IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: P-02(NCVC)(W)-1792-10/2024

BETWEEN

ERAMAS KONSORTIUM SDN BHD **... APPELLANT**

AND

GA YEE FURNITURE SDN BHD **... RESPONDENT**

IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: P-02(NCVC)(W)-1991-11/2024

BETWEEN

1. **ENCONY DEVELOPMENT SDN BHD**
2. **DATO' KHOR WOOI CHEN**
3. **DATO' SRI CHIN SEAK HUAT** **... APPELLANTS**

AND

GA YEE FURNITURE SDN BHD **... RESPONDENT**

CORAM:

ALWI BIN HJ. ABDUL WAHAB, JCA
EVROL MARIETTE PETERS, JCA
LATIFAH BINTI HAJI MOHD TAHAR, JCA

GROUNDS OF JUDGMENT

Introduction

[1] These two appeals arose from the decision of the learned High Court Judge, who found the Second and Third Appellants in Appeal No. 1991 liable for fraud and breach of fiduciary duty owed to the Respondent. The learned High Court Judge further held that the Appellant in Appeal No. 1792 and the First Appellant in Appeal No. 1991 had received and held the misappropriated funds as constructive trustees for the benefit of the Respondent.

Factual background

[2] At the material time, the Respondent ("Ga Yee"), a furniture-manufacturing company, was wholly owned and controlled by its two shareholders, namely, Dato' Sri Chin Seak Huat ("Chin"), who held 70% of the shares and served as managing director, and Dato' Khor Wooi Chen ("Khor"), who held the remaining 30% and served as director. Khor and Chin were the Second and Third Appellants in Appeal No 1991.

[3] Through their positions as directors and shareholders, Khor and Chin also controlled two other companies, namely, Encony

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Development Sdn Bhd (an investment company) (“Encony”) who was the First Appellant in Appeal 1991, and Eramas Konsortium Sdn Bhd (a construction company) (“Eramas”), who was the Appellant in Appeal 1792.

[4] Between February 2014 and January 2016, Khor and Chin, acting in their capacity as authorised signatories to Ga Yee's cheques, orchestrated the transfer of MYR9,397,057.40 from Ga Yee's bank accounts to Encony and Eramas. Of this sum, MYR5,648,884.78 was deployed by Encony to satisfy instalment payments due under a share sale agreement entered into in December 2013 for the acquisition of Eramas's shares. A further MYR4,034,917.70, transferred in April 2014, was channelled directly to Eramas and applied towards reducing the outstanding balance of MYR5,162,949 that Eramas owed to BIOD Leisure & Recreation Sdn Bhd ("BIOD") for the purchase of a parcel of land ("the Property").

[5] Following the change in management of Ga Yee in May 2016, the company issued a Notice of Demand in December 2016 to Eramas, Encony, Khor and Chin (collectively “the Appellants”), demanding repayment of the misappropriated funds. On 22 December 2016—just 14 days after the Notice—Khor and Chin resigned as directors of Encony and were promptly replaced by new appointees. Barely a week later, in January 2017, they similarly resigned from Eramas and orchestrated the transfer of Eramas's shares to third parties, namely Dato' Lee Foo San and Ching Seak Hooi.

[6] Ga Yee subsequently commenced proceedings against the Appellants, seeking, *inter alia*, the recovery of the misappropriated funds, declarations that the funds and Property were held on

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

constructive trust for Ga Yee, and equitable tracing relief to recover the proceeds arising from the sale of the Property by Eramas.

[7] The learned High Court Judge found in favour of Ga Yee and held that the transfers of funds were fraudulent; that Khor and Chin had breached their fiduciary duties and conspired to injure Ga Yee; and that Encony and Eramas held the misappropriated funds as constructive trustees for Ga Yee. The learned High Court Judge further held that Ga Yee was entitled to trace the misappropriated funds into the Property and to recover an amount accordingly.

[8] Dissatisfied with the decision of the learned High Court Judge, Encony, Eramas, Khor, and Chin appealed to this Court.

Issues

[9] The issues for consideration were distilled as follows:

a) Whether the learned High Court Judge had erred in holding that Khor and Chin had breached their fiduciary duties towards Ga Yee;

b) Whether the learned High Court Judge had erred in holding that Khor and Chin had conspired to injure Ga Yee;

c) Whether the learned High Court Judge had erred in holding that Encony and Eramas held the appropriated funds as well as the Property purchased with it on constructive trust for Ga Yee; and

d) Whether the learned High Court Judge had erred in the quantification of damages awarded.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[10] These appeals were unanimously dismissed for the following reasons.

Contentions, evaluation, and findings

[11] The starting point for an appellate court is the presumption that any decision appealed against is correct in every respect. Therefore, to succeed in these Appeals, the Appellants must convince this Court that the decision appealed against was wrong; and if this Court was not so convinced, these Appeals would fail.

[12] This principle, expounded in *Watt or Thomas v. Thomas* [1947] AC 487, has been assimilated into Malaysian jurisprudence through several cases including *Ng Hoo Kui & Anor v Wendy Tan Lee Peng*, *Administrator of the estates of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, and *The New Straits Times Press (Malaysia) Bhd v Aideah Communication Sdn Bhd* [2025] 5 CLJ 661, where in the latter case, it was stated by Ahmad Terrirudin Mohd Salleh FCJ, in the following passage:

> The grounds on which an appellate court is entitled to interfere are, therefore, limited and it certainly could not interfere merely because it would have reached a different conclusion had it been hearing the case at first instance (*Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1*;* [2020] 12 MLJ 67; *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641*;* [2018] 2 MLJ 177; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1).
>
> [Emphasis added.]

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[13] However, this does not mean that the hands of the appellate court are tied. The exception to the general rule mentioned above is when the findings are clearly wrong: *China Airlines Ltd v Maltan Air Corp Sdn Bhd* [1996] 3 CLJ 163; [1996] 2 MLJ 517; or where crucial evidence has been misconstrued, or disregarded: *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ Rep 237; or if the trial judge is shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason, or to have drawn an inference from evidence which was equally capable of supporting a different inference, it then may be the duty of an appellate court to interfere: *Woon Ngee Yew and Others v. Ng Yoon Thai and Others* [1940] 1 LNS 119; [1941] 10 MLJ (FMSR) 37.

[14] We also made reference to *Nor Azlina bt Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 3 MLJ 763, where the principles of appellate intervention were distilled by the Court of Appeal, through Harmindar Singh Dhaliwal JCA (as he then was) in the following passages:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
>
> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509);
>
> (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1);

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

(c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1);

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87);

(e) where the trial judge was plainly wrong in arriving at his decision see *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor* [2003] 2 MLJ 97); 772 Malayan Law Journal [2017] 3 MLJ;

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149).

[Emphasis added.]

[15] The circumstances warranting appellate intervention were succinctly encapsulated by Mc Elwaine CJ in *Woon Ngee Yew and Others v. Ng Yoon Thai and Others,* in the following oft-cited passage:

> An Appellate Court should be very loath to differ on a finding of fact by a Court which has seen and heard the witnesses but if the learned Judge can be shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference it may be the duty of an Appellate Court to interfere.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[Emphasis added.]

Whether High Court Judge erred in holding that Khor and Chin had breached fiduciary duties towards Ga Yee

[16] A fiduciary duty represents the highest standard of care in equity, arising when one party places trust and confidence in another who undertakes to act in the first party's best interests. Directors of a company are classic fiduciaries, as they are entrusted with the company's assets and must exercise their powers honestly, in good faith, and for the company's benefit.

[17] This is reflected in section 213 of the Companies Act 2016 ("Companies Act"), which reads:

> Section 213 – *Duties and responsibilities of directors*
>
> (1) A director of a company shall at all times exercise his powers in accordance with this Act, 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.
>
> **...**
>
> [Emphasis added.]

[18] The fiduciary duties owed by directors to their companies have been repeatedly affirmed in numerous authorities, including *Takako Sakao v Ng Pek Yuen & Anor* [2010] 1 CLJ 381, *Perbadanan*

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Kemajuan Pertanian Selangor v JW Properties Sdn Bhd [2017] 1 MLJ 561, *Petra Perdana Bhd v Tengku Dato' Ibrahim Petra* [2018] 2 CLJ 641, and *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2022] 8 CLJ 529, all of which recognise that directors stand in a fiduciary relationship with their companies and are bound to act in the companies' best interests. Consequently, where a fiduciary acquires property or derives a benefit through a breach of duty or other wrongful conduct, equity will impose a constructive trust, requiring the fiduciary to hold the property for the benefit of the true owner or beneficiary.

[19] At all material times from February 2014 to January 2016, both Khor and Chin held significant positions in Ga Yee. Khor was a shareholder and signatory of Ga Yee's cheques, while Chin was a shareholder owning 70% of the company (through himself and his nominee), a director, and also a signatory of Ga Yee's cheques. It was also undisputed that Khor and Chin had control of Ga Yee, Encony, and Eramas, and that as directors of Ga Yee, owed a fiduciary duty to the company.

[20] Having perused the learned High Court Judge's grounds of judgment and the evidence before the court, we were satisfied that his Lordship was entirely justified in looking beyond the mere mechanics of the impugned transactions and examining, with care, the conduct of both Khor and Chin, and the true character of the transfers from Ga Yee to Encony and Eramas. When viewed in their proper context, these transactions lay bare a stark truth, namely, that Khor and Chin had flagrantly breached the fiduciary duties they

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

owed to Ga Yee. The evidence that compelled such conclusion was as follows.

[21] **Relationship amongst Ga Yee, Encony, and Eramas** – The Appellants contended that the learned High Court Judge had erred in holding that the transfers of money from Ga Yee to Encony and Eramas were not "related-party transactions". The Appellants submitted that Ga Yee and the recipient companies, Encony and Eramas were "related" because they had common shareholders and directors, namely Khor and Chin.

[22] We found the Appellants' contention untenable for the following reasons.

[23] The legal definition of "related companies" is found in section 7 of the Companies Act, which reads:

> Section 7 – *When corporations deemed to be related to each other*
>
> A corporation is deemed to be related to each other if-
>
> *(a)* it is the holding company of another corporation;
>
> *(b)* it is a subsidiary of another corporation; or
>
> *(c)* it is a subsidiary of the holding company of another corporation.

[24] Hence, for companies to be deemed related, there must be a corporate parent-subsidiary relationship or they must share a common holding company.

[25] In the present case, it was undisputed that Ga Yee had no shareholding in Encony or Eramas, nor did Encony or Eramas have

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

any shareholding in Ga Yee. They were entirely separate legal entities operating in different industries. The mere fact that Khor and Chin held positions in all three companies did not, in law, make Ga Yee, Encony or Eramas "related companies" and, therefore, did not legitimise the transfers of money between them.

[26] The term "related-party transactions" was, therefore, not met in this case, and hence, the transfers of money from Ga Yee to Encony and Eramas were not related-party transactions.

[27] Although inter-company loans between or amongst companies with common directors are not, in themselves, prohibited under the Companies Act, such transactions necessarily attract closer scrutiny owing to the inherent risk of conflicts of interest and the potential misuse of corporate funds for collateral purposes. It was, therefore, entirely appropriate for the learned High Court Judge to subject the transfers of a total sum of MYR9,397,057.40 from Ga Yee to Encony and Eramas, facilitated by Khor and Chin, to careful examination in order to determine whether those transfers were tainted by fraud or formed part of a conspiracy to injure Ga Yee.

[28] The learned High Court Judge further observed that the transfers of money from Ga Yee to Encony and Eramas had lacked the hallmarks of a *bona fide* commercial loan transaction and were devoid of any commercial substance indicative of a genuine lending arrangement. This, in turn, rendered the transfers inherently questionable. In our judgment, his Lordship was fully justified in reaching that conclusion for the following reasons.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[29] **Nature of transaction** – A genuine loan or advance would be documented with clear terms regarding consideration, purpose, and, most importantly, repayment.

[30] The evidence adduced in the present case showed that these essential elements were completely absent. The transfers of money were made without any formal loan agreements, no interest was charged, no collateral was provided, no guarantees were given by the directors, and there was no repayment schedule. The very nature of the transfers, being made without any consideration or benefit to Ga Yee, pointed to embezzlement rather than a legitimate inter-company loan.

[31] In our view, had the transfers of money from Ga Yee to Encony and Eramas been genuine loans, they would ordinarily have been documented on commercially reasonable terms, with clear provisions addressing matters such as repayment obligations, interest, security, and the borrower's ability to repay. One would also expect each company to have independently considered and approved the transactions through separate board resolutions. Significantly, there was no evidence whatsoever that the purported loans were intended to be repaid, which had further undermined the characterisation of these transfers as genuine commercial lending arrangements.

[32] It is trite that directors who sit on the boards of both the lending and borrowing companies, as in the present case, owe distinct fiduciary duties to each company and are required to act in the best interests of the particular company whose board they are serving at the relevant time. Accordingly, when approving a loan on behalf of the

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

lending company, directors must be satisfied that the transaction is commercially justifiable and genuinely advances the interests of the lending company, rather than merely conferring a benefit on the borrower. Reference on this point is made to section 214 of the Companies Act, which reads:

> Section 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.
>
> [Emphasis added.]

[33] In addition, any director who has a direct or indirect interest in the transaction must disclose the nature and extent of that interest to the board. Depending on the circumstances and the company's constitution, the interested director should also consider abstaining from participating in the deliberations or voting on the resolution. The board minutes should record the disclosure of interests, the commercial rationale for the transaction, and the reasons why the

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

loan is considered to be in the best interests of the lending company. This is provided for in section 218 of the Companies Act, which reads:

> Section 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-
>
> *(a)* use the property of the company;
>
> *(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;
>
> *(d)* use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company; or
>
> *(e)* engage in business which is in competition with the company, to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company.
>
> (2) Any person who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or a fine not exceeding three million ringgit or to both.
>
> [Emphasis added.]

[34] These fundamental requirements of the Companies Act were plainly not complied with. We, therefore, agreed with the learned High Court Judge that the transfers of funds from Ga Yee to Encony and Eramas, orchestrated by Khor and Chin, were fraudulent in nature.

[35] **Control of Ga Yee –** The learned High Court Judge had also concluded that Khor and Chin were in effective control of Ga Yee,

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

and we were in agreement with that finding. The control by Khor and Chin extended beyond participation in Ga Yee's corporate governance and permeated its financial affairs. As co-signatories to Ga Yee's bank accounts, Khor and Chin possessed the authority to authorise and effect payments from Ga Yee's funds, thereby occupying a position of trust as gatekeepers of its financial resources.

[36] Khor and Chin had, instead, abused that position by conspiring to procure the transfer of MYR9,397,057.40 from Ga Yee to Encony and Eramas, to the obvious detriment of Ga Yee. The ability of Khor and Chin to effect those transfers demonstrated the practical extent of their control over Ga Yee's finances.

[37] Further, Chin's 70% shareholding placed him in a position of overwhelming influence over Ga Yee's board and its corporate decision-making processes. Such a controlling position carried with it a fiduciary obligation to exercise his powers in the interests of Ga Yee, and not for his personal benefit or for the advantage of related entities.

[38] Viewed cumulatively, the combined dominance of Khor and Chin over Ga Yee's corporate decision-making processes and financial infrastructure enabled them to orchestrate and execute the fraudulent diversion of the company's funds with little effective internal restraint or oversight.

[39] **The "sham" resolutions –** Khor and Chin relied on Ga Yee’s board and members' resolutions purporting to ratify the transfers of money in support of their contention that such transfers were valid and

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

properly authorised. We were, however, unable to accept this submission. The learned High Court Judge had made a finding of fact that the resolutions were inconsistent with Ga Yee's own audited financial statements, which contained no record of Encony or Eramas as debtors of Ga Yee. That inconsistency had cast serious doubt on the authenticity and legitimacy of the resolutions.

[40] The position was further undermined by the statutory declaration signed by Chin affirming the accuracy of those audited accounts, which stood in direct contradiction to the alleged existence of the transfers of money from Ga Yee. Taken together, these circumstances fortified the learned High Court Judge's conclusion that the resolutions were merely a "sham" or a retrospective attempt to legitimise and conceal the fraudulent conspiracy, rather than evidence of the genuine approval of a *bona fide* corporate transaction.

[41] **Subsequent conduct of Khor and Chin –** Both Khor and Chin resigned as directors of Eramas and Encony a mere two weeks after receiving Ga Yee's Notice of Demand. The timing of those resignations was telling. They occurred only after the alleged fraud had been uncovered and the prospect of litigation had become unavoidable. Far from being routine corporate changes or *bona fide* commercial decisions, the resignations bore all the hallmarks of a calculated attempt to distance themselves from the impugned transactions and to shield themselves from the consequences of their misconduct.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[42] In our view, the learned High Court Judge was fully entitled, in accepting Ga Yee's claims for conspiracy and breach of fiduciary duty, to regard the resignations of Khor and Chin as directors, as forming part of the wider mosaic of evidence pointing towards fraud. The resignations did not occur in isolation. Rather, they formed part of a broader pattern of suspicious post-discovery conduct, including alterations to the shareholding structures and directorships of Encony and Eramas.

[43] Viewed cumulatively, the resignations of Khor and Chin as directors were not consistent with innocent commercial behaviour. Instead, they were indicative of attempts to obscure the true state of affairs, to distance the perpetrators from the entities involved, and ultimately to frustrate efforts to trace responsibility for the diversion of Ga Yee's funds by Khor and Chin to Encony and Eramas.

[44] In those circumstances, we were satisfied that the learned High Court Judge was correct in concluding that Khor and Chin had acted in breach of the fiduciary duties they had owed to Ga Yee.

Whether High Court Judge erred in holding that Khor and Chin conspired to injure Ga Yee

[45] The Appellants submitted that the learned High Court Judge erred in finding them liable for the tort of conspiracy. They argued that the evidence fell short of establishing the essential elements of conspiracy, namely the existence of a combination or common design, an intention to injure the Respondent, overt acts carried out pursuant to the alleged agreement, and loss suffered as a consequence of those acts.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[46] The tort of conspiracy comprises four essential elements. First, there must be a combination, agreement or understanding between two or more persons to act in concert. Such an agreement need not be formal or express, but may be inferred from the parties' conduct and the surrounding circumstances. Secondly, the conspirators must have intended to injure the plaintiff. Even in a lawful means conspiracy, it is sufficient if the predominant purpose of the combination was to cause harm to the plaintiff. Thirdly, there must be overt acts undertaken in furtherance of the common design or agreement. Mere discussions or an intention to carry out the scheme, without any act implementing it, are insufficient. Finally, the plaintiff must have suffered actual loss or damage as a result of those acts. There must, therefore, have been a causal connection between the acts done in furtherance of the conspiracy and the loss complained of. Once these elements are established, each conspirator is jointly and severally liable for the damage occasioned by the conspiracy, regardless of the precise role played by each participant in carrying out the common design. We drew guidance from the cases of *Renault SA v Inokom Corp Sdn Bhd* [2010] 5 MLJ 394 and *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd* [2016] 3 MLJ 797*.*

[47] In the present case, the learned High Court Judge found that there was a concerted agreement between Khor and Chin, an inference of their intention to injure Ga Yee was made out from their following conduct:

a) **Signing Payments and Cheques**: Both Khor and Chin were signatories of the cheques and had signed the banking

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

remittance forms for each transfer, effectively authorising the payments.

b) **Directing the Payments**: Both Khor and Chin specifically orchestrated a payment of MYR4,034,917.70 from Ga Yee directly to BIOD's solicitors to pay for the Property purchased by Eramas.

c) **Passing Sham Resolutions**: Both Khor and Chin sought to justify the impugned payments by relying on members' and directors' resolutions purporting to characterise them as loans. The learned High Court Judge, however, rightly found that these resolutions were not credible, given that the purported loans were never recorded in Ga Yee's audited accounts.

d) **Abusing Positions**: By virtue of their positions as directors of Ga Yee and their involvement in Encony and Eramas, Khor and Chin were able to procure and facilitate the transfer of funds from Ga Yee to Encony and Eramas. This was done notwithstanding the absence of any commercial or legal nexus between Ga Yee and the recipient companies. The effect of the arrangement was that the funds were diverted for the benefit of Encony and Eramas, rather than for the benefit of Ga Yee.

[48] The loss suffered by Ga Yee was clear. By reason of the transfers of funds to Encony and Eramas effected by Khor and Chin, Ga Yee was deprived of the monies that rightfully belonged to it, as well as the opportunity to utilise those funds for its own benefit.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[49] We, therefore, could not find any error by the learned High Court Judge in how he had arrived at the conclusion that Khor and Chin had, in fact, conspired to injure Ga Yee.

Whether High Court Judge erred in imposing a constructive trust

[50] Eramas' position was that the learned High Court Judge had erred in granting relief based on a constructive trust and allowing tracing against it when no such case had been pleaded. According to Eramas, Ga Yee's pleadings had identified only Khor and Chin as the alleged constructive trustees, and did not extend that allegation to Eramas. The mere assertion in Ga Yee's Reply, without any supporting material particulars, was said to be inadequate. Eramas further argued that Ga Yee had failed to plead the necessary foundation for a constructive trust, namely, any unconscionable conduct or fraud attributable to Eramas.

[51] Relying on authorities such as *Tan Keng Yong @ Tan Keng Hong & Anor v Tan Hwa Ling @ Tan Siew Leng & Ors* [2022] 2 MLJ 805, *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697, and *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, Eramas contended that non-pleaded issues cannot be argued or succeed on appeal. Since the learned High Court Judge had acknowledged the lack of pleadings but still allowed the claim, Eramas submitted this was a fatal error and prayed that the appeal be allowed and judgment against it be set aside.

[52] It is trite law, as affirmed by the Federal Court in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1**,** that parties are bound by their pleadings and may not rely on facts or issues that have not

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

been pleaded. Pleadings serve the important function of giving the opposing party fair notice of the case it has to meet and of defining the issues for determination by the court. That said, it must also be borne in mind that pleadings are intended to advance, not obstruct, the administration of substantive justice. They should not be treated as technical traps to defeat an otherwise legitimate claim where the material factual foundation has, in substance, been sufficiently pleaded.

[53] Therefore, the sustainability of such an objection must be assessed by reference to the specific grounds upon which it is founded. Where evidence relating to the alleged non-pleaded fact has already been admitted without objection, the challenge cannot be sustained, as this would demonstrate that the opposing party was not taken by surprise and that any subsequent allegation of prejudice is without basis. Conversely, the objection may succeed where the evidence concerns matters that were never disclosed and the opposing party was thereby deprived of a fair opportunity to test, challenge, or respond to the truth or accuracy of those matters.

[54] On this point, we drew guidance from the Court of Appeal case of *Bank Bumiputra Malaysia Bhd v. Emas Bestari Sdn Bhd* [2014] 1 CLJ 316; [2014] 2 MLJ 316, and Supreme Court case of *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567.

[55] In the present case, although the learned High Court Judge recognised that Ga Yee had not pleaded constructive trust as a separate cause of action against Eramas, His Lordship held that this

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

omission was not fatal to its claim. This was because constructive trust does not constitute an independent cause of action in itself; rather, it is an equitable remedy or form of relief that may be granted by the court where the facts pleaded and proved justify such intervention. The critical question was, therefore, not whether Ga Yee had expressly pleaded the legal label of "constructive trust", but whether the material facts necessary to establish the basis for such relief had been pleaded and subsequently proved.

[56] In this regard, Ga Yee had expressly sought, in its Amended Statement of Claim, a declaration that Eramas held the monies received from Ga Yee on constructive trust. The claim for that relief was, therefore, clearly placed before the court. More importantly, the factual allegations underpinning the claim were pleaded, including the circumstances surrounding the transfer of MYR9,397,057.40 from Ga Yee to Encony and Eramas, the absence of any legitimate commercial basis for the transactions, and the wrongful diversion of Ga Yee's funds for the benefit of other entities.

[57] The Appellants could not, therefore, have been taken by surprise or prejudiced by the learned High Court Judge's finding that Eramas held the monies on constructive trust for Ga Yee. The facts relied upon by the learned High Court Judge were not new facts introduced at trial or findings based on a non-pleaded case; rather, they were facts that had already formed part of Ga Yee's pleaded case and had been the subject of evidence and submissions before the court. The Appellants had accordingly been afforded a full opportunity to meet and challenge those allegations.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[58] In our view, the learned High Court Judge was not plainly wrong in granting the declaratory relief sought. The declaration of constructive trust did not arise from a cause of action that had not been pleaded, but from the application of an equitable remedy to facts that had been properly pleaded and established at trial. To hold otherwise would elevate form over substance and impose an unnecessary requirement that parties plead the precise legal characterisation of every remedy sought, rather than the material facts upon which that remedy is founded.

Whether High Court Judge erred in quantification of damages awarded

[59] The learned High Court Judge granted four principal orders. First, his Lordship ordered Khor and Chin to jointly pay Ga Yee the sum of MYR9,397,057.40, together with interest, being the full amount misappropriated from Ga Yee. This order was premised on his Lordship's finding that Khor and Chin had acted in concert to misappropriate Ga Yee's funds, in breach of their fiduciary duties and duties as directors, for their own benefit.

[60] Secondly, Encony would have to pay MYR9,206,210.02 plus interest to Ga Yee. This was for the total amount for the first five transfers it had received, which Encony had admitted to.

[61] Thirdly, Eramas would have to pay MYR190,847.28, plus interest, to Ga Yee. This was for the total amount for the last four transfers it received, which Eramas had also admitted to.

[62] Fourth, and most critically, Eramas was ordered to pay MYR11,178,313.90 under the tracing process. The amount of MYR4,034,917.70 of Ga Yee's money received by Eramas was

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

applied towards the Property, funding 39.1% of its purchase price. When Eramas later sold the Property for MYR25 million, the learned High Court Judge held that Ga Yee was entitled to the same proportion of the sale proceeds, namely, MYR9,775,000**,** plus interest of MYR1,403,313.92, bringing the total to MYR11,178,313.90.

[63] The learned High Court Judge arrived at these Orders after finding that the purported transfers of funds were not genuine loans but sham transactions designed to disguise the wrongful diversion of Ga Yee's monies. His Lordship observed that there were no repayment terms, no provision for interest, and no proper accounting records reflecting the alleged loans in Ga Yee's books. These circumstances undermined the assertion that the transfers represented legitimate commercial transactions.

[64] The learned High Court Judge further found that Encony and Eramas lacked the financial capacity to independently fund the acquisition of the Property and shares. Instead, the acquisitions were financed using monies that had been improperly diverted from Ga Yee by Khor and Chin. As Ga Yee's funds had been applied towards the purchase of the relevant assets, the learned High Court Judge applied the equitable principles of tracing to identify and recover the value of the assets acquired through the misappropriated funds. In effect, the orders were intended to restore to Ga Yee the value of what its money had been converted into.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[65] Eramas argued that it should only repay the amount of MYR4,034,917.70 that it had actually received, and not a proportion of the land's increased value.

[66] We found the Eramas's argument untenable for the following reasons.

[67] The learned High Court Judge was correct in relying on the House of Lords decision in *Foskett v McKeown* [2000] UKHL 29. *Foskett v McKeown,* is a leading authority on the equitable principles of tracing. The case establishes that tracing is not itself a remedy, nor is it a process founded upon unjust enrichment; rather, it is an evidential process by which a claimant identifies and follows its proprietary interest in property that has been misapplied or transferred into a substitute asset.

[68] The House of Lords in *Foskett v McKeown* held that where misappropriated funds were used to acquire a new asset, the claimant's proprietary interest was not extinguished but may be traced into that substitute asset. The claimant may then elect to assert a proportionate beneficial interest in the asset, including any increase in its value, or alternatively claim an equitable lien to secure repayment of the original amount misapplied.

[69] Importantly, it was crucial to bear in mind that the exercise of tracing does not depend upon proof of unconscionable conduct or unjust enrichment. The central inquiry was whether the claimant could establish a proprietary connection between the original property and the asset into which it had been converted.

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[70] The principles established in *Foskett v McKeown* have since been adopted and assimilated into Malaysian trust law jurisprudence through the decision of the Federal Court in *Takako Sakao v Ng Pek Yuen & Anor* [2009] 6 MLJ 751, and Court of Appeal case of *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur* [2008] MYCA 88.

[71] In the present case, the specific amount of MYR4,034,917.70 was used by Eramas to buy the Property. Under *Foskett v McKeown*, Ga Yee's proprietary right followed that money into the land and then into the MYR25 million sale proceeds. Ga Yee was entitled to 39.1% of that sale value, which would amount to MYR9,775,000**.** The learned High Court Judge did not treat this as a "repayment" of the original MYR4,034,917.70 – instead, his Lordship treated it as giving Ga Yee its rightful share of what its money had become. This was proprietary remedy, which Ga Yee was entitled to.

[72] The rest of the appropriated money was the subject of personal claims. The judgment against Khor and Chin for the full amount of MYR9,397,057.40, and the admissions of liability by Encony and Eramas for the sums they received, were personal orders to pay money. This was a separate and distinct legal wrong, the breach of fiduciary duty and the tort of conspiracy, which made Khor and Chin personally liable for the loss.

[73] There was, therefore, no error in how the learned High Court Judge had calculated the amount that Ga Yee was entitled to, which was in a nutshell the following:

a) Proprietary remedy against Eramas for the traced money; and

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

b) Personal remedies against the individual wrongdoers (Khor and Chin) and the corporate recipients (Encony and Eramas) for the appropriated money.

[74] Consequently, we were of the view that the learned High Court Judge had not erred in quantification of damages awarded.

Concluding remarks

[75] In the present case, the learned High Court Judge had the benefit of observing first-hand all the witnesses who testified during the trial, including the current shareholder and managing director of Ga Yee (PW1), Chin (DW1), the solicitor who acted on behalf of Eramas (DW2), and Chin's brother (DW3), who was also a director of Eramas. His Lordship was, therefore, uniquely placed to assess their credibility by considering their demeanour, the consistency of their testimony, their responses under cross-examination, and the extent to which their evidence was supported by the contemporaneous documentary evidence.

[76] It was also significant that Khor, despite being a defendant in the High Court proceedings and a material witness to the transactions in question, was not called to testify. Although the learned High Court Judge did not expressly draw an adverse inference against Khor pursuant to s 114(g) of the Evidence Act 1950, the failure to call such a central witness was a relevant consideration. In the circumstances, it was open to the learned High Court Judge to infer that Khor's evidence, had he been called, would not have assisted his case. This further reinforced the conclusion reached by the

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

learned High Court Judge that Ga Yee had proved its claim on a balance of probabilities.

[77] Having carefully considered the evidence before this Court, the submissions advanced by the respective parties, and the detailed grounds of judgment of the learned High Court Judge, we were satisfied that his Lordship's findings were amply supported by the evidence and were not plainly wrong. The learned High Court Judge had carefully evaluated the competing accounts and was entitled to prefer Ga Yee's version of events over that advanced by any of the Appellants.

[78] Accordingly, we found no basis to interfere with the findings of fact made by the learned High Court Judge. These Appeals were, therefore, unanimously dismissed with costs.

Dated: 7 August 2026

……SIGNED……

(EVROL MARIETTE PETERS)
Judge of the Court of Appeal
Malaysia

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Counsel:

For the Appellant in Suit 1792 – Alan Wong Teck Wei, Yap Yoon Jan, Chau Yen Zhe, Yeo Yen Hock; Messrs Yap Siew Yee & Co.

For the Appellants in Suit 1991–Vincent Lim Seng Liang, Sera Foong Chui-Yeng; Messrs Dennis Nik & Wong.

For the Respondent – Ranjit Singh, David Tan Hong Kai, Yuki Lim Jie Ng; Messrs Presgrave & Matthews

S/N cVwZKfwWKkSIzIwQBhpkkQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal