

A Kam Seng Realty Sdn Bhd v Dato Tai Fatt Yew & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-547 OF
2010

B MOHAMAD ARIFF J
24 JUNE 2011

C *Civil Procedure — Action — Recovery of money paid — Whether plaintiff had sufficient documentary evidence to prove its loan to first defendant — First defendant's version of events almost wholly oral — Whether defendant's version failed probability test when matched against contemporaneous documentary evidence*

D The plaintiff sued the first defendant for recovery of a RM727,000 interest-free friendly loan ('the loan') it claimed it had given the first defendant. The action against the second defendant was withdrawn. The plaintiff pleaded that contrary to what was agreed, the first defendant failed to repay the said sum upon sale of his 6.5 acres property. To support its claim, the plaintiff relied on various documentary evidence including a copy of a cheque for RM727,000 to the first defendant, the latter's acknowledgement of same, minutes of the plaintiff's board of directors' meeting approving and ratifying the loan and copies of letters exchanged between solicitors for the plaintiff and the first defendant concerning the loan. The first defendant denied existence of the loan. He said that in any case, the plaintiff's claim was time-barred. He alleged the payment to him of the RM727,000 was part of an 'arrangement' whereby he was required to pay RM420,000 out of that sum to a company in which a director of the plaintiff had an interest while the balance was part-payment of commission due to him for negotiating the sale of the plaintiff's land to a third party.

Held, allowing the claim with costs to be taxed, unless agreed:

- H** (1) Although there was no direct formal evidence of the friendly loan and terms of repayment, there was sufficient documentary evidence to prove the existence of the loan as opposed to the 'arrangement' alleged by the first defendant. On the evidence presented, the plaintiff had succeeded in proving its case on a balance of probabilities (see paras 24 & 37).
- I** (2) The defendant's evidence in support of the existence of an 'arrangement' was almost exclusively verbal. Aside from the cheque made payable to Malaysia Steel Works, there was no documentary evidence to indicate there was such an arrangement. When tested against the entirety of the

evidence led and the available contemporaneous documentary evidence, the first defendant's version of the facts was improbable (see paras 32 & 34).

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(3) There was no documentary support for the first defendant's assertion that part of the payment he received constituted his commission for successfully arranging the sale of the land (see para 34).

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(4) The first defendant was to repay the loan from the proceeds of the sale of his land, the purchase price for which was payable by tranches, the last tranche was to be by June 2004. As the writ was issued in March 2010, the suit was not statute-barred (see para 39).

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[Bahasa Malaysia summary]

Plaintif menyaman defendan pertama untuk mendapatkan kembali RM727,000 pinjaman persahabatan bebas faedah ('pinjaman tersebut') yang dituntutnya telah dipinjamkan kepada defendan pertama. Tindakan terhadap defendan kedua ditarik balik. Plaintif memplid bahawa bertentangan dengan apa yang dipersetujui, defendan pertama gagal untuk membayar balik jumlah tersebut selepas jualan hartanahnya 6.5 ekar. Untuk menyokong tuntutan, plaintif bergantung atas beberapa keterangan dokumentar termasuk salinan cek untuk RM727,000 kepada defendan pertama, penerimaan cek tersebut oleh defendan pertama, minit-minit mesyuarat lembaga pengarah meluluskan dan mengesahkan pinjaman tersebut dan salinan-salinan surat-surat yang bertukar tangan antara peguam-peguam untuk plaintif dan defendan pertama berkaitan pinjaman tersebut. Defendan pertama menafikan kewujudan pinjaman tersebut. Dia menyatakan walau bagaimanapun, tuntutan plaintif adalah dihalang masa. Dia mendakwa pembayaran kepadanya sebanyak RM727,000 adalah sebahagian 'arrangement' di mana dia dikehendaki untuk membayar RM420,000 daripada jumlah tersebut kepada syarikat di mana pengarah plaintif mempunyai kepentingan sementara baki adalah sebahagian bayaran komisyen yang kena dibayar kepadanya kerana berunding jualan tanah plaintif kepada pihak ketiga.

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Diputuskan, membenarkan tuntutan dengan kos ditetapkan, kecuali bersetuju:

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(1) Walaupun tidak terdapat keterangan rasmi yang terus mengenai pinjaman persahabatan dan terma bayaran balik, terdapat keterangan dokumentar yang mencukupi untuk membuktikan kewujudan pinjaman bertentangan kepada 'arrangement' yang didakwa oleh defendan pertama. Atas keterangan yang dikemukakan, plaintif berjaya membuktikan kesnya atas imbangan kebarangkalian (see para 24 & 37).

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(2) Keterangan defendan yang menyokong kewujudan 'arrangement' hampir secara eksklusif lisan. Selain daripada cek yang dibayar kepada Malaysia Steel Works, tidak terdapat keterangan dokumentar untuk

- A menunjukkan bahawa terdapat pengurusan sedemikian. Apabila diuji terhadap keseluruhan keterangan yang dikemukakan dan keterangan dokumentar semasa yang ada, versi defendan pertama mengenai fakta adalah sukar diterima akal (lihat perenggan 32 & 34).
- B (3) Tidak terdapat sokongan dokumentar untuk penegasan defendan pertama bahawa sebahagian bayaran yang diterimanya merupakan komisyennya kerana berjaya menguruskan jualan tanah tersebut (lihat perenggan 34).
- C (4) Defendan pertama adalah dikehendaki membayar pinjaman tersebut daripada keuntungan jualan tanahnya, harga belian yang mana boleh dibayar oleh *tranches*, *tranche* yang terakhir adalah dibayar sebelum Jun 2004. Memandangkan writ dikeluarkan pada Mac 2010, tindakan tidak dihalang oleh statut (lihat perenggan 39).]

D **Notes**

For a cases on recovery, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 196.

Cases referred to

- E *Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59, FC (refd)
Reeves v Butcher [1891] 2 QB 509, CA (refd)
Tay Ivy v Tay Joyce [1992] 1 SLR 893, HC (refd)

Legislation referred to

- F Evidence Act 1950 ss 101, 102, 103, 104, 114(g)
Limitation Act 1953 s 6(1)

V Balasingam (Kemala bt Alang with him) (Balasingam & Co) for the plaintiff. Jayakumar Palakrishnar (Nurul Husna with him) (Zahir Jeya & Zainal) for the first defendant.

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Mohamad Ariff J:

- H [1] In this action after a full trial, the plaintiff is claiming a sum of RM727,000 and interest thereon from the first defendant, particulars of which are as stated in the amended statement of claim, in particular paras 4, 5, 7 and 8. The thrust of the claim is found in para 4, reading:

- I At the request of the 1st Defendant, the Plaintiff had given an interest-free friendly loan of a total sum of RM727,000.00 to the 1st Defendant repayable by the 1st Defendant upon receipt of the purchase price in respect of the sale by the 1st Defendant of his property of 6.5 acres in Lot PT 5058, Mukim Setapak, Daerah Gombak comprised No. Hakmilik HSD 17930 (Master Lot) to Jurus Positif Sdn Berhad.

[2] As can be seen from para 4, the plaintiff is claiming the payment of a interest-free friendly loan allegedly granted to the first defendant by it.

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[3] The plaintiff has withdrawn the claim against the second defendant even before the trial, and thus the present claim concerns the single important issue of whether there exists the alleged interest-free friendly loan for the sum stated, or, on the contrary, there exists no loan as such between the parties but an arrangement whereby monies belonging to the company have been siphoned out through the device of a loan and diverted in part to a related party, ie Malaysia Steel Works (KL) Sdn Bhd. It is argued by the first defendant that there is no friendly loan; instead the RM727,000 paid to the first defendant comprises two components — (1) payment to Malaysia Steel Works in the sum of RM420,000 and (2) the remainder sum of RM307,000 as part of the commission due to the first defendant for his part in the sale and purchase agreement of 32.76 acres of what is described as ‘un-acquired land’ which was sold to the company described as Jurus Positif Sdn Bhd.

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[4] This ‘un-acquired land’ comprises part of a larger piece of land, originally owned by the plaintiff, but acquired by the Selangor State Government in 1973 to develop into the International Islamic University. The 32.76 acres were not utilised, and it is in evidence that, through the effort of the first defendant, this part of the land was subsequently returned to the plaintiff. In this regard the first defendant refers to a service agreement dated 18 June 2003 whereby he successfully negotiated with the authorities for the return of the 32.76 acres of the un-acquired land, for which the plaintiff agreed to transfer 6.5 acres of this land to the first defendant. Thus the first plaintiff retained 26.6 acres. See pp 3–12 of part two of the bundle of documents for a copy of the service agreement.

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[5] In the course of this trial the first defendant has maintained that he acted as consultant to the plaintiff not only in respect of the service agreement but in relation to two other matters in respect of the land, namely (1) an appeal for higher compensation, and (2) as agent to negotiate and arrange for the sale of the un-acquired land at a maximum/fixed price of RM210,000 per acre. In respect of (2) the first defendant maintains that he had managed to arrange for the sale to Jurus Positif Sdn Bhd at RM210,000 per acre for the total purchase consideration of RM5,515,020. As agreed commission, the plaintiff, according to the first defendant, had agreed to pay him RM350,000. By the above stated ‘arrangement’, he had been paid part of this commission due to the tune o RM307,000 from the RM727,000 alleged to be the friendly loan granted to the first defendant. In respect of the appeal for higher compensation, this matter is the subject of a separate claim, for which the first defendant is

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A claiming from the plaintiff the sum of RM4,938,067 as his commission. This aspect of their overall dispute is therefore best left to be determined by the other court.

B [6] It is the first defendant's case that he was never fully paid his commission for his part in the return of the un-acquired land, and further he had expended further sums as payment to the agent in the sale and purchase agreement (sum of 2% of the total purchase price of the sale and purchase agreement dated 14 January 2004), payment of RM18,569.90 being quit rent for the plaintiff 26.6 acres and land surveyors fees and the sum of RM200,000 for the clearing of squatters from the land before it could be sold. These additional sums have not been reimbursed by the plaintiff.

D [7] In meeting the plaintiff's claim, the first defendant has also raised the issue of limitation, and counsel for the defendant, Mr Jayakumar, has forcefully argued that the plaintiff's claim is statute barred under the Limitation Act 1953 s 6(1).

THE CRITICAL DATES

E [8] Given the issue of limitation being raised, it becomes critical to fix and determine when the alleged friendly loan was granted or disbursed. There is no formal loan document in evidence, however. According to PW2, Dato' Tai E King (the chairman of the plaintiff), the first defendant requested a friendly loan from the plaintiff company sometime in late 2003. What followed was a
F informal meeting of 'a few directors of the Plaintiff company'. The first defendant was present at this meeting and he made the request for the friendly loan of RM727,000 from the plaintiff, stating that he would sell his 6.5 acres of the land and would repay the loan upon receipt of the proceeds of the sale of
G his land. The friendly loan of RM727,000 was then given by Bank of Commerce Cheque No 019728 dated 14 January 2004. This cheque appears on p 63 of part one of the bundle of documents. The relevant part of PW2's testimony on this aspect of the case reads:

H In examination-in-chief

Q I come to a different topic now. Did the 1st Defendant request for a loan from the Plaintiff?

A Yes sometime in late 2003 the 1st Defendant requested me for friendly loan from the Plaintiff company.

I Q What happen to this request?

A After the request from the 1st Defendant there was an informal meeting of a few Directors of the Plaintiff company. The 1st Defendant was present at the meeting. He made the request for a friendly loan of RM727,000.00 from the Plaintiff and said that he was selling his 6.5 acres of land and would repay the

loan sum upon receiving of the proceed of the sale of his land. He further said that he would direct the solicitor acting for him in the sale of this land to forward a sum of RM727,000.00 out of the sale price with the Plaintiff when the solicitor received money from the purchaser.

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Q Was the loan given to the 1st Defendant?

A Yes the friendly loan of RM727,000.00 was given by way of BOC cheque No. 019728 dated ... January 2004.

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Q Question 39. Please look at Bundle A page 63. Can you confirm that this is a copy of the cheque?

A Yes this is the copy of the cheque.

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Q Who handed the cheque to the 1st Defendant?

A I believe one Mr. Teh Kok Ping ...

Q Did the 1st Defendant acknowledge receipt of the cheque?

A Yes I believe he has signed the Plaintiff voucher.

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Q Where did the handing over of the cheque take place?

A I believe in our office at Jalan Melayu, Kuala Lumpur.

Q Were you present at that time?

A No.

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Q The 1st Defendant states that before the loan sum was given to him at an earlier meeting with you and Teh Kok Ping, you and Teh Kok Ping asked the 1st Defendant to pay a sum of RM420,000.00 out of the loan sum of RM727,000.00 to Malaysia Steel Works Sdn Berhad. Is this true?

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A No.

Q In 2004 did you have anything to do with Malaysia Steel Works Sdn Berhad?

A No.

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Q Has the 1st Defendant till to date repaid you the loan sum of RM727,000.00 to the Plaintiff?

A No.

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[9] The evidence also shows the first defendant acknowledging receipt of the sum in the voucher issued by the plaintiff. This voucher is tendered in evidence as p 3 of bundle C (exh P5). It is addressed to Dato' William Tai Fatt Yew @ Tie Foot Sang and under 'particulars', the following appears:

Being a loan to Dato' William Tai Fatt Yew BOC 019726 (Cheque No.).

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[10] The sum is RM727,000. The first defendant initialled as 'Collector'. The voucher is dated 14 January 2004.

A [11] The other document bearing on the loan is exh P6, which is the minutes of the board of directors' meeting of the plaintiff's held on 28 January 2004. Minute 3 is the relevant part, and it reads:

3 Advance to Dato' William Tai Fatt Yew @Tie Foot Sung.

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[12] The meeting noted that prior to this meeting, the board of directors had advanced a loan amounting to RM727,000 to Dato' William Tai.

C [13] It was unanimously resolved:

That the advances of RM725,000.00 [Ringgit Malaysia: Seven Hundred Twenty Five Thousand] to Dato' William Tai Fatt Yew @ Tie Foot Sung on 14th January 2004 upon such terms and conditions mutually agreed by both parties thereat, be and is hereby approved and rectified.

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And that the execution of all relevant documents pertaining thereto by any one of the directors, for and on behalf of the company, be and is hereby ratified.

E [14] I pause here to emphasise the reference to 'a loan', 'advances' and 'such terms and conditions mutually agreed by both parties'.

F [15] Thus on the evidence presented it seems there was payment of the RM727,000 to the first defendant on or about 14 January 2004, and a resolution was passed by the board of directors of the plaintiff on 28 January 2004 to approve and ratify the 'loan' or 'advance' of this amount given in 14 January 2004. This 'loan' or 'advance' is said to be upon such terms and conditions mutually agreed by the parties, but these terms and conditions are not expressed in the board minutes. The first defendant is relying on the absence of clear written terms and conditions in support of his ground that the plaintiff's claim is statute-barred. I will return to this point shortly.

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H [16] An observation needs to be made in relation to the dates in the writ of summons and statement of claim. The writ of summons is dated 24 March 2010, but the statement of claim is dated 31 December 2009. This incongruity in the dates has also been commented upon by first defendant's counsel in relation to the argument taken on limitation.

I [17] As I indicated above, the essential dispute centres on whether there was a 'loan' or an 'arrangement'. On this issue, the parties were diametrically at odds.

[18] This is how the first defendant addressed the issue of 'arrangement' in his testimony:

Testimony of 1st Defendant in Examination in Chief

Q What is this arrangement?

A There was a meeting sometime in January 2004 between Dato' Tai E King, Teh Kok Ping and myself at Dato' Tai E King's office in Jalan Melayu. They suggested that the Plaintiff will issue me a cheque for the sum of RM727,000.00. Dato Tai E King and Teh Kok Ping also wanted a commission from me from this sum. They wanted me to issue a cheque of RM420,000.00 in favour of Malaysia Steel Works KL Sdn Berhad as their commission from the amount of RM727,000.00. So Dato' Tai E King had agreed that the balance sum of RM307,000.00 would be my ... commission in ... the sale of the land to Jurus Positif Sdn Berhad and other expenses which I incurred in previous transaction.

Q You mentioned that you were requested by Dato' Tai E King and Teh Kok Ping to issue a cheque payable to Malaysia Steel Works KL Sdn Berhad for the amount of RM420,000.00. Do you know the purpose they wanted you to issue this cheque?

A So Your Honour they had mentioned that the RM420,000.00 to be made payable to Malaysia Steel Works KL Sdn Berhad is to be treat as a commission for recommending myself to the Plaintiff to negotiate the high compensation on the unacquired land and for the return of the said unacquired land. So Dato' Tai E King told me that at that time he was the Director of Malaysia Steel Works KL Sdn Berhad and some interest in that company. He also, sorry I also have to add a little bit more because at that time my meeting with them, he also even mention that to me that his Malaysia Steel Works KL Sdn Berhad, at the moment at that time have some financial problem. So he require me to help him and issue a cheque for RM420,000.00 to him. So he inform me not to inform their Kam Seng company. That he wants the RM420,000.00 to help his company.

Q So you would like to add on 'that he also informed me Malaysia Steel Works KL Sdn Berhad had some financial problem?'

A So request me to issue a cheque to help his company out of the problem.

Q 'He also informed me that Malaysia Steel Works KL Sdn Berhad had some financial problem and had requested that I help him?'

A Yes.

Q Court 'and he requested that I help him.'

A I help him Your Honour, yes.

Q You want to add on the fact about Kam Seng and all that? Not to inform Kam Seng is it necessary.

A He told me not to inform Kam Seng about this payment.

[19] I will now proceed to first address the fundamental issue of whether there was a loan as opposed to an arrangement, and then consider the limitation issue.

A LOAN, ADVANCE OR ARRANGEMENT

B [20] It is both an accepted general principle of the law of evidence and a practical rule that where oral testimony of witnesses conflict drastically, as they do in this case, the court is to test the oral testimony against their inherent improbabilities and extraneous documentary evidence, in particular as against contemporaneous documents. Secondly, mere oral assertions however vigorously pursued, may not be necessarily a substitute for proof. Thirdly, the court's assessment of the evidence, as tested, has to be in line with the issue of which party bears the onus and standard of proof, be it the general burden or a particular burden, the latter burden being in the sense of the burden to prove a particular relevant fact in the trial process. These principles are in line with the rules of evidence laid down in s 101 to s 104 of our Evidence Act 1950. I wish to quote in particular s 103 because it has a material bearing on this case:

D 103 Burden of proof as to particular fact. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

E [21] It is obviously the rule that the general burden to go forward in the evidence and to establish its case lies on the plaintiff, and in this light it will have to prove through its evidence that the facts supporting the existence of the friendly loan which it claims under, exist.

F [22] The first defendant disputes the existence of the interest free friendly loan but raises the issue of the 'arrangement', which is vigorously denied by the plaintiff's witnesses. This 'arrangement' is a particular fact which the first defendant sets up as a defence, and to that extent he must himself marshal sufficient evidence to establish its existence. The general burden is of course on the plaintiff to establish its claim, but the mere fact the plaintiff shoulders this general burden cannot mean the first defendant himself has no burden to discharge. At the very least he has the burden to move forward in evidence to establish the 'arrangement'.

H [23] I now proceed to consider and evaluate how the evidence for both parties adds up in this equation.

I *The plaintiff's arguments on the evidence*

[24] To summarise the plaintiff's arguments, they seem to be as follows. Although there is no direct formal evidence on the friendly loan and terms of repayment, there is sufficient documentary evidence to prove the existence of

the loan, as opposed to the arrangement. These include:

- (a) the payment vouchers signed by the first defendant himself (exh P5);
- (b) the board minutes of 28 January 2004 (exh P6);
- (c) a letter written by the first defendant himself and dated 19 January 2004 addressed to his solicitors Messrs Amir Toh Francis & Partners (p 14 of bundle B (P2));
- (d) a letter from Messrs Amir Toh Francis & Partners dated 19 January 2004 to Messrs Balasingam & Co;
- (e) a letter from Messrs Balasingam & Co dated 27 July 2004 to Messrs Amir to Francis & Partners (p 16 of bundle B (exh P2)); and
- (f) a letter from Messrs Amir told Francis & Partners dated 27 July 2004 addressed to Messrs Balasingam & Co (p 15 of bundle B (exh P2)).

[25] The first defendant's letter dated 19 January 2004 expressly refers to 'Repayment of a Friendly Loan of RM777,000.00 to Kam Seng Realty Sdn Berhad'. I reproduce the material parts of this letter below:

M/s Amir Toh Francis & Partners

Dear Sirs,

Re: Sale of 6.5 acres of land forming part of all that piece of freehold land known as HSD No: 17930 PT No: 5058, Mukim Setapak, Daerah Gombak Repayment of a Friendly Loan of RM777,000.00 to Kam Seng Realty Sdn Berhad.

I hereby irrevocably, authorise, instruct and direct you to, upon receipt of the balance purchase price of RM1,092,000.00 from Jurus Positif Sdn Berhad in respect of the sale of my property mentioned above, pay to Kam Seng Realty Sdn Berhad a sum of Ringgit Malaysia 777,000.00 only which sum was borrowed by me as an interest-free loan from Kam Seng Realty's Sdn Berhad.

I further instruct you to give a letter of undertaking to M/S Balasingam & Company, solicitors for Kam Seng Realty's Sdn Bhd that upon receipt of the balance purchase price of RM1,092,000.00 you will remit within seven days the sum of RM777,000.00 to M/S Balasingam & Company... as solicitors for Kam Seng Realty Sdn Berhad....

[26] This letter is signed by the first defendant, and copied to Kam Seng Realty Sdn Bhd.

[27] I now turn to look at the letter by M/S Amir Toh Francis & Partners to M/s Balasingam & Co dated 19 January 2004, which reads:

M/ Balasingam & Company

A Dear Sirs,
Re: Repayment of a Friendly loan of RM777,000.00 to Kam Seng Realty Sdn Berhad.

B We refer to the above matter whereby upon instructions given by our client, Dato Tai Fatt Yew @Tie Foot Sung, we hereby provide our undertaking to pay to you within seven days, the sum of RM777,000.00 subject to the condition that we shall have received as it sum of RM777,000.00 from our client....

[28] This letter is copied to the first defendant.

C [29] M/s Balasingam and Co dated 27 July 2004 addressed to M/S Amir Toh Francis & Partners constitutes another documentary evidence which tends to support the existence of, and corroborative of, the friendly loan. This letter states:

D M/S Amir Toh Francis & Partners
Dear Sirs,
Re: Sale of the land measuring 32.76 acres forming part of all piece of freehold known as lot PT 5058, Mukim of Setapak, Daerah Gombak comprised in Hakmilik HSD 17930.

E We refer to our letter dated 19.7.2004 and have our client's instructions to kindly remind you which we now do to forward to our client or to us as solicitors for our client the sum of RM777,000.00 being repayment of the friendly loan given by our client to your client which sum is to come from the balance purchase price received by your client for in respect of sale of his portion of the above land to Jurus Positif Sdn Berhad....

[30] This letter is copied to Kam Seng Realty Sdn Bhd.

G [31] It is to be observed that the letters all refer to a friendly loan of RM777,000 not RM720,000. In this connection, the plaintiff also introduces in evidence another letter written under the hand of the first defendant and dated 10 January 2003. This particular letter, tendered in evidence as exh P15, reads:

H Kam Seng Realty's Sdn Berhad
23 Jalan Melayu
50100 Kuala Lumpur
I Dear Sir,
Re: Personal Loan RM50,000.00.
I thank you for granting my request for a personal loan of RM 50,000.00, Ringgit Malaysia: 50,000 only) which I hereby acknowledge receipt.

I shall repay a total sum of RM50,000.00 to you upon successful completion of my services as per your appointment letter to me dated June 11, 2002 and any subsequent extensions. Should the services to be rendered by me is deemed incomplete or unsuccessful, the total loan amount shall immediately become due to you and payable by me.

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Yours faithfully,

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(signed)

Dato' William FY Tai

The defendant's arguments on the evidence in relation to 'arrangement'

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[32] The defendant's evidence in support of the existence of the arrangement is almost exclusively verbal. Aside from the cheque made payable to Malaysia Steel Works, there is no documentary evidence to indicate there was such an arrangement as pleaded by the first defendant. The first defendant, however, attacks the credibility of the plaintiff's witnesses, in particular PW2 who has said in his evidence that he was not connected with Malaysia Steel Works. The first defendant introduces evidence to show such a connection and establish that Malaysia Steel Works is in law 'a connected person' to PW2. The evidence discloses that Dato' Tai E King's brothers were directors of the company and his son was the CEO of Malaysia Steel Works at the time the payment of RM420,000 was made pursuant to the arrangement. Counsel for the first defendant states in his submission:

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It is evident that Dato' Tai E King and the Plaintiff are closely connected with Malaysia Steel Works KL Sdn Berhad and their denial is an untruthful attempt to rebut the arrangement between parties at the material time.

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Moreover the Plaintiff's lawyer Maurice Scully had testified that he acted to companies in which Dato' Tai E King is actively involved including Malaysia Steel Works KL Sdn Berhad and Soon Seng Company Sdn Berhad the latter being the shareholders/holding company of the former. Maurice Scully's evidence was never challenged by the Plaintiff.

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DW 1 and DW 2 to have both not been truthful in regard to Dato' Tai eking and/or the Plaintiff's association with Malaysia Steel Works KLs and as such their testimony that they have nothing to do with Malaysia Steel Works KL Sdn Berhad and that they did not request the 1st Defendant pay the RM420,000.00 to Malaysia Steel Works KL Sdn Berhad cannot be accepted.

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[33] Counsel argued there was payment made to Malaysia Steel Works but there was no receipt. The plaintiff and the plaintiff's chairman (DW2) could have very easily shown the purpose of the payment to Malaysia Steel Works, but did not.

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[34] I have earlier addressed the relevance of s 103 of the Evidence Act in this

A connection. On the law, the burden to establish the particular fact of an arrangement made between the parties must lie on the first defendant. It is incumbent on the first defendant to discharge the evidential burden at least, and it is only in the event that the evidential burden is discharged that it can be said to have shifted to the plaintiff. I do not believe the first defendant has in

B this connection moved beyond a bare assertion on oral testimony. The first defendant cannot shift the evidential burden this way merely to argue that the plaintiff and the plaintiff's witness could very easily prove the purpose for the payment of the RM420,000 allegedly made to Malaysia Steel Works from the 'friendly loan' granted to the first defendant. The first defendant himself could

C have very easily subpoenaed a relevant person from Malaysia Steel Works to confirm the fact of payment and the purpose. Mr Balasingam argues in his reply submission that the first defendant could have also produced the cheque butt which could have established the purpose for the payment, but this was not done. As such, the adverse inference under s 114(g) of the Evidence Act should apply against the first defendant. There is some force and validity in this

D argument. The probabilities of the first defendant's argument on this issue of arrangement have also to be tested against the entirety of the evidence led. When tested against the available contemporaneous documentary evidence, I find the first defendant's version of the facts improbable. Why would a letter be

E written by him and his solicitor refer to a friendly loan expressly, if not for the fact that the friendly loan was granted to him upon his request? The first defendant has not supplied a convincing answer to this. Furthermore, there is documentary evidence to support the plaintiff's contention that actually a total sum of RM777,000 had been granted to the first defendant as advances.

F Exhibit P15, which I have mentioned above, proves this point; in the latter which is exh P15, the first defendant had expressly knowledge that a friendly loan of RM50,000 had been granted to him earlier. As for his argument that part of the RM770,000 constitutes his commission for successfully arranging for the sale and purchase of the un-acquired land, there is again no

G documentary support for this assertion. The only documentary evidence available is in the form of the service agreement dated 18 June 2003, which appears from pp 4–8 of bundle B (exh P2), and has to do with the first defendant's negotiation with the relevant authorities for the return of the un-acquired land. The consideration for the services rendered is very clearly

H spelt out in cl 1 of the service agreement, which reads:

I 1. In consideration of the services to be rendered by Thai in negotiating with the relevant authorities, KS Realty hereby agrees to transfer thereby a portion of the un-acquired land measuring 6.5 acres (hereinafter referred to as 'the said portion'), Subject Always to the un-acquired land being duly registered in favour of KS Realty and the subdivision of the un-acquired land has been duly completed by KS Realty.

[35] There is absolutely no mention of any other consideration, such as a monetary commission for services rendered.

[36] As for the alleged commission for obtaining a higher compensation for the acquired land, this issue is not immediately relevant to this present case, and since it is the subject matter of another civil suit in the courts, it will not be appropriate for me to comment on it, let alone to come to some findings of fact on this issue.

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[37] Hence, bearing in mind the issue of burden of proof, in general as well as particular, and the probabilities of the case advanced by each party, I can only conclude on the evidence presented the plaintiff has succeeded in proving its case on a balance of probabilities. On the other hand, the probabilities of an arrangement existing between the parties in the sense advanced by the first defendant can only be described as not extending beyond bare oral averments without the necessary documentary support. The fact that Malaysia Steel Works is a connected person in law cannot, and does not, tilt the evidential burden in favour of the first defendant, without further credible evidence.

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[38] The remaining issue to consider is of course whether the claim is statute barred.

THE ISSUE OF LIMITATION

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[39] The issue on limitation revolves around the question whether there were agreed terms of repayment, and if they were no such terms, when the limitation period can be said to run. The minutes of the board of directors meeting referred to earlier, merely refers to 'upon such terms and conditions mutually agreed by both parties thereat'. What these terms and conditions are cannot be gathered from the minutes themselves. Mr Jayakumar, counsel for the first defendant, refers to the common law rule that stipulates where there is no fixed date for repayment of the loan, the period of limitation runs from the earliest time at which an action could be brought'. See the observations of the Federal Court in *Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 and the reference to the English case of *Reeves v Butcher* [1891] 2 QB 509, where Lindley LJ was quoted as stating, 'the right to bring an action may arise on ... this event; but it has always been held that the statute runs from the earliest time at which an action could be brought.' See also the decision of the Singapore High Court in *Tay Ivy v Tay Joyce* [1992] 1 SLR 893 when it is stated that in the case of a loan simpliciter, as a loan repayable from the date of advance, limitation runs from the date of advance. On the evidence, as seen earlier, the date of advance of this particular friendly loan is 14 January 2004. The writ is issued on 24 March 2010. With the limitation period of six years stipulated under s 6(1) of our Limitation Act 1953, if time is taken to run from the date of the advance, the plaintiff's claim will be time-barred. The issue then turns very much on whether they were in fact terms of repayment agreed between the parties. This again is a matter of evidence. In this regard, I agree

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- A** with the argument advanced by plaintiff's counsel, Mr Balasingam, that the agreed term of repayment was for the first respondent to repay the loan from the proceeds of the sale of the un-acquired land, more specifically from his portion of the un-acquired land. In this regard, the first defendant's own letter to his solicitors (exh P2, p 14) expressly refers to his agreed term of repayment.
- B** By the sale and purchase agreement dated 14 January 2004 (p 21 of exh P1), the purchase price was payable by tranches and the last tranche was to be by June 2004. There is no denial by any of the parties that the purchase price was paid. Hence, the repayment of the friendly interest-free loan granted by the plaintiff to the first defendant should have been effected by June 2004. Since it
- C** has not been so satisfied, the plaintiff is entitled to claim against the first defendant for repayment. Limitation would have barred the claim had the suit been filed after June 2010. The writ of summons is filed on 24 March 2010; the suit has therefore been instituted within the six years and as such is not statute-barred.

D CONCLUSION

- E** [40] For the reasons stated above, I am therefore allowing the plaintiff's claim against the first respondent as prayed in the amended statement of claim, para 8(a) and (b), with costs to be taxed, unless agreed.

Claim allowed with costs to be taxed, unless agreed.

- F** Reported by Ashok Kumar

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