan sebanyak US$7,000 kepada defendan pertama. Plaintif memfailkan saman terhadap defendan pertama hingga ketiga bagi: (A) konspirasi untuk mencederakan plaintif dengan cara yang sah dan/atau tidak sah oleh defendan pertama dan kedua; (B) membantu, menyokong, memperdayakan dan/atau menjadi aksesori kepada konspirasi oleh defendan ketiga iaitu konspirator bersama; dan (C) pelanggaran tanggungjawab statutori dan fidusiari oleh defendan kedua dan ketiga. Plaintif mendakwa bahawa konspirasi tersebut bertujuan sama ada untuk menggantikan AMSB dan ASM dari projek tersebut atau memaksa AMSB untuk membeli saham defendan pertama pada jumlah yang jauh melebihi nilai sebenar saham tersebut. Mahkamah Tinggi dalam menolak saman tersebut: (1) mengguna pakai inferens bukan niat jahat dan menolak inferens niat jahat ('peraturan inferens bukan niat jahat'); (2) tidak dapat membuat inferens bahawa defendan pertama dan kedua mempunyai niat, apatah lagi niat yang utama, untuk melakukan tort konspirasi untuk mencederakan plaintif; dan (3) defendan tidak menyebabkan sebarang kerugian atau kerosakan sebenar kepada plaintif. Mahkamah Tinggi juga mendapati bahawa: (a) kerana plaintif tidak dapat membuktikan konspirasi yang didakwa, defendan ketiga tidak boleh dipertanggungjawabkan kepada plaintif sebagai konspirator bersama; dan (b) kerana tiada niat untuk mencederakan plaintif, defendan kedua dan ketiga tidak boleh dianggap telah melanggar tanggungjawab yang terhutang kepada plaintif. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

(1) Peraturan inferens bukan niat jahat tidak seharusnya digunakan. Akta Keterangan 1950 ('AK') tidak memperuntukkan peraturan inferens bukan niat jahat. Begitu juga, peraturan inferens bukan niat jahat tidak ditetapkan dalam s 69 Akta Kehakiman 1964 ('AK 1964') atau mana-mana peruntukan lain dalam AK 1964. Mahkamah Rayuan boleh membuat sebarang inferens fakta yang tidak melibatkan kredibiliti seorang saksi. Oleh itu, Mahkamah Rayuan tidak terikat oleh peraturan

A inferens bukan niat jahat (lihat perenggan 17).

(2) Tiada bukti atas imbangan kebarangkalian bahawa defendan kedua dan ketiga telah melanggar s 132(1) Akta Syarikat 1965 ('AS 1965') dan s 213(1) Akta Syarikat 2016 ('AS 2016'). Tindakan mereka menunjukkan bahawa mereka telah bertindak untuk tujuan yang betul, dengan niat baik dan demi kepentingan terbaik plaintif. Keadaan pemikiran defendan ketiga dalam menyokong tindakan defendan kedua hanya boleh untuk tujuan yang betul, dengan niat baik dan demi kepentingan terbaik plaintif. Tambahan pula, plaintif tidak berjaya memenuhi beban undang-undang dan keterangan di bawah ss 101(1), (2) dan 102 AK untuk membuktikan atas imbangan kebarangkalian bahawa pelanggaran tanggungjawab yang didakwa telah dilakukan. Selanjutnya, defendan kedua dan ketiga tidak membuat sebarang 'penilaian perniagaan' berkenaan dengan plaintif. Oleh itu, tidak ada ruang untuk menerapkan s 214(1) AS 2016 terhadap defendan kedua dan ketiga (lihat perenggan 25, 27 & 29).

(3) Memandangkan tiada bukti yang menunjukkan pelanggaran tanggungjawab yang didakwa, plaintif tidak dapat membuktikan bahawa defendan pertama dan kedua telah berkonspirasi untuk mencederakan plaintif melalui cara yang tidak sah. Oleh itu, defendan ketiga tidak boleh dianggap sebagai konspirator bersama kepada sebarang tort konspirasi oleh defendan pertama dan kedua untuk mencederakan plaintif melalui cara yang tidak sah (lihat perenggan 32).

(4) Hakim Mahkamah Tinggi yang bijaksana tidak terkhilaf dalam membuat inferens bahawa defendan tidak berkonspirasi untuk mencederakan plaintif melalui cara yang sah. Oleh itu, tidak boleh diandaikan bahawa defendan mempunyai niat utama untuk menyebabkan kerugian kepada plaintif. Dengan itu, defendan pertama dan kedua tidak boleh dianggap telah melakukan tort konspirasi untuk mencederakan plaintif melalui cara yang sah; dan defendan ketiga tidak boleh menjadi konspirator bersama dengan defendan pertama dan kedua untuk mencederakan plaintif melalui cara yang sah. Kesilapan undang-undang Mahkamah Tinggi dalam menerapkan peraturan inferens bukan niat jahat tidak menjejaskan merit keputusan Mahkamah Tinggi dalam apa jua cara dan oleh itu tidak relevan dalam rayuan ini mengikut s 72 AK 1964 (lihat perrenggan 35–36).

(5) Hakim Mahkamah Tinggi yang bijaksana tidak terkhilaf dalam memutuskan bahawa kerugian/kerosakan sebenar plaintif tidak dibuktikan kerana: (a) perjanjian perkhidmatan kapal tunda pelabuhan masih kekal. Tiada bukti bahawa hubungan antara plaintif dan Vale telah terjejas dengan cara yang negatif; dan (b) kemudahan plaintif tidak ditamatkan oleh bank. Dalam apa jua keadaan, plaintif tidak memenuhi beban undang-undang dan keterangan untuk membuktikan atas

imbangan kebarangkalian bahawa kerugian/kerosakan sebenar plaintif telah ditanggung akibat daripada pelanggaran tort konspirasi untuk mencederakan plaintif oleh defendan. Sebagai alternatif, 'causa causans' kerugian/kerosakan sebenar plaintif bukanlah tindakan defendan, apatah lagi tort konspirasi yang dilakukan oleh defendan untuk mencederakan plaintif dengan cara yang sah (lihat perenggan 38–40).]

Cases referred to

Abdul Rahman bin Soltan & Ors v Federal Land Development Authority & Anor and other appeals [2023] 4 MLJ 318, CA (refd)
Benmax v Austin Motor Co Ltd [1955] 2 WLR 418, HL (refd)
British Motor Trade Association v Salvadori & Ors [1949] 1 Ch 556, Ch D (refd)
Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd [1983] 1 SCR 452, SC (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd and another appeal [2018] 8 MLJ 394, HC (refd)
Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and other appeals [2016] 6 MLJ 73; [2016] 9 CLJ 169, CA (refd)
Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153, CA (refd)
JSC BTA Bank v Ablyazov and another [2018] 2 WLR 1125, CA (refd)
Li Siu Lun v Looi Kok Poh and another [2015] 4 SLR 667, HC (refd)
Lim Choon Seng v Lim Poh Kwee [2020] 5 MLJ 587, FC (refd)
Mersey Docks and Harbour Board v Procter [1923] AC 253, HL (refd)
Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors [2016] 11 MLJ 38, HC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)
OBG Ltd v Allan; Douglas v Hello! Ltd (No 3); Mainstream Properties Ltd v Young [2007] 4 All ER 545, HL (refd)
Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors [1996] 1 MLJ 843, SC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)
R + V Versicherung AG v Risk Insurance and Reinsurance Solutions SA [2006] EWHC 42 (Comm), QBD (refd)
Sundram v Arjunan & Anor [1994] 3 MLJ 361, SC (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177, FC (refd)
WT Development Sdn Bhd v Chow Cho Tai & Ors [2019] MLJU 1691; [2019] 1 LNS 2039, HC (refd)

A *Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thal* [1981] 2 MLJ 21, FC (refd)

Legislation referred to

B Companies Act 1965 (repealed by Companies Act 2016) ss 131B, 132(1), 133A, 167

Companies Act 2016 ss 210, 211(1), (2), 213(1), (2), (2)(a), (2)(b), 214(1), (1)(a), (1)(b), (1)(c), (1)(d), (2), 217(1), 218(1)(b), (1)(c)

Courts of Judicature Act 1964 ss 69(4), (5), 70, 72

C Evidence Act 1950 ss 8(2) , 40, 41, 42, 43, 44, 101(1), (2), 102

Federal Constitution art 8(1)

Legal Profession (Practice and Etiquette) Rules 1978 r 22

Rules of the Court of Appeal 1994 rr 54, 96

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Appeal from: *Nautilus Tug & Towage Sdn Bhd v Nautical Supreme Sdn Bhd & Ors* [2018] MLJU 1212 (High Court, Kuala Lumpur)

Cyrus V Das (with David Thomas Mathews, Olivia Loh, Lai Ann Xing and Koh Jo Vin) (Gananathan Loh) for the appellant.

E *Pang Kong Leng (with Chok Zhin Theng, Jonathan Lim See Kheng and Michelle Chin Zi Shan) (Cheah Teh & Su) for the respondent.*

Wong Kian Kheong JCA (delivering judgment of the court):

F A. BACKGROUND

[1] This appeal raises two novel questions, namely:

(1) if two inferences are equally open to the court from the same set of facts and these inferences do not concern the credibility of a witness, is there G a rule that the court should accept the non-sinister inference and reject the sinister inference ('non-sinister inference rule')? and

(2) with regard to the tort of conspiracy to injure a claimant by unlawful means, whether Malaysian courts should substitute the requirement of H actual knowledge regarding the unlawful means on the part of the conspirators and accept a lower threshold of 'constructive intent' as laid down by the apex courts in Canada and the United Kingdom ('UK') as follows:

I (a) the decision of the Supreme Court of Canada in *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd* [1983] 1 SCR 452; and

(b) the joint judgment of Lord Sumption and Lord Lloyd-Jones JJSC in UK's Supreme Court case of *JSC BTA Bank v Ablyazov*

and another [2018] 2 WLR 1125.

[2] A draft of this judgment ('draft') had been previously forwarded to Hanipah bt Farikullah FCJ (who heard this appeal in the Court of Appeal) and Mariana bt Haji Yahya JCA. Both my learned sisters had expressed their agreement with the draft.

B. BACKGROUND

[3] We shall refer to the parties as they were in the High Court.

[4] With regard to the plaintiff company ('plaintiff'):

(1) the shareholders of the plaintiff are as follows:

  (a) the first defendant company ('first defendant') holds 20% of the shares in the plaintiff ('first defendant's 20% shares (plaintiff)'); and

  (b) 80% of the plaintiff's shares ('AMSB's 80% shares (plaintiff)') belong to Azimuth Marine Sdn Bhd ('AMSB');

(2) the first defendant had nominated the second and third defendants ('second defendant' and 'third defendant') to be non-executive directors of the plaintiff. The second and third defendants are also directors of the first defendant;

(3) Dato' Seri Suresh Emmanuel Abishegam ('Captain Suresh') is:

  (a) the managing director ('MD') and Chief Executive Officer ('CEO') of the plaintiff; and

  (b) a director of AMSB.

AMSB is a member of Azimuth group of companies which is ultimately owned by East India Shipping Corp Sdn Bhd ('EISC'). Captain Suresh is the majority shareholder of EISC;

(4) Dato' Ahmad Johari bin Abdul Razak ('Johari') is a director of the plaintiff and the chairman of its board of directors ('BOD');

(5) Dato' Abdul Latiff bin Ahmad ('Latiff') is a director of the plaintiff. Mr Jaya Sudhir a/l Jayaram ('Sudhir') is an alternate director of Latiff in the plaintiff as at 7 March 2016. With effect from 2 November 2016, Sudhir is a director of the plaintiff; and

(6) the plaintiff's Financial Controller is Puan Azian bt Abdul Aziz ('Azian').

[5] The plaintiff is a 'special purpose vehicle' to undertake a project with Vale

Malaysia Minerals Sdn Bhd ('Vale') in Lumut, Perak Darul Ridzuan ('Project'). With regard to the project:

(1) the plaintiff was required to construct, own and operate seven harbour tug boats ('Tug Boats') to:

(a) be chartered to Vale; and

(b) provide harbour tug services.

For the purpose of the project, the plaintiff and Vale entered into a 'Harbour Tugs Services Agreement' on 11 April 2013 ('Harbour Tugs services agreement (plaintiff-Vale)').

(2) by way of a 'BIMCO' (Baltic and International Maritime Council) standard ship management agreement dated 12 April 2013 ('BIMCO agreement'), the plaintiff appointed Azimuth Ship Management Sdn Bhd ('ASM') to manage and operate the Tug Boats on behalf of the plaintiff; and

(3) the plaintiff obtained a US$51,845.183 banking facility from Export-Import Bank of Malaysia Bhd ('Bank') to finance 70% of the plaintiff's expenditure for the project — please refer to the facility agreement dated 9 April 2013 between the plaintiff and the Bank ('plaintiff's facility'). The balance 30% for the project was to be funded by the plaintiff's shareholders.

[6] On 12 April 2013, the plaintiff entered into a sale and purchase agreement with Shin Yang Shipyard Sdn Bhd ('Shin Yang') for the purchase of seven Tug Boats (to be chartered to Vale) at a total price of US$68.5m ('SPA (Shin Yang-plaintiff)').

[7] The plaintiff entered into an 'Agreement for Advisory Services' with the first defendant on 22 April 2013 ('advisory services agreement (plaintiff-first defendant)'). According to the advisory services agreement (plaintiff-first defendant), among others:

(1) the advisory services agreement (plaintiff-first defendant) was executed in recognition of the assistance provided by the first defendant in:

(a) securing the Harbour Tugs services agreement (plaintiff-Vale); and

(b) establishing and maintaining goodwill with:

(i) Vale and Vale's group of companies; and

(ii) all relevant government authorities,

— for the purpose of the operations of the plaintiff's business.

(2) until the delivery of the seventh Tug Boat by Shin Yang to the plaintiff, the plaintiff shall pay a monthly sum of US$7,000 to the first defendant.

C. PROCEEDINGS IN THE HIGH COURT

[8] The plaintiff had filed this suit ('this suit') against the first to third defendants (collectively referred to in this judgment as the 'defendants') based on the following three causes of action ('plaintiff's three causes of action'):

(1) the first and second defendants had conspired to injure the plaintiff by lawful and/or unlawful means ('alleged conspiracy (first and second defendants)');

(2) the third defendant had dishonestly assisted, aided, abetted and/or was an accessory to the alleged conspiracy (first and second defendants). In other words, the third defendant was a co-conspirator in the alleged conspiracy (first and second defendants) ('alleged co-conspirator (third defendant)'); and

(3) as the plaintiff's directors, the second and third defendants had breached the following duties owed to the plaintiff:

   (a) statutory duties pursuant to ss 213(1), (2), (2)(a), (2)(b), 214(1), 217(1) and 218(1)(b) and (1)(c) of the Companies Act 2016 ('the CA (2016)'); and

   (b) fiduciary duties under case law,

('alleged breaches of duties (second and third defendants)').

[9] The plaintiff alleged that the alleged conspiracy (first and second defendants) was carried out to injure the plaintiff by placing the plaintiff and the project in jeopardy so as to achieve either one of the following two alternative objectives:

(1) to displace AMSB and ASM from the project so as to enable the defendants to hijack the project for themselves without having to pay the full value of AMSB's 80% shares (plaintiff) ('alleged plan to exclude AMSB/ASM (project)'); or

(2) to force AMSB to buy the first defendant's 20% shares (plaintiff) at an extortionate sum far in excess of the true value of the first defendant's 20% shares (plaintiff) ('alleged alternative plan (sale of first defendant's 20% shares (plaintiff))').

[10] The defendants resisted this suit on the grounds, among others, that AMSB, as the majority shareholder of the plaintiff, had weaponised the plaintiff to:

(1) file this suit against:

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(a) the minority shareholder of the plaintiff, ie, the first defendant; and

(b) the second and third defendants who were nominated by the first defendant to be directors of the plaintiff,

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(2) muzzle dissent on issues of corporate governance in the plaintiff raised by the second and third defendants, including the mismanagement of the plaintiff by Captain Suresh and the other directors of the plaintiff who had been nominated AMSB ('plaintiff's corporate governance issues'); and

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(3) exert improper pressure on the defendants to halt other legal proceedings filed by, among others, the second defendant against Captain Suresh.

[11] The High Court dismissed this suit with costs of RM200,000 ('High Court's decision').

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[12] The plaintiff had appealed to the Court of Appeal against the High Court's decision ('this appeal').

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[13] According to the grounds of judgment of the High Court ('GOJ'), among others:

(1) this case concerned a dispute between the shareholders of the plaintiff ('shareholders' dispute (plaintiff)') — paras 150, 164, 197 and 198 GOJ;

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(2) with regard to the tort of conspiracy to injure the plaintiff:

(a) the learned High Court judge (later a judge of the Court of Appeal) followed Lord Nicholls' judgment in the House of Lords in *OBG Ltd v Allan; Douglas v Hello! Ltd (No 3); Mainstream Properties Ltd v Young* [2007] 4 All ER 545, at [166], that the plaintiff had to prove the defendants' intention to injure the plaintiff and not merely the defendants' foresight that the defendants' unlawful conduct might or would probably damage the plaintiff — paras 148, 189 and 190 GOJ;

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(b) the High Court must consider all the evidence as a whole and decide whether to draw an inference that the defendants had the intention to injure the plaintiff (paras 174 and 175 GOJ);

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(c) in paras 176 to 178 GOJ, the High Court adopted the non-sinister inference rule. According to the learned High Court judge, the non-sinister inference rule is laid down in the following two Court of Appeal cases:

(i) the majority judgment of Mahadev Shankar JCA in *Heller*

Factoring Sdn Bhd (Previously Known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153, at 177, decided as follows:

> *It is well established that when two inferences are equally open from the same set of facts, the sinister inference is not preferred.* (Emphasis added.)

(ii) according to Mary Lim Thiam Suan JCA (as she then was) followed *Heller Factoring* in *Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and other appeals* [2016] 6 MLJ 73; [2016] 9 CLJ 169, at [53]:

> [53] *But, given that the above circumstances, events and matters are construed and inferred by the learned High Court judge as amounting to a scheme with fraudulent overtones when these are in fact ordinary transactions and decisions of business and commerce, with respect, we are unable to see how that inference and conclusion can be safely and reasonably drawn by the learned judge*. These same circumstances, events and matters occurred over a period of time well before the plaintiff and the 12th defendant were in contract; and certainly these events are unrelated to the award. There is no evidence that the defendants, any of them, knew what the award would be. *There is nothing untoward let alone sinister in the first defendant or the directors knowing of the arbitration or that an award would be rendered. Knowledge of these matters is not and does not amount in law to intent to defraud or commit any of the torts complained of. More is required and there is no evidence of any degree before the trial court for the learned High Court judge to conclude as he did. These events and matters are capable of more than one inference. Where that is the case, the sinister inference cannot be preferred without more even where the burden is one on a balance of probabilities. The Court of Appeal had expressed to this effect in Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* ... (Emphasis added.)

(d) the learned High Court judge could not make an inference that the first and second defendants had the intention, let alone a predominant intention, to commit the tort of conspiracy to injure the plaintiff — paras 179 and 191 GOJ. According to the High Court:

(i) the second defendant raised the plaintiff's corporate governance issues (paras 154 and 179 GOJ) in the second defendant's email dated 29 January 2016 to all directors of the plaintiff, other than Captain Suresh ('defendant's email (29 January 2016)'). In the second defendant's email (29 January 2016), the second defendant had disclosed his proposals for putting in place and the implementation of policies in the plaintiff which could improve its corporate governance (para 157 GOJ);

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(ii) in the defendant's email (29 January 2016), the second defendant proposed a legal and financial review of the BIMCO agreement 'to ensure that [the BIMCO agreement] is fully above board' — paras 157 and 160 GOJ;

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(iii) the plaintiff's failure to pay Shin Yang after Shin Yang's delivery of seven Tug Boats to the plaintiff ('plaintiff's non-payment (Shin Yang)') — paras 158 and 159 GOJ.
The second defendant applied for leave of the High Court to commence a derivative action on behalf of the plaintiff with regard to the plaintiff's non-payment (Shin Yang) ('second defendant's derivative suit (Shin Yang)'). The High Court refused leave but this decision was reversed by the Court of Appeal. Hence, the second defendant's derivative suit (Shin Yang) had been filed (paras 161 and 165 GOJ);

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(iv) there was a conflict of interest on the part of Captain Suresh ('alleged conflict of interest (Captain Suresh)') — para 160 GOJ;

(v) in the defendant's email (29 January 2016), the second defendant proposed the appointment of a firm of accountants to conduct a forensic audit of the plaintiff's accounts — para 157 GOJ. For this purpose, the second defendant had appointed Messrs Crowe Horwath ('Messrs CH'). There was no evidence that Messrs CH had not acted professionally in this case — para 166 GOJ;

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(vi) the second defendant had repeatedly requested for the plaintiff's accounting records but to no avail (paras 159 and 162 GOJ). Consequently, the second defendant had to apply for and obtain an order from Mohd Nazlan Ghazali J (as he then was) in the High Court in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd and another appeal* [2018] 8 MLJ 394 for the plaintiff to disclose its accounting records to the second defendant ('inspection order (plaintiff's records)') pursuant to the then applicable s 167 of the Companies Act 1965 ('the CA (1965)') — para 159 GOJ;

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(vii) the alleged plan to exclude AMSB/ASM (project) was not probable because there was no other company to take the place of ASM in the project (para 160 GOJ);

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(viii) the second defendant's application to the High Court to cite the plaintiff, Captain Suresh and Azian for contempt of the inspection order (plaintiff's records) ('second defendant's committal proceedings'):
(viii)(a) was an exercise of the second defendant's right to enforce the inspection order (plaintiff's records); and
(viii)(b) could not be relied on to support the existence of the

alleged plan to exclude AMSB/ASM (project) paras 167 and 168 GOJ.

(ix) the second defendant called for an independent investigation in respect of the sinking of one Tug Boat, 'NTT Lumut' ('sinking (NTT Lumut)'). The second defendant failed to obtain leave of the High Court to file a derivative suit on behalf of the plaintiff in respect the sinking (NTT Lumut). This High Court's decision was affirmed on appeal to the Court of Appeal.
The sinking (NTT Lumut) concerned the second defendant because NTT Lumut was an asset of the plaintiff (para 169 GOJ). In any event, the plaintiff's insurance claim for the sinking (NTT Lumut) was not jeopardized — para 170 GOJ;

(x) in July 2015, Vale decided that Vale would not charter two Tug Boats, namely NTT Lumut and 'NTT Larut' ('two Tug Boats'), from the plaintiff. Vale had proposed for the two Tug Boats to be redeployed to Mozambique. The plaintiff did not agree because firstly, the plaintiff had no office in Mozambique. Secondly, the plaintiff was of the view that a bare boat charter (as proposed by Vale) would not ensure that the two Tug Boats would be adequately cared for.
The two Tug Boats were of financial concern for the plaintiff. Hence, when the second defendant insisted to participate in the negotiations between the plaintiff and Vale regarding the two Tug Boats ('plaintiff-Vale negotiations (two Tug Boats)'), he had a legitimate reason to be concerned (para 171 GOJ).
Furthermore, the Harbour Tugs services agreement (plaintiff-Vale) was concluded due to the efforts of the first defendant — para 172 GOJ. There was also no real reason for AMSB to be concerned about the second defendant's participation in the plaintiff-Vale negotiations (two Tug Boats) because AMSB had control of the shareholding and BOD of the plaintiff;

(xi) the measures taken by the first and second defendants in this case were not undertaken in stealth (para 180 GOJ). On the contrary, the first and second defendants resorted to court proceedings under 'full sight of the law' — para 180 GOJ;

(xii) in paras 181, 182 and 184 GOJ, the learned High Court judge could not accept that the tort of conspiracy was committed because of the plaintiff's refusal to extend the advisory services agreement (plaintiff-first defendant). According to the High Court, the advisory services agreement (plaintiff-first defendant) was worth only US$7,500 per month while the value of the Harbour Tugs services agreement (plaintiff-Vale) was in the region of US$200m. Furthermore, there was nothing wrong for the first

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defendant to seek an extension of the advisory services agreement (plaintiff-first defendant); and

(xiii) the plaintiff's refusal to pay the 'Daily Fee' to the first defendant was not a 'catalyst' for the defendants' tort of conspiracy to injure the plaintiff — paras 183 and 184 GOJ;

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(e) the alleged plan to exclude AMSB/ASM (project) was improbable because the first defendant did not have the expertise to provide the services that ASM was providing (para 185 GOJ). It was also improbable for the first defendant to incur an enormous legal expense in various legal proceedings against the plaintiff and at the same time, run the risk of jeopardizing the Harbour Tugs services agreement (plaintiff-Vale);

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(f) in para 186 GOJ, the learned High Court judge held that the alleged alternative plan (sale of first defendant's 20% shares (plaintiff)) was improbable because AMSB already had 80% shares in the plaintiff. As such, there was no obvious reason why AMSB would or could be forced to buy the first defendant's 20% shares (plaintiff) at an extortionate price; and

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(g) the defendants did not cause any actual loss or damage to the plaintiff (para 192 GOJ). According to the learned High Court judge:

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(i) there was no severance of the relationship between the plaintiff and Vale;

(ii) the plaintiff's facility was not terminated by the Bank;

(iii) any loss suffered by Captain Suresh (as the plaintiff's director) or the other directors of the plaintiff, did not amount to loss suffered by the plaintiff (an element of the tort of conspiracy) — para 193 GOJ;

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(iv) in paras 194 and 196 GOJ, the High Court held that the plaintiff's BOD had decided that:
(iv)(a) the plaintiff would indemnify the costs incurred by its directors who were cited in the second defendant's committal proceedings; and
(iv)(b) the plaintiff would store NTT Lumut and incur storage charges (instead of selling NTT Lumut as scrap),
As the plaintiff's BOD was controlled by AMSB and Captain Suresh, the plaintiff cannot now claim to have suffered the above two losses as caused by the defendants or their conspiracy;

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(v) the plaintiff's legal costs, time, effort and administrative disruption due to the second defendant's enforcement of the

inspection order (plaintiff's records) and other legal proceedings, could not be considered as loss caused to the plaintiff due to the alleged conspiracy (first and second defendants) — para 196 GOJ; and

(vi) the High Court applied the doctrine of 'damnum sine injuria' (damage without legal injury) in this case (para 196 GOJ),

(3) as the plaintiff could not prove the alleged conspiracy (first and second defendants), the third defendant could not be liable to the plaintiff as a co-conspirator — para 173 GOJ; and

(4) in respect of the alleged breaches of duties (second and third defendants):

(a) the CA (2016) came into effect on 31 January 2017. For the alleged breaches of duties (second and third defendants) which had been committed before the enforcement of the CA (2016), the plaintiff relied on the breaches of case law fiduciary duties by the second and third defendants (para 200 GOJ);

(b) as the learned High Court judge could not draw an inference that there was any intention to injure the plaintiff on the part of the defendants, the second and third defendants could not have breached:

(i) s 213(1) of the CA (2016) — paras 202 to 204 GOJ;

(ii) ss 213(2) and 214(1) of the CA (2016) — paras 205 to 207 GOJ;

(iii) s 217(1) of the CA (2016) — paras 209 to 216 GOJ. Furthermore, the learned High Court judge decided that there was no conflict between the interest of the plaintiff and the first defendant (as a shareholder of the plaintiff); and

(iv) s 218(1)(b) and (c) of the CA — paras 217 to 219 GOJ; and

(c) the second and third defendants did not breach case law fiduciary duties owed to the plaintiff — paras 220 to 226 GOJ.

OUR DECISION

D. OUR APPROACH

[14] We will first decide on the alleged breaches of duties (second and third defendants) and then on:

(1) the alleged conspiracy (first and second defendants); and

(2) the alleged co-conspirator (third defendant).

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E. BASIS FOR APPELLATE INTERVENTION

[15] The learned High Court judge's findings on the alleged breaches of duties (second and third defendants) are factual decisions. Consequently, in view of the audio-visual advantage enjoyed by the learned trial judge (as compared to an appellate court), as a general rule, an appellate court should not set aside the trial judge's findings of fact — please refer to the Federal Court's judgment delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paras [33] and [34]. Exceptionally, as explained in *Ng Hoo Kui*, at para [78], an appellate panel can only set aside a trial court's factual finding which is a 'plain' factual error as understood in the following two cumulative circumstances:

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(1) the trial court's finding of fact cannot be reasonably explained or justified; and

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(2) no reasonable trial judge could have arrived at the factual finding.

F. IS THERE A NON-SINISTER INFERENCE RULE?

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[16] With regard to an inference of fact made by a High Court's trial judge which does not involve the credibility of a witness, we refer to s 69(4) and (5) of the Courts of Judicature Act 1964 ('the CJA') as follows:

> s 69 *Hearing of appeals*
>
> ...
>
> (4) *The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires*.
>
> (5) *The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision*. (Emphasis added.)

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By virtue of s 69(4) and (5) of the CJA, in respect of a factual inference made by a High Court which does not concern the veracity of a witness, the Court of Appeal is in the same position as the High Court and may draw any inference of fact. This position in s 69(4) and (5) of the CJA is supported by the following cases:

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(1) in UK, Viscount Cave LC decided as follows in the House of Lords in *Mersey Docks and Harbour Board v Procter* [1923] AC 253, at pp 258 to 259:

> *The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a*

case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far as they are known, are undisputed; and the Court of Appeal was at liberty, and indeed was bound, to draw its own inference from them. (Emphasis added.)

(2) in *Benmax v Austin Motor Co Ltd* [1955] 2 WLR 418, at pp 420 to 421, Viscount Simonds in the House of Lords followed *Mersey Docks and Harbour Board* and decided as follows:

> *It appears to me that these statements are consonant with the Rules of the Supreme Court, which prescribe that 'all appeals to the Court of Appeal shall be by way of rehearing' (RSC, Ord 58, r 1), and that 'the Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made' (r 4). This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here it must first be determined what the defendant in fact did and, secondly, whether what he did amounted in the circumstances (which must also so far as relevant he found as specific facts) to negligence. A jury finds that the defendant has been negligent, and that is an end of the matter unless its verdict can be upset according to well established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem*. (Emphasis added.)

(3) *Benmax* has been adopted by our apex courts as follows (in chronology):

(a) by a 2–1 majority judgment of the Supreme Court delivered by

Edgar Joseph Jr SCJ in *Sundram v Arjunan & Anor* [1994] 3 MLJ 361, at 373;

(b) the decision of Peh Swee Chin SCJ in the Supreme Court case of *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors* [1996] 1 MLJ 843, at p 854; and

(c) in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, at 527 to 528, Mohd Dzaiddin FCJ (as he then was) gave the following judgment of the Federal Court:

> *On the other hand, there is a clear authority also from the House of Lords — and followed by the Privy Council — which says that a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former. That authority is the speech of Lord Reid in the House of Lords' decision in Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, *followed later by the Privy Council in the Singapore case of Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 *at p 94. At p 329, His Lordship stated*:
>
> *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. *But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion*. (Emphasis added.)
>
> In *Tay Kheng Hong v Heap Moh Steamship Co Ltd*, the Singapore Court of Appeal found there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. It held that the trial judge was wrong in accepting the appellant's evidence. On appeal, the Privy Council held that the Court of Appeal's acceptance of the witness's evidence depended on inferences from documents. However, these inferences were insufficient material to entitle them to reject the result arrived at by the trial judge.
>
> *In the present case, it is apparent to us that the learned judge based her findings after considering the evidence of the witnesses and the documents; and clearly, her conclusions were based on inferences drawn from them. In*

> *our view, the learned judge did not make any specific finding of fact based on the evidence of PW3 and DW3 and the documents. Although she accepted the evidence of PW3 and DW3 as the most telling, there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them. At any rate, we will also show that her acceptance of their evidence was wrong. As for the second issue, her conclusion depended entirely on inferences drawn from the three agreements, AB22, 26 and 29. Since the present case does not involve the question of credibility of the witnesses, we are satisfied, following the Benmax principle, that we are in as good a position to review and evaluate the evidence of the case as the trial judge.* (Emphasis added.)

(4) in *Lim Choon Seng v Lim Poh Kwee* [2020] 5 MLJ 587, at [83], Abdul Rahman Sebli FCJ (as he then was) delivered the following judgment of the Federal Court:

> [83] *Thus, the mere fact that the appellate court would have come to a different conclusion on the evidence is not a ground for interference except where the decision of the trial court was based entirely on inferences to be drawn from the proved facts (as opposed to findings which involved the issue of the credibility of the witnesses), in which case the appellate court would be placed in the same position as the trial court*. We do not think it is necessary to cite any authority for this trite proposition of law. (Emphasis added.)

From the view point of the *stare decisis* doctrine, the Court of Appeal is bound by the judgments of our apex courts in *Sundram, Paul Murugesu, China Airlines* and *Lim Choon Seng* ('four apex court decisions').

[17] We are of the respectful view that the non-sinister inference rule should not be applied by our courts. Our reasons are as follows:

(1) the Evidence Act 1950 ('the EA') does not provide for the non-sinister inference rule. Nor is the non-sinister inference rule stipulated in s 69 of the CJA or any other provision in the CJA;

(2) our research is not able to find the existence, let alone the application, of the non-sinister inference rule in other common law jurisdictions;

(3) based on the general standard of proof in civil cases, namely, a plaintiff is required to prove his or her case on a balance of probabilities, where there is no issue regarding the credibility of a witness, a trial court should draw an inference of fact which is probable. In other words, if there are two or more factual inferences and the veracity of a witness is not in doubt, the court should make an inference of fact which is probable, even though that probable factual inference may be sinister;

(4) an application of the non-sinister inference rule will fetter the trial court's judicial power and duty to draw a probable but sinister inference of fact.

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Such a fetter is contrary to justice; and

(5) as explained in the above para 16, by virtue of s 69(4) and (5) of the CJA as well as our four apex court decisions, the Court of Appeal can draw any inference of fact which does not involve the credibility of a witness. Hence, the Court of Appeal is not bound by the non-sinister inference rule. Regrettably, the attention of the Court of Appeal in *Heller Factoring* and *Formis Resources* was not drawn to s 69(4), (5) of the CJA and the four apex court decisions.

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In any event, we are bound by the four apex court decisions. Consequently, we are constrained to depart from *Heller Factoring* and *Formis Resources*. In the Federal Court case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, at pp 12 to 13, Peh Swee Chin FCJ has decided that the Court of Appeal is not bound by its own previous decision which cannot stand with a decision of our apex court (in this instance, the four apex court decisions).

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G. DID THE HIGH COURT ERR IN DECIDING THIS SUIT AS THE SHAREHOLDERS' DISPUTE (PLAINTIFF)?

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[18] We are not able to accede to the contention by the plaintiff's learned counsel that the learned High Court judge erred in law and/or in fact by deciding the plaintiff's three causes of action as the shareholders' dispute (plaintiff). The High Court, as a trial court, is duty bound to consider all the facts in this case, including the shareholders' dispute (plaintiff). Furthermore, by virtue of s 8(1) of the EA the shareholders' dispute (plaintiff) provides the motive for the conduct of the parties in this case. Section 8(1) of the EA states as follows:

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> 8(1) *Any fact is relevant which shows or constitutes a motive* or preparation *for any fact in issue or relevant fact*. (Emphasis added.)

G

H. WHETHER THERE WERE PLAIN FACTUAL ERRORS BY THE HIGH COURT REGARDING ALLEGED BREACHES OF DUTIES (SECOND AND THIRD DEFENDANTS)

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[19] We reproduce below ss 211, 213(1), (2), 214, 217(1) and 218(1)(b) and (c) of the CA (2016):

> 211 *Functions of Board*
>
> (1) *The business and affairs of a company shall be managed by, or under the direction of the Board.*
>
> (2) *The Board has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the constitution of the company.*

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213 *Duties and responsibilities of directors*

(1) *A director of a company shall at all times exercise his powers in accordance with [CA (2016)], for a proper purpose and in good faith in the best interest of the company.*

(2) *A director of a company shall exercise reasonable care, skill and diligence with —*

(a) *the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and*

(b) *any additional knowledge, skill and experience which the director in fact has.*

214 *Business judgment rule*

(1) *A director who makes a business judgment is deemed to meet the requirements of the duty under subsection 213 (2) and the equivalent duties under the common law and in equity if the director —*

(a) *makes the business judgment for a proper purpose and in good faith*;

(b) *does not have a material personal interest in the subject matter of the business judgment*;

(c) *is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances*; *and*

(d) *reasonably believes that the business judgment is in the best interest of the company.*

(2) *For the purposes of this section, 'business judgment' means any decision on whether or not to take action in respect of a matter relevant to the business of the company.*

217 *Responsibility of a nominee director*

(1) *A director* who was appointed by virtue of his position as an employee of a company, or *who was appointed by or as a representative of a member*, employer or debenture holder, *shall act in the best interest of the company and in the event of any conflict between his duty to act in the best interest of the company and his duty to his nominator, he shall not subordinate his duty to act in the best interest of the company to his nominator*.

218 *Prohibition against improper use of* property, *position, etc*

(1) *A director or officer of a company shall not, without the consent or ratification of a general meeting —*

...

(b) *use any information acquired by virtue of his position as a director or officer of the company*;

(c) *use his position as such director* or officer; ... (Emphasis added.)

[20] The plaintiff contended that the alleged breaches of duties (second and third defendants) had been committed as follows:

(1) the second defendant's conduct as the plaintiff's director was not for a proper purpose, was not in good faith and was not in the plaintiff's best

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interest (as required by s 213(1) of the CA (2016)) because:

(a) the second defendant's conduct was to preserve and enhance the relationship between the first and second defendants on the one part and Vale on the other part. Hence, the second defendant had interfered with issues between the plaintiff and Vale;

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(b) the second defendant met up with:

(i) Sudhir; and

(ii) Mr Paul Xavier Kelly ('Mr Kelly'), a British citizen who was Sudhir's independent adviser,

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with the intention to exclude Captain Suresh from the plaintiff.

(c) the second defendant caused strife and disharmony in the plaintiff;

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(d) the second defendant refused to attend the plaintiff's Annual General Meetings ('AGM');

(e) the second defendant's committal proceedings had been commenced and were subsequently set aside by the High Court;

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(f) the second defendant called for an independent investigation in respect of the sinking (NTT Lumut); and

(g) the manner in which the second defendant dealt with the Bank could have led to a termination of the plaintiff's facility by the Bank.

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(2) the third defendant breached his duties owed to the plaintiff as follows:

(a) the third defendant was the alleged co-conspirator (third defendant);

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(b) the third defendant refused to sign the plaintiff's cheques with regard to the plaintiff's operational expenses; and

(c) contrary to s 213(1) of the CA (2016), the third defendant did not act for a proper purpose, did not act in good faith and in the plaintiff's best interest.

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(3) the second and third defendants failed to comply with s 213(2)(a) and (b) of the CA (2016) by not exercising reasonable care, skill and diligence as directors of the plaintiff;

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(4) the second and third defendants breached s 214(1)(a) of the CA (2016) by not exercising in good faith any 'business judgment' for a proper purpose;

(5) the second and third defendants had subordinated their duty to act in the best interest of the plaintiff to the first defendant (who had nominated

them as the plaintiff's directors). Hence, a breach of s 217(1) of the CA (2016) had been committed by the second and third defendants; and

(6) the second defendant breached s 218(1)(b) and (c) of the CA (2016) when he obtained the inspection order (plaintiff's records) solely in the interest of the first defendant and/or to the detriment of the plaintiff.

[21] The plaintiff's learned counsel had attempted to persuade us to set aside the High Court's judgment regarding the alleged breaches of duties (second and third defendants) because the learned High Court judge omitted to consider the judgment of Azahar Mohamed FCJ (as he then was) in the Federal Court in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 (which laid down the test to be applied by the courts in deciding whether a director had breached his or her statutory duties under the then applicable s 132(1) of the CA (1965)). We shall refer to this test as the 'test (*Tengku Dato' Ibrahim Petra*)'.

[22] We reproduce the following passages in the Federal Court's judgment in *Tengku Dato' Ibrahim Petra*, at paras [120], [127], [133], [165] to [167] and [193]:

> [120] *It is seen from the foregoing discussion that courts in other jurisdictions have consistently taken the view that shareholders in general meetings may not control the powers of management conferred by the articles of associations on a board of directors; they can only do so by altering the articles to take away the powers of the board of directors, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. Today this principle cannot be disputed. We respectfully agree and we would gratefully adopt this view.*
>
> ...
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> [127] *Section 131B (CA (1965)) which was inserted into (CA (1965)) in August 2007, created a new provision that has a significant and wide ranging consequence, primarily on directors. The new provision expressly declared that the board of directors must manage the business and affairs of a company. It is necessary to look at the operative word of the provision. The legislature advisedly used the word 'must', which highlighted legislative recognition that the board of directors is the principal management organ of a company. It is interesting to note that s 157A of Singapore Companies Act, which is equivalent to our s 131B, provides that the business of a company shall be managed by or under the direction of the directors. In consequence, the statutory position in Malaysia is even stronger by s 131B using the words the business and affairs of a company 'must be managed' by the board of directors. As the authors of Woon & Hicks, 'The Companies Act of Malaysia: An Annotation' (LexisNexis, 2012) at p 210 observed, s 131B 'makes it mandatory for the business and affairs of a company to be managed by or under the directions of the directors'. The word comes along with phrase 'the board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company' in sub-s 2 of s 131B. The provision was drafted in the widest possible terms; it encapsulated the fundamental principle of our company*

A law that a company's power of management is reserved to its directors, collectively called the board of directors and not its shareholders. It has to be noted that s 211 (CA (2016)) provides that a board 'shall' manage the business and affairs of the company. We shall say no more about the new provision as the appeals before us deal with s 131B (Companies Act (1965)).

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[133] *At this stage it would be appropriate to provide a summary of the powers of management of the directors of the plaintiff. Business management control of the plaintiff resides with its directors and not its shareholders. It is clear on principle and on* C *authority that, provided that the act is within the powers delegated to the directors, the shareholders of the plaintiff in general meeting cannot interfere with or override management decisions its board of directors, even if all shareholders agree*.

…

D [165] *What then is the true test for breach of duty as a director to act in good faith and in the 'best interest of the company'? The question is whether it is a subjective or objective test to judge whether directors acted in the best interest of the company*. It is to this we now turn.

E [166] *In our judgment, the correct test combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company*. …

[167] *The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts*. …

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[193] *In consequence and in view of all the above, our answers to the legal issues posed under questions 1–11 are as follows*.

G Question 1: *The powers of management conferred on directors by the Act and the articles of association of a company governed by Table A of (CA (1965)) could not be overridden by an ordinary resolution passed by a simple majority of shareholders at a general meeting*.

H Question 2: *The Court of Appeal erred when it held that 'the classical position (as explained in the case of The Gramophone and Typewriter, Limited v Stanley has been varied by legislation, for instance s 132(1) (CA (1965)). Shareholders in general meetings may not control the powers of management conferred by the articles of associations on directors; if powers are vested in the directors, they and they alone can exercise those powers*.

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Question 4: *The true position as regards powers of shareholders on the one hand and that of directors on the other is as declared in s 131B (CA (1965)) that the business and affairs of a company 'must be managed by, or under the direction of the board of directors', and further by s 132(1B) (CA (1965)) that vests 'business judgment' with the directors. In this regard, we note that s 211 (CA (2016)) now provides that the business and affairs*

of a company 'shall' be managed by the board.

...

Question 8: *The test to determine whether there is any breach of director duties combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director. The classic formulation of the subjective element in the test is found in In re Smith & Fawcett, Limited. The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts. This is the test set out in Charterbridge Corporation Ltd v Lloyds Bank Ltd and another adopted by our Court of Appeal in Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals. The Court of Appeal erred when it adverted to the proposition that 'the best interest of the company' is a matter for the majority of the shareholders to decide.*

Question 9: *The statutory business judgment rule as provided under s 132(1B) (CA (1965)) is as stated in Howard Smith Ltd v Ampol Petroleum Ltd and others: the courts do not undertake the exercise of assessing the merits of a commercial or business judgment made by directors. Courts will not interfere with business decisions as long as the directors acted bona fide.* (Emphasis added.)

[23] Firstly, in accordance with s 131B of the CA (1965) as well as s 211(1) and (2) of the CA (2016), as authoritatively interpreted by our Federal Court in *Tengku Dato' Ibrahim Petra*, the business and affairs of the plaintiff 'shall' be managed by its BOD and not by any other entity (including the individual directors, shareholders and employees of the plaintiff). In this case, the plaintiff's BOD is controlled by the nominees of AMSB. In fact, Captain Suresh is the plaintiff's MD and CEO. These facts are relevant when we discuss subsequently on whether the plaintiff had indeed suffered actual loss due to the plaintiff's three causes of action.

[24] Secondly, s 132(1) of the CA (1965) (*A director shall at all time act honestly and use reasonable and diligence in the discharge of the duties of his office*) and s 213(1) of the CA (2016) only concern the exercise of 'duties' and 'powers' of a company's director with respect to the company.

[25] Thirdly, applying the test (*Tengku Dato' Ibrahim Petra*) in this case, there is no proof on a balance of probabilities that the second and third defendants had breached s 132(1) of the CA (1965) and s 213(1) of the CA (2016). This decision is premised on the following evidence and reasons:

(1) applying the subjective test, namely, the state of mind of the second and third defendants, their conduct showed that they had acted for a proper purpose, in good faith and in the best interest of the plaintiff;
The second defendant's state of mind is reflected by his conduct as follows:

(a) the plaintiff's corporate governance issues were raised in:

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(i) the second defendant's email dated 17 September 2015 to, among others, Captain Suresh; and

(ii) the second defendant's email (29 January 2016).

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(b) on 16 January 2016, in a meeting at a hotel in Singapore, 'Swissotel', between the second defendant and Mr Kelly, the second defendant had raised the plaintiff's corporate governance issues;

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(c) the second defendant sent a notice on 30 January 2016 to call for a meeting of the plaintiff's BOD to pass, among others, the following resolutions:

(i) to put in place and implement policies that would improve the plaintiff's corporate governance; and

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(ii) to appoint a firm of accountants to undertake a forensic audit of the plaintiff.
On 30 January 2016, only the second and third defendants turned up for the meeting of the plaintiff's BOD. Although there was a quorum for the plaintiff's BOD meeting, the meeting of the plaintiff's BOD was adjourned to 2 March 2016. The second and third defendants did not bulldoze the meeting of the plaintiff's BOD on 30 January 2016 and pass the above resolutions;

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On 2 March 2016, once again, only the second and third defendants attended the meeting of the plaintiff's BOD. Notwithstanding the fact that there was a quorum for this meeting, yet again, the second and third defendants did not proceed with this meeting;

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(d) the second defendant applied for and obtained the inspection order (plaintiff's records);

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(e) the second defendant appointed Messrs CH to to conduct a forensic audit of the plaintiff's accounts;

(f) the second defendant applied for and obtained leave of the Court of Appeal to commence the second defendant's derivative suit (Shin Yang);

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(g) the second defendant applied unsuccessfully for leave of court to commence a derivative action in respect of the sinking (NTT Lumut). Even though the second defendant failed in this leave application (up to the Court of Appeal), his conduct supported his state of mind that he had acted for a proper purpose, in good faith and in the best interest of the plaintiff; and

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(h) the second defendant's committal proceedings were subsequently set aside by the court but nonetheless such proceedings evidenced

the second defendant's state of mind to enforce the inspection order (plaintiff's records) so as to enable Messrs CH to review the plaintiff's records. Such a conduct was clearly for a proper purpose, in good faith and in the best interest of the plaintiff. A party's conduct is relevant under s 8(2) of the EA which states as follows:

> *The conduct of any party*, or of any agent to any party, to *any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto*, and the conduct of any person an offence against whom is the subject of any proceeding*, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.*(Emphasis added.)

(2) the plaintiff's corporate governance issues were not without basis and included, among others, the following matters:

(a) the alleged conflict of interest (Captain Suresh); and

(b) whether the BIMCO agreement was in the best interest of the plaintiff.

(3) as explained in the above sub-paras (1) and (2), the third defendant's state of mind in supporting the conduct of the second defendant in this case, could only be for a proper purpose, in good faith and in the best interest of the plaintiff; and

(4) premised on the evidence and reasons stated in the above sub-paras (1) to (3), an objective review by the court cannot show that the second and third defendants had breached s 132(1) of the CA (1965) and s 213(1) of the CA (2016).

[26] We have not overlooked the following submission by the plaintiff's learned counsel:

(1) the second defendant insisted on the first defendant participation in the plaintiff-Vale negotiations (two Tug Boats) so as to preserve and enhance the goodwill and relationship between the first and second defendants on the one part and Vale on the other part. The plaintiff had relied on the following evidence:

(a) the plaintiff had decided in a BOD meeting on 19 August 2015 for Captain Suresh to be given the mandate by the plaintiff to negotiate with Vale regarding Vale's proposal to redeploy two Tug Boats to Mozambique ('plaintiff's decision (19 August 2015)');

(b) notwithstanding the plaintiff's decision (19 August 2015), the second defendant sent an email dated 8 October 2015 to, among others, Captain Suresh and Johari, which stated, among others,

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'we should find a fair and equitable solution with Vale', 'be fair to [Vale]'; and

(c) answer to question No 27 of second defendant's witness statement stated that 'it was imperative for [first defendant] to maintain its goodwill with Vale Group since the [Project] was made possible by this goodwill from the beginning'. According to the second defendant, the value of the subsequent phases with Vale was worth over US$1.1 billion.

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(2) the second defendant insisted on an independent investigation regarding the sinking (NTT Lumut) even though the insurers of NTT Lumut and Marine Department were conducting their investigations;

(3) the Bank was concerned that the change of the status of the first defendant from a private exempt company to a non-exempt company might contravene s 133A of the CA (1965). The second and third defendants went to the Bank and caused a 'fracas of sorts'. Such a conduct could have caused the Bank to declare an 'event of default' under the plaintiff's facility and this would then lead to the Bank's termination of the plaintiff's facility (which would be disastrous for the plaintiff). However, the Bank did not declare an 'event of default' under the plaintiff's facility;

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(4) the second defendant commenced an 'avalanche' of legal proceedings against the plaintiff ('second defendant's various proceedings (plaintiff)') which had the following adverse consequences for the plaintiff:

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(a) the plaintiff had to expend much time, effort and costs to resist the second defendant's various proceedings (plaintiff);

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(b) the plaintiff's operations and management were disrupted by the second defendant's various proceedings (plaintiff); and

(c) the second defendant's various proceedings (plaintiff) were filed to harass and/or intimidate the plaintiff's directors and/or management. In such a manner, the morale of the plaintiff's directors, management and staff had been negatively impacted by the second defendant's various proceedings (plaintiff).

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(5) the second defendant's conduct had exposed the plaintiff to penalties by Suruhanjaya Syarikat Malaysia;

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(6) the many queries, complaints, demands and/or accusations by the first and/or second defendants against the plaintiff and/or Captain Suresh were stage-managed and choreographed so as to provide a paper trial in furtherance of the alleged conspiracy (first and second defendants);

(7) the second and third defendants were absent at the plaintiff's AGM on 31 March 2016; and

(8) with regard to the third defendant:

(a) the third defendant was an authorized cheque signatory of the plaintiff but he refused to sign certain cheques issued by the plaintiff. Such a refusal by the third defendant had jeopardized the plaintiff's operations and had injured the plaintiff's interest. That was why the plaintiff averred that the third defendant was a co-conspirator in the alleged conspiracy (first and second defendants); and

(b) after the meeting of the plaintiff's BOD on 31 March 2017, the third defendant did not attend any meeting of the plaintiff's BOD.

We have carefully considered all the matters raised in the above sub-paras (1) to (8) together with all the evidence and reasons stated in the above sub-paras 25(1) to (3). Considering all the evidence in totality, especially the conduct of the second defendant to raise the plaintiff's corporate governance issues, we have no hesitation to affirm the High Court's decision that the second and third defendants had not breached:

(i) ss 213(1), (2), 214(1), 217(1), 218(b) and (c) of the CA (2016); and

(ii) fiduciary duties owed to the plaintiff under case law.

All the cases cited by the plaintiff's learned counsel can be easily distinguished from this case based on the evidence and reasons stated in the above sub-paras 25(1) to (3).

[27] Additionally, in view of the evidence and reasons as elaborated in the above sub-paras 25(1) to (3), we are of the considered view that the plaintiff had not succeeded to discharge its legal and evidential burden under ss 101(1), (2) and 102 of the EA ('legal burden' and 'evidential burden') to prove on a balance of probabilities that the alleged breaches of duties (second and third defendants) had been committed in this case.

[28] The omission of the High Court to consider the test (*Tengku Dato' Ibrahim Petra*), in our view, does not adversely affect the part of the High Court's decision that the second and third defendants had not breached s 132(1) of the CA (1965) and s 213(1) of the CA (2016). As decided by the Court of Appeal in *Abdul Rahman bin Soltan & Ors v Federal Land Development Authority & Anor and other appeals* [2023] 4 MLJ 318, at [54], such an omission is immaterial in this appeal according to s 72 of the CJA. We reproduce below s 72 of the CJA:

72 *Immaterial errors*

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> *No judgment or order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by the Court of Appeal, on account of any error*, defect, or irregularity, *whether in the decision or otherwise not affecting the merits or the jurisdiction of the Court*. (Emphasis added.).

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[29] In addition to the reasons provided in the GOJ, the above decision is fortified by the following grounds:

(1) all the paras (a) to (d) of s 214(1) of the CA (2016) must apply cumulatively. This is clear from the conjunction 'and' which is placed by Parliament between paras (c) and (d) in s 214(1) of the CA (2016). It is thus clear that the plaintiff cannot rely solely on s 214(1)(a) of the CA (2016).

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'Business judgment' is defined in s 214(2) of the CA (2016) as a 'decision on whether or not to take action in respect of a matter relevant to the business of the company'. According to s 214(1)(d) of the CA (2016), a 'business judgment' made by a 'director' (defined widely in s 210 of the CA (2016)), is deemed to meet s 213(2) of the CA (2016) if the director 'reasonably believes that the business judgment is in the best interest of the company'. Consequently, s 214(1)(a) to (d) of the CA (2016) applies cumulatively only to a director's 'business judgment' with regard to a matter which is made by the director on behalf of a company;

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In this case, the second and third defendants had not made any 'business judgment' with regard to the plaintiff. Hence, there cannot be any room to apply s 214(1) of the CA (2016) on the second and third defendants in this case; and

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(2) we will explain later in para 38 below on why we accept the High Court's decision that the plaintiff had not suffered any actual loss or damage ('plaintiff's actual loss/damage') arising from the conduct of the defendants in this case ('defendants' conduct');

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Even if it is assumed that the plaintiff's actual loss/damage had been proven in this case, we are not satisfied that the 'causa causans' of the plaintiff's actual loss/damage was the defendants' conduct. It is trite law that the plaintiff bears the evidential onus to prove on a balance of probabilities that the plaintiff's actual loss/damage was caused in fact by the defendants' conduct. The following evidence and reasons do not support the chain of causation from the defendants' conduct to the plaintiff's actual loss/damage:

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(a) the plaintiff's BOD was controlled at all material times by the nominee directors of AMSB (not the second and third defendants);

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(b) Captain Suresh was the plaintiff's MD and CEO; and

(c) the second defendant sent, among others, emails dated 12 August

2015, 17 September 2015 and 30 October 2015 to Captain Suresh which requested for the plaintiff's accounting records. A letter dated 18 December 2015 by second defendant's solicitors had also been sent to the plaintiff. Neither Captain Suresh nor the plaintiff responded to the above requests until Captain Suresh's emails dated 12 February 2016 and 11 March 2016.
The second defendant sent follow-up questions to Captain Suresh in an email dated 1 April 2016. However, there was no reply by the plaintiff and Captain Suresh to these follow-up questions.
If the plaintiff had responded adequately and/or timeously to all the requests for information, clarification and/or documents by the second defendant, the second defendant would not have, among others applied for and obtained the inspection order (plaintiff's records). Indeed, a stitch in time saves nine!

[30] In any event, we are far from satisfied that the High Court's factual findings on the non-occurrence of the alleged breaches of duties (second and third defendants) are 'plainly wrong' in the sense that:

(1) such findings of fact cannot be reasonably explained or justified; and

(2) no reasonable trial judge could have arrived at such factual findings.

We hasten to add that in a lengthy GOJ, the learned High Court judge had painstakingly sifted all the acts and omission of both the plaintiff and defendants in this case with sound reasons for the High Court's decision.

I. TWO SEPARATE TORTS OF CONSPIRACY TO INJURE A PERSON

[31] There are two separate torts of conspiracy to injure a person, namely:

(1) tort of conspiracy to injure by unlawful means; and

(2) tort of conspiracy to injure by lawful means.

The elements of both torts of conspiracy to injure a person has been explained in *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2016] 11 MLJ 38, at [21], as follows:

> [21] *Based on my understanding of the above cases*:
>
> (1) *the three elements of the tort of conspiracy to injure by unlawful means (three elements), are as follows*:
>
> (a) *there must be proof of*:
>
> (i) *an agreement; and/or*
>
> (ii) *a combination of efforts*
> *of the conspirators to injure the plaintiff. Such an agreement or combination may be*:

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(ai) *formal or informal; or*
(aii) *in writing or by word of mouth*;

(b) *there are acts committed to execute the agreement or combination to injure the plaintiff; and*

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(c) *the plaintiff has suffered damage due to acts done in execution of the agreement or combination to injure the plaintiff.*

(2) *the tort of conspiracy to injure by lawful means has the three elements and a fourth ingredient, namely there is a pre-dominant purpose or intention of the conspirators to injure the plaintiff.* (Emphasis added.)

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J. NO PROOF THAT THE DEFENDANTS HAD COMMITTED TORT OF CONSPIRACY TO HARM THE PLAINTIFF BY UNLAWFUL MEANS

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[32] As there was no proof of the commission of the alleged breaches of duties (second and third defendants), the plaintiff could not prove that the first and second defendants had conspired to harm the plaintiff by illegal means — please refer to the above Part H. As such, the third defendant could not be a co-conspirator to any tort of conspiracy by the first and second defendants to injure the plaintiff by unlawful means.

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[33] The plaintiff's learned counsel had cited the following joint judgment of Lord Sumption and Lord Lloyd-Jones JJSC in *JSC BTA Bank*, at [13]:

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[13] ... *The emphasis in the authorities on cases in which the predominant purpose was to injure the claimant has diverted attention from the fact that both lawful means and unlawful means conspiracies are torts of intent. But the nature of the intent required differs as between the two. This is because a conspiracy may be directed against the claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant. This point had been made, some years earlier, by the Supreme Court of Canada in Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd* [1983] 1 SCR 452. *After a careful analysis of the (mainly English) authorities, Estey J, delivering the judgment of the court, concluded at pp 471–472 that*:

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whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

(1) *whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or*,

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(2) *where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result*.

> *In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.*

Likewise, in *Total Network*, Lord Walker, at para 82, recognised the:

> *clear distinction between the requirement of predominant purpose under one variety of the tort of conspiracy and the lower requirement of intentional injury needed for the other variety*. (Emphasis added.)

According to the plaintiff's learned counsel, for tort of conspiracy to injure a claimant by unlawful means, the learned High Court judge had erred in law by:

(1) applying a high threshold of 'intention to injure' the plaintiff as laid down in *OBG*; and

(2) not applying a lower threshold of 'constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue' ('constructive intent doctrine'):

    (a) as decided by the Supreme Court of Canada in *Cement LaFarge*, at pp 471 to 472; and

    (b) followed by UK's Supreme Court in *JSC BTA Bank*.

[34] As we are satisfied that the plaintiff had failed to prove the tort of conspiracy by unlawful means against the defendants in this case, we will not express any view regarding the applicability of the constructive intent doctrine (as decided in *Cement LaFarge* and *JSC BTA Bank*) in this country.

K. DID THE HIGH COURT DRAW AN ERRONEOUS INFERENCE THAT THE DEFENDANTS HAD NOT CONSPIRED TO HARM THE PLAINTIFF?

[35] Based on the evidence and reasons stated in the above sub-paras 25(1) to (3), the learned High Court judge did not err in making an inference that the defendants did not conspire to injure the plaintiff by lawful means. *A fortiori*, it cannot be inferred that the defendants had the pre-dominant intention to cause loss to the plaintiff. Accordingly:

(1) the first and second defendants could not have committed the tort of conspiracy to injure the plaintiff by lawful means; and

(2) the third defendant could not be a co-conspirator with the first and second defendants to injure the plaintiff by valid means.

[36] As explained in the above paras 16 and 17, there is no basis for the

A non-sinister inference rule. Having said that, in view of our decision in the above para 35, the High Court's legal error in applying the non-sinister inference rule in this case, did not affect the merits of the High Court's decision in any manner and is therefore immaterial in this appeal according to s 72 of the CJA.

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L. WAS THERE PROOF OF THE PLAINTIFF'S ACTUAL LOSS/DAMAGE?

[37] One of the elements of the tort of conspiracy to injure a person (X) by C lawful and unlawful means, is the proof of actual loss or damage to X. Such a legal requirement is understandable because the tort of conspiracy to injure X by lawful and unlawful means is an economic tort which has caused actual economic loss to X. As such, we cannot accept the following contentions by the plaintiff's learned counsel:

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(1) X is not required to prove actual loss or damage;

(2) X has a duty to mitigate its actual loss or damage; and

(3) inconvenience or disruption to X is sufficient to enable X to claim damages from the conspirators.

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In respect of the cases relied on by the plaintiff's learned counsel in support of the submission in the above sub-paras (1) to (3):

(a) in the High Court case of *WT Development Sdn Bhd v Chow Cho Tai & Ors* [2019] MLJU 1691; [2019] 1 LNS 2039, at [154] to [156], the F following judgment of Faizah Jamaludin J (as she then was) was actually contrary to the above contentions by the plaintiff's learned counsel:

> [154] *Mdm Chow in her counterclaim is seeking both special and general damages, aggravated and exemplary damages. She testified that she had incurred* G *the following costs: RM10,000 for the handwriting expert's services; RM28,500 for the 2016 OS; RM29,500 for the 2015 Writ Action and RM85,500 for the original suit and this counterclaim. The High Court in the 2016 OS, although it allowed Mdm Chow's claim against the SSM, did not award any costs against the SSM. The court also allowed the Liquidators in the 2015 writ action to discontinue their claim against Mdm Chow without any order as to costs.*
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> H
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> [155] *For the tort of unlawful means conspiracy, the claimant must show that he/she had suffered some pecuniary loss as a result of the conspiracy. Once the pecuniary loss is shown, damages are at large. McGregor on Damages (at para 46–20) states that*:
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> > *Thus while a showing a pecuniary loss is necessary to ground the action for conspiracy, the damages are at large so that, once some pecuniary loss is shown, the damages are not limited to the precise calculation of pecuniary loss actually proved.*
>
> [156] *Belinda Ang J in the Singapore High Court case of Li Siu Lun v Looi Kok*

Poh and another [2015] 4 SLR 667 *at para 29, explained that 'unlawful means conspiracy is an economic tort that is actionable only on proof of damage'.* (Emphasis added.)

(b) in UK's High Court case of *British Motor Trade Association v Salvadori & Ors* [1949] 1 Ch 556, as a result of the defendants' tort of conspiracy against the plaintiff (a trade association), Roxburgh J decided that the plaintiff would have suffered actual loss in the form of the plaintiff's own extinction (as an association). According to *British Motor Trade Association*, at pp 566 and 568 to 569:

> [His Lordship dealt at length with each individual breach of covenant. He found seven cases of procurement of breach of contract and four cases of breach of contract, and *he held that the defendants had conspired to procure breaches of contract*]
>
> [His Lordship continued:] *I now come to the question of damages, and I have to deal with it both in connexion with the conspiracy* and also in relation to the breaches of covenant.
>
> …
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> *The Warren Street kerb market is the forum of an organized counter-attack on the covenant system. The defendants are a ring within that market which is counter-attacking by means of a conspiracy to procure breaches of contract and many overt acts have been proved. These counter-attackers adopt every available means of covering up their tracks and as occasion requires resort to false names, false addresses and false documents. the plaintiffs are bound to react strongly against such counter-attack which imperils their very existence. I must recall what Mr Johnson-Davies, the secretary, said: 'There would be no manufacturers' prices if they were not maintained. It would be beyond human endurance to expect dealers to sell at a narrow margin when they saw their customers immediately obtain the price of three times that amount within a few minutes of sale. Of course it would.' Again he says: 'At the moment, my Lord, with the present state of the market, and with the state of the market as far as one can foresee it, until the Government choose to supply enough cars for the home market to meet the home demand' — and Mr Johnson-Davies gave me some very gloomy prognostications on that head — 'practically all the functions of the Association [plaintiff] turn on the covenant system. It is true that there are rules and there would still continue to be rules if the covenant scheme were abandoned, but with the covenant scheme removed, in the present state of the market I can see no useful purpose that the Association can perform.*
>
> *I accept that evidence, and if of course the Association could perform no useful purpose, I am prepared to infer that its membership would decline almost, if not quite, to the point of extinction. To resist such a counter-attack and also counter-attacks from various other directions, the plaintiffs maintain, and must maintain, a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. I can see no reason for not treating the expenses so incurred which*

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could not be recovered as part of the costs of the action as directly attributable to their tort or torts. That these expenses cannot be precisely quantified is true, but it is also immaterial. Accordingly, the plaintiffs have proved the damage which is essential to the tort of conspiracy, and they are entitled to an inquiry accordingly. (Emphasis added.)

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(c) the decision of *British Motor Trade Association* had been analysed by Gloster J (as she then was) in the High Court of UK in *R + V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 (Comm).

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Firstly, it is clear in *R + V Versicherung AG*, at paras [11], [54] and [55], that the plaintiff had suffered actual damage due to the tort of conspiracy committed against the plaintiff in that case:

[11] *Moore-Bick J* [the learned trial judge who found that the defendants were liable to the plaintiff for the tor of conspiracy], *therefore, found that Mr Gebauer had no authority to enter into the Addenda, that this was known by the defendants (through Mr Chalhoub) and that the Addenda were entered into as part of a dishonest conspiracy between Risk and Mr Gebauer*. The judge further found that R+V was entitled to terminate all its Binders with the defendants and could claim damages for conspiracy. The judge dismissed the first defendant's counterclaim for damages for wrongful termination.

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[54] *It became common ground in the course of the hearing before me that R+V was entitled in principle, and subject to quantification, to recover, as damages for conspiracy, external costs and expenses incurred as a result of the conspiracy*. ...

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...

[55] *The real issue under this head, however, is whether, as R+V contends, and Risk disputes, R+V is entitled to recover, as damages, internal management and staff time and internal overheads, except to the extent that R+V can prove that it has suffered a loss of profits due to the diversion of resources as a result of an actionable wrong*. (Emphasis added.)

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Based on the above judgment, *R+V Versicherung AG* is not an authority to support the proposition that actual loss or damage to X is not an element of the the tort of conspiracy to injure X by lawful and unlawful means.

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In *R+V Versicherung AG*, at paras [60] and [77], Gloster J (the learned judge who assessed the quantum of damages which could be claimed by the plaintiff for the tort of conspiracy to injure) decided that so long as a plaintiff can claim actual loss or damage caused by a tort of conspiracy to injure, the amount of damages is at large and can be proven at trial or assessment of damages. This is clear from the following passages in *R+V Versicherung AG*:

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[60] *It is clear from [British Motor Trade Association] (and, indeed, others) that in conspiracy, damages are at large and that the court is not over-concerned to*

require the plaintiff to prove precise quantification of its losses. Whilst I accept Mr Page's submission that the case does not go so far as to show that in any isolated case overheads can be claimed as loss without proving that the incurring of the overhead expenditure was directly attributable to the conspiracy, the case does show that it is not necessary to show a loss of profit that would otherwise have been made.

...

[77] *In my judgment, as a matter of principle, such head of loss (ie the cost of wasted staff time spent on the investigation and/or mitigation of the tort) is recoverable, notwithstanding that no additional expenditure 'loss', or loss of revenue or profit can be shown. However, this is subject to the proviso that it has to be demonstrated with sufficient certainty that the wasted time was indeed spent on investigating and/or mitigating the relevant tort; ie that the expenditure was directly attributable to the tort — see per Roxburgh LJ in British Motor Trades Association at 569. This is perhaps simply another way of putting what Potter LJ said in Standard Chartered, namely that to be able to recover one has to show some significant disruption to the business; in other words that staff have been significantly diverted from their usual activities. Otherwise the alleged wasted expenditure on wages cannot be said to be 'directly attributable' to the tort. The quantification of such expenditure will, of course, have to be proved with sufficient particularity at the March 2006 hearing.* (Emphasis added.)

(d) the following cases do not concern the tort of conspiracy to injure a person:

(i) Abdul Hamid FCJ (as he then was) delivered a judgment of the Federal Court in *Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thal* [1981] 2 MLJ 21, at p 22, regarding the tort of negligence; and

(ii) the decision of Belinda Ang Saw Ean J (as she then was) in the Singapore High Court in *Li Siu Lun v Looi Kok Poh and another* [2015] 4 SLR 667, at para [2], concerned a claim based on the tort of professional medical negligence.

[38] We are of the view that the learned High Court judge had not erred in deciding that the plaintiff's actual loss/damage had not been proven in this case. The following evidence and reasons support this decision:

(1) the Harbour Tugs services agreement (plaintiff-Vale) remained intact. There was no proof that the relationship between the plaintiff and Vale had been adversely affected in any manner; and

(2) the plaintiff's facility was not terminated by the Bank.

[39] In any event, we are not satisfied that the plaintiff had discharged the legal burden and evidential burden to prove on a balance of probabilities that

the plaintiff's actual loss/damage had been incurred due to the commission of the tort of conspiracy to injure the plaintiff by the defendants.

[40] Additionally or alternatively, as explained in the above sub-paras 29(2)(a) to (c), even if it is assumed that the plaintiff's actual loss/damage had been caused, the 'causa causans' of the plaintiff's actual loss/damage was not the defendants' conduct, let alone the tort of conspiracy committed by the defendants to injure the plaintiff in a lawful manner.

M. CONCLUSION

[41] Premised on the above grounds, we have no hesitation to:

(1) dismiss this appeal with costs to be paid by the plaintiff to the defendants ('our decision'); and

(2) affirm the High Court's decision.

[42] Before we conclude, we need to highlight the following two matters:

(1) the defendants' learned counsel in his written and oral submission, had alluded to the fact that the first defendant is owned by a royal family. We wish to state that such a fact is wholly immaterial in our deliberations and decision. As enshrined in art 8(1) of the Federal Constitution, every person, including a litigant, is equal before the law and is entitled to equal protection of the law; and

(2) after learned counsel for all parties had concluded their oral submission in the Court of Appeal on 18 September 2024 and after we had reserved our decision, the defendants' solicitors sent a letter dated 7 November 2024 ('defendants' letter (7 November 2024)'). The defendants' letter (7 November 2024) referred to three court decisions ('three decisions');
Not unexpectedly, the plaintiff's solicitors sent a letter dated 20 November 2024 which stated that by virtue of ss 40 to 44 of the EA, the three decisions were not relevant to this appeal ('plaintiff's letter (20 November 2024)');
Undeterred by the plaintiff's letter (20 November 2024), in a letter dated 25 November 2024, the defendants' solicitors replied to the contents of the plaintiff's letter (20 November 2024) ('defendants' letter (25 November 2024)'). Not to be outdone, by way of a letter dated 19 December 2024, the plaintiff's solicitors replied to the defendants' letter (25 November 2024);
In respect of the above four letters ('four letters'):

(a) r 22 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the LPR') provides as follows:

> 22 *Advocate and solicitor to bring to Court's attention any proposition of law etc*
>
> (a) *Where after the conclusion of the evidence and argument and while judgment is reserved, an advocate and solicitor discovers a proposition of law or a decision of law which is directly in point, he shall bring it to the Court's attention and the advocate and solicitor appearing of the other side shall concur in the proposal even though the proposition is against him.*
>
> (b) *Where the other advocate and solicitor does not concur, it is still in order for the first-named advocate and solicitor to submit the additional authority and the proper course is for the first-named advocate and solicitor to send the other advocate and solicitor a copy of his letter to the Court, so that the other advocate and solicitor can comment on it if necessary.* (Emphasis added.)

In the Federal Court case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793, at 838, Edgar Joseph Jr FCJ, had explained the application of r 22 of the LPR as follows:

> We must now direct attention to a separate matter. *Some four weeks after judgment was reserved in the present case, counsel for the father [a party to this appeal], without the leave of this court, and without the consent of his opponent, put in a written submission running into some 12 pages, to which counsel for the intervener/purchaser took strong exception. In so doing, counsel for the father relied on r 22 of the [LPR] which provides*:
>
> …
>
> *In our view, given the circumstances of the present case, reliance on r 22 counsel for the father was misplaced as it concerns only propositions of law directly in point. But we accept that this could have been due to a genuine misunderstanding on the part of counsel for the father. Nevertheless, in a situation such as this, as a matter of courtesy, one would expect, an attempt to seek the concurrence of counsel on the other side, before putting in a supplementation by way of written submission*. (Emphasis added.)

(b) we have considered the three decisions and are firmly of the view that the three decisions are not relevant to this appeal. As the three decisions, in our view, did not fall within the phrase of 'a proposition of law or a decision of law which is directly in point' within the meaning of r 22 of the LPR, the defendants' letter (7 November 2024) should not have been sent in the first place. We wish to state that in arriving at our decision, the contents of the four letters were of no consequence; and

(c) even if the defendants' solicitors were under an erroneous impression that the three decisions were 'directly in point' with the issues which arose in this appeal, as a matter of professional etiquette and courtesy, the defendants' solicitors should have

A sought the concurrence of the plaintiff's solicitors before sending the defendants' letter (7 November 2024) to the Court of Appeal — please refer to *Pekan Nenas Industries*.

[43] After we had delivered our decision, we invited all learned counsel to submit on the quantum of costs for this appeal. After hearing learned counsel, we exercise our discretion under s 70 of the CJA read with rr 54 and 96 of the Rules of the Court of Appeal 1994 to order the plaintiff to pay costs of this appeal in a sum of RM100,000 to the defendants (subject to allocatur fee).

B

C

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh

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