Tanaka Lumber Pte Ltd *v* Datuk Haji Mohammad Tufail bin Mahmud and another (Dato Ting Check Sii and another, third parties)
[2015] SGHC 276

Case Number : Suit No 783 of 2012

Decision Date : 23 October 2015

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Goh Phai Cheng SC (Goh Phai Cheng LLC) for the plaintiff; Harry Elias SC, Andy Lem Jit Min, Sharmini Sharon Selvaratnam, Lee Hui Min and Lin Chunlong (Harry Elias Partnership LLP) for the first defendant; Khor Wee Siong and Tay Yu Shan (Khor Thiam Beng & Partners) for the second defendant/first third party; Ling Hoe Kieh @ Ling Chun Kai (in person) for the second third party.

Parties : Tanaka Lumber Pte Ltd — (1)Datuk Haji Mohammad Tufail bin Mahmud — (2)Dato Ting Check Sii — (1)Dato Ting Check Sii — (2)Ling Hoe Kieh @ Ling Chun Kai

Trusts – Trustees – Joint trustees

Trusts – Breach of trust

Tort – Conspiracy

23 October 2015

Edmund Leow JC:

Introduction

1 Tanaka Lumber Pte Ltd ("Tanaka") was incorporated in Singapore in February 1987. Its main business was in the wholesale trading of timber and timber-related products. Datuk Haji Mohammad Tufail bin Mahmud ("Datuk Tufail") and Dato Ting Check Sii ("Dato Ting") are two of its three shareholders. They enjoyed a successful business relationship in Malaysia prior to setting up Tanaka. Mr Ling Hoe Kieh ("Mr Ling"), who is resident in Singapore, is the third shareholder, and all three men are also directors of Tanaka.

2 Between 27 May 1992 and 26 March 1996, monies amounting to about US$8,259,549.73 ("the Transferred Sum") were transferred from Tanaka's HSBC current account 250-XXXXXX-XXX ("the Current Account") to the HSBC account 260-XXXXXX-XXX held jointly by Datuk Tufail and Dato Ting ("the Joint Account"). The question to be answered in this case was whether the Transferred Sum was held on trust by Datuk Tufail and Dato Ting for the purposes of Tanaka's investments in Malaysia.

3 I found the evidence adduced by both sides to be unreliable and lacking in credibility in material respects. As neither side had discharged its burden of proof, I dismissed Tanaka's claim as well as Datuk Tufail's counterclaim and third-party claim. The parties have since appealed my decision and I now give the grounds for my decision.

Background facts

4 Datuk Tufail is the brother of the former Chief Minister of Sarawak. It was undisputed that Datuk Tufail and Dato Ting first became acquainted sometime in 1974 at a timber moulding factory owned by Ding Brothers Sdn Bhd ("Ding Brothers") in Sarawak, Malaysia. Datuk Tufail was a director of Ding Brothers and Dato Ting was a foreman of the same, holding the position of "section head". Datuk Tufail states that as they were around the same age, they were able to relate to each other and quickly formed a friendship. Datuk Tufail also introduced Dato Ting to his younger brother, the late Datuk Mohammad Arip bin Mahmud ("Datuk Arip") and the three of them became close friends.

5 Subsequently, Dato Ting left the employ of Ding Brothers, and eventually incorporated a transportation business known as Binta Corporation Sdn Bhd with Datuk Tufail and Datuk Arip. Datuk Tufail and Dato Ting began to venture into a variety of businesses from then on, from sawmilling to logging to plywood manufacturing and to property development. Their business relationship in Malaysia was extremely successful and they incorporated at least 16 companies in this period. Sometimes Datuk Arip would have shares in the companies, but oftentimes he would not. Datuk Tufail and Dato Ting's close relationship was also evidenced by the fact that Datuk Tufail even sent Dato Ting to Harvard University for further studies.

6 Sanyan Sdn Bhd ("SSB") was one of these companies incorporated in 1977 and as of February 1982, Datuk Tufail, Dato Ting and Datuk Arip were the shareholders and directors of SSB. SSB was licensed to export timber logs out of Sarawak, and sometime in 1986, Datuk Tufail, Dato Ting and Mr Ling decided to incorporate Tanaka in Singapore for the purposes of timber trading. Mr Ling is Dato Ting's brother-in-law, a permanent resident of Singapore, with some experience in timber processing in Singapore. Mr Ling testified that he was very interested in participating in the company because of Datuk Tufail's political connections through his brother, and because Datuk Tufail had promised to introduce various contacts in Sarawak to them which would benefit the proposed company. Tanaka was thus used to purchase timber from SSB and sell the timber onto foreign purchasers. Datuk Tufail claimed that Tanaka was set up for the purpose of limiting SSB's tax exposure in Malaysia, and was thus a company with no real operations of its own, but Dato Ting denied this.

7 The relationship between the parties soured sometime in 2003. It was undisputed that in mid-2003 Datuk Tufail took over the role of managing director of Sanyan Holdings Sdn Bhd and Sanyan Wood Industries Sdn Bhd ("SWI") from Dato Ting. Datuk Tufail explained that it was because Dato Ting wished to devote more time to his political career and had decided to resign from the companies. At that material time, Dato Ting was the State Assemblyman for the State Constituency of Meradong. But Dato Ting disputed this, and claimed that he did not voluntarily resign from the companies, but in fact was forced to resign from his position as managing director. From his account, it appeared that Datuk Tufail had orchestrated the whole affair and isolated the staff from Dato Ting even after removing him from the position of managing director, and did not give him any work to perform in his new capacities, whether as deputy executive chairman or chairman of the various companies. As the relationship between the parties further deteriorated, Dato Ting commenced various lawsuits in Malaysia to seek reinstatement of his position as the managing director of the companies. The lawsuits commenced in the Malaysian courts ranged from matters disputing ownership, management and/or control of these companies, to proceedings seeking the dissolution or winding-up of the companies. These lawsuits were ultimately unsuccessful in the High Court of Sabah and Sarawak as well as the Court of Appeal in Malaysia.

8 Now Tanaka has commenced this present action against both Datuk Tufail and Dato Ting. Because Datuk Tufail is also the younger brother of the former Chief Minister of the State of Sarawak, Malaysia, allusions to the state of politics and corruption in Sarawak did surface during the course of the trial, but these did not concern the court. Instead, I proceeded by focussing only on the evidence that was relevant to the claims.

Parties' claims

9 Tanaka claimed that Datuk Tufail and Dato Ting were trustees of the Transferred Sum for the specific purpose of investing the said sum in two Malaysian companies – SWI and Pelita Towerview Sdn Bhd ("PT"). To that end, Tanaka sought various prayers, including declarations that Datuk Tufail and Dato Ting held the Transferred Sum on trust and that they owed Tanaka fiduciary duties. Tanaka further claimed that Datuk Tufail and Dato Ting had been unjustly enriched and had breached their statutory duties as directors under the Companies Act (Cap 50, 2006 Rev Ed).

10 Dato Ting admitted to being a trustee of the Transferred Sum. But Datuk Tufail denied this, and went further to contend that the Transferred Sum belonged to him and Dato Ting, and/or SSB which had invoiced Tanaka for the timber logs that were bound for foreign purchasers. Datuk Tufail also pleaded in his counterclaim that Tanaka, Dato Ting and/or Mr Ling had engaged in a conspiracy against him and had acted in bad faith or unconscionably in causing Tanaka to commence this action against him.

Issues

11 The main issues for determination in this case were:

(a) whether Datuk Tufail and Dato Ting held the sum of about US$8.26m on trust for Tanaka to carry out investments in SWI and PT pursuant to oral agreements;

(b) whether Datuk Tufail and Dato Ting had breached their fiduciary duties owed to Tanaka; and

(c) whether Tanaka, Dato Ting and Mr Ling had committed an actionable tort of conspiracy against Datuk Tufail in commencing this action.

12 As a preliminary comment, it was obvious from the proceedings that while both Datuk Tufail and Dato Ting were defendants, and Mr Ling was Tanaka's representative, Tanaka was in substance, Dato Ting's mouthpiece. Ultimately, the dispute was between Dato Ting and Datuk Tufail.

The alleged oral agreements

13 Tanaka relied on two alleged oral shareholder agreements in 1993 and 1994 ("the Oral Agreements") to plead that the monies in the Joint Account were Tanaka's investment in SWI through Goodmatch Sdn Bhd ("Goodmatch"), and PT through Sanyan Holdings Sdn Bhd (collectively referred to as the "Malaysian Companies"). The Oral Agreements were allegedly for Dato Ting and Datuk Tufail to invest Tanaka's money on its behalf for a period of 18 and 15 years respectively.

Tanaka's reliance on the written directors' resolutions

14 It is pertinent to note that this was not Tanaka's original case. Tanaka's case was originally premised on directors' resolutions that were purportedly made in 1993 and 1994. In its statement of claim (first amendment) filed on 26 August 2013, Tanaka had pleaded that pursuant to a directors' resolution dated 3 January 1993 ("the 1993 Directors' Resolution") it was resolved that Tanaka would invest RM10–RM15m in Goodmatch, a company incorporated in Malaysia to operate plywood manufacturing in Sibu, Sarawak, and that Dato Ting and Datuk Tufail would return the said investment in 18 years (*ie*, January 2011). The investment would be in their names due to political sensitivities between Malaysia and Singapore. It was also alleged that pursuant to the 1993 Directors' Resolution,

Goodmatch was to enter into a joint venture with two Japanese companies through SWI, which would apply for pioneer status and if successful in doing so, would enjoy tax exemption for a period of 10 to 15 years (this duration was ostensibly why the 18-year timeframe was chosen).

15 In addition, Tanaka asserted that pursuant to a directors' resolution dated 15 December 1994 ("the 1994 Directors' Resolution"), it was resolved that Tanaka would invest a sum of RM12–RM15m in PT (previously known as Towerview Sdn Bhd), for the construction of an 18-storey building in Sibu, Sarawak. But due to political sensitivities, Tanaka's investment would once more be placed under the names of Dato Ting and Datuk Tufail for a period of 15 years commencing on January 1995 (*ie*, expiring on January 2010). It was also resolved that Datuk Tufail and Dato Ting would be *personally* liable for the repayment of the construction loan as joint guarantors and that Tanaka would not be responsible for any liabilities arising from the construction of the said building.

16 But Tanaka never produced the original documents containing the purported directors' resolutions to court and merely produced copies of these directors' resolutions. Dr Steven James Strach ("Dr Strach"), a senior handwriting and forensic document examiner with Forensic Document Services Pty Ltd in Australia examined, *inter alia*, the copies of the 1993 and 1994 Directors' Resolutions and filed an AEIC dated 8 October 2014, which provided strong support that these copies were in fact fabricated evidence. He found that the signatures of Datuk Arip and Mr Ling in the copy of the 1993 Directors' Resolution were most probably reproduced, and Mr Ling's signature block was observed to be out of alignment with the rest of the text. He also found that the signatures of Mr Ling, Datuk Arip, and Dato Ting had been reproduced onto the copy of the 1994 Directors' Resolution. Thus, after examining the 1993 and 1994 Directors' Resolutions coupled with other directors' resolutions given by Tanaka to the court, Dr Strach summarised his findings by stating that the "signature images have been determined to have been transposed from document to document on numerous occasions".

17 Tanaka, on the other hand, had intended to field two forensic document experts to contest Dr Strach's evidence, but they eventually did not take part in the case. At the pre-trial conference on 11 November 2014, Tanaka had indicated that it would be calling two forensic document experts, namely, Ms Lee Gek Kwee ("Ms Lee") and Mr Pang Chan Kok William ("Mr Pang"). Subsequently, Ms Lee withdrew as an expert prior to filing an expert report. Mr Pang did file an expert report on 2 December 2014, but which quite tellingly, merely reviewed and commented on Dr Strach's report and did not include an examination of the 1993 and 1994 Directors' Resolutions or enclose any findings on that basis. Moreover, on 29 December 2014, just two weeks prior to the commencement of trial, Mr Pang was withdrawn as a witness. At the end of the day, neither of Tanaka's experts gave evidence in support of the authenticity of the purported directors' resolutions.

18 After such evidence of fabrication was presented to the court, Tanaka changed the main plank of their case and completely abandoned reliance on these purported written resolutions. It applied to amend its statement of claim on 12 December 2014, such that its claim was no longer based on the written directors' resolutions, but on oral shareholder agreements that were purportedly made around the same time as the resolutions. The amendments came more than two years after Tanaka instituted its claim. At trial, Mr Ling, Tanaka's representative, claimed that after Tanaka changed its legal representation, its new counsel were of the view that the verbal agreements were "simpler and more time-saving than the directors' resolutions" and more convenient. I was of the view that there was no merit to this explanation, especially when there was a complete overlap between the terms of the Oral Agreements and the terms of the 1993 and 1994 Directors' Resolutions. The manner in which Tanaka changed its story after Dr Strach filed his report demonstrated clearly to me that their story lacks credibility. I found Dr Strach's evidence to be objective and reliable, and found no reason to reject his evidence especially in light of the fact that there was no expert evidence to the contrary. I

thus found that the copies of the directors' resolutions given to the court in support of Tanaka's claim had been fabricated.

Tanaka's evidence on the Oral Agreements

19 I then examined the Oral Agreements which contained identical terms to the terms previously asserted under the written resolutions. The surrounding circumstances of the alleged meeting on or about 3 January 1993 were that Mr Ling, Dato Ting, and the remaining director of Tanaka at that time (Datuk Arip) met at Mr Ling's residence, but Datuk Tufail was absent from this alleged meeting. The agreement was to invest Tanaka's funds in Goodmatch, which operated a plywood manufacturing facility in Sibu, Sarawak, and that the investments would be returned in 18 years, which were identical to the terms asserted under the written resolutions (see [14] above). It was further claimed that Dato Ting subsequently informed Datuk Tufail about the proposed investments sometime in late January to early February 1993, and Datuk Tufail agreed to these investments. The second oral agreement allegedly took place in Sibu between Datuk Tufail and Dato Ting sometime in late November or early December 1994. The discussion was to use Tanaka's funds to invest in PT's building project in Sarawak and an agreement was reached on the same terms as asserted under the written resolutions (see [15] above)). Dato Ting then met with Mr Ling to discuss the investment plans which Mr Ling then agreed to.

20 But while Mr Ling was involved in the Oral Agreements, and came to court as Tanaka's representative, the quality of his evidence was "far from satisfactory", as Tanaka itself conceded. In his recollection of the events, he appeared tentative, ignorant, and at best, forgetful on the stand. When asked about the alleged Oral Agreements, Mr Ling merely stated the following without further elaboration on the surrounding circumstances:

> Q: You had a lot of directors' resolutions, and in your directors' resolutions you had all the plans of investments, you had the time limit of investments, you had the type of investments. My question is: were the directors' resolutions setting out the trust that my client and Dato Ting had to perform for Tanaka?
>
> A: I was not the only one who entrusted them, because there were three shareholders in Tanaka. I was just one of the three shareholders. So there were three shareholders and there were three directors, so it was – the three of us, Tanaka, that entrusted this task to them.
>
> Q: You're sitting there as the representative of Tanaka now, are you not? "Yes" or "no"?
>
> A: Yes.
>
> Q: I'm asking you, as Tanaka's representative, are the terms of the trust in the directors' resolution?
>
> A: I can't remember well, because I'm already very old, and this was an agreement that took place 20 to 30 years ago, so I can't really recall. But what I recall very clearly is that there were discussions when we were having chats and having tea together, and the agreements were as such.

Even if Mr Ling was unable to recall certain details partly due to his age, it was noteworthy that he was unable to answer even the most basic questions about a trust, *eg*, whether there was a written trust document to show that Dato Ting and Datuk Tufail hold the monies on trust for Tanaka.

Q: Can I put this to you, that the trust deed, the trust instrument, the trust arrangements must have been minuted, must have been docketed, must have been spelt out somewhere in writing.

A: I can't be sure.

…

Q: Mr Ling, do you want to answer my question or don't you want to answer? Is a trust document important – at any time? If you give me money to hold on trust, would a document evidencing that be important?

A: It is important.

Q: Thank you very much. It took us half an hour to establish that. Does one exist in this case which says that my client and Dato Ting hold the monies, whatever monies, in trust? Mr Ling, answer my question, please. Does a document evidencing the trust exist in Tanaka's records? "Yes" or "no".

A: I do not know.

He also claimed that he did not have access to the company records and could not testify as to the existence of numerous documents, even though he was a director and shareholder of Tanaka.

Q: Have you access to Tanaka's records?

A: I can't.

Q: You have no access?

A: I can't access them.

Q: I'm sorry, I don't know his answer.

A: I can't access the records.

Q: He can't access it? He's forbidden?

A: Your Honour, I don't know, because, one I have signed the documents, Dato Ting would take them back for the other directors to sign. And then, as for who was holding on to the documents, I have no idea. But, based on my own understanding, I think that it should be Datuk Tufail, who is the 1st defendant, who is holding on to them.

…

Q: Where are the records of Tanaka kept?

A: Tanaka uses my office. What records are you referring to?

Q: Whatever records the company needs to keep.

A: Can you give an example?

Q: You are a director of a company, you are a shareholder of the company, you've been in business for umpteen years, and you do not know what the company needs to keep as its documents. Is that a true answer, Mr Ling, or you are playing your one-on-one game with me again?

A: Your Honour, I had a question earlier on. My question was what kind of records are you referring to. So, for me, perhaps the board of directors meetings and then perhaps the documents – the documents are evidencing the investments in Sarawak, or other documents. Are you referring to this?

And, as for the businesses that went through Singapore, that means those where materials were purchased and then exported to other countries, for these businesses there are records in the company, but for documents that I signed at the board of directors' meetings, et cetera, those were taken away after I signed them.

Q: I'm looking at one document, the trust deed. Does it exist?

A: No, it's not with me.

Q: Does it exist? Have you seen it?

A: For this, you will have to inquire with the other directors.

…

Q: Sorry, Madam Interpreter…Now I'm looking at the trust deed in writing: has he seen one, and, if so, when?

A: I do not know. I can't remember.

It was also noteworthy that he was unaware of the documents given in discovery and had not bothered to read any of the AEICs of the first defendant's witnesses or even the defence in the pleadings. It was obvious from his ignorance of the case that he was not the one running Tanaka's case, and it bears repetition that Tanaka throughout the course of proceedings has shown itself to be Dato Ting's mouthpiece even though Dato Ting is nominally a defendant.

Q: I'm talking about written documents. So my question is: have you ever cited such a document in all your dealings with Tanaka? "Yes" or "no"?

A: I can't recall. This is because I'm not the only director in the company. You can also ask the other directors.

…

Q: Okay. Let me put this case to you. You've made discovery of all the documents that Tanaka has in its possession. Not a single one of those documents show a trust deed in writing. Do you agree or disagree?

A: Your Honour, I do not know. This is because only part of the documents were explained to

me. Not all the documents were explained to me, so I don't know.

…

Ct: Let me try to clarify. Counsel is not asking you whether you agree with Datuk Tufail's arguments. He's asking you whether you know what Datuk Tufail said – whether you know or don't know.

A: Now I know.

Ct: But not before today?

A: I know – I know nothing before today.

…

Q: Is this the very first time – again I repeat my question – you have come to the knowledge of what Datuk Tufail says? Today is the very first time?

A: Yes.

Q: Have you seen the defence filed by my clients two years ago, in February 2013? Two years ago.

A: No.

…

Q: Have you ever read my client's defence?

A: No.

…

Q: Has anybody explained my client's defence to you? …

A: No.

21 In fact, both Dato Ting (as the driving force behind Tanaka commencing this action) and Mr Ling did not show themselves to be credible witnesses, and were often evasive and inconsistent in their testimony. Not only had they previously relied on the fabricated directors' resolutions in their AEICs dated October 2014, their claims often contradicted each other. For example, to support his argument that Tanaka was earning huge profits such that it was able to make investments of more than US$8m in the Malaysian Companies, Dato Ting asserted at trial that all the documents that Tanaka had provided to its auditors, which stated that Tanaka had made meagre profits, were false. Essentially, he was claiming that he had deceived the Singapore accountants by furnishing them with allegedly false or fictitious documents for the purposes of under-declaring Tanaka's allegedly true profits, and consequently the evasion of Singapore tax. But this contradicted the evidence of Mr Ling, who had testified that the accounts presented to the auditors were real and genuine. Of course, it is certainly possible that Mr Ling had also been deceived, like the accountants. But in the light of the inconsistencies in the testimonies of Dato Ting and Mr Ling, as a matter of prudence, I scrutinised the rest of the evidence with some care.

22 After examining the rest of the evidence, I came to the conclusion that there was a paucity of contemporaneous documentary evidence to support Tanaka's assertion of any oral agreement. This gap in the evidence was made all the more apparent in the light of the size of the purported investments of some more than US$8m. It was unrealistic for mere oral agreements to prescribe that investments would be for a period of 15 or 18 years, and it beggared belief that terms concerning long-term investments and that were worth more than US$8m would not be reduced to writing. As Datuk Tufail's counsel pointed out, even if Tanaka did not wish to draw up a formal contract or trust deed, Mr Ling and Dato Ting had ample opportunities over the course of more than two decades to put into writing the fact that the oral agreements had been made. Though Tanaka relied on four letters allegedly sent from Dato Ting to Datuk Tufail between 2005 to 2010 which made reference to the purported trusts, these letters were sent more than a decade after the formation of the alleged Oral Agreements, and after the breakdown in the relationship between the parties. These letters, which Datuk Tufail denied receiving, struck me as inherently self-serving and I thus placed little weight on them.

23 There was also no evidence given to establish the specific, commercially complex terms of the purported Oral Agreements and the manner in which the investments would be monitored or accounted for. These were not agreements that experienced businessmen such as Datuk Tufail and Dato Ting would have entered into, especially when the 1994 Oral Agreement prescribed that they would be personal guarantors of a banking loan amounting to RM60m. I also attached little weight to the evidence of Mr Ling who said that he had set the wheels in motion to reclaim Tanaka's money in 2011 (as allegedly agreed upon in the Oral Agreements) given the lack of evidence to support such an assertion. I thus found that Tanaka's claim as to the existence of these Oral Agreements was a belated assertion and a mere afterthought after its claim based on the written resolutions fell apart. Given that all we had in evidence were bare assertions made by Tanaka as to the existence of the Oral Agreements, I therefore rejected Tanaka's claim in this regard.

The existence of a trust apart from the Oral Agreements

24 Tanaka submitted that even if the Oral Agreements did not exist, Datuk Tufail and Dato Ting nevertheless held the money that was transferred to the Joint Account as trustees and had breached various fiduciary duties owed to the plaintiff, *inter alia*, to act in good faith, to advance Tanaka's interest, and to render a true and full account of the funds in the Joint Account upon request. Though it was able to elaborate at length on the details of such alleged "breaches", it had much less to say as to the existence of the trust in the first place.

25 In the main, Tanaka submitted that it had paid its money into the Joint Account which required both Datuk Tufail and Dato Ting's signatures for withdrawals. The whole purpose of this arrangement was to ensure that both directors approved of the withdrawals from the Joint Account and the purposes for which the money was applied to. This, it alleged, indicated that a trust was created and that Tanaka was the beneficial owner of the monies in the Joint Account. Moreover, the opening of a separate account in joint names and the fact that Tanaka's money was transferred with the agreement of all the shareholders evidenced an intention to create a trust based on the requirement to keep the money separate. But these arguments did not go toward showing the intention behind the transfer of these monies. If the Oral Agreements did not exist, there was a factual vacuum as to the actual purpose of the transfer. Without knowing the purpose of the transfer, it was impossible to tell if a trust had been created and flowing from that, whether there was a breach of trust. It is for the person asserting a trust to prove that a trust has been created. But the evidence touching on Tanaka's arguments on the existence and breach of a trust were incomplete and contradictory. Merely because Datuk Tufail and Dato Ting did not account to Tanaka for the Transferred Sum would

not necessarily indicate that they were trustees in breach of trust, but might indicate what was more apparent, that they were in fact not trustees of Tanaka for the Transferred Sum.

26 I thus found that Tanaka had not discharged its legal burden of proving that the money was transferred in circumstances that imported any form of trust such that it retained beneficial ownership of the money even after it was transferred to the Joint Account. There was also simply no credible evidence to substantiate its claim concerning the alleged Oral Agreements at all material times.

Whether Datuk Tufail and Dato Ting breached fiduciary duties

27 Tanaka submitted that even if the Oral Agreements do not exist and no trust was created when its money was transferred to the Joint Account, the defendants breached their fiduciary duties to Tanaka when transferring the monies from Tanaka's Current Account to the Joint Account. To this end, Tanaka submitted that the transfer was unauthorised and there would be no reasonable ground for the defendants to believe that in transferring the monies to the Joint Account, they were acting honestly in the interest of Tanaka. Thus, Tanaka alleged that the defendants would be liable for knowing receipt. The breaches of fiduciary duty, which Datuk Tufail and Dato Ting owed as Tanaka's directors, rendered them accountable as constructive trustees of Tanaka's funds. Alternatively, it was argued that the defendants had breached their duties under s 157 of the Companies Act for not acting honestly and using reasonable diligence in the discharge of their duties and Tanaka was entitled to an account of profit under s 157(3)(*a*) of the said Act.

28 But the transfers took place by way of cheques and it was not disputed that Dato Ting and Datuk Tufail were authorised to sign cheques to draw down on Tanaka's Current Account (to the exclusion of Mr Ling). Mr Ling had also admitted at trial that in relation to the "issuing of cheques and project investments, that would come under the scope of the 1st and 2nd defendants'" purview pursuant to an agreement that "each person will play his part". There was every indication that Mr Ling was content to comply with Dato Ting's instructions at all material times in relation to the issuing of cheques and project investments, and no evidence to show that the transfers from Tanaka's Current Account to the Joint Account were unauthorised.

29 In any event, there was some evidence to show that Mr Ling had signed the payment vouchers which reflected the transfer of the Transferred Sum to the Joint Account and also had access to Tanaka's bank statements as a director and shareholder of Tanaka. Further, it is not necessary to have a proper written shareholders' resolution on the ratification or authorisation of such transfers if all the shareholders with the right to attend and vote at a general meeting had assented to this matter which a general meeting of the company could carry into effect. The assent would thus be as binding as a resolution in a general meeting (*Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 at [183]). It was therefore clear to me that the defendants had not breached their fiduciary duties in transferring the monies because all the shareholders of Tanaka had unanimously assented to the transfer and retention of the Transferred Sum by Dato Ting and Datuk Tufail through their Joint Account.

30 Tanaka's argument also ran into the same problem as the earlier arguments on trust. Shorn of the Oral Agreements, Tanaka was unable to show any other purpose for the transfer that would translate to a breach of fiduciary duties. There was no evidence that any restrictions or conditions were placed at the time of the transfer of the monies and there was no monitoring of the monies once it was transferred. In fact, had there been an express trust or breach of fiduciary duties, it was hard to believe that Tanaka did not take action for so many years. The alleged Oral Agreements prescribed that the investments would be for a period of 18 and 15 years respectively, but when these agreements were taken out of the equation, there was no reason for Tanaka to sit on its rights for so

long unless it had relinquished ownership of the money that was transferred to the Joint Account.

31 Further, the plaintiff's submissions on knowing receipt were a non-starter as the cause of action in knowing receipt is directed against a third party who knowingly receives trust property as a result of the trustee's breach of fiduciary duties. In such a situation, while the trustee himself is liable for the loss caused by his breach of trust, a third party who receives the trust property may also be treated as jointly responsible for the wrong and consequent loss if there was such a want of probity on his part as to make it unconscionable for him to retain the trust property (*Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 at [44]). As Tanaka has alleged that Datuk Tufail and Dato Ting acted in breach of their fiduciary duties to Tanaka by using the monies in the Joint Account for their own purposes, even if Tanaka's case was established, which I did not accept, it would simply mean that they had primary liability to account to Tanaka for any loss suffered and not that they were liable for knowing receipt.

32 In my view, there was also no reason why the transfer of monies to the defendants was unjust. Tanaka had failed to plead any specific unjust factors recognised in law which would give rise to a claim in unjust enrichment, and since the transfer of the monies had occurred about 20 years ago, the monies have since been used by the defendants for their purposes, and it is likely that the defence of change of positions would apply. I thus dismissed Tanaka's claim against the defendants.

Datuk Tufail's alleged ownership of the monies in Tanaka

33 As I found that Tanaka had failed to discharge its burden of proof to prove that a trust had been created over the Transferred Sum, *ie*, its case could not get off the ground, it was unnecessary for me to consider whether the defence that Datuk Tufail mounted in response to Tanaka's claim was valid. However, as much was made by Datuk Tufail about the purpose of Tanaka's incorporation and the alleged ownership of Tanaka's monies, for completeness, I will address Datuk Tufail's argument and briefly outline my reasons for dismissing it.

34 Datuk Tufail claimed that the monies in Tanaka's account did not belong to Tanaka, and "never belonged to [Tanaka]", but instead belonged to Dato Ting, Datuk Tufail and/or SSB. SSB, as mentioned above at [6], was a licensed exporter of timber logs and had been incorporated in Sarawak in September 1977. Dato Ting and Datuk Tufail were the directors and shareholders of SSB. In support of this argument, counsel for Datuk Tufail has outlined a transactional flow between SSB, Tanaka and foreign purchasers of timber. Datuk Tufail relied on this to allege that Tanaka's profits do not belong to Tanaka but are in fact debts owed to SSB as Tanaka is simply used as a vehicle by SSB to evade tax in Sarawak.

35 In this transactional flow, SSB negotiates the sale of timber with the foreign purchaser directly, but instead of SSB, Tanaka is the one to issue the invoice to the foreign purchaser for the same transaction, Hence, based on the invoices, SSB sells the timber to Tanaka and Tanaka resells the timber to the foreign purchaser and receives the corresponding payment from the foreign purchaser based on the full purchase price. But SSB would invoice Tanaka at a mere fraction of the full purchase price. Since Tanaka receives the payment from the foreign purchaser based on the higher selling price, it made a hefty profit margin from each transaction. The effect of such an arrangement was that SSB's income in Malaysia would drastically decrease and consequently, its Malaysian income tax liability would similarly decrease. Tanaka, on the other hand, based on this arrangement alone, would be making substantial profits. This would result in the unintended consequence that Tanaka would incur substantial tax liability in Singapore.

36 To ameliorate this unintended consequence in Singapore, the transactional flow included a

second arrangement. As part of this second arrangement, SSB appears to issue a second invoice to Tanaka for "additional charges" (collectively referred to as the "Second Invoices"), the purpose of which was to decrease Tanaka's declared income and consequently avoid Singapore tax for Tanaka. Ordinarily, the result of this arrangement would have been to shift the income tax liability back to SSB. At the end of the day, it is the same pool of income that is shared between Tanaka and SSB and whatever the chosen arrangement may be, the income would have to be recognised by one party or the other.

37 In fact, neither SSB nor Tanaka recognised this income, and neither paid tax on it. The Second Invoices were reflected as expenses by Tanaka, which reduced the income in its hands. But the Second Invoices were not reflected in SSB's audited accounts, and so the corresponding income was never recognised by SSB. This enabled SSB to under-declare its income in Sarawak when making tax declarations (based only on the first invoices issued), and simultaneously, enabled Tanaka to rely on both the first and second invoices purportedly reflecting payments out of Tanaka, to under-declare its income in Singapore as well. The Second Invoices were clearly designed to reduce Tanaka's profits. Since the accountants in Singapore knew about these invoices, they recorded these in Tanaka's accounts and consequently reflected a lower income which would be used for the purposes of tax declaration in Singapore. At the same time, no payment was ever made to SSB. In effect, the purpose of these Second Invoices was to deceive Tanaka's accountants into thinking that money was taken out pursuant to the Second Invoices.

38 At trial, Datuk Tufail's case had initially been one that was based on alleged ignorance, as he had maintained that he did not know about any of the details of the alleged tax avoidance scheme. He asserted that he was not involved in the business of SSB, and had not perused the invoices in the transactional flow until the court proceedings. In particular, he claimed that he was completely unaware of the Second Invoices which had been issued from SSB to Tanaka purportedly as "additional charges". He was thus unable to respond to Dato Ting's claim that these Second Invoices were false. It seemed altogether too convenient for Datuk Tufail to argue on the one hand that the purpose of setting up Tanaka was to avoid tax in Malaysia, but on the other hand to then argue that his knowledge of the affairs of the company was only "in principle", and which precluded knowledge of the details.

39 I also thought it unlikely that someone as astute and experienced as Datuk Tufail would have been unaware of such matters. It was not conceivable that Dato Ting would have done all this without the knowledge and assistance of Datuk Tufail, who did not strike me as being naïve in the ways of the world. More importantly, Datuk Tufail had to sign off on the audited accounts of Tanaka and SSB as their director and shareholder, and file tax returns in Malaysia and Singapore, and would have been aware of the profits which Tanaka was making because it was being charged based on the first invoice from SSB at a fraction of the purchase price. It was thus very likely that not only was he aware of this arrangement, Datuk Tufail must have agreed to it as well and known about the details of how Tanaka was being used as a means of tax evasion. Datuk Tufail on his part also claimed that the Second Invoices represented a debt which Tanaka owed to SSB, and pursuant to which Tanaka would pay monies out to Datuk Tufail, Dato Ting and local suppliers, on SSB's behalf.

40 Even though I had found that Datuk Tufail knew about the details of tax evasion, I was not of the view that this must mean that the monies in Tanaka belonged to Dato Ting and himself and/or SSB. This was because I did not accept Datuk Tufail's story as a complete and accurate reflection of the true state of affairs. According to Datuk Tufail, the Second Invoices were genuine in that they reflected a debt owed by Tanaka to SSB even though the description used, namely, "additional charges", may not have been accurate. But these Second Invoices were clearly fictitious for several reasons.

41 Firstly, the Second Invoices were purportedly "additional charges" for services, when it was obvious that no such service was performed. Mr Wong Suk Chiew ("Mr Wong"), a shipping clerk at SSB at the material time, testified in court that SSB did not provide any other goods or services to Tanaka besides what appeared to be the sale and export of logs. It was clear that the purpose for which these invoices were issued was clearly false. Secondly, an invoice is from one party to another, and if the Second Invoices truly reflected a debt owed to SSB which was legitimate, it should have been reflected in both parties' accounts. But these debts were not recorded in SSB's accounts, and moreover, Mr Wong, who was Datuk Tufail's own witness, testified that he was completely unaware of the Second Invoices and only came to know about them after the commencement of this suit. Thirdly, the purpose of these Second Invoices in the context of the transactional flow is clear – their role was merely to deceive Tanaka's accountants in Singapore so as to under-declare Tanaka's income in Singapore and evade Singapore tax.

42 Thus, I found that the first part of the transactional flow (from SSB to Tanaka to the foreign purchaser) was genuine, though manipulated (in terms of pricing), but the second part of the transactional flow (SSB's Second Invoices to Tanaka) was clearly fictitious as the invoices were used to deceive Tanaka's accountants. To complete the transactional flow, according to Dato Ting the profits that were not used to pay the Second Invoices purportedly issued by SSB were eventually paid out, but to parties who were not identified, and for reasons not explained.

43 Datuk Tufail also alleged that there was an oral agreement between Dato Ting and himself that any profits made by Tanaka would belong to Dato Ting and Datuk Tufail personally, as Tanaka was simply used as a vehicle to evade tax in Sarawak, and the other directors and shareholders of Tanaka were aware of this arrangement.

44 But there was an absence of any contemporaneous evidence to demonstrate the existence of an oral agreement which had been agreed to amongst the directors or shareholders of Tanaka, and which would bind the company to show that monies in Tanaka's account actually belonged to Datuk Tufail, Dato Ting and/or SSB. In contrast to Datuk Tufail's assertions in his AEIC that "at all material times, the directors and shareholders of the Plaintiff were aware that any funds held in [Tanaka's account] belonged" to himself and Dato Ting, Datuk Tufail admitted at trial that Mr Ling, the remaining shareholder of the Tanaka, was unaware of this agreement and hence could not be a party to the agreement. He also asserted that Datuk Arip came into the agreement "later" but was unable to pinpoint exactly when that happened.

45 In fact, the evidence available to the court indicated the contrary. The audited accounts and tax declarations of Tanaka, which Datuk Tufail had to sign off on, declared that the assets in Tanaka were owned by Tanaka. Given that Datuk Tufail was a party to all these actions, it did not lie in his mouth to now claim that Tanaka was merely a nominee for Dato Ting and himself and/or SSB and was not the legitimate owner of its own assets. Portraying Tanaka as a mere nominee to claim that its current account belonged to Datuk Tufail, Dato Ting and/or SSB ignored the fact that Tanaka also had another bank account – an interest-bearing call deposit account, of which neither Dato Ting nor Datuk Tufail were the signatories to. Mr Ling exercised control over that account, and in fact was its sole signatory. I thus dismissed Datuk Tufail's claims in regard to an oral agreement which would bind Tanaka and demonstrate that its profits belonged to other parties.

46 Whether or not the court accepted Datuk Tufail's claim that Tanaka was not running a substantive trading business, the money that was paid into its company bank account would *prima facie* have belonged to it. Even if Tanaka was an agent of SSB as Datuk Tufail asserted, it was a separate legal entity. The effect of manipulated pricing was merely that the tax authority has been deceived, but it did not invalidate the transaction, or demonstrate that Tanaka did not own the

assets which were in its own name. I was thus of the view that Datuk Tufail had failed to discharge his burden of proof to show that Tanaka was holding the monies on trust for both Dato Ting and Datuk Tufail and/or SSB in Tanaka's account. It was possible that Datuk Tufail was confusing ownership with ultimate ownership. As shareholders of Tanaka, ultimately Datuk Tufail and Dato Ting indirectly own Tanaka, albeit with Mr Ling, but the fact that the two of them were shareholders was irrelevant, and in the absence of any reasons why the corporate veil should be pierced, the corporate personality of Tanaka must be respected. I found no reason to pierce the corporate veil such that the money, *while* in Tanaka's bank account, belonged to Dato Ting and Datuk Tufail.

47 Pursuant to investigations carried out sometime in 1996 by the Center for Investigation and Intelligence of the Inland Revenue Board in Kuching, SSB entered into a settlement agreement in February 1997 with the tax authority. While we do not know the content of the investigations, the settlement agreement states that by reason of an understatement of income, tax amounting to some RM2m had not been charged on SSB for the years of assessment of 1991 to 1996, and was evidence that SSB had admitted to their wrongdoing in tax avoidance. It was thus agreed that SSB would pay a total sum of RM3.3m for the unpaid tax and consequent penalty. It is reasonable to think that if one has admitted to wrongdoing and suffered the consequences, one would be more inclined to tell the truth thereafter. If in reality Tanaka did not own its assets, why did the directors and shareholders of Tanaka continue to declare, even after this settlement agreement had been entered into, that Tanaka owns all its assets? If Tanaka was a mere nominee of Dato Ting and Datuk Tufail and/or SSB, or if the monies were merely held on trust for them, these should have been information that would have been raised subsequent to investigations. If Datuk Tufail's story was to be believed, this would imply that both of them continued to lie even after investigations were carried out and a pricey settlement was entered into, which struck me as inherently implausible.

48 I thus found that the evidence adduced by both sides was unreliable and lacking in credibility in material respects. I observed that most of the submissions advanced by counsel for the first defendant was premised on a false dichotomy, *eg*, if the oral agreements asserted by the plaintiff do not exist, then the basis for the transfer of monies from Tanaka's Account to the Joint Account *must* be for the reasons proffered by the first defendant, *ie*, that the transfers of monies to the Joint Account were payments to Dato Ting and Datuk Tufail in discharge of the debt Tanaka owed to SSB by virtue of the invoices charged at a lower price. But I was of the view that one does not necessarily follow the other. Given that I had rejected both stories, it was difficult for the court to ascertain the truth in this matter, but it was apparent to me that both sides had not been forthcoming and failed to prove their respective claims.

Datuk Tufail's counterclaim in conspiracy

49 Datuk Tufail's counterclaim was that on or before 19 September 2012 (when legal proceedings were commenced by Tanaka), Tanaka, Dato Ting and/or Mr Ling had by unlawful means (through the use of fabricated documents) with the intention of injuring Datuk Tufail conspired to commence the current claim against Datuk Tufail, and as a result of which Datuk Tufail had suffered loss and damage in the form of incurring legal costs on an indemnity basis. In the alternative, he argued that the predominant intention on their part was to use Tanaka to commence this action to wrest back control and management of the Malaysian Companies from Datuk Tufail and hence to injure him pursuant to lawful means conspiracy.

50 To succeed on a claim of conspiracy by unlawful means, the following elements must be satisfied (*EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 ("*EFT Holdings*") at [112]):

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

By comparison, a claim for conspiracy by lawful means does not require an unlawful act, but there is the additional requirement of proving a "predominant purpose" by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved (*Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 ("*Raffles Town Club*") at [62] affirming *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 at [45]).

Whether there was an agreement between two or more persons to do an unlawful act

51 Parties to an agreement must be sufficiently aware of the surrounding circumstances and share the object for it properly to be said that they were acting in concert at the time of the acts complained of (*EFT Holdings* at [113] quoting from *Kuwait Oil Tanker Co SAK and another v Al Bader and others (No 3)* [2000] 2 All ER (Comm) 271 at [111]). Mr Ling and Dato Ting as the directors of Tanaka signed a directors' resolution dated 29 March 2012 which stated that "after deliberation, it was unanimously resolved to appoint Drew & Napier LLC as solicitor of the Company to take all appropriate legal actions to recover investment in Sarawak." This was notwithstanding the fact that Dato Ting became a defendant in the suit. But it is not unlawful in itself to commence legal action to recover a company's investment in another country. The unlawful act which Datuk Tufail asserted was the fabrication of evidence and the agreement to do the same for the purposes of commencing legal proceedings. To that end, I was not satisfied on the facts that there had been an agreement or combination to carry out certain unlawful acts. Though I accepted that Dato Ting and Mr Ling had *de facto* control of Tanaka's board, that was insufficient evidence to establish conspiracy between two men.

Intention to cause damage

52 But assuming that there is sufficient evidence of an agreement, both conspiracy by lawful and unlawful means require an intention to injure. Datuk Tufail's claim that the acts done in furtherance of the conspiracy were for the purpose of causing injury was plainly unsustainable. To this end, he alleged that this was an attempt by Dato Ting to wrest back control of or wind up the Malaysian Companies. But Tanaka's pleaded case (as amended) did not even include a claim for beneficial ownership of the shares in any Malaysian company. It was simply not possible for Tanaka to gain the majority shareholding in the Malaysian Companies by way of this action as pleaded at trial, and all the consequences which allegedly flowed from that – that Dato Ting would regain his management of the Malaysian Companies and oust Datuk Tufail, were merely hypothetical. Even if the court accepted that Dato Ting intended to gain control of the Malaysian Companies by commencing this action *initially*, this did not provide evidence of an intention to injure. Proving that a claim for beneficial ownership of shares in a company exists could very well go toward showing that the predominant intention of a party is to gain beneficial ownership of the shares which he asserts rightfully belongs to him, and does not necessarily mean that the action has been commenced with the predominant intention to injure the other party.

53 Datuk Tufail, on an alternative basis, argued that Dato Ting and Mr Ling sought to use Tanaka to obtain a profit of over US$8m for themselves, and deprive Datuk Tufail of his legitimate, personal investment in the Malaysian Companies. But even if Tanaka were to succeed on this action, the monies would be held on trust by Tanaka for the specific purpose of investment in the Malaysian Companies. Dato Ting and Mr Ling would not benefit from the outcome of this action to the exclusion or detriment of Datuk Tufail; Datuk Tufail is similarly a shareholder of Tanaka, and a shareholder and director of the Malaysian Companies as well.

54 The unique facts and circumstances of *Raffles Town Club* demonstrate the high threshold which one has to meet to prove the requirement of a predominant intention to injure. The sole directors and shareholders of Raffles Town Club ("RTC") caused RTC to sue its former directors for losses suffered by RTC or benefits acquired by the latter, and claimed that the former directors had been in breach of their duties as directors of RTC. The former directors in turn alleged that the current directors had caused and/or conspired with RTC to commence the suit to injure them. The Court of Appeal ("CA") held that the sole shareholders and directors' predominant purpose in commencing the suit was to cause financial harm to the former directors just as much as it was to profit themselves. In fact, it was found that the sole shareholders were using the company as a nominee to claim against the former directors for breaches of duties which the former directors as shareholders of the company had already accepted or ratified over many years (at [57]). The facts were sufficient even to support the lifting of the corporate veil of the company and the plaintiff's claims were eventually treated as personal claims of the shareholders which were advanced, in substance, for their own benefit. It was found that the suit was commenced for no reason other than to increase the assets of the company directly and correspondingly, their value of the shareholding in the company (at [59]), and the tort of conspiracy by lawful means was hence made out. Such a high threshold, in my view, had not been met in this case by Datuk Tufail.

Whether the plaintiff suffered loss as a result of the conspiracy

55 In any event, even if Datuk Tufail could satisfy this court that there was an agreement with the necessary intention to do certain acts, whether lawful or unlawful, the only damage alleged was legal costs in defending this action on an indemnity basis. But the CA in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 dismissed the counterclaim of tort of conspiracy on the basis that no damage had been suffered as a result of the alleged conspiracy other than the costs of defending the suit. This was because the "cost incurred by the Appellants in defending the Present Suit was a cost which would have been incurred regardless of whether [the] claim against them was well founded or not" (at [100]). Similarly in the present case, the only damage that Datuk Tufail claimed to have suffered was the cost incurred to defend the claim. This was a cost that would have been incurred regardless of whether Tanaka's claim against them was well-founded or not. If Tanaka's claim had no basis, Datuk Tufail would be entitled to recover costs from the plaintiff and that is the relief that the law allows him as a matter of course. But the mere fact that one party is not telling the truth and suing another party should not be sufficient basis to found a cause of action for conspiracy. If that were the case, every case in which a plaintiff lies or gives false evidence would give rise to a counterclaim by a defendant for the tort of conspiracy.

56 As stated in *Lim Kok Lian (executor and trustee of the estate of Lee Biau Luan, deceased) v Lee Patricia (executor and trustee of the estate of Lee Biau Luan, deceased) and another* [2015] 1 SLR 1184 ("*Lim Kok Lian*") at [32], it is not clear whether costs *per se* can constitute actionable damage for a claim in conspiracy. Datuk Tufail had relied on *Raffles Town Club* to argue that the claim in conspiracy should be allowed even though the only damage suffered was legal costs incurred. But it was pertinent to note that the CA in *Raffles Town Club* at [71] did not order damages to be assessed

even though they allowed the appeal in relation to the claim of conspiracy. The reason appeared to be precisely because no loss was suffered other than the costs of defending the suit. Instead, the CA decided to exercise their discretion to award costs of defending the suit to be personally borne by the sole shareholders and directors on an indemnity basis. Applying that to our present case, even if the court accepted Datuk Tufail's submissions on the claim of conspiracy, given that no loss had been suffered other than costs incurred in defending the suit, the court, in my view, retained the discretion to award costs rather than necessitating an assessment of damages. Thus, even the CA decision in *Raffles Town Club* did not appear to support Datuk Tufail's attempt to claim damages for the tort of conspiracy. Therefore, even if I were to find that a tort of conspiracy had been made out on the facts of this case, I would not have awarded damages given that the loss suffered only related to legal costs, and it is for the court to then take this commission of a tort into account in exercising its discretion to award costs.

Bad faith or unconscionable conduct

57 Datuk Tufail had also advanced a claim that Dato Ting and Mr Ling had acted in bad faith or were unconscionable in causing, directing and/or assisting RTC to commence the present suit. But I was of the view that neither "bad faith" nor "unconscionability" could constitute a cause of action. That they may have acted in bad faith did not avail Datuk Tufail of any legal remedy, and I did not think it was necessary to dwell any further on this assertion. I thus dismissed Tanaka's claim as well as Datuk Tufail's counterclaim and third-party claim because neither side had discharged its burden of proof.

Costs

58 The general rule is that costs are in the court's discretion and costs should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made (O 59 r 3(2) of the Rules of Court) (Cap 322, R5, 2014 Rev Ed). I was of the view that it was appropriate and just to exercise my discretion in such a manner in this case. Though Tanaka's claim may have been dismissed, the conduct of Datuk Tufail in these proceedings was not beyond reproach. Tanaka's claim had not been dismissed because I believed Datuk Tufail's version of the events, but because Tanaka had failed to discharge its burden of proof. I had also dismissed Datuk Tufail's counterclaim and in my view, both parties had been unsuccessful. In fact, none of the parties to this action had been forthright and forthcoming with the evidence. I was thus not prepared to award costs to any of the parties.