Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Pentadbir Kepada Harta Pusaka Tan Ewe Kwang, Simati & Ors [2020] MLJU 1469

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FEDERAL COURT (PUTRAJAYA)

MOHD. ZAWAWI SALLEH, VERNON ONG LAM KIAT, ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND ZABARIAH MOHD YUSOF FCJJ

RAYUAN SIVIL NO: 02(f)-60-07/2019 (P)

24 September 2020

Cyrus Das, Karin Lim Ai Ching, Suppiah a/l Arumugam, Lee Kar Cheng, Nicholas Lim Wei Jian [Presgrave and Matthews] for the Appellants/Plaintiffs.
Lee Khai, Teh Chiew Yin, Lee Huai [Ong and Maneksha] for the Respondents/Defendants.

Zabariah Mohd Yusof FCJJ:

JUDGMENT OF THE COURTINTRODUCTION

[1]At the Federal Court, the appellant was granted leave to appeal on the sole question of law as follows -

> "Whether the application of the "plainly wrong" test by an appeal court in reversing the findings of facts by a trial court should be subject to guidelines and whether the guidelines laid down by the UK Supreme Court in *Henderson v Foxworth Investments Ltd and Another* (2014) 1 WLR 2600 and *Mc Graddie v Mc Graddie and Another* (2013) 1 WLR 2477 should be adopted as the relevant guidelines or such other guidelines as may be relevant or appropriate?"

[2]The aforesaid leave question arises as a result of the decision of the Court of Appeal which reversed the decision of the High Court on findings of fact on the main issue, namely, whether the monies paid by the 1st appellant (Ng) to the deceased, Tan Ewe Kwang (TEK) was for capital contribution for shares in the 2nd appellant, Alor Vista Development Sdn Bhd (AVD).

[3]The High Court after a full trial, held that the monies paid by Ng to TEK was for capital contribution for shares in AVD and not for premium payment payable to TEK for participation in the land development undertaken by AVD. It further held that the 2nd and the 3rd respondents held the shares (to the value of the investment by Ng) in AVD as trustees for Ng and ordered the transfer of the said shares to him (Ng). However, on appeal, the Court of Appeal reversed the decision of the High Court and held that the payment made by Ng was not for capital contribution nor were the other payments, towards capital investment in AVD.

[4]The appellants in this appeal are the plaintiffs and the respondents are the defendants in the High Court. In this judgment, unless otherwise stated as herein below, parties shall be referred to as they were in the High Court:

(a) The 1st appellant shall be referred to as "Ng";

(b) The 2nd appellant company shall be referred to as "AVD";

(c) The deceased shall be referred to as "TEK"; and

(d) The 4th respondent company shall be referred to as "AV".

[5]Given that the determination of the issue will turn on the purpose of the payments made by Ng, the findings thereof by the learned trial Judge and the principle of appellate intervention on such findings, an appreciation of the factual matrix to the payments made by Ng and the subsequent dispute between the parties is of critical importance.

BACKGROUND

[6]The 1st plaintiff (Ng) is a director and shareholder in the 2nd plaintiff company, Alor Vista Development Sdn. Bhd (AVD).

[7]The 1st defendant (D1) is the administratrix of the estate TEK (deceased), who was a shareholder and former director of AVD and AV.

[8]AVD was incorporated by Ng and TEK on 3.10.2013 to develop a mixed housing project on 2 pieces of land situated at Bukit Mertajam, Seberang Perai Tengah, Pulau Pinang. The lands were purchased by AVD on 7.10.2013 from a subsidiary listed company, Ivory Properties Group Berhad (Ivory) at a purchase price of RM18.0 million.

[9]Ng agreed to invest with TEK in the development project by AVD, after he was introduced by Lim Weng Heng (SD 3) who is a director of AV and nephew to TEK.

[10]Between 18.9.2013 until 18.7.2014, Ng claimed to have invested RM10,490,000.00 personally as paid up capital investment in AVD in the following manner:

(a) RM4,290,000.00 was paid by cheque and cash directly into AVD's account (the defendants did not dispute the payment of this amount) by Ng;

(b) RM6.0 million was paid by way of cheques and cash into AV's account as a conduit to transfer to AVD as Ng's paid-up capital comprising:

(i) RM4.0 million paid into AV as at 23.10.2013 (before AVD's account was set up); and

(ii) RM2.0 million that was paid between 25.11.2013 to 28.11.2013 directly into AV's account (after AVD's bank account had been set up).

(the defendants did not dispute this payment of RM6.0 million by Ng but disputed the purpose of the payment and contended that the sum is premium paid by Ng to TEK and/or to AV for Ng' participation in the development project of AVD); and

(c) RM200,000.00 was paid in cash to TEK as his paid-up capital in AVD (The defendants disputed this payment).

[11]From the Statement of Accounts of AV, AVD and TEK's personal account, which Ng obtained from TEK, Ng discovered that the money which he had paid into AV as his contribution for AVD's paid-up capital had been channeled by TEK from AV's account into his (TEK's) personal account and that TEK had deposited only a portion of it (i.e. RM3,974,450.00) into AVD's account to give the impression that he (TEK) had made direct contribution from his own funds of RM3,974,450.00 into AVD.

[12]The understanding between TEK and Ng was that both of them will contribute to the paid-up capital of AVD and the allocation of shares will be based on their contribution at par value as provided in Clause 6 of the Memorandum of Association of AVD.

[13]Initially both TEK and Ng were allotted 2.0 million unit of shares each in AVD. Ng questioned TEK about the disparity between the total sum of monies he had contributed to the paid up capital of AVD and the number of shares allotted to him in AVD, because he had contributed more than RM2.0 million. As a result, on 6.8.2014, TEK instructed his daughter, the 3rd defendant to transfer 250, 000 of shares in AVD to Ng's wife without payment of any consideration, leaving TEK's family with a balance of 1,750 shares.

[14]The plaintiffs also contended that the deposit of RM1.8 million for the purchase of the Development Land was paid by TEK using RM6.0 million paid by Ng into AV.

[15]As Ng did not receive his entitlement of shares according to his capital contribution, he persistently continued to make demands for his additional entitlement of shares from TEK orally (before 4.9.2014) and also through the following letters:

(a) letter dated 4.9.2014 to TEK to put him on notice that he has not received the shares all due to him. Ng also enclosed payment slips representing the sum of RM10,490,000.00 to ensure that his full payment is reflected in the accounts of AVD;

(b) letter dated 17.9.2014 to TEK to request for the management account of AVD and to claim for his shares entitlement based on percentage of his contribution to AVD; and

(c) letter dated 10.10.2014 (wherein Ng challenged TEK to prove his alleged contribution of RM3,974,450.00 to AVD, as Ng claimed that the said amount was actually derived from his (Ng) monetary contribution to AV).

TEK did not reply to this letter dated 10.10.2014, instead he abruptly resigned as Managing Director of AVD on 15.11.2014.

[16]In addition to the abovementioned letters, Ng also sent the following notices to TEK:

(a) notice dated 30.11.2014 wherein he demanded from TEK for the balance sum of RM2,225,550.00 [RM10,490,000.00 - (RM3,974,450.00 + RM4,290,000.00)]. There was no response from TEK to this notice;

(b) notice dated 12.1.2015 to demand the transfer of 1,750,000 shares (2.0 million shares minus 250,000 shares which was transferred to Ng's wife by the 3rd defendant) which Ng asserted were being held on trust for him. Again, there was also no response from TEK to this notice; and

(c) notice dated 13.5.2015 issued to AV pursuant to *section 218* of the *Companies Act 1965* to demand for the balance sum of RM2,025,550.00 (RM6.0 million – RM3,974,450) which Ng treated as a loan from him to AV.

(The defendants replied to this particular notice stating that the sum of RM 6.0 million paid by Ng into AV's account was paid by Ng to AV and/or to TEK as premium for participation in the said development project. This is the 1st time that AV raised the issue of premium).

[17]Ng also claimed that TEK had failed to pay the sum of RM200,000.00 (which Ng claimed he had paid in cash to TEK) as Ng's contribution towards the paid-up capital of AVD and the said sum was still due and owing by TEK to Ng. This sum was paid into AV's account upon the request of TEK to enable him as AVD's Managing Director to use funds to expedite payment by AVD to avoid delay in getting signature of Ng who was staying in Kulim at that time. TEK confirmed that Ng will get his proportion of shares later in AVD.

[18]As Ng failed to receive his full entitlement based on his contribution towards the paid up capital in AVD, he filed the present suit in the High Court against the defendants claiming, inter alia, for the following orders:

(a) 1,750,000 units of shares which are registered under the name of TEK, the 2nd and the 3rd defendants, are held by them as trustees for and on behalf of Ng and that Ng is the lawful and beneficial owner of the 1,750,000 shares in AVD;

(b) TEK, the 2nd and the 3rd defendants transfer the ownership of the 1,750,000 shares in AVD to Ng;

(c) TEK, the 2nd and the 3rd defendants are restrained from voting, and/or interfering with the affairs and/or management and/or exercising their rights as the registered shareholders of AVD on the ground that they hold the said shares as trustees for Ng;

(d) AV repay to Ng the sum of RM2,025,550.00 being the loan from him to AV ; and

(e) that TEK repay Ng the sum of RM200,000.00 and interest on the said sums.

[19]The Defence of the defendants to the plaintiffs' claim was filed on 25.8.2015 (after the demised of TEK), which are as follows:

(a) the amount owing to TEK as a director had been misrepresented as a loan due to Ng and that the total owed by AVD to TEK was RM2,224,450.00 as at 30.9.2014 and this was wrongly assumed by Ng as a loan to Ng;

(b) the defendants did not hold 1.0 million shares as bare trustees or as constructive trustees for Ng;

(c) that all payments made by Ng was premium paid to TEK as consideration for taking part in the housing development of the Development Land of AVD; and

(d) the sum of RM3,974,450.00 paid by TEK into AVD was TEK's own money, even if a portion of the premium was paid by Ng to TEK.

Notably the Defence of the defendants was filed after the LHDN had presented the Winding Up Petition against AV on 3.8.2015 and AV was wound up on 4.12.2015.

[20]The defendants filed a Counterclaim against the plaintiffs for the return of 2,224,450 shares which were issued to Ng by converting the deceased's RM2,224,450.00 loan to AVD into shares.

[21]After a full trial, the High Court allowed the claim by the plaintiffs and dismissed the Counterclaim by the defendants. On appeal, the Court of Appeal reversed the High Court's decision and found in favour of the defendants.

[22]The disputes, both in the High Court and the Court of Appeal, revolved around the following issues:

(a) Whether the RM6.0 million paid by Ng into AV was a conduit to transfer to AVD as paid up capital or whether it was for premium paid by Ng to AV and/or TEK for participating in the development project?;

(b) Whether the defendants hold 1,750,000 shares in AVD as constructive trustees for Ng?;

(c) Whether RM2,025,550.00 is a loan given by Ng to AV is part of the RM10,490,000.00 paid by Ng?;

(d) Whether RM200,000.00 cash was given to TEK as paid up capital of Ng in AVD?; and

(e) Whether the sum of RM2,224,450.00 is Ng's paid up capital in AVD or the loan given by TEK to AVD as part of the premium of RM6 million?

FINDINGS OF THE HIGH COURT

[23]The High Court held that:

(i) As at 18.9.2013, TEK's personal bank account shows that he only had RM463.35. Between 18.9.2013 to 27.9.2013 Ng had transferred RM4.0 million to AV's account. Between 24.9.2013 to 4.10.2013, RM2.0 million was deposited into TEK's personal account from AV's account and then from TEK's personal account to AVD's account on 18.10.2013 and 22.10.2013.

(ii) If RM4.0 million was meant as premium leaving Ng with a mere RM300,000.00 capital contribution as at 23.10.2013, TEK would not have issued 2,000,000 shares in AVD to Ng. Ng would have only been issued 300,000 shares reflecting the RM300,000.00 that he had directly banked into AVD and not RM2.0 million. Also, there was nothing in Form 24 of AVD that shows that any payment as being premium. 2.0 million shares were issued to Ng without any explanation or justification by the defendants.

(iii) Also, SD1 had said during cross-examination that "*if money had already been paid to my father as a premium, how can he use the same money to issue shares?*"

(iv) No explanation or evidence was adduced by the defendants to dispute the plaintiffs' claim that the 2.0 million shares in AVD as allotted to Ng was from the RM4.0 million contribution into AV.

(v) On the RM2.0 million that was paid between 25.11.2013 to 28.11.2013 directly into AV's bank account (after AVD's bank account had been set up), Ng had satisfactorily explained and supported his evidence by documentary evidence that since he was living in Kulim, it would be inconvenient for him to go all the way

from Kulim to Penang to sign the cheques every time a payment had to be made on an urgent basis such as payments to consultants and other related payments for and in respect of the development project.

(vi) Furthermore, the defendants had failed to lead evidence to show that TEK did possess the experience and expertise in development projects.

(vii) The fact that 250,000 shares were allotted to Ng's wife from TEK's shares in AVD fortifies Ng's claim that the monies were capital contribution and not premium.

(viii) The Statement of Affairs of AV dated 28.6.2016 lodged by SD3, a director of AV, with the Insolvency Department also confirms that the money paid by Ng to AV is for the purpose of obtaining shares in AVD. SD3 had also confirmed that AV did not receive any premium from Ng during TEK's lifetime and this was not contradicted by the defendants.

(ix) The High Court thus concluded that TEK, the 2nd and 3rd defendants hold 1,750,000 units of shares on trust for Ng as the consideration for the same had been advanced from the money paid by Ng to AV's account.

(x) On the sum of RM2,025,550.00 allegedly given by Ng to AV, the High Court held that the fact that AV owed the plaintiffs this amount was evident from the Statement of Affairs of AV filed by SD3 with the Insolvency Department and supported by SD3's testimony at trial.

(xi) Finally on the RM200,000.00 in cash that was delivered to TEK as the paid-up capital of Ng in AVD, the High Court held that this amount was tabulated in the letter dated 4.9.2014 that TEK did not dispute during his lifetime and was supported by SP3's oral evidence.

FINDINGS OF THE COURT OF APPEAL

[24]The Court of Appeal had applied the "plainly wrong" test under which a finding ought not to be disturbed unless the appellate court is convinced that it is plainly wrong and mere doubt whether a finding is right would not be sufficient to warrant any interference.

[25]The Court of Appeal reversed the findings of the High Court that the RM4.0 million was made into AV as capital contribution as the Court of Appeal found that "there were no contemporaneous documents" such as a written agreement indicating so. The Court of Appeal observed that Ng had continued making another RM2.0 million payment into AV's account even after AVD had its own account, which led the Court of Appeal to form the view that it was "incredulous" that Ng deposited such a large sum of money into an account where he was not a signatory, premised on reason of "convenience".

[26]The Court of Appeal held that the money trail prepared by the plaintiffs was "based on assumptions and unsupported by any contemporaneous evidence".

[27]On the issue of whether the defendants hold 1,750,000 shares in AVD as constructive trustees for Ng; the Court of Appeal ruled that the plaintiffs had failed to lead evidence to show that Ng and TEK had any intention to create a trust, and neither was there evidence of unconscionable conduct by TEK. It had cited the principles relating to constructive trusts as expounded in various case laws and held that Ng had failed to show that TEK was the trustee who had acquired the shares for his benefit and that there was unconscionable conduct by TEK depriving him of his beneficial interest.

[28]The Court of Appeal observed that if AV was meant to be used as a vehicle for the subscription of Ng's shares, Ng had not explained why further payments were made even after he discovered that the shares issued to him were disproportionate.

[29]On whether the RM2,025,550.00 was a loan given by Ng to AV, the Court of Appeal was of the view that no weight should be given to the evidence given by SD3 as he was a "nominee director" who had "no knowledge" that the RM6.0 million was meant to be premium.

[30]With regard to RM200,000.00 payment in cash by Ng to TEK, the Court of Appeal chose to disbelieve the table of payments prepared by Ng himself and also the testimony of SP3 as there was no receipt or other form of acknowledgment of such payment.

[31]Finally on the claim for the sum of RM2,224,450.00, the Court of Appeal held that since there was no dispute

that TEK had paid RM3,974,450.00 into AVD, based "on the totality of evidence" TEK is entitled to 2,224,450 shares.

[32]Given the circumstances, the Court of Appeal set aside the order of the learned trial Judge and allowed the appeal by the defendants.

THE LAW IN APPELLATE INTERVENTION

[33]"It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial Judge's conclusions on primary facts unless satisfied that he was plainly wrong." (The Supreme Court of United Kingdom in *Mc Graddie v Mc Graddie* [2013] WLR 2472).

[34]The "plainly wrong" test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records. The test was pioneered by the House of Lords in *Clarke v Edinburgh Tramways Co* [1919] SC (HL) 35, when it adjudicated on the ability of an appellate court to reconsider the facts of a particular case, when there is already findings of fact by the lower court. In this regard, Lord Shaw's judgment is pertinent when His Lordship said:

> "When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? **In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I-who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case-in a position, not having those privileges, to come to clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."[emphasis added]**

[35]Lord Shaw's judgment was adopted by Viscount Sankey L.C. in *Powell v Streathem Manor Nursing Home* [1935] AC 243 when His Lordship made the following observation at page 250:

> "What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not hear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. ….**On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses**."
>
> [emphasis added]

[36]Both ***Clarke*** (supra) and ***Powell*** (supra) used the "plainly wrong" phrase in the context of a trial Court's assessment of the evidence of the witnesses before it.

[37]In much later years, the House of Lords had the occasion to consider on the same issue in *Watt (or Thomas) v Thomas* [1947] AC 484, namely, when was it appropriate for an appellate court to set aside the judgment of the court on findings of fact at first instance, and it held that:

> "When a question of fact has been tried by a judge without a jury, and it is not suggested that he has misdirected himself in

> law**, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witness, and should not disturb his judgment unless it is plainly unsound.**
>
> The appellate court is however free to reverse his conclusion if the grounds given by him therefore **are unsatisfactory by reason of the material inconsistencies or inaccuracies or if it appears unmistakably from the evidence in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.**"
>
> *[emphasis added]*

Viscount Simon at page 486 had this to say:

> " But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if **that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. [emphasis added]**

His Lordship further added:

> "What I have just said reproduces in effect the view previously expressed in this House - for example by Viscount Sankey L.C. in Powell v Streathem Manor Nursing Home (I) and in earlier cases there quoted."

[38]The Privy Council (PC) soon adopted and applied the "plainly wrong" test in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 LNS 202 and *Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41*.

[39]The leave question refers to guidelines in appellate intervention on findings of facts laid down by the UK Supreme Court in ***Henderson*** and ***Mc Graddie*** (supra). To answer the leave question, it is pertinent to consider these guidelines (if any).

[40]*Henderson* involved the decision of 3 tiers of Courts, namely:

(a) the Outer House of Court of Session (where the Lord Ordinary, Lord Glennie held in favour of Nova Scotia Limited (NSL) and Letham Grange Development Company ('LGDC');

(b) Inner House (which reversed the decision of the Outer House of Court of Session and held that there was inadequate consideration); and

(c) the Supreme Court (which reversed the decision of the Inner House and held that Lord Ordinary's finding was correct).

[41]*Henderson* concerned a lengthy legal tussle between Foxworth Investments Limited ('FIL') and NSL on one side and Matthew Henderson, the liquidator of LGDC on the other. The liquidator sought reduction of a disposition granted by LGDC in favour of NSL. The liquidator argued that the sale of the Letham Grange ('the property") by LGDC to NSL constituted a 'gratuitous alienation' as defined in section 242 of the *Insolvency Act 1986*. LGDC had purchased the property in 1994 for just over £2 million, and sold the same in 2001 for only £248,100. On the first round of the legal tussle, the liquidator won, and was granted decree by default in 2009.

[42]Subsequently, in 2011, the liquidator sought reduction of a standard security granted by NSL in favour of FIL in 2003 over the property. He argued that as a result of the gratuitous alienation, the disposition of the property was not for adequate consideration, hence NSL is not a purchaser in good faith and for value, as Mr. Liu, is a common director of NSL and LGDC. The liquidator further argued that FIL knew when they obtained the security that LGDC was in liquidation and the disposition itself was open to challenge. NSL and FIL argued otherwise, stating that the sale of the property was for adequate consideration because in addition to the sale price of £248,100, NSL claimed it had also assumed the debts owed by LGDC to Mr. Liu and his family members totalling £1.85 million. FIL argued that they fell within the scope of the proviso to section 242(4) of the *Insolvency Act 1986* as they had obtained the standard security from NSL in good faith and for value.

[43]Lord Ordinary, at first instance found in favour of NSL and FIL and held that the sale of the property had been made for adequate consideration and the standard security was therefore not liable to reduction. The case hinged on the credibility of Mr. Liu, namely on the contradictions in Mr. Liu's account of what he told Mr. Gardner, his solicitors about the consideration of the sale, the discrepancies between the 1994 and the 1995 letters which were produced by Mr. Liu. The December 1994 letters attributed the loan to LGDC to 4 family members while the fax dated February 1995 mentioned 8 family members giving the loan and the evidence of Mr Gardner, which put the credibility of Mr. Liu in bad light. Despite all these criticisms on the credibility of Mr. Liu's evidence, nevertheless, Lord Ordinary, after assessing his credibility, found his evidence to be reliable on material and essential particulars.

[44]However, on appeal, the Inner House reversed the decision of Lord Ordinary on grounds that the judge had erred in law. The Inner House found that Lord Ordinary failed to give satisfactory reasons that NSL had assumed the debts at the time of sale. He was therefore not entitled to find that adequate consideration had been given or that FIL had obtained their rights under the standard security in good faith or for value. Further error on the part of the Lord Ordinary is his failure to address the contradictions by Mr. Liu on what he told his solicitors, Mr. Gardner on the consideration of the sale. The evidence of solicitors acting for LGDC in the sale which put the evidence of his client, Mr. Liu in bad light was viewed as being significant by the Inner House, was only skimmed through by Lord Ordinary as being of no significant value and has no bearing on the issue at hand.

[45]On appeal to the Supreme Court by FIL and NSL on 2.7.2014, it was reversed by all 5 Supreme Court judges. They unanimously allowed the appeal and held that an appellate court could interfere with the decision of the trial judge, where that judge has gone "plainly wrong" in their decision and that he had made a decision that no other reasonable judge could have made, without any explanation or justification. The Supreme Court held that this was not the situation in ***Henderson***. Lord Ordinary had, in clear terms identified the main issue namely, whether the alienation had been made for adequate consideration, and whether there was an obligation taken to assume LGDC's debts. There was evidence from Mr. Liu that a decision to assume the indebtedness had been taken on behalf of NSL before the sale was completed, and Lord Ordinary was entitled to accept this evidence.

[46]The Supreme Court clearly outlined that Lord Ordinary had not erred in law as was claimed by the Inner House. He was well within his powers to reject the arguments of the Liquidator and find in favour of the FIL and NSL. Lord Ordinary heard evidence from both parties, weighed each side's arguments up and in his wisdom made a reasoned decision.

[47]Lord Ordinary made his decision based on the evidence of Mr Liu; he was reported to have an "acute business intelligence", and had received advice from his solicitor with regards to the transferring of assets at an undervalue. Lord Ordinary did not overlook the contradictions in Mr. Liu's evidence as to whether he had told his solicitors about the assumption of debt. In light of that he made a finding that, after having seen Mr. Liu over a considerable period in the witness box, and after having heard him at length under persistent and skilful cross examination, he formed the view that his evidence was credible and reliable so far as material particulars were concerned. With this in mind Lord Ordinary accepted the evidence of Mr Liu.

[48]*Henderson* acts as a reminder to appellate courts that even if a trial judge has made a decision they do not necessarily agree with, this does not form a competent ground to overturn the decision at first instance when that trial judge has justified their decision sufficiently. Lord Reed delivering the judgment of the court said:

> "48. It is true that the Lord Ordinary [Lord Glennie] did not refer expressly to a passage during Mr Liu's cross-examination, quoted by Lady Paton, in which he gave what appears to have been a rather emotional answer to the effect that the reason he had not told Mr Gardner that the debt had been assumed was because the deeds had already been prepared by then, and he felt that he would look like a fool if he asked for them to be corrected at that stage. **There is however no reason to suppose that this passage in the evidence was overlooked, merely because it was not expressly mentioned. An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration:** *Thomas v Thomas* *1947 SC (HL) 45*, *61*;; *[1947] AC 484*, *492*, per Lord Simonds; see also *Housen v Nikolaisen* [2002] 2 SCR 235, para 72.
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> ….
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> 57. I would add that, in any event, **the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course**

consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). **The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable**."

[emphasis added]

[49]Lord Reed then went on to explain what the "plainly wrong" criterion entailed:

"62. ….The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. **It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion**. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

…

67. It follows that, **in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified**."

[emphasis added]

[50]The Supreme Court accordingly found that that the appellate court had no basis for reversing the trial judge's decision.

[51]The decision of the Outer House and the Inner House in ***Henderson***, focused primarily on error of facts as opposed to error of law. The Supreme Court had analysed the facts and judgments of both the Inner and the Outer House and made additional observations under which the plainly wrong test was discussed. The Supreme Court was not rewriting or resetting any guidelines to the plainly wrong test, but merely construed the meaning of the phrase "plainly wrong" as can be discerned from the judgment by Lord Reed.

[52]In restoring the decision of the trial court, the Supreme Court endorsed the principles stated in ***Clarke*** (supra) and ***Thomas v Thomas*** (supra) (at page 2480) and observed additionally the following:

"[3].. The reasons justifying that approach are not limited to the fact, emphasized in Clarke's case and Thomas v Thomas, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564, 574-575:

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to the case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the main event"….rather than a "tryout on the road"…For these reasons, **review of factual findings under the clearly erroneous standard-with its deference to the trier of fact-is the rule, not the exception. [emphasis added]**

[53]*Henderson* followed ***Mc Graddie*** (supra), in the application of the "plainly wrong" test to the facts as found by the trial court which was explained by Lord Reed in ***Henderson***. In holding as such, Lord Reed referred to the dicta of Lord Macmillan, Lord Thankerton, Lord Simons and Lord du Parcq in ***Thomas v Thomas*** (supra) and held that:

> "66. These dicta are couched in different language, but they are to the same general effect, and assist in understanding what Lord Macmillan is likely to have intended when he said the trial judge might be shown "otherwise to have gone plainly wrong". Consistently with the approach adopted by Lord Thankerton in particular, **the phrase can be understood as signifying that the decision of the trial judge cannot reasonably be explained or justified**." *[emphasis added]*

[54]Premised on ***Thomas v Thomas*** (supra) and ***Henderson*** (supra) Lord Reed qualified that the "plainly wrong" test only comes into play in the absence of the following:

(a) material error of law;

(b) critical factual finding which had no basis in evidence;

(c) demonstrable misunderstanding of relevant evidence; and

(d) demonstrable failure to consider relevant evidence.

In the presence of any of the above, the appellate court is entitled to set aside the judgment of the trial court without having to consider the "plainly wrong" test. Lord Reed reiterates that these 4 identifiable errors are however not exhaustive. It appears that the other examples which could be added to this non-exhaustive list, are as listed in ***Thomas v Thomas*** (supra) namely:

(a) There is misdirection by the judge;

(b) There is no evidence to support a particular conclusion;

(c) There is material inconsistencies or inaccuracies;

(d) The trial Judge fails to appreciate the weight and bearing of circumstances admitted or proved.

[55]*Mc Graddie* (supra) involved a property dispute between a father and son. The case came before Lord Brodie at first instance. Lord Brodie preferred the evidence of the father and found in his favour, noting that he did not find "any other evidence to materially undermine the specifics of the [father's] account or his evidence more generally". However, on appeal to the Inner House, it was concluded that there was such evidence and held that Lord Brodie was "plainly wrong" in preferring the father's evidence over the son. The Supreme Court overturned the decision of the Inner House and Lord Reed concluded that of the eight aspects of evidence highlighted by the Inner House as undermining the father's account, only four were of substance-and they all had been considered and addressed by Lord Brodie. Lord Reed further noted that the Inner House had failed to consider the father's evidence in the context of the evidence presented in the case as a whole and that they had failed to scrutinise the evidence of the son in the same manner - a failing which was attributed to the "telescopic nature" of appeals, and cited as a clear reason why appellate courts are not in a favourable position to assess and determine factual matters. ***Mc Graddie*** (supra), was merely recognizing the dicta in ***Thomas v Thomas*** (supra) and said that the issue had long been settled law. The Supreme Court in ***Mc Graddie*** (supra) held that the law is not in doubt, it is the application that has been inconsistent, when it held that:

> "5. While the law is not in doubt, its application has been inconsistent. From time to time it has proved necessary for its application to be considered at its highest level, in Scotland as in other jurisdictions."

Mc Graddie (supra) does not add anything additional or new to what was held in ***Thomas v Thomas*** (supra).

[56]At about the same time as the ***Henderson's*** (supra) case, the Privy Council explained the application of the "plainly wrong" test to the facts of the case in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] 4 AER 418 in similar terms:

> "[12]….. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggot Brothers & Co Ltd v Jackson* [1991] 1 RLR 309 at 312,; [1992] 1 ICR 85 at 92 (Lord Donalson of Lymington MR). Rather it directs the appellate court to consider whether it was permissible for the judge

> at first instance to make findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence."

[57]The governing approach today in UK is the ***Henderson's*** (supra) approach as evident from the judgment of the Court of Appeal in UK in the case of *W. Nagel v Pluczenik Diamond Co* [2019] 1 LLR 36 when it refused to reverse the decision of the trial judge on findings of fact on the existence of an oral agreement:

> "[24] The reason why Pluczenik was refused permission to challenge the judge's findings of fact about what was orally agreed was, as Asplin LJ rules, that such an appeal had no prospect of success. That ruling, with respect, is unimpeachable. The judge's conclusion about the probable nature of the agreement falls squarely within the province of the court whose responsibility it is to ascertain the relevant facts. **As such it is a conclusion with which an appellate court ought not interfere unless satisfied that it is plainly wrong or is one that no reasonable judge could have reached: see eg** *McGraddie v Mc Graddie* 2013 SLT 1212;; *[2013] 1 WLR 2477* and *Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600."[emphasis added]*

[58]More recently in *Carlyle v Royal Bank of Scotland Plc [2015] UKSC 13* the above principles were reiterated by the Supreme Court:

> "22. The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence. On these matters see In *re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911*, Lord Wilson at para 53; the US Supreme Court in Anderson v City of Bessemer 470 US 564 (1985), pp 574-575; and the Canadian Supreme Court in Housen v Nikolaisen 2002 SCC 33, para 14, to all of which Lord Reed referred in paras 3 and 4 of McGraddie."

[59]The issue in ***Carlyle*** (supra) was whether the evidence supported the contention that the bank had made a binding commitment to advance a large sum of money. The trial court held that it did, while the Inner House (the appellate court) felt that it did not. It is significant that in this case Lord Hodge noted that if he were the trial judge, he would have agreed with the Inner House, but had stressed that it was not the task of an appellate court to approach matters as if it was a court of first instance.

[60]The aforesaid cases illustrate the highly deferential attitude adopted by appellate courts in the United Kingdom towards reviewing findings of fact by the trial court. The test is not whether the higher court feels that it would have reached a different conclusion on the same facts as the trial court, but whether or not the decision by the lower court on findings of fact was reasonable. In other words, if the trial judge's decision can be reasonably explained and justified, then appellate courts should refrain from intervention.

[61]Extra judicially, Lord Neuberger in his lecture "Judgment and Judgments – The Art of Forming and Writing Judicial Decisions", *Denning Society Lecture 2017*, Lincoln's Inn, 30 November 2017" has commented on this rule somewhat humorously as follows:

> "… the almost invariable rule throughout the UK is that, unless he makes a real mess of it, the trial judge has the last word on issues of fact."

The Malaysian Position

[62]The Malaysian position has always been that, a decision that is arrived at, due to a lack of judicial appreciation of evidence is plainly wrong. The Federal Court case of ***Gan Yook Chin & Anor v Lee Ing Chin & Anor*** (supra) call for consideration as to what constitutes as the "plainly wrong" test.

[63]The appellant in ***Gan Yook Chin & Anor*** (supra) premised her appeal, inter alia, on the ground that the test adopted by the Court of Appeal, namely "insufficient judicial appreciation of the evidence" was said to be a departure from the established "plainly wrong" test. The appellant's counsel argued that, as a result, the Court of Appeal had introduced and applied a new test of appellate intervention which was termed as "insufficient judicial appreciation of the evidence." However, the Federal Court was not persuaded and dismissed the argument by counsel for the appellant and held that the phrase "insufficient judicial appreciation of the evidence" used by the Court of Appeal was merely related to the process of evaluation of the evidence of the trial judge and thus is consistent with the "plainly wrong" test. Essentially there was no new test invoked by the Court of Appeal. Consequently, the Federal Court affirmed the test of "insufficient judicial appreciation of evidence" as a ground for appellate intervention as adopted by the Court of Appeal. It sets out the principle that ought to be adopted and is central to appellate intervention i.e. that a decision arrived at, by a trial court without judicial appreciation of the evidence might be set aside on appeal. This was consistent with the established "plainly wrong" test. In holding so, Steve Shim CJ (Sabah & Sarawak) held, at page 10:

> "11. In gist, the pivotal question raised by the appellants was whether the term "insufficient judicial appreciation of the evidence" used by the Court of Appeal constituted a new test for appellate intervention. We think it is important to examine this proposition in the light of what the Court of Appeal had said in its judgment beginning from para 27 which we have reproduced but repeated herein for the purpose of emphasis. It states:
>
> > Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.
>
> 12. And the Court of Appeal went on to explain in para 28 as follows:
>
> > **A judge who is required to adjudicate upon a dispute must arrive at his decisions on an issue of fact by asserting, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria… He must also test the evidence of a particular witness against the probabilities of the case**. *[emphasis added]*
>
> 13. In making the observations above, the Court of Appeal cited the following cases: *Tindok Besar Estate Sdn Bhd v Tinjar Co* *[1979] 2 MLJ 229*; *Muniandy & Ors v Public Prosecutor* *[1966] 1 MLJ 257*; *Dr Shanmuganathan v Periasamay s/o Sithambaram Pillai* [1977] 3 MLJ 61, *Yusoff bin Kassim v Public Prosecutor* *[1992] 2 MLJ 183* at 188; *Rex v Low Toh Cheng* [1941] MLJ 1; *Tengku Mahmood v Public Prosecutor* *[1974] 1 MLJ 110*; *Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165*; *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 LI R 1; State of Rajasthan v Hanuman AIR 2001 SC at 284; Tek Chand v Dile Ram AIR 2001 SC 905.
>
> 14. In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, i.e. **to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence**. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "Insufficient judicial appreciation of evidence" merely related to such process. This is reflected in **the Court of Appeal's restatement that a Judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, i.e. that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.[emphasis added]**
>
> 15. In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country."

[64]The "plainly wrong" test was also applied by this Court in *UEM Group Berhad v Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785, where it was held that:

> "[26]…the prime issue in respect of Questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. **It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence** (See *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt or Thomas v Thomas* *[1947] AC 484*; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309).
>
> [27] In the instant case, as found by the trial judge, that the case of UEM and GIE was not one that was premised only on documentary evidence. The positions of the respective parties depended largely on oral evidence as to the circumstances of the dispute between the parties as well as the circumstances underlying material documentary evidence. In respect of documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by material witnesses.
>
> [28] It is for this reason that the trial judge's conclusion that Seow, the only witness put forth by GIE, being not a witness of truth, was of great significance. This is because GIE's case was mounted on the strength of Seow's evidence. Reliance was placed on Seow as to how documents were to be understood. Several affidavits were filed by Seow in the proceedings which were then relied upon on Seow's evidence in chief for the trial of both the petitions. Thus, what the trial judge had to say of Seow as a witness is crucial*……."*
>
> *[emphasis added]*

[65]On the same issue of appellate intervention on findings of facts, this Court in *Azman bin Mahmood & Anor v SJ Securities Sdn Bhd* *[2012] 6 MLJ 1*, held that:

> "[25] The law on appellate intervention on findings of fact by a trial Judge is trite. In this context it may be useful to refer to the case of Multar v Lim Kim Chet and Anor [1982] 1 MLJ 184; [1982] CLJ 107 (FC), wherein it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence"- and the consistency of the other party's evidence being disregarded. In the Privy Council case of Choo Kok Beng v Choo Kok Hoe and Ors [1984] 2 MLJ 165 it was held that when 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, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice**….*[emphasis added]*

[66]*Azman bin Mahmood* (supra) was not a case involving pure questions of fact founded upon the credibility of witnesses. Rather, it was a case where the Federal Court emphasized that proper inferences must be drawn based on all evidences fairly admitted by the parties. On the facts, the Federal Court found that the trial judge had correctly in her judgment shown that there was indeed inconsistency and manifest error in the purported contract notes relating to the unauthorized transactions, and that the trial judge's decision was not only supported by documentary evidence but also further substantiated by the testimonies of the plaintiff's witnesses. Thus, the Court of Appeal had misdirected itself when it said that the defendants had knowledge of the unauthorized transactions, as the material evidence showed otherwise.

[67]Subsequent years saw this Court reiterating the principle in applying the "plainly wrong" test in *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, culminating in the latest decision of this Court embodying the legal position governing appellate intervention relating to findings of fact in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v Petra Perdana Berhad & Anor Appeal* [2018] 2 CLJ 641 FC. Here, the Federal Court had to resolve the primary factual question of why the board of the plaintiff undertook the sale of the second and third divestment. The Federal Court had to determine whether there was a genuine cashflow problem as alleged by the defendants or a conspiracy to divert the shares in the sale to a third party as alleged by the plaintiff. The High Court held that the plaintiff was faced with

acute cash-flow problems and high-geared borrowings that justified the sale of the said shares to restore its liquidity condition and that the defendants acted in the best interest of the plaintiff.

[68]The Court of Appeal in ***Tengku Dato' Ibrahim Petra Tengku Indra Petra*** (supra) on the other hand, took a contrary view and held that the defendants acted in bad faith and engaged in an elaborate scheme or conspiracy to pass the shares to a third party. After examining the evidence against the judgments of the High Court and Court of Appeal, the Federal Court held that the High Court had rightly placed reliance on contemporaneous documents, including the board of directors' minutes and did not solely rely on oral evidence. Conversely, the Court of Appeal had failed to consider important evidence (documents and a tape recording by PW1) when deciding on the question of the purpose of the divestments.

The Federal Court in its judgment held that:

> "[94] The law is clear and well-settled in that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, **In re B (A Child) (Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911; and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453). This court has said this before, and we adhere to it now. Having regard to the above principle, we find that in the present case the Court of Appeal made no findings that the High Court had gone plainly wrong, let alone that on a reconsideration of the whole evidence the opposite conclusion should be reached.
>
> [95] In *McGraddie v. McGraddie and Another* *[2013] 1 WLR 2477*, the United Kingdom Supreme Court held that an appellate court should not interfere with the trial court's conclusions on primary facts unless it was satisfied that the court was plainly wrong; that the reasons justifying that approach were not limited to the fact that the trial judge was in a privileged position to assess the credibility of witnesses' evidence, but also included the fact that trial judges possessed expertise in determining issues of fact, that duplication of the trial judge's efforts on appeal was undesirable.
>
> [96] In **McGraddie**, the Supreme Court referred to the judgment of the majority of the Canadian Supreme Court in *Housen v. Nikolaisen* [2002] 2 SCR 235, which explained why appellate courts are not in a favourable position to assess and determine factual matters: "appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole".
>
> [97] Recently in *Henderson v. Foxworth Investments Ltd and Another* *[2014] 1 WLR 2600*, the United Kingdom Supreme Court held that **in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached; and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge**.
>
> [98] Coming back to the present case, the Court of Appeal did not undertake the appropriate review exercise and further, did not make the appropriate determination that the High Court had gone plainly wrong in its decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached.
>
> [99] The Court of Appeal had reversed the overall conclusions on primary facts of the learned High Court Judge without impeaching findings of fact by the High Court on the existence of a cash-flow problem in the plaintiff. The Court of Appeal did not impeach the learned High Court Judge's analysis of the evidence on the pivotal issue of "dominant purpose" and "conspiracy" and other critical matters in the dispute between the parties.
>
> [100] The Court of Appeal failed to appreciate that as an appellate court it should not interfere with the learned High Court Judge's conclusions on primary facts unless it was satisfied that the learned High Court Judge was plainly wrong. The Court of Appeal erred in arriving at its conclusion without itself identifying why the High Court's findings were "plainly wrong" on the key issues of the genuineness of a cash-flow problem, of bona fides, or of a dominant purpose or an improper objective on the part of the defendants.
>
> [101] In our opinion, a grave fundamental error made by the Court of Appeal was its failure to apply correctly the principles

governing the review of findings of fact by appellate courts. This is in itself sufficient to warrant appellate interference on our part on this point."

[emphasis added]

[69]For those reasons, the Federal Court reversed the decision of the Court of Appeal and reinstated the decision of the High Court.

[70]That appellate interference would only be justified in situations where the trial court has been "plainly wrong" has been repeatedly affirmed in the latest decisions of this Court: see ***Director of Forest Sarawak & Ors v. Nicholas Mujah Ason & Ors*** [2020] 2 CLJ 1 at paragraphs [73]-[74] and *Jeli Anak Naga & Ors v. Tung Huat Pelita Niah Plantation Sdn Bhd & Ors* [2020] 1 CLJ 449 at paragraph [49].

Different Approach in Appellate Intervention:

[71]From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian Courts. Whilst Lord Reed in ***Henderson*** (supra) separated the 4 non exhaustive identifiable errors of a trial judge from the plainly wrong test:

(a) a material error of law;

(b) a critical finding of fact which has no basis in the evidence;

(c) demonstrable misunderstanding of relevant evidence; and

(d) a demonstrable failure to consider relevant evidence;

(all of which justifies appellate intervention of a trial judge's decision), this Court in ***Gan Yook Chin*** (supra) effectively included them under what amount to the trial judge as being "plainly wrong".

[72]The phrase "lack of judicial appreciation of evidence" used in ***Gan Yook Chin*** (supra) could very well encompass 3 out of 4 errors of a trial judge (other than the "material error of law") said to be identifiable by Lord Reed in ***Henderson*** (supra), namely:

(a) critical factual finding which has no basis in evidence;

(b) demonstrable misunderstanding of relevant evidence; and

(c) demonstrable failure to consider relevant evidence.

[73]Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of "material error of law" listed by Lord Reed in ***Henderson*** (supra) can occur when a trial judge erroneously apply legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interprete the factual matrix before him. The commission of material error of law by the trial Judge in arriving at his conclusions (e.g. the requirement of proof of intention in constructive trust as oppose to express trust), also justifies an appellate court reversing such conclusions.

[74]Thus, whilst there is slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.

[75]The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v Paras Nath Singh* [1976] 1 MLJ 151, when it held:

"The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 92 and [1965] 2 MLJ 151 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:

> "Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion."
>
> This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong."

[76]What is pertinent is that, the "plainly wrong" test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.

[77]It is to be observed that this Court in ***Tengku Dato' Ibrahim Petra Tengku Indra Petra*** (supra) had referred to ***McGraddie*** (supra) and ***Henderson*** (supra) and has adopted the ***Henderson*** (supra) approach of the "plainly wrong" test in determining whether the trial court's findings of fact is reversible upon appeal:

> "Recently in Henderson v Foxworth Investments Ltd and Another [2014] 1 WLR 2600, the United Kingdom Supreme Court held that **in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly wrong" in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge." [emphasis added]**

[78]Hence following this court's ruling in ***Tengku Dato' Ibrahim Petra Tengku Indra Petra*** (supra) an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly wrong" where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[79]The outcome of the present appeal would therefore turn upon whether the findings of the learned trial Judge were reasonably made.

WHETHER THE COURT OF APPEAL HAD ACTED ON THE CORRECT PRINCIPLES OF APPELLATE INTERVENTION IN REVERSING THE TRIAL COURT ON ITS FINDINGS OF FACTS

[80]Coming back to our present appeal, in reversing the decision of the High Court, the Court of Appeal applied the "plainly wrong" test and applied it in the sense of "judicial appreciation of the evidence". In this respect, we reproduced the relevant paragraph of the judgment of the Court of Appeal :

> "[18] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong. **It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right (See:** *Lee Ing Chin & Ors v Gan Yook Chin* [2003] 2 CLJ 19, Gan Yook Chin & Anor v Lee Ing Chin & Ors [2004] 4 CLJ 309).
>
> [19] The appellate court must be slow to interfere with the findings made by the trial court unless it is shown that there was no judicial appreciation of the evidence adduced before it." *(emphasis added)*

[81]From the aforesaid, although the Court of Appeal was correct in stating the principle to be applied in appellate intervention, the issue is whether the observation by the Court of Appeal that there "was no judicial appreciation of

the evidence" is sustainable in view of the findings made by the learned trial Judge. We will address this in the following paragraphs.

Whether the RM6.0 million was paid by Ng as paid-up capital or premium in AVD?

[82]When the RM6.0 million payment was made, it was made in 2 split payments, namely RM4.0 million was paid into AV account before AVD account was opened and another RM2.0 million was paid after the AVD account was opened. The learned trial Judge had addressed these 2 payments and made separate findings of facts in respect of each.

[83]It is to be noted that there is another sum of RM300,000.00 paid by Ng which was paid directly into AVD and this payment was not disputed by the defendants. This payment is pertinent, which is addressed in the later part of this judgment.

[84]For the RM4.0 million payment, after outlining the facts and the evidence at paragraphs 29 - 36 of his judgment, the learned trial Judge reasoned his conclusion that the plaintiffs had proved their claim in respect of the RM4.0 million payment into AV as his capital investment:

> "[37] Based on the foregoing reasons, by the process of "following" and "tracing" and in view of the totality of evidence adduced before me, it is my considered view that the Plaintiff had successfully proven its claim in respect of the RM4,000,000.00 being payment made into AV as his capital contribution into AVD for the following reasons:
>
> (a) Payments of RM 4,000,000.00 was in fact made by the 1st Plaintiff into AV which was not disputed by the Defendants;
>
> (b) As at 18.9.2013 TEK's account only had RM 463.35, had it not been for the 1st Plaintiff's contribution into AV's account, TEK would not have been able to make the Deposit payment to the Development Land and TEK would not have been able to contribute RM 2,000,000.00 into AVD for the issuance of share of 4,000,000.00 to both TEK and the Plaintiff;
>
> (c) The Deposit payment to the Development Land was paid by cheque issued from Ong & Maneksha's client account, AVD's solicitor in respect of the Sale and Purchase Agreement and not by TEK personally as affirmed by SD 4 at trial; and
>
> (d) If RM4,000,000.00 was meant as the Premium leaving the Plaintiff with a mere RM 300,000.00 capital contribution as at 23.10.2013, TEK would not have issued 2,000,000 shares in AVD to the 1st Plaintiff."

[85]For the payment of the next RM2.0 million by Ng, the learned trial Judge had addressed his mind to the contention of the defendants who claimed that the payment could not be for capital investment in AVD because by then the AVD account had been set up by them and that the act by Ng was nonsensical. However, the learned Judge had accepted the explanation by Ng that the payment was made into AV's account despite that AVD's account had already being opened, due to convenience as Ng was residing in Kulim and he would have to travel to Penang where the AVD account was opened to execute cheques as co-signatory. The learned trial Judge justified and explained his acceptance of such "convenience" reason by Ng at paragraphs 40 and 41 in his judgment:

> "[40] A further sum of RM 2,000,000.00 was further deposited into AV's account between 25.11.2013 to 28.11.2013. The Plaintiffs claimed that this amount was paid into AV despite the AVD's bank account having been set up upon request by TEK for convenience purpose.
>
> [41] It was suggested by the Defendants that such action by the 1st Plaintiff was nonsensical as the 1st Plaintiff was made a joint signatory for the bank account of AVD in order to safeguard the utilization of monies in AVD but the 1st Plaintiff had disregarded such safety and was willing to bank in monies without obtaining the 1st Plaintiff's approval. As such it is the Defendant's contention that the RM 2,000,000.00 was meant as the Premium and not as the 1st plaintiff's capital contribution into AVD. **It is in my considered view that the purpose of convenience as claimed by the Plaintiff has been satisfactorily explained by the 1st Plaintiff during cross examination supported by documentary evidence** as follows:
>
> (i) During the material time, the 1st Plaintiff was living in Kulim and he was a signatory to the cheque of AVD. Therefore, it would be inconvenient for the 1st Plaintiff to come all the way from Kulim to Penang island to sign

cheques for payment out every time a payment has to be made for whatever sum. Payments had been made by the 1st Plaintiff into AV's account so that TEK, a director of AV, can sign cheques to withdraw money or to pay whenever payment is due from AVD and ;

…..

(ii) There were certain payments which were required to be made on an urgent basis such as payments to consultants and other related payments for an in respect of the development project. The facts that the deposit for the purchase of the development land from Ivory was paid by AVD before the bank account of AVD was set up supports the 1st Plaintiff's contention that there was urgent need for funds for purchase of the Development land and other aspects of the project development for which money was needed on short notice.

(iii) It was expressly stated in the letter dated 4.9.2014 that payments paid to AV were made upon request of TEK for convenience purposes only and is reproduced herein for ease of reference:

> "The above payments paid to your Company were made upon request by Mr. Tan Ewe Kwang for convenience purposes only but at all times the monies are paid for the investment in Alor Vista Development Sdn Bhd. We reiterate and confirm that payments are for Alor Vista Sdn Bhd. And Mr. Tan Ewe Kwang is aware that your Company is merely a conduit for the payments and he had undertaken to ensure these payments are paid to Alor Vista Sdn. Bhd."

[emphasis added]

[86]The learned trial Judge made findings of fact that part of the monies paid by Ng into AV's account as capital payment in AVD was channeled by TEK into his personal account evidenced by the cheque trail as can be discerned from paragraph 35 of his judgment:

> "It must be noted that TEK's personal bank statement shows that as at 18.9.2013 his account only had RM463.35. Between 18.9.2013 to 27.9.2013 the 1st Plaintiff transferred a sum of RM 4,000,000.00 into AV's account. As may be observed from the bank statements as adduced before me, a total sum of RM2,000,000.00 had been deposited into the personal account of TEK from AV between 24.9.2013 to 4.10.2013 and from TEK's personal account to AVD's account on 18.10.2013 and 22.10.2013. For a better understanding, the money trail was adduced by the Plaintiffs before this court and is reproduced as follows…"

From the aforesaid, the learned trial Judge took into account the evidence of the money trail adduced by Ng which showed that:

between 18.9.2013 to 27.9.2013, the personal bank statement of TEK showed his account only had RM463.35;
between 18.9.2013 to 27.9.2013, Ng had transferred RM4.0 million into AV's account; and

on 23.10.2013, TEK and Ng had been allotted 2 million shares each in AVD, which was from Ng's contribution of RM4.0 million into AV's account.

[87]His Lordship ruled that, if indeed RM4.0 million was meant to be as premium payment, leaving Ng a mere RM300,000.00 capital contribution (as this payment of RM300,000.00 which was paid directly into AVD by Ng was not disputed by the defendants), as at 23.10.2013, surely TEK would have only issued 300,000 shares in AVD to Ng, and not 2.0 million.

[88]From the evidence, on the date when the 4.0 million shares were allotted, where each family (TEK's and Ng's) obtained 2.0 million shares, it would mean that AVD should have funds when the shares were allotted, otherwise the shares could not be allotted. However, the evidence showed that AVD had no such amount in its accounts and neither did TEK, as he only had RM463.35 standing in his personal account at that material time. In addition, there was the evidence that when Ng persistently demanded for his shares entitlement to correspond with his monetary contribution, TEK had instructed the 3rd defendant to transfer 250,000 AVD shares (out of 2 million shares which

had been allotted to TEK) to Ng's wife and what was left with TEK's family was only 1,750,000 shares, which Ng is now claiming from the defendants. This is because, even these 1,750,000 shares came from the monies from Ng.

[89]In view of the aforesaid, the learned trial Judge found that Ng had successfully proven his claim in respect of RM4.0 million being payment made into AVD as his capital contribution into AVD. As Ng had established that the 2.0 million shares in AVD as allotted to him was from his (Ng's) RM4.0 million contribution into AV, what is left is for the defendants to adduce evidence to rebut Ng's claim.

[90]In determining whether the defendants had proved their case that the payment of RM6.0 million was premium payment (as it was the defendants who assert that the payment was for premium payment), the learned Judge observed and noted the following:

(a) TEK had resigned when he was pressed by Ng for the accounts and the disparity in his share allotment (paragraph 45 in the judgment);

(b) the issue of premium was raised for the 1st time in May 2015 when the defendants' solicitors in their letter said that the payment of premium was **due to AV** (paragraphs 46 and 47 in the judgment); and

(c) The defendants, after the demised of TEK raised the issue of premium by stating that the premium **was due to TEK personally**.

[91]What is particularly glaring is the factual error made by the Court of Appeal at paragraph 24 of the grounds of the Court of Appeal, wherein it states : "***Why did Ng bank in RM6,000,000.00 into AV's account when AVD had its own account?***" Factually, only RM2.0 million (and not RM6.0 million as stated by the Court of Appeal in its grounds) was paid by Ng into AV's account after AVD had opened its account. This demonstrates that the Court of Appeal in considering the facts erred in its appreciation of the facts itself. With respect, this is a critical factual finding which has no basis in evidence.

[92]On Ng's explanation of convenience as to why he banked into AV's account when AVD had its own account; this explanation was accepted by the learned trial Judge as being plausible. The Court of Appeal regard it as "incredulous", when it stated at paragraphs 27 and 29 of its grounds as follows:

> "[27] If in fact payment into AV's account was purely for TEK's convenience, then TEK would have been the sole signatory of AVD's account. This was not so. Both Ng and TEK were joint signatories of AVD's account. It seems incredulous that one would deposit such a large amount of money in account of which he is a signatory purely for TEK's convenience when he (Ng) lives in Kulim, and is also a joint signatory of AVD's account.
>
> ……..
>
> [29] **No evidence was adduced as to the existence of any agreement, oral or written, between Ng and TEK that the sum of RM 6, 000, 000.00 paid by Ng into AV served as a conduit to transfer the aforesaid sum to AVD as Ng's contribution to the paid-up capital**. Ng admitted during cross examination that he only raised his concerns for the first time in September 2014, one year after he paid RM 6 million. It was only after the Ng family became a majority shareholder of AVD did they start to claim that they owned all the shares in AVD. The transfer of 250, 000 units of shares from the Tan family to the Ng family was in August 2014. Ng had stated that he had "inadvertently" received TEK's personal bank statement from Public Bank sometime in June 2014. It was upon scrutinizing TEK's personal bank statement, that he discovered that the monies he paid into AV was transferred to TEK's personal account and that TEK's contribution into AVD came partly from TEK's personal account. Ng admitted he had so concluded based on his own assumption and unsupported by any cogent evidence. The money trail prepared by the Plaintiffs was based on assumptions and unsupported by any contemporaneous evidence." *[emphasis added]*

[93]The Court of Appeal found that the finding and acceptance of Ng's evidence by the learned trial Judge to be incredulous. But nowhere did the Court of Appeal made a finding that such conclusions by the learned trial Judge was "plainly wrong". There was evidence that, as at 18.10.2014, the sum which had been directly banked into AVD by Ng was only RM300,000.00 whereas 2.0 million shares in AVD had been issued to Ng and his nominees, which supported Ng's contention that the sum of RM4.0 million out of RM6.0 million paid by him into AV between 18.9.2013 until 27.9.2013 was utilized by TEK for the issuance of shares to Ng and to himself thereby defeating the defendants' claim that the sum of RM4.0 million was part of premium. If the contention of the defendants that the

payment of RM6.0 million by Ng was for premium to be accepted, in that case Ng would have been issued only with 300,000 shares on par value with his capital contribution of RM300,000.00 and there would not be any justification for the allotment of the initial 2.0 million shares on 23.10.2014 despite banking in funds into AV's account instead of into AVD's account. In our view, the Court of Appeal erred in failing to give due appreciation and consideration that the allotment of the initial 2.0 million shares to Ng supported the fact that there was an agreement that the sum of RM6.0 million paid by Ng into AV served as a conduit to transfer the said sum to AVD as Ng's contribution to the paid-up capital.

[94]The Court of Appeal further held that:

> "The money trail prepared by the Plaintiffs was based on assumptions and unsupported by any contemporaneous evidence….Under the circumstances, we have absolutely no hesitation to hold that based on the facts and the evidence, in absence of any evidence to the contrary, the Learned Judicial Commissioner had erred in concluding that the purpose of the payment of RM 6, 000, 000.00 into AV's account was a conduit to transfer to AVD as paid-up capital on behalf of Ng.",

whereas the learned trial Judge had considered the documentary evidence of Ng's monetary contribution in the sum of RM10,490,000.00 for AVD vide payment slips as particularized in paragraph 8 of the Statement of Claim as to dates of payment, amount of payment, the name of the banks as well as the account number into which the payments were made. The payment by Ng was made by cash as well as cheques which was duly proven by the bank statements of AV. Hence, it cannot be said that the money trail was based on suppositions and assumptions as stated by the Court of Appeal. In addition, there are contemporaneous documents as evidence to support the money trail. Obviously the Court of Appeal erred when it held that there were no contemporaneous documents with regards to the payments made in the form of bank statements of AV and TEK. In any event, if the Court of Appeal's holding is taken to be correct, it would follow that the assessment by the trial court on the believability of the oral evidence for the plaintiffs should stand unless it is said to be a plainly wrong assessment, which was not the finding by the Court of Appeal.

RM1.8 million deposit for the development of the land

[95]Ng claimed to have paid RM1.8 million deposit for the development of the land. The plaintiffs proved by documentary evidence that TEK's personal account had RM463.35 at the material time.

[96]It is the contention of Ng that the deposit for the land was paid by TEK using the RM6.0 million paid by him (Ng) into AV. Taking into account of Ng's direct payment of RM300,000 into AVD together with the said deposit of RM1.8 million, Ng was issued 2.0 million shares in AVD. Premised on the aforesaid, it is the contention of Ng that TEK had treated RM6.0 million as paid up capital of AVD issuing 2.0 million shares in AVD to him. In this respect the learned trial Judge at paragraphs 37(b) and 37(c) of his grounds held as follows:

> " (b) as at 18.9.2013 TEK's account only had RM 463.35, had it not been for the 1st Plaintiff's contribution into AV's account, TEK would not have been able to make the Deposit payment to the Development Land and TEK would not have been able to contribute RM 2,000,000.00 into AVD for the issuance of share of RM 4, 000,000 to both TEK and the Plaintiff.
>
> (c) The Deposit payment to the Development Land was paid by cheque issued from Ong & Maneksha's client account, AVD's solicitor in respect of the Sale and Purchase Agreement and not to TEK personally as affirmed by SD 4 at trial."

[97]From the evidence the deposit for the purchase of the lands came from Ng. Ng signed the cheques as he did not know that the deposit had been paid earlier on 7.10.2013, i.e upon signing of the Sale and Purchase Agreement entered between AVD and Ivory as evident from the cheque issued by Ong & Maneksha Client's Account, Ong & Maneksha being the Purchaser's solicitors i.e. AVD in respect of the Sale and Purchase Agreement. Neither did Ng know when the deposit was actually paid. When Ng passed the 2 cheques to Ng, TEK only informed Ng that it was for payment of land deposit and since the amount stated was correct (namely RM 1 million and RM800,000.00), Ng approved the cheques. When Ng issued the cheques, they were pre-signed and the name of the payee not stated.

[98]Further, the learned trial Judge also premised his conclusions on the money trail through the documentary evidence which were adduced before him in the form of AV's bank statements (pages 323 - 325 CB Vol 2). The evidence showed that on 13.9.2013, AV had credit in its accounts of only RM13,328.00. However between

18.9.2013 and 23.9.2013, Ng had paid RM2 million into AV's account. It can be seen that subsequently, TEK withdrew a cheque for RM1.6 million from AV's account to pay the solicitor's deposit of 10% for the project land. On 4.10.2013, a further sum of RM180,000.00 was also withdrawn by TEK, making it the full deposit sum of RM1.8 million. Had it not been for the payments of RM2.0 million made by Ng into the AV account, TEK could not have made the payment of deposit of RM1.8 million.

[99]The learned trial Judge at paragraph 42 (ii) of his judgment further found related expenses for the intended project were paid out of AV's account:

> "There were certain payments which were required to be made on an urgent basis such as payments to consultants and other related payments for and in respect of the development project. The fact that the deposit for the purchase of the development land from Ivory was paid by AVD before the bank account of AVD was set up supports the 1st Plaintiff's contention that there was urgent need for funds for purchase of the Development Land and other aspects of the project development for which money was needed on short notice."

[100]As a result the conclusion made by the learned trial Judge that the payment was made into AV's account was for convenience purposes as explained by Ng and that the payment was for capital contribution and to make payments for the project development was a reasonable conclusion.

[101]The Court of Appeal at paragraph 30 in its judgment also disagreed with the learned trial Judge's conclusion on the purpose of the RM6 million payment into AV's account when it held that the learned trial Judge had erred in this conclusion as there was "the absence of any evidence to the contrary". However, this holding was erroneous because the learned trial Judge referred to evidence of both oral and bank statements showing the movement of moneys made by Ng into AV's account and TEK taking the monies out of AV's account.

[102]The aforesaid payments showed a cogent, clear and incontrovertible evidence that the payments made by Ng into AV's account were never payments for premium to TEK as claimed by the defendants. The evidence showed otherwise. Again we failed to see how such finding is one which no reasonable Judge could have reached.

Whether the defendants hold 1,750,000 shares in AVD as constructive trustees for Ng

[103]The learned trial Judge held that 1,750,000 shares in AVD are held by the defendants as constructive trustees for Ng, which was set aside by the Court of Appeal.

[104]Before we address the issue of constructive trustee, we will deal with the issue on the payment of premium first. TEK had denied the purpose of Ng's contributions and claimed that the sum of RM6.0 million paid by Ng is premium for participation in the development project undertaken by AVD.

[105]On the contention by the defendants that the payment by Ng was for premium, it was first raised only after 1½ years after the payment had been made by Ng. The issue of premium was raised by AV's solicitors wherein it was asserted that the premium was due to AV. Subsequently after the demise of TEK, the defendants changed their stance and stated that the payment of premium was due to TEK personally.

[106]Factually, if at all any premium is due, it would be to AVD and not TEK or AV, as AVD was the one that issued the shares. In addition, there is no documentary evidence supporting the claim for any payment of premium.

[107]TEK never responded to the repeated claims made by Ng in his letters or notices for more shares. Prior to 6.8.2014, Ng had orally asked from TEK for the balance of his shares because of the disparity between the sum of money which he had contributed and the number of shares he had been allotted. If it is true that those payments by Ng was meant for premium, surely TEK would have responded immediately and told Ng that those payments were for premium and not for payment of shares allotment, and that Ng is not entitled for any shares in AVD. Why did TEK keep quiet when Ng was making his claims for more shares? Instead he caused 1,750,000 shares of AVD to be transferred from the 3rd defendant to Ng's wife. This reaction by TEK certainly did not correspond with his contention that payment by Ng was for premium (Section 8 of the *Evidence Act 1950* refers). The learned trial Judge in his judgment at paragraph 48 held that having regard to the subject matter of the letter, there were no reasons nor justification provided by the defendants as to TEK's failure to reply and dispute these allegations made by Ng.

[108]The learned trial Judge at paragraphs 49 - 56 of his judgment made findings of facts that the claim for premium appears to be an afterthought by the defendants after having heard and considered the evidence of the defendants' witnesses, which are as follows:

(a) RM4.0 million was paid before AVD's account was set up on 18.10.2013. If the version of the defendants is to be accepted as true, i.e. that RM 6.0 million is the premium payable to TEK, then surely that amount of RM 6.0 million would have been paid directly into TEK's personal account before Ng became shareholder of AVD and Ng would not have been allotted with the 2 million shares in AVD. There was no agreement in writing nor was there any understanding in writing between TEK and Ng prior to or simultaneously with the incorporation of AVD that Ng had to pay a premium of RM6.0 million to participate in the development project of AVD;

(b) AVD was newly established then and it was a RM2 company with no track record. There was no ongoing project, no goodwill, no asset and no developer license or planning permission to justify the payment of premium. Ng and TEK were the original subscribers, the first shareholders and also the first directors. The defendants claimed that TEK was an established developer and the Court of Appeal was persuaded by such claim. However, if that is true and is an important factor, surely the initial shareholding between TEK and Ng would not have been equal as in the present case. Form 24 shows no such premium payment is payable to AVD. It was a development project undertaken by AVD. All the consultants, engineers and architect were appointed by AVD and their fees were paid by AVD;

(c) The said development project belongs to AVD and not to TEK personally, hence there is no justification for premium payment to be paid to TEK personally or to AV. It is a fact that the project became abandoned subsequently;

(d) The statement of affairs of AV dated 28.6.2016 lodged by SD 3 with the Insolvency Department confirms that the money paid by Ng to AV was for him to obtain shares. SD 3 also confirmed that AV did not receive any premium during TEK's lifetime; and

(e) The defence of premium raised by the defendants is inconsistent; the solicitors of AV vide letter dated 30.9.2013 stated that the sum of RM6.0 million was premium due to AV. However the defendants later (after the demise of TEK) claimed that the sum of RM6.0 million was premium due to TEK personally.

[109]On the issue of constructive trustee, the Court of Appeal set aside the finding of the learned trial Judge which held that TEK is a constructive trustee for Ng (Refer to paragraph 61 of the High Court judgment). The learned trial Judge held as such, since the consideration for the 1,750,000 shares held by the defendants was advanced from the money which Ng had paid into AV's account.

[110]From the evidence, TEK had transferred into AVD a portion of the money which Ng had paid into AV, as his (TEK) contribution to the paid-up capital of AVD, to make it look as if it was his (TEK's) contribution to the paid up capital of AVD and had issued shares to himself although in reality, there was no contribution from him (TEK), as his account only had RM463.35 at that point in time. In this regard, the Court of Appeal held that:

> "the Plaintiffs failed to adduce any evidence that Ng and TEK had any intention to create a trust neither was there any evidence of unconscionable conduct on the part of TEK, that is, there was element of dishonesty or acts/omissions done in bad faith."

> "…the Learned Judicial Commissioner erred in law and in fact when he concluded that the 2nd and the 3rd Defendants held the 1,750,000 shares in trust as they did not contribute any money representing the par value of the said shares." [emphasis added]

[111]It is trite law that the intention to create a trust is applicable in situation of express trusts and not in constructive trusts. A constructive trust are trusts that may be implied in the absence of any declaration/intention of a trust, where the trustee has induced another to act to their detriment they would acquire a beneficial interest in the land/property. A characteristic feature of this trust does not owe its existence to the parties' intention, but by operation of law. In *Takako Sakao v Ng Pek Yuen* *[2009] 6 MLJ 751*, it was held that:

> "A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances, e.g. where there is dishonest, unconscionable or fraudulent conduct in the acquisition of property. What

equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or part thereof."

[112]Constructive trust is viewed as a device under which equity will intervene so as to create a trust relationship between the parties in order to make a person accountable for the trust to prevent any unfairness or injustice. Equity will impose obligation on the defendant to hold the property for the benefit of another.

[113]Applying the principle as aforesaid, from the evidence of TEK's personal account and his failure to explain his source of income, we are of the view that TEK was financially incapable of acquiring the shares in AVD. TEK's acquisition of the shares was made possible based on the monies obtained from payments made by Ng. These monies (claimed by TEK to have been paid as premium), for the said acquisition of the AVD shares, are monies paid by Ng. The learned trial Judge found that this act on the part of TEK (acquiring AVD's shares using monies paid by Ng on one hand and claiming the monies were for payment of premium on the other) amounts to a dishonest and an unconscionable conduct, as TEK was not entitled to the shares legally as there is no evidence to show that he paid for it (Refer to paragraph 61 of the learned trial Judge's judgment). Clearly, the Court of Appeal erred in law and fact in failing to hold that the defendants had not contributed any monies into AVD towards the capital of AVD. It is clear that TEK, the 2nd and the 3rd defendants are holding the 1,750,000 shares registered in their names as constructive trustees as they had obtained the said shares without making any contribution to the capital of AV and had obtained the same as a result of the dishonest, unconscionable and inequitable conduct on the part of TEK in that TEK had claimed that the monies paid by Ng into AV was part of premium due to him personally or to AV and therefore he was entitled to utilize the same. This constitutes a dishonest, inequitable/unconscionable conduct to deprive Ng of his beneficial interest in shares in AVD. The Court of Appeal erred in not appreciating that constructive trust is imposed by law and does not arise as a result of any intention to create it unlike express trusts.

[114]There is further evidence that, following the oral query from Ng as to the disparity of his payment and the amount of shares allocated to him, TEK instructed the 3rd defendant to transfer 250,000 shares in AVD to Ng's wife (a reduction of TEK's 2.0 million shares to 1,750,000 shares). To the learned Judge this fortifies Ng's claim that monies paid into AV were for his capital contribution into AVD. Given those facts and evidence, the learned trial Judge found that TEK, the 2nd and the 3rd defendants hold 1,750,000 units shares on trust for Ng as the consideration for the 1,750,000 shares was advanced from monies paid by Ng into AV's account. Consequently, the learned trial Judge declared that TEK, the 2nd and the 3rd defendants are holding 1,750,000 units shares in AVD as constructive trustees for and on behalf of the plaintiffs and further ordered that TEK, the 2nd and the 3rd defendants transfer the ownership of the said shares in AVD to the plaintiffs.

Whether RM2,025,550.00 is part of a loan given by Ng to AV and whether it is part of RM10,490,000.00 paid by Ng

[115]Ng claimed that the sum of RM2,025,550.00 given by him to AV is a loan and that it forms part of the sum of RM10,490,000.00 paid by him as his contribution to AVD. This sum of RM2,025,550.00 was derived from the total sum of RM10,490,000.00 which was paid by Ng as his paid up capital, after deducting the following amount:

(a) the sum of RM3,974,450.00 which had been transferred by TEK into his personal account;

(b) the sum of RM4,290,000.00 as his capital contribution into AVD; and

(c) the sum of RM200,000.00 which was the cash handed over by Ng to TEK.

This claim was accepted by the learned trial Judge as it was supported by the Statement of Affairs lodged by Lim Weng Heng (SD 3) to the Insolvency Department. SD 3 was called by the defendants as their witness. Although the plaintiffs claimed that SD 3 had approached Ng about the matter, it is in evidence that SD 3 signed the Statement of Affairs under oath after he had gone through all the documents. SD 3 testified that he believed what Ng told him after he saw all the proof and the evidence that AVD owed RM2,025,550.00 (page 53 ACB). In fact it was also in evidence that he "did some work and make sure everything done correctly….". After he had lodged the Statement of Affairs, SD 3 said that the Tan family did not approach him to contradict the said Statement of Affairs. Hence the Court of Appeal erred when it held that SD 3 was only a nominee director not involved in the management of AV, and that he did not have the knowledge of the premium. The Court of Appeal also erred when it held that there was absence of documentary evidence to support the allegation that RM2,025,550.00 was a loan given by Ng to AV as part of RM10,490,000.00 paid by him. In the present case AV had been wound up and in winding up proceedings, the Statement of Affairs was accepted as the truth. The learned trial Judge held that until the date of judgment, no

one has contradicted the report filed by SD 3. The fact that SD 3 was a nominee director or someone not involved in the management of AV is of no significance, given the presence of the documentary evidence.

[116]In fact SD 3 alleged that he had gone to TEK's family to seek for help on the matter but they refused to help him. Hence SD 3 approached Ng to get more information and to find out what actually happened. It was not that SD 3 merely took in what was informed by Ng to him blindly, but after he had seen the documents and did some investigation, did he lodge the Statement of Affairs of AV with the Insolvency Department. The learned trial Judge had given due consideration to the oral evidence of SD 3 and the documentary evidence adduced. Of relevance is Paragraph 64 of his judgment which states:

> "[64] The fact that AV owed the Plaintiffs the sum of RM2,0225,550.00 is evident from the Statement of Affairs of AV filed by SD 3 to the Insolvency Department and further supported by SD 3's testimony at trial. No other director of AV had filed a separate Statement of Affairs to contradict or challenge the same. This, in my considered view, is a valid claim by the Plaintiffs. The amount of RM2,025,550.00 as deposited into AV for the paid-up capital of AVD has not to date been transferred to AVD. As such, RM2,025,550 is to be regarded as loan from the 1st Plaintiff to AV and is to be repaid by AV to the 1st Plaintiff."

[117]The Court of Appeal failed to identify why was the findings of the learned trial Judge wrong, in view of the oral evidence of SD 3 and the documentary evidence. Therefore, for the Court of Appeal in holding that "in the absence of other contemporaneous documents, this allegation has no documentary evidence" and disallowed the claim, clearly shows a failure on the part of the Court of Appeal in the appreciation of the oral and documentary evidence adduced.

Whether RM200,000.00 cash was given to TEK as Ng's paid up capital

[118]On the issue of the cash of RM200,000.00 which Ng alleged was paid by him to TEK as his paid up capital in AVD, there was oral evidence of SP 3 when he witnessed the payment and also documentary evidence. The amount of RM 100,000 was paid twice to TEK in the presence of SP 3. The credibility of SP 3 has not been challenged by the defendants and that the claim for RM200,000.00 was also supported by the entries in TEK's personal account. The cash was handed over because of the request by TEK to make urgent payments.

[119]In addition, the cash payment had been adverted to, by Ng in his letter dated 4.9.2014 to TEK. There was no response from TEK to this averment of payment in the letter. If it is true that no such payments were made surely TEK would have immediately denied of such payments being made.

[120]Therefore, Ng had discharged the burden of proof in relation to the payment of RM200,000.00 through his own evidence, the evidence of SP 3 and also the letter dated 4.9.2014. The learned trial Judge believed the plaintiffs' witnesses and this was stated at paragraph 70 of his judgment. With such overwhelming evidence in support, the Court of Appeal erred when it held that there was "a palpable lack of evidence", with regards to Ng's claim of payment of cash RM200,000.00 to TEK.

Whether the sum of RM2,224,450.00 is Ng's capital in AVD or the loan given by TEK to AVD as part of premium of RM6.0 million

[121]This amount represents the counterclaim by the defendants against the plaintiffs. The Court of Appeal held that there is no dispute that TEK had paid RM3,974,450.00 into AVD and therefore he is entitled to 2,224,450 shares in AVD, based on the totality of the evidence of TEK (Paragraph 46 of the Court of Appeal judgment).

[122]However, the Court of Appeal failed to appreciate that there was no evidence of monetary contribution from TEK to AVD and TEK failed to prove his source of income. What has been established at trial are from the evidence of Ng and the contemporaneous documents that the sum of RM3,974,450.00 was part of the sum of RM6.0 million which Ng had paid into AV. TEK had transferred a huge portion of Ng's RM6.0 million into his personal account and subsequently transferred RM3,974,450.00 to AVD to make it look as if it was his personal contribution into AVD.

[123]TEK attempted to justify it by stating that he was entitled to the whole of RM6.0 million (which was undisputedly paid by Ng) as premium which was due to him and/or for Ng's participation in the development of project in AVD. It was based on the above that 2.0 million shares had been allotted to him and his family. However how does one explain the subsequent transfer by TEK of D3's 250,000 shares to Ng's wife on 6.8.2014 after Ng

started to question on the disparity between his contribution and the number of shares that he was entitled at par value? If TEK's contention is true that the monies paid by Ng is for premium and not capital contribution, TEK could have very well responded to Ng's query and informed Ng that he was not entitled to any shares as there has been no payment for the capital contribution. TEK's reaction to Ng's query, by giving 250,000 shares to Ng's family, dispel all contention that the payments made by Ng was for premium, hence giving justification for Ng's claim to 1,750,000 units of shares in AVD. The Court of Appeal had wrongly added the sum of RM250,000.00 to RM1,974,450.00 so as to arrive at the figure of RM2,224,450.00, given the undisputed fact that 250,000 shares had been transferred to Ng's wife for no consideration. The Court of Appeal erred in law and fact when it held that TEK had paid RM3,974,450.00 into AVD and therefore he is entitled to 2,224,450 shares in AVD, based on the totality of the evidence of TEK, when the evidence adduced during trial clearly showed that TEK had wrongly and dishonestly treated RM 6.0 million paid by Ng into AV as premium due to him and that as at 18.9.2013 his account had only RM435.35 and the shares allotted to him came from the sum of RM6.0 million paid into AV by Ng and as such he is not at all entitled to the 2,224,450 shares or any shares, given the fact that there was no contribution from him for the capital of AVD.

[124]The defendants produced and relied on 2 sets of Tables of an unaudited draft account with the same contents but with different dates, to substantiate its Counterclaim (page 240 of CCB (2) and page 572 of CCB (3)). Although the Court of Appeal did not expressly say in its judgment that it relied on the Tables in allowing the Counterclaim, but no matter how one looks at it, there is no basis for the claim of 2,224,450 shares by the defendants. In addition the maker of the Tables was not called nor was any explanation given why he/she was not called to testify. Given the aforesaid, clearly the Court of Appeal had erred in law and fact when it allowed the return of 2,224,450 shares to the defendants.

Other issues

[125]The Court of Appeal held that the authorized capital of AVD was only RM5.0 million. As a director and co-founder of AVD, Ng knew that the authorized capital of AVD at the material time was RM5,000,000.00. Hence it does not make sense for Ng to pay RM6.0 million as paid up capital for AVD. The Court of Appeal further held that Ng did not adduce any evidence that as a director he had sought for a director's meeting to increase the authorized capital of AVD. However, the issue on authorized capital being only RM5.0 million was never the pleaded defence of the defendants. In any event authorized capital of a company could be increased progressively and it is not disputed that RM6.0 million was indeed paid by Ng.

[126]On the defendants' allegation that there is contradiction in the evidence of the plaintiffs because, on one hand, Ng said in evidence that he paid into the account of AV for purposes of convenience whereas at paragraph 7 of the Statement of Claim and in one part of cross examination, Ng claimed that the sum of RM6.0 million paid into AV as a conduit to be channeled into AVD. The defendants claimed that Ng departed from his pleaded case and claimed that paying RM6.0 million into AV was easier for TEK to make payment on behalf of AVD as he lives in Kulim and TEK lives in Penang. In other words, there is contradiction between the "convenience" argument and the "conduit" argument raised by Ng.

[127]On this contradiction issue, it has been confirmed by the defendants' witnesses that Ng paid for the land deposit and the learned trial Judge accepted this evidence (refer to paragraphs 37 (b) and 37 (c) of the learned trial Judge's grounds of judgment):

> "(b) as at 18.9.2013 TEK's account only had RM463.35, had it not been for the 1st Plaintiff's contribution into AV's account, TEK would not have been able to make the Deposit Payment to the Development Land and TEK would not have been able to contribute RM2,000,000.00 into AVD for the issuance of share of RM 4, 000,000 to both TEK and the Plaintiff.
>
> (d) The Deposit payment to the Development Land was paid by cheque issued from Ong & Maneksha's client account, AVD's solicitor in respect of the Sale and Purchase Agreement and not be TEK personally as affirmed by SD 4 at trial."

[128]The learned trial Judge accepted the reason given by Ng as to why he paid into AV's account despite the account of AVD had been set up.

[129]Ng had pleaded at paragraph 7 of the Statement of Claim that:

"7. Between 18.9.2013 until 18.7.2014, the 1st Plaintiff had invested RM10,490,000.00 as his contribution to the paid up capital of the 2nd Plaintiff by way of cheques and cash, inter alia, RM4,490,000.00 which was paid directly into the 2nd Plaintiff and at the request of the deceased, RM6,000,000.00 was paid through the 4th defendant as conduit to transfer the said RM6,000,000.00 into the 2nd Plaintiff as the 1st Plaintiff's contribution. The said deceased was aware and/or had knowledge that the contribution of RM6,000,000.00 was the 1st Plaintiff's contribution in respect of the paid up capital of the 2nd Plaintiff."

[130]Paragraph 14 of the Statement of Claim made specific reference to the letter of demand dated 14.9.2014 to which the defendants made a mere denial. This letter of demand was written by Ng to AV had the caption "Payment made for investment purpose in Alor Vista Development Sdn Bhd:" and the contents stated, inter alia:

"2. I hereby confirmed that I have paid the following amounts to Alor Vista Development Sdn Bhd through your company for investment in Alor Vista Development Sdn. Bhd.

3. The above payments paid to your company were made upon request by Mr. Tan Ewe Kwang [TEK] for convenience purpose only but at all times all monies paid are paid for the investment in Alor Vista Development Sdn Bhd…Mr. Tan Ewe Kwang is aware that your company is merely a conduit for the payments and he had undertaken to ensure these payments are paid to Alor Vista Sdn Bhd.

4. As of today, I have paid a total of RM10,490,000.00 for the investment in Alor Vista Development Sdn. Bhd. Please ensure all payments made by me are reflected in the account of Alor Vista Development Sdn. Bhd. Kindly ensure that my shares are given to me based on the proportion of my contribution as I have not received all the shares due to me." "

TEK failed to respond to this letter.

[131]There was evidence that upon receipt of the draft management account, Ng challenged TEK to prove his alleged contribution of funds and source of funds, but TEK failed to do so, instead he resigned. This was referred to by the learned trial Judge at paragraphs 44 and 45 of his grounds:

"44. The 1st Plaintiff further wrote to TEK on 17.9.2014 requesting for a copy of the latest management account of AVD to which TEK replied by way of a letter dated 30.9.2014 wherein TEK sent the draft account of AVD for the period of October 2013 to September 2014 and stated that the shareholding if the 1st Plaintiff had increased to 56.2% from 50% and his shareholding has been reduced from 50% to 43.75%. The Plaintiff had then issued a letter of Notice to Object the incomplete alleged management account dated 10.10.2014 for TEK's failure to reflect the RM10,490,000.00 contribution by the 1st Plaintiff into AVD.

45. TEK had failed to respond to the allegations made by the 1st Plaintiff but had instead, following these correspondences letter, resigned as the Managing Director of AVD as evident from the letter of resignation dated 15.11.2014."

[132]The learned trial Judge had referred to the letter dated 4.9.2014, TEK's letter dated 30.9.2014 and Ng's Notice to Object to the incomplete alleged management account dated 10.10.2014, and made a finding that TEK failed to respond to the allegations made by Ng and instead TEK resigned, thus fortifying the claim by the plaintiffs that the payments were indeed for paid up capital into AVD.

[133]The issue of convenience and issue of "conduit" are inter related and both had been:

(a) pleaded with sufficient clarity and detail in the Statement of Claim;

(b) adverted to, in correspondence in the letter dated 4.9.2014, the contents of which was not denied.

[134]The learned trial Judge accepted the "convenience" argument as stated at paragraph 42 of his judgment. Given the circumstances aforesaid, there is no merits in the arguments of any contradiction between the "convenience" argument and the "conduit" argument of Ng.

[135]It was submitted by the defendants that the learned trial Judge did not address the credibility of Ng at all and did not touch on the inconsistencies raised against Ng whose evidence was self serving, despite the defendants having made lengthy submission on Ng's credibility. Lord Reed had addressed a similar issue in ***Henderson*** (supra) at paragraphs 48 and 57 of the said judgment, which we had addressed at paragraph 48 of our judgment herein. We do not feel the need to repeat it here again. In any event there is no finding by the Court of Appeal of any unsatisfactory reason due to material inconsistencies or inaccuracies or if it appears from evidence in reaching to his conclusions, the learned trial Judge had not taken proper advantage of having seen or heard the witnesses or failed to appreciate the weight and bearing of situations admitted or proved.

[136]The learned trial Judge had appropriately dealt with the evidence, oral and documentary at paragraph 69 of his judgment where he states:

> "[69] ….This Court has carefully weighed both the oral and documentary evidence adduced by all parties, scrutinized all the documents tendered and relied upon by the parties and considered the written submissions as well as the authorities filed by them. In considering the evidence as a whole especially the evidence of all the Plaintiffs' witnesses vis-à-vis the pleadings and that of the Defendants, it is my considered view that the Plaintiffs had proved its pleaded case on a balance of probabilities against the Defendants."

It could not be reasonably concluded that he had erred or unreasonably come to a decision that the plaintiff had proven his case, on a balance of probabilities.

[137]Given the aforesaid, the learned trial Judge made the following findings of fact in paragraphs 57 - 61 in his grounds of judgment:

> "[57] …..it is my considered view that the Plaintiff had proven its claim to this Court's satisfaction that RM 6, 000, 000.00 was made into AV by the 1st Plaintiff as conduit for his capital contribution into AVD. The Defendant had failed to satisfy this court that RM6,000,000.00 was paid by the 1st Plaintiff as premium for the Development project.
>
> …….
>
> [60] …..the Defendants had conceded that TEK's contribution of RM 3,974, 450.00 to AVD came from the sum of RM 6, 000,000.00 which had been paid by the 1st Plaintiff to AV.
>
> [61] **On the facts of this case**, especially on my findings in respect of the RM 6, 000, 000.00 paid by the 1st Plaintiff, I am satisfied that TEK, 2nd Defendant and 3rd Defendant hold 1,750,000 units of shares for the 1st Plaintiff as the consideration for the 1,750,000 shares had been advanced from the money paid by the 1st Plaintiff into AV's account. I agree with the Plaintiff' s submission that to allow TEK, the 2nd and the 3rd Defendants to be vested with beneficial ownership of the 1,750,000 shares when they did not contribute any money representing the par value of the said shares would be unconscionable and inequitable."
>
> *[emphasis added]*

Counterclaim

[138]The Court of Appeal allowed the Counterclaim of the defendants. On the Counterclaim for 2,224,450 shares, we had addressed this in paragraphs 121 - 124 of this judgment.

[139]From the evidence as aforesaid, TEK did not contribute any moneys towards payment of AVD capital for him to be entitled for the return of 2,224,450 shares in AVD. These shares belong to Ng as there was no contribution by TEK of the amount of RM3,974,450.00 as capital of AVD. The 2 million shares which were issued to TEK has also been established to be from the contribution by Ng. The defendants' claim for 2,224,450 shares is based on the sum of RM6.0 million contributed by Ng.

[140]The 250,000 shares (which was given to Ng's wife after Ng queried on the disparity of his entitlement of shares) were part of the 2.0 million shares allotted to the Tan Family. If 250,000 shares are said to be held on

constructive trust, surely the balance 1,750,000 shares should also be held on trust for TEK. The shares came together, they cannot be separated. Therefore it is erroneous for the Court of Appeal to order the plaintiffs for the return of 250,000 shares which had been given to Ng as consideration for it had been contributed by Ng.

[141]Consequently, the Court of Appeal also erred when it allowed the defendants to retain 1,750,000 shares when it actually belongs to Ng who contributed money for the issuance of the said shares.

[142]Further error committed by the Court of Appeal was when it allowed the counterclaim for dividends and for damages to be assessed when AVD did not declare any dividends and the defendants had never suffered any damages.

Is there a need for "guidelines" by the Federal Court?

[143]Should the "plainly wrong" test be subject to guidelines and whether the "guidelines" in ***McGraddie*** (supra) and ***Henderson*** (supra) or other guidelines be adopted by our courts?

[144]Firstly, it need to be emphasized that the Supreme Court in ***Henderson*** (supra) was not setting any guidelines to the plainly wrong test. It merely provides a construction as to what amounts to the "plainly wrong" test in appellate intervention. In this regard, we find that Lord Neuberger's remarks at paragraph 60 of ***In Re B (a Child) (FC)*** [2013] UKSC 33 are instructive:

> "When it comes to an evaluation, the extent to which the benefit of hearing the witnesses and watching the evidence unfold will result in the trial judge having a particular advantage over an appellate tribunal **will vary from case to case. Accordingly, it is not possible to lay down any single clear general rule as to the proper approach for an appeal court to take where the appeal is against an evaluation**…" [emphasis added]

[145]This is in consonant with Lord Thankerton's dicta in ***Thomas v Thomas*** (supra) at page 488 that:

> "It is obvious that the value and importance of having seen and heard the witnesses will **vary according to the class of case, and, it may be, the individual case in question**." [emphasis added]

[146]It is important to recognise that in the United Kingdom, the view that findings of fact might not necessarily lend themselves to one singularly "right" conclusion, has been endorsed by high authority. For one, Ward LJ in *Assicurazioni Generali SpA v Arab Insurance Group* *[2003] 1 WLR 577* CA acknowledged that:

> "The trial judge's view inevitably imposes a restraint upon the appellate court, the weight of which varies from case to case. Two factors lead us to be cautious about interfering. First, the appellate court recognises that judging the witness is a more complex task than merely judging the transcript. Each may have its intellectual component but the former can also crucially rely on intuition. That gives the trial judge the advantage over us in assessing a witness's demeanour, so often a vital factor in deciding where the truth lies. **Secondly, judging is an art not a science. So the more complex the question, the more likely it is that different judges will come to different conclusions and the harder it is to determine right from wrong. Borrowing language from other jurisprudence, the trial judge is entitled to "a margin of appreciation**."
>
> **197. Bearing these matters in mind, the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below**. Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used - "clearly", "plainly", "blatantly", "palpably" wrong, is an adaptation of what Lord Fraser of Tullybelton said in G v G (Minors: Custody Appeal) [1985] 1 WLR 642, 652, admittedly dealing with the different task of exercising a discretion. Adopting his approach, **I would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible.** The difficulty or ease with which that test can be satisfied will depend on the nature of the finding under attack. If the challenge is to the finding of a primary fact, particularly if founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence

before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts."

[emphasis added]

[147]It is true that the "margin of appreciation" doctrine, as Ward LJ was well-aware, was derived from a case which dealt with discretionary power. This doctrine, which is derived from the French term *marge d'appréciation*, is more helpfully translated as "margin of assessment/appraisal/estimation" and refers to the room for manoeuvre. The element of "reasonableness" features prominently in the jurisprudence discussing this doctrine.. The recognition that a certain margin of appreciation is acceptable depending on the facts and circumstances of a particular case should be the only "fixed" criterion relevant to the assessment of what constitutes a reasonable result. After all, the Supreme Court in ***Carlyle*** (supra) had indicated that it might have come to a different conclusion than the trial judge had it been sitting in the first instance but ultimately upheld the trial judge's decision as it had a reasonable basis.

[148]Given the aforesaid, we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the "plainly wrong" test as espoused in decisions of this Court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[149]Coming back to the question posed by the appellant, the said question has 3 limbs, namely:

(a) whether the application of the "plainly wrong" test by an appeal court in reversing the findings of facts by a trial court should be subject to guidelines; and

(b) whether the guidelines laid down by the UK Supreme Court in *Henderson v Foxworth Investments Ltd and Another* *(2014) 1 WLR 2600* and *Mc Graddie v Mc Graddie and Another* *(2013) 1 WLR 2477* should be adopted as the relevant guidelines; or

(c) such other guidelines as may be relevant or appropriate?"

Based on the aforesaid discussion in the preceding paragraphs of this judgment, our answers to the 3 limbs in the question posed are as follows:

(a) for paragraph (a), the answer is in the negative;

(b) for paragraph (b), the answer is that the Supreme Court in ***Henderson*** was not setting any guidelines to the plainly wrong test but merely construed the meaning of the plainly wrong test. Henderson followed ***Mc Graddie*** in the application of the "plainly wrong test";

(c) for paragraph (c), the answer is in the negative as there is no necessity to have a rigid guideline to be adopted by an appellate court in the application of the "plainly wrong test" in reversing finding of facts by a trial court.

Conclusion on the Appeal

[150]The Court of Appeal reversed the findings of the trial Judge on facts when it held that "there was no judicial appreciation of the evidence adduced before it". We are of the view that the Court of Appeal had erroneously applied the "plainly wrong" test in a broad and general manner. The Court of Appeal erred in arriving at its conclusion without identifying specifically why the learned trial Judge's findings were plainly wrong on the key issues, namely the purpose of the payment by Ng. Essentially the Court of Appeal disagreed with the learned trial Judge's conclusion as to the purpose of the payment of RM6 million by Ng to TEK and reversed the said conclusion premised on their disagreement. Clearly it had erred in taking the approach that it could, on an assessment of the evidence before the trial Judge, reach a different conclusion on the facts from that of the learned trial Judge because it disagreed with it. The Federal Court in ***Tengku Dato' Ibrahim Petra Tengku Indra Petra*** (supra) had decided that such approach was wrong when it held that:

" …it was irrelevant that, with whatever degree of certainty, it (the appellate court) considered that it would have reached a

different conclusion from the trial judge."

[151]It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judge's findings of fact could be overturned. The task of the trial Judge is hard enough, without having to deal with every single piece of evidence which may emerge in the course of the trial. If such a requirement was to be imposed on a trial judge then their task in hearing a case would be very tedious and the time taken to produce judgments would increase. ***Mc Graddie*** (supra) had dealt with this point holding that versions of story goes to credibility, and if a witness is believed, the fact that there were contradictions would not displace the truth of his case. In this regard, Lord Reed said:

"[28] In a case where the court was faced with a stark choice between irreconcilable accounts, the credibility of the parties' testimony was an issue of primary importance. The Lord Ordinary found that the pursuer was a credible witness on the credible issue, notwithstanding a number aspects of the evidence which could be regarded as detracting from his credibility, including the aspects mentioned in para 26. The question whether the pursuer's evidence was to be regarded as credible and reliable having regard to the other evidence in the case was pre-eminently a matter for the Lord Ordinary."

[152]The Court of Appeal failed to undertake the appropriate review exercise and further failed to make the appropriate determination that the learned trial Judge had gone plainly wrong in his decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable Judge could have reached. Unless the conclusion that the learned trial Judge drew from it was one that no reasonable judge would have made, his conclusion on the point should be left undisturbed premised on the ***Henderson*** (supra), ***Mc Graddie*** (supra) *and* ***Tengku Dato' Ibrahim Petra Tengku Indra Petra*** (supra) principles. The Court of Appeal failed to impeach the analysis of the evidence on the key issue of the purpose of the payment and other crucial issues which are in dispute between the parties.

[153]We had analyzed the facts and judgments of both the trial Judge and the Court of Appeal and we found that the trial Judge had arrived at his findings of fact based on what he heard and saw from the main plaintiffs' witness, Ng, who had direct knowledge of the payments, which he was entitled to. Compared to the evidence of the defendants' witnesses who had no personal knowledge of the payments. We cannot say that the trial Judge's findings of fact or conclusion was one where no reasonable judge would make in the circumstances. The assessment of credibility of witnesses is well within the purview of the trial Judge and it is not for the appellate court to interfere. The evidence as a whole can reasonably be regarded as justifying the conclusions arrived at the trial and that conclusion was heard and seen by the learned trial Judge as compared to the appellate court who has not enjoyed this opportunity. In addition, there has been no findings by the Court of Appeal that the learned trial Judge had gone plainly wrong and neither was there on a reconsideration of the whole evidence, the opposite conclusion should be reached.

[154]Based on the foregoing paragraphs, it is our considered view that the Court of Appeal has committed a fundamental error when it failed to impeach the learned trial Judge's analysis of the evidence on key issues, namely the purpose of the payment by Ng and other critical matters in dispute between the parties. Hence, the Court of Appeal has erred when it intervened and reversed the findings of fact of the learned trial Judge and allowed the appeal of the defendants. This warrants appellate intervention on our part.

[155]Consequently, we unanimously allowed the appeal by the plaintiffs with costs of RM70,000.00 for here and below. The order of the Court of Appeal is hereby set aside and the order of the High Court is reinstated.