

ABDUL RAZAK BIN DATO AS DAWOOD & ANOR v PA ABDUL WAHAB &  
CO SDN BHD & ORS

CaseAnalysis

| [2020] MLJU 2422

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**Abdul Razak bin Dato AS Dawood & Anor v PA Abdul Wahab & Co Sdn Bhd &  
Ors [2020] MLJU 2422**

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

KHADIJAH IDRIS J

SUIT NO WA-22NCC-180-04 OF 2019

30 September 2020

*Akif Rusli (Law Practice of Rafique) for the plaintiffs.*

*Mohd Irzan Iswat (Norizan & Assoc) for the ffith defendant.*

*K Navinderan (Preakas & Partners) for the sixth and seventh defendants.*

**Khadijah Idris J:**

GROUPS OF JUDGMENT

**(enclosure 57)**

Introduction

[1]Via enclosure 57, the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant applied to strike out the plaintiffs' claim against them under Order 18 rule 19 of the Rules of Court 2012 ("RoC 2012"). This court allowed the said application premised on the reasons stated below.

Factual background

[2]The 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Plaintiff are individuals, the 1<sup>st</sup> Plaintiff being the father of the 2<sup>nd</sup> Plaintiff.

[3]The 2<sup>nd</sup> Plaintiff is one of the shareholder in the 1<sup>st</sup> Defendant company, holding 63,440 units of shares.

[4]The 2<sup>nd</sup> Defendant, an individual, is a director of the 1<sup>st</sup> Defendant company and said to be involved in the attesting the transfer and sale of shares of the 6<sup>th</sup> Defendant and / or 7<sup>th</sup> Defendant in the 1<sup>st</sup> Defendant company to the 2<sup>nd</sup> Plaintiff in consideration of the financial assistance given by the 1<sup>st</sup> Plaintiff to the 1<sup>st</sup> Defendant company.

[5]The 3<sup>rd</sup> Defendant, an individual, is a director of the 1<sup>st</sup> Defendant company and a brother to the 2<sup>nd</sup> Defendant.

[6]The 4<sup>th</sup> Defendant, an individual, owns 11,240 shares in the 1<sup>st</sup> Defendant company. The 4<sup>th</sup> Defendant is the mother of the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant.

[7]The 5<sup>th</sup> Defendant is the Guardian Ad-Litem on behalf of Mohamed Haneef bin P.A. Abdul Wahab bin P.A. Abdul Wahab. The 5<sup>th</sup> Defendant is the nephew of the 1<sup>st</sup> Plaintiff and cousin of the 2<sup>nd</sup> Plaintiff.

[8]The 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant are Indian citizen and having their respective address for service in Tamil Naidu, India. They are close relative to the Plaintiffs. Both the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant are among the former shareholder in the 1<sup>st</sup> Defendant company. Both their shares were purchased by the 1<sup>st</sup> Plaintiff for purpose of transferring to the 2<sup>nd</sup> Plaintiff. However the said shares have yet to be transferred even though the purchase and sale of the said shares were mutually agreed by the 1<sup>st</sup> Plaintiff and the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant respectively.

[9]The 8<sup>th</sup> Defendant, a Malaysian citizen, is the company secretary of the 1<sup>st</sup> Defendant company.

[10]It is the Plaintiffs' pleaded case that the 2<sup>nd</sup> Defendant to the 8<sup>th</sup> Defendant are all involved in fraudulent conspiracy misconduct against the Plaintiffs.

[11] Around 2009 the 1<sup>st</sup> Defendant company suffered serious financial crisis due to its inability to settle its debt. In 2010 a winding-up order was made against it. The 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant with the mutual consent of the other shareholders pleaded to the 1<sup>st</sup> Plaintiff for financial assistance. Due to the familial relationship the 1<sup>st</sup> Plaintiff had agreed to help, settling the 1<sup>st</sup> Defendant's perilous financial problem and also saving the 1<sup>st</sup> Defendant's property ("the Property") from being auctioned off by the bank / lender. The Plaintiffs allege, in consideration of the financial assistance rendered by the 1<sup>st</sup> Plaintiff, the shares of the 5<sup>th</sup> Defendant, 6<sup>th</sup> Defendant, 7<sup>th</sup> Defendant and one Hathija Ammal will be transferred to the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff had paid to the said Defendants and Hathija Ammal for the said shares. Although the said Defendants had executed Shares Transfer Forms and submitted the same to the company secretary then, the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant had dishonestly took ownership of all the 1<sup>st</sup> Defendant's documents and dispose the original documents in relation to the transfer of the said shares to the 1<sup>st</sup> Plaintiff.

[12] On 20 January 2015, an extraordinary general meeting of the 1<sup>st</sup> Defendant company was held where a resolution was passed for the 1<sup>st</sup> Defendant company to sell the Property. The Plaintiffs claim that the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant, 5<sup>th</sup> Defendant and Hathija Ammal had defraud the Plaintiffs by signing several proxy forms in order to approve the selling of the Property without the Plaintiffs' knowledge. At all material times the Defendants has full knowledge that the shares of the 5<sup>th</sup> Defendant, 6<sup>th</sup> Defendant, 7<sup>th</sup> Defendant and Hathija Ammal were purchased by the Plaintiff on 5 January 2012 to be transferred to the 2<sup>nd</sup> Plaintiff.

[13] In 2015 the 1<sup>st</sup> Plaintiff commenced an action against the 1<sup>st</sup> Defendant company and 2<sup>nd</sup> Defendant at the Kuala Lumpur Sessions Court Suit No. WA-B52NCC-474-06/2016 ("Suit 474"). In Suit 474 the 1<sup>st</sup> Plaintiff sought, among others,

- (a) declaration the 2<sup>nd</sup> Defendant and the shareholders in the 1<sup>st</sup> Defendant company are trustee for the 1<sup>st</sup> Plaintiff with regards to the said shares;
  - (b) specific performance against the 2<sup>nd</sup> Defendant and the shareholders of the 1<sup>st</sup> Defendant company to transfer the shares held by them as trustee for the 1<sup>st</sup> Plaintiff;
- and

- (c) declaration that all sale and purchase agreement between the 1<sup>st</sup> Defendant company and third party in relation to the Property be stopped and annulled.

[14]The Plaintiffs' claim in Suit 474 was dismissed by the Sessions Court. It was the findings of the Sessions Court that, inter alia, the transfer of shares in the 1<sup>st</sup> Defendant company to the 2<sup>nd</sup> Plaintiff had been carried out by means of forged signatures. As such the transfer of shares was void. The Sessions Court also found there were no evidence that payment were made to the shareholders as consideration for the shares. The 1<sup>st</sup> Defendant's counterclaim was allowed and the court ordered for the shares transferred to the 2<sup>nd</sup> Plaintiff be transferred back to the original shareholders (ie the 3 Indian shareholders which are the 6<sup>th</sup> Defendant, 7<sup>th</sup> Defendant and Hathija Ammal).

[15]The Plaintiffs appealed vide Civil Appeal WA-12BNCC-14-05 2017 ("Appeal Suit 14"). At the appellate stage the Plaintiffs' application to adduce new evidence was dismissed by the High Court. Subsequently the Plaintiffs' appeal was dismissed by the High Court.

[16]Subsequently in July 2018 the 1<sup>st</sup> Plaintiff filed an action against the 8th Defendant WA-22NCC-318-07/2018 ("Suit 318") seeking, among others, for a declaration that the transfer of the shares to the 2<sup>nd</sup> Plaintiff was effective and that the members' resolution regarding the sale of the Property is void. The 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant had successfully intervened to be made parties to Suit 318. On the application of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant, Suit 318 was struck out on the ground, among others, that the issues raised in Suit 318 were res judicata. The Plaintiffs initially appealed against the striking out but subsequently withdrew their appeal.

[17]In April 2019 the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff filed this instant action against the 1<sup>st</sup> Defendant to the 8th Defendant, seeking, among others, that the judgment obtained in Suit 474 is void due to fraud by all the Defendants. According to the Plaintiffs, all the Defendants had, at the trial of Suit 474 conspired against the Plaintiffs when the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant deliberately did not attend the said trial despite their involvement in the case.

[18]The particulars of fraud pleaded by the Plaintiff were set out in paragraph 23 (a) – (e) of the Plaintiffs' Statement of Claim. Via this instant action, the Plaintiff seek, among others, the following reliefs –

53. Berdasarkan pernyataan-pernyataan di atas kini Plainti-Plaintif menuntut:

- a. *Satu Deklarasi bahawa Perintah Mahkamah Sesyen di bawah Guaman Sivil No.: WA-B52NCC-474-06/2016 bertarikh 27.4.2017 adalah tidak tepat dan/atau tidak sah serta terbatal ("void ab initio");*
- b. *Satu Deklarasi bahawa Perintah Mahkamah Tinggi di bawah Rayuan Sivil No.: WA-12BNCC-14-05/2017 bertarikh 16.3.2018 adalah tidak tepat dan/atau tidak sah serta terbatal ("void ab initio");*
- c. *Satu Deklarasi bahawa mana-mana Perintah dan/atau Penghakiman sampingan lain yang berkaitan dengan Perintah Mahkamah Sesyen di bawah Guaman Sivil No.: WA-B52NCC-474-06/2016 bertarikh 27.4.2017 dan juga Perintah Mahkamah Tinggi di bawah Rayuan Sivil No.: WA-12BNCC-14-05/2017 bertarikh 16.3.2018 adalah tidak tepat dan/atau tidak sah serta terbatal ("void ab initio");*
- d. *Satu Perintah bahawa saham yang telah dibeli oleh Plaintiff Pertama daripada Defendan Keenam dipindahmilik kepada Plaintiff Kedua kerana Plaintiff Pertama telah pun menjelaskan dengan penuh pembayaran penuh;*
- e. *Sejumlah RM2,432,100.00 iaitu selepas keuntungan daripada pelupusan Hartanah Defendan Pertama tersebut yang dibahagikan mengikut jumlah saham yang sepatutnya dimiliki oleh Plaintiff Kedua iaitu 88,440 unit saham dibayar kepada Plaintiff Pertama dan/atau Plaintiff Kedua;*
- f. *Satu Perintah Injunksi Mandatori menghalang Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat dan/atau Defendan Kelima dan/atau Defendan Keenam dan/atau Defendan Ketujuh dan/atau Defendan Kelapan dan/atau melalui agen-agennya dan/atau pekerja-pekerjanya dan/atau apa cara juga sekalipun, samada secara sendiri dan/atau berasingan, daripada membuat mana-mana urusan dan/atau menggunakan hasil keuntungan daripada jualan Hartanah Defendan Pertama tersebut;*
- g. *Satu Deklarasi bahawa Borang-Borang Proksi yang ditandatangani oleh Defendan Kelima dan/atau Defendan Keenam dan/atau Defendan Ketujuh adalah tidak terpakai dan/atau tidak sah dan/atau salah di sisi undang-undang kerana P.A. Hathija Ammal dan/atau Defendan Kelima dan/atau Defendan Keenam dan/atau Defendan Ketujuh telah menjual saham mereka sepenuhnya kepada Plaintiff Pertama yang kemudiannya meletakkan nama Plaintiff Kedua sebagai pemiliknya;...*

[19]The Plaintiffs now contend they came into possession of new evidence which establishes that the Defendants are guilty of perjury in both the previous suits. The purported new evidence are as stated in paragraph 45 of the Statement of Claim. In particular the alleged new evidence is set out in the Plaintiffs' affidavit enclosure 59 Exhibit ARRD- 3 which includes, among others, three documents that were purported to be admissions from the 6<sup>th</sup> Defendant, 7<sup>th</sup> Defendant and Hathijah. The said purported admissions by the said Defendants was that they had acknowledged receiving the purchase price from the 1<sup>st</sup> Plaintiff and that they had agreed for their respective shares in the 1<sup>st</sup> Defendant company to be transferred to the 1<sup>st</sup> Plaintiff. Besides that and importantly, the Plaintiffs has also alleged that 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant

has committed fraud by conspiring with the other Defendants when the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant refused to attend the trial in Suit 474.

Enclosure 57Contentions of the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant

**[20]**Essentially it is contended by the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant that the Plaintiffs claim against them in this instant action is an abuse of the process of the court as this is repeated actions / claims. As such the Plaintiffs are estop by the doctrine of res judicata from litigating the same facts and issues which has been litigated in both Suit 474 and Suit 318.

**[21]**With respect to the alleged new evidence, the said evidence is at all material time were in the possession of the Plaintiffs during the trial of Suit 474 and the Appeal Suit 14. In fact the alleged new evidence was used by the Plaintiffs in the said Suit 474.

**[22]**It is further contended by the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant that the Plaintiffs has no locus to commence this instant action against the Defendants on the following grounds –

- (a) Via the decision of the court in Suit 474 and Appeal Suit 14, both the Plaintiffs are declared not to be shareholders of the 1<sup>st</sup> Defendant company. As the Plaintiffs are neither a shareholder nor director of the 1<sup>st</sup> Defendant company, this suit against the Defendants are obviously unsustainable;
- (b) the Plaintiffs' claim failed to specify any discernible nexus between the alleged conspiracy of the Defendants and the alleged false evidence given by the Defendants; and
- (c) by the Plaintiffs' failure to appeal against the decision of the court in Appeal Suit 14, the Plaintiffs has admitted there were fraud committed by them to transfer some of the shares to the 2<sup>nd</sup> Plaintiff. By such conduct the Plaintiffs are estopped from claiming there was conspiracy and false evidence perpetrated by the Defendants.

Plaintiffs' contentions

**[23]**It is contended by the Plaintiffs that in Suit 474 and Appeal Suit 14, the purported new evidence was not before the courts as it was not within the possession of the Plaintiffs. It is further argued that the cause of action in this instant case is totally different as it was on the

allegation of perjury committed in the course of trial and concealment of evidence by the Defendants which led the court to decide in favour of the Defendants. In their affidavit resisting the application of the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant to strike out their Statement of Claim, the Plaintiffs produced the alleged new evidence in their affidavit enclosure 59.

The law

[24]The Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 held that the summary procedure under Order 18 rule 19 of the RoC 2012 can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. A striking out application is not a trial on affidavits and the court should not conduct a minute examination of the documents and the facts of the case. It is further held that as long as the claim discloses some cause of action or raises some question fit to be tried it should not be struck out. The mere fact the case is weak and not likely to succeed is no ground for the pleadings to be struck out (*Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd & Ors* [2012] 1 MLJ 510).

[25]With regards to res judicata, it was held in *Seruan Gemilang Makmur Sdn Bhd V Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1 section 44 of the Evidence Act 1950 the doctrine of res judicata is not applicable in an action to impeach or to set aside an earlier judgment which has been obtained by fraud. Thus the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant contentions that the Plaintiffs are estopped by the said doctrine is untenable.

[26]In *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; ; [2013] 5 MLJ 1, on the issue of setting aside a previous order on the ground of fraud, the Federal Court opined as follows –

*[36] As regards the appellant's submission on the court being functus officio and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; ; [1981] 1 MLJ 14 *which we think has settled these issues. The headnotes from the report in that case, which need no further explanation, or expansion, is now reproduced as our answer to those related questions:*

*In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of non est factum and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed.*

*Held:*

- (1) *the learned judge was functus officio;*
- (2) *the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;*
- (3) *if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;*
- (4) *in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground fraud.*

*[37] Although both the courts below had referred to the cases of Ling Kuok Teck & Anor v. Tseng Choon Chin @ Tay Bak Hui & 5 Ors [1995] 3 CLJ 889 and the Hock Hua Bank Bhd (supra), which cases involved applications to impeach perfected judgments previously obtained on the grounds of fraud or non-disclosure of material documents, both the courts unfortunately missed to observe that in both cases **fresh actions** were filed to trash out the issue of fraud. In fact, Chang Min Tat FJ speaking for the Federal Court in the latter case, clearly stated that a “fresh action will lie to impeach the original judgment”, and that the court had “no power under any application **in the same action** to alter, vary or set aside a judgment regularly obtained”.*

(emphasis added)

## Findings of this court

**[27]**Based on the reliefs sought by the Plaintiffs as stated at paragraph 53 of their Statement of Claim, the Plaintiffs by this fresh action is challenging the decision of the court in Suit 474 and Appeal Suit 14 as incorrect, unlawful and void ab initio. Although the relief sought in paragraph 53 does not expressly sought for the decision pronounced by the court in both suits to be set aside, the various prayers sought by the Plaintiffs ultimately has such effect.

**[28]**After Suit 474 (and the Appeal Suit 14) and Suit 318, the Plaintiffs now launched another attack by filing this action, and this time the Plaintiffs combined the defendants in Suit 474 and Suit 318. At the outset it is to be noted that the facts pleaded by the Plaintiffs in this instant case are substantially similar with the facts and issues in Suit 474 and Suit 318. It all revolves around the shares held by the 2<sup>nd</sup> to the 7<sup>th</sup> Defendants in the 1<sup>st</sup> Defendant company which was repeatedly alleged by the Plaintiffs to have been transferred by the respective Defendants to the 1<sup>st</sup> Plaintiff who then transferred the shares to his son the 2<sup>nd</sup> Plaintiff.

[29] However in this instant suit it is claimed by the Plaintiffs that they have now with them fresh evidence to show that the decision of the court in Suit 474 was obtained by fraud committed by the Defendants. The fraud alleged to have been committed by the Defendants at the trial of Suit 474 are set out at page 24 of the Statement of Claim as follows –

*BUTIR-BUTIR PENIPUAN (“DECEIT”) SEMASA PERBICARAAN*

- a. *Defendan Kedua dengan curang dan/atau berniat jahat menafikan dan/atau menyembunyikan fakta bahawa Defendan Kedua telah mengambil semula kesemua dokumen milik Defendan Pertama yang menjadi pertikaian dalam Guaman Sivil No.: WA-B52NCC-474-06/2016 daripada Alma Advisory Sdn Bhd dan telah memusnahkan dokumen- dokumen tersebut;*
- b. *Defendan Kelapan yang sentiasa berada di bawah kawalan dan/atau seliaan Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat dengan curang dan/atau berniat jahat bertindak memberikan keterangan palsu secara bertulis bertarikh 27.7.2016 bagi memastikan keterangan yang diberikan oleh Defendan Kedua bertarikh 23.2.2017 dan 24.2.2017 di hadapan Mahkamah Sesyen Kuala Lumpur boleh diterimapakai dan “selari” dengan niat bersama untuk memastikan Mahkamah membuat dapatan salah yang akhirnya memihak kepada Defendan Pertama dan/atau Defendan Kedua;*
- c. *Defendan Kelima dengan curang dan/atau berniat jahat bertindak untuk bersepakat dan/atau bersekongkol samada secara bersesama dan/atau berasingan dengan Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Kelapan untuk memutarbelitkan keterangan Defendan Kelima sendiri yang telah diakui melalui Satu Akuan Statutori bertarikh 5.10.2018 yang disediakan oleh Defendan Kelima sendiri dan secara salah menimbulkan keraguan kepada Mahkamah Sesyen Kuala Lumpur terhadap keterangan Defendan Kelima;*
- d. *Defendan Ketiga dengan secara curang dan/atau berniat jahat telah membuat Laporan Polis No.: SEA PARK/007389/16 dan Laporan Polis No.: DANG WANGI/025592/16 yang kedua-duanya bertarikh 26.9.2016 yang palsu dengan menyatakan bahawa pada setiap masa material Defendan Ketiga kononnya langsung tidak mempunyai pengetahuan berkaitan persetujuan pemindahan saham dan/atau pelaksanaan proses pemindahan pemindahan saham kepada Plaintiff Kedua dan telah menggunakan laporan-laporan polis tersebut untuk mengukuhkan keterangan salah dan/atau palsu Defendan Kedua dan/atau Defendan Ketiga;*
- e. *Defendan Keenam dan/atau Defendan Ketujuh dengan curang dan/atau berniat jahat bersepakat dan/atau bersekongkol dengan Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga untuk tidak menghadirkan diri semasa Perbicaraan di peringkat Perbicaraan di Mahkamah Sesyen Kuala Lumpur untuk memberikan keterangan;*

The Plaintiffs’ claim against the 1<sup>st</sup> Defendant – 4<sup>th</sup> Defendant and the 8<sup>th</sup> Defendant was struck out by this court on the application of the said Defendants.

[30] As can be seen from the pleadings, the fraud alleged to have been committed by both the 6<sup>th</sup>

Defendant and 7<sup>th</sup> Defendant is that both the said Defendants had conspired with the rest of the Defendants “*untuk tidak menghadirkan diri semasa Perbicaraan di peringkat Perbicaraan di Mahkamah Sesyen Kuala Lumpur untuk memberikan keterangan*”. In other words it is the Plaintiffs’ position that both the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant has deliberately refused to attend court to testify in the trial of Suit 474.

[31] However, contrary to the Plaintiffs’ allegations, the learned judge in her judgment in Suit 474, at page 12 of the judgment made the following findings –

*(c) I agreed with the Defendants’ submission that there was no evidence led by the Plaintiff to show that the 3 Indian Shareholders did in fact sign those transfer forms and have agreed to transfer their shares to the Plaintiff despite it being the Plaintiff’s assertion. It is the Defendants’ case that the Indian Shareholders have never agreed to transfer their respective shares to the Plaintiff. **However the Plaintiff chose not to call the 3 Indian Shareholders to the witness stand despite the trial was adjourned numerous occasions to call them as Plaintiff’s witnesses.** Thus an adverse inference under s.114(g) Evidence Act 1950 ought to be drawn against the Plaintiff in that the evidence of the 3 Indian Shareholders if called would be adverse to the Plaintiff’s case.* (emphasis added)

The three Indian Shareholders referred to in the judgment are the 6<sup>th</sup> Defendant, 7<sup>th</sup> Defendant and Hathija Ammal.

[32] Thus the Plaintiffs’ allegations that the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant refused to attend the trial of Suit 474 is simply not true. It was the learned High Court Judge’s findings, upon perusal of the record of appeal that the 1<sup>st</sup> Plaintiff plainly failed to call the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant (both the said Defendants are supposed to be the 1<sup>st</sup> Plaintiff’s witness in Suit 474) to testify on the alleged transfer of their shares to the 1<sup>st</sup> Plaintiff. This resulted in an adverse inference drawn against the 1<sup>st</sup> Plaintiff.

[33] At paragraph 32 of his affidavit enclosure 59 (resisting the application by 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant to strike out) the 1<sup>st</sup> Plaintiff alleges that the basis of this instant action is perjury and misleading evidence of the 2<sup>nd</sup> Defendant, 3<sup>rd</sup> Defendant, 5<sup>th</sup> Defendant and 8<sup>th</sup> Defendant in Suit 474. Thus perjury as alleged by the Plaintiffs cannot be attributed to the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant as they did not testify in Suit 474 because the 1<sup>st</sup> Plaintiff did not call them to give evidence in the trial of the said suit. Yet the 1<sup>st</sup> Plaintiff has the audacity to now allege the court in Suit 474 and Appeal Suit 14 misled and made the wrong decision when it was, among others, their own doing which led to the 1<sup>st</sup> Plaintiff’s claim in Suit 474 being dismissed by court.

**[34]**Besides that, it is also pertinent to note the Plaintiffs failed to adduce evidence to support their allegations that both the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant refused to attend the said trial. As pointed out by counsel for both the Defendants, there is nothing to indicate that both the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant were subpoena to attend trial of Suit 474. As such to file a fresh action as in this instant case and alleges that both the said Defendants conspire with the other Defendants because they refused to attend the trial of Suit 474 is scandalous and frivolous. It is indeed an abuse of the process of the court. This is especially so when the 1<sup>st</sup> Plaintiff withdrew his appeal against the decision of the High Court affirming the Sessions Court decision dismissing the 1<sup>st</sup> Plaintiff's claim in Suit 474.

**[35]**With regards to the alleged new evidence, at paragraph 43 of the Statement of Claim, the Plaintiffs pleaded as follows –

*43. Walau bagaimanapun kesemua tuntutan yang dinyatakan di Perenggan 40 di atas telah pun ditolak di peringkat Mahkamah Sesyen Kuala Lumpur dan Plaintiff Pertama kemudiannya memfailkan satu rayuan kepada Mahkamah Tinggi Kuala Lumpur di bawah Rayuan Sivil No.: WA-12BNCC- 14-05/2017. Di peringkat rayuan tersebut Plaintiff Pertama telah memfailkan satu Notis Permohonan untuk mendapatkan kebenaran bagi menampilkan Keterangan Baru untuk dipertimbangkan oleh Mahkamah Tinggi Kuala Lumpur. Walau bagaimanapun, Mahkamah Tinggi Kuala Lumpur telah menolak permohonan Plaintiff Pertama tersebut dan sejourus pelupusan permohonan interlokutori tersebut, Mahkamah Tinggi Kuala Lumpur turut menolak rayuan.*

**[36]**By the above averment, the alleged new evidence is at all material time in the 1<sup>st</sup> Plaintiff's possession and his attempt to introduce the alleged new evidence was rejected by the High Court in Appeal Suit 14. Thus it is not true that these are new evidence. In fact it is shown by the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant that one of the alleged new document which is a statutory declaration by one P.K. Abdul Khadar (see enclosure 59 Exhibit ARDD-1) was referred to by the 1<sup>st</sup> Plaintiff's witness in the trial of Suit 474 (see enclosure 65 Exhibit ARA-1). As stated above the 1<sup>st</sup> Plaintiff did not pursue his appeal against the High Court decision. Thus, by his conduct the 1<sup>st</sup> Plaintiff is estopped from now re-litigating the issue on the alleged new evidence. It is to be noted that the Plaintiffs did not deny the averments by the 6<sup>th</sup> and 7<sup>th</sup> Defendants that the alleged new documents were with the Plaintiffs during the trial of Suit 474.

**[37]**Moreover, even if this court accept that the said statutory declaration is new evidence, the said statutory declaration does not on the face of it lend support to the Plaintiffs' allegations that

the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant conspire with the 1<sup>st</sup> Defendant – 3<sup>rd</sup> Defendant to commit fraud against the Plaintiff by not attending the trial in Suit 474.

Conclusion

**[38]** Premised on the above reasons, the Plaintiffs' claim against the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant is obviously unsustainable. There is adequate facts to justify that this instant action filed by the Plaintiffs is scandalous and an abuse of the process of the court and ought to be struck out. Accordingly the application by the 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant to strike out the Plaintiffs' claim was allowed in terms of enclosure 57.

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