IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 36

CA 207/1998

Between

Aircharter World Pte Ltd

… *Appellant*

And

Kontena Nasional Bhd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Appeals; Contract — Formation — Acceptance

Version No 1: 20 Nov 2026 (00:35 hrs)

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Aircharter World Pte Ltd v Kontena Nasional Bhd

[1999] SGCA 36

CA 207/1998
Karthigesu JA; L P Thean JA; Yong Pung How CJ
18 May 1999

Judgment:

KARTHIGESU JA

(delivering the grounds of judgment of the court): This is an appeal against the decision of the learned judge to disallow the appellants` claim for the sum of US$200,000 as a deposit payable pursuant to an alleged oral agreement between the appellants and the respondents made on 14 September 1995. The learned judge found the evidence adduced in support of the alleged oral agreement to be unsatisfactory and held that no agreement had been made accordingly. At the conclusion of the hearing we allowed the appeal and now give our reasons.

2. ***Background***

The appellants are an exempt private limited company registered in Singapore principally engaged in aircraft lease and charter brokerage. The respondents are a public company registered in Malaysia providing haulage, depot, warehousing and freight forwarding services to, inter alia, the Government of Malaysia.

3.On 13 July 1995, the respondents were invited by the Ministry of Defence, Malaysia (`Mindef`) to collect and submit tender documents for the transportation of Malaysian peacekeeping troops from Malaysia to Bosnia and from Bosnia back to Malaysia. The closing date for the tender was 17 July 1995. The respondents duly collected the documents and in turn invited the appellants to submit a quotation. On 14 July 1995, the appellants replied setting out the terms and conditions of their quotation. Apart from the price (the appellants quoted two prices for two separate options - US$1,528,000 or US$1,465,000 respectively - both not inclusive of war risk insurance), one of these was that the sum of US$200,000 was payable as a `deposit due confirmation`. The appellants` offer was expressed to expire on 31 July 1995 at 1200 hours (Kuala Lumpur time). On 17 July 1995, the respondents submitted their tender documents to Mindef. The respondents quoted two prices for two separate options - US$1,615,000 or US$1,552,500 respectively.

4.On 7 September 1995, one Brandon Teo Keng Leng (`Teo`) of the appellants, one Abdul Hamid bin Abdul Momin (`Abdul Hamid`) and one Sulaiman Maamor of the respondents had a telephone conversation in which Teo was informed of the outcome of a meeting which the respondents had with Mindef. After the conversation, the respondents sent a facsimile to the appellants informing them, inter alia, that Mindef required only a DC-10 or a better aircraft and not the L1011-100 which the appellants had offered as an alternative in their letter of 14 July 1995. On 11 September 1995, Abdul Hamid sent another facsimile to Teo informing him of the outcome of further discussions the respondents had with Mindef.

5.On the same day, Mindef informed the respondents of its acceptance of the respondents` quotation at the adjusted `ceiling rate` of US$1,664,660. Mindef stated in para 2 of its letter that

Version No 1: 20 Nov 2026 (00:35 hrs)

> *[w]ith the acceptance of your [ie the respondents`] quotation by the Government, you are advised that there is a binding contract between the Government and yourselves. A formal contract ... will be executed later with the inception of all the quotation terms as amended. You will be informed later by the Government once the contract document is ready to be executed by yourselves.*

Paragraph 3 of the letter spelt out additional terms: para 3.1 required the respondents to provide an irrevocable performance bond in the form of a banker`s guarantee for 5% of the total value of the tender; and para 3.2 subjected Mindef`s offer to the approval of the United Nations.

6.On 12 September 1995, the appellants sent a revised quotation to the respondents incorporating their previous discussions and exchange of correspondence. The appellants maintained as one of their terms and conditions that the respondents were to pay the sum of US$200,000 as a `deposit due confirmation`. The price quoted for the charter was US$1,528,000 with war risk insurance of US$165,000, resulting in a total charter price of US$1,693,000. Unlike the appellants` first offer of 14 July 1995, there was no expiry date for this offer.

7.According to Abdul Hamid, he spoke to his senior manager, one Nor Salam Sulan (`Nor Salam`) on the same day and brought the appellants` revised quotation to his attention. Nor Salam instructed Abdul Hamid to inform the appellants that they were to proceed to make all the arrangements for the execution of the charter.

8.On 14 September 1995, an oral agreement was allegedly made between the appellants and the respondents. According to Teo and Abdul Hamid, who gave evidence for the appellants, this was effected by way of a telephone conversation between both of them. The appellants alleged that the terms of the agreement were (a) that the charter price was US$1,693,000; (b) that the sum of

Version No 1: 20 Nov 2026 (00:35 hrs)

US$200,000 was payable as a deposit upon confirmation of the charter by the respondents; and (c) that if the respondents terminated or cancelled the agreement, 25% of the charter price was payable. The alleged oral agreement was followed by a facsimile of the same date from the respondents to the appellants. It was alleged that the facsimile was a confirmation of the oral agreement and that the respondents were thus liable to the appellants for the deposit.

9.The next day, 15 September 1995, Abdul Hamid received a facsimile from the appellants enclosing a copy of a draft agreement for the respondents` perusal and eventual execution. The main terms of the agreement (viz price, deposit and cancellation charge) were identical to those of the oral agreement set out above. Abdul Hamid brought the agreement to Nor Salam and informed him that the original would arrive shortly. Nor Salam said that he would sign the agreement. However, it later transpired that Abdul Hamid had actually received two draft agreements: one prepared on 14 September and the other on 15 September. The same terms appeared in both drafts, but the second draft contained a provision which was not present in the first draft. This was cl 7, the cancellation clause, which provided, inter alia, for the payment as `agreed compensation` of 25% of the charter price if the charter was cancelled upon execution. (Both draft agreements will hereinafter be referred to as `the first draft agreement` and `the second draft agreement` respectively.) It was not in dispute that neither agreement was in the event executed by the respondents, nor did the parties at any time thereafter enter into any other written agreement.

10.Subsequently, Mindef postponed the flights for one month - from October to November 1995 - for political and security reasons. The respondents informed the appellants of this accordingly.

Version No 1: 20 Nov 2026 (00:35 hrs)

11.On 22 September 1995, Abdul Hamid on behalf of the respondents wrote to the appellants to enquire whether they were willing to reduce the price of war risk insurance (quoted at US$165,000 in both the appellants` revised quotation of 12 September 1995 and the agreement dated 15 September 1995) for the flights. The reason for this, as Abdul Hamid himself explained, was that if the price of war risk insurance was added to the charter price of $1,528,000, the respondents` quotation to Mindef (US$1,664,660) would be lower than what they would have to pay the appellants on the charter (US$1,693,000), resulting in the respondents incurring a loss on the transaction. The appellants replied on the same day, saying that they would try to reduce the amount quoted for war risk insurance to between US$15,000 and US$20,000, subject to confirmation 72 hours before the flights. The appellants also informed the respondents that they would be sending an invoice for the `initial fee` of US$200,000 (or the deposit) which had been paid by their principal in the United States, Aircharter World (USA) (`ACW (USA)`) to the carrier as a down payment for the aircraft. On 25 September 1995, the respondents received an invoice (No 02/09) for US$200,000 being the `advance contractual fee` payable by the appellants to their principal (`the invoice`).

12.On 17 October 1995, Mindef wrote to the respondents informing them that the United Nations was of the opinion that the respondents` quotation of US$1,664,660 was `high`. Accordingly, Mindef requested the respondents to reduce their original quotation, the new quotation not to exceed US$1,295,000. On 20 October 1995, the respondents responded with a new price of US$1,620,000. On 25 October 1995, Mindef informed the respondents that the United Nations was not agreeable to the respondents` new offer and would be making the arrangements for the flights themselves. Mindef therefore rejected the respondents` offer and cancelled the agreement, relying on para 3.2 of its

Version No 1: 20 Nov 2026 (00:35 hrs)

letter dated 11 September 1995 (referred to above). Meanwhile, the respondents had on 17 October 1995 requested the appellants to quote for another charter which was to take place in November 1995. The appellants replied on the same day enclosing their revised quotation and the new flight schedule for November. They also informed the respondents that the outstanding sum of US$200,000 would be set off against the price of the November charter, should it proceed. On 30 October 1995, however, the respondents informed the appellants that the November charter would not be proceeding.

13.The respondents submitted the invoice to Mindef. The appellants were informed of this by a facsimile dated 22 November 1995. Mindef rejected the respondents` claim on the ground, according to Abdul Hamid, that the `compensation charges` were `exorbitant`. He informed the appellants of Mindef`s response on 28 December 1995 and requested for the charges to be reduced or abolished. The appellants replied that they were unable to reduce the charges as the sum of US$200,000 was the down payment to be paid by them to the carrier. In this regard, it is noteworthy that the appellants had originally claimed 25% of the charter price as a cancellation fee due and payable to them upon cancellation or termination of the charter agreement, in addition to the sum of US$200,000 as a deposit payable upon confirmation. Subsequently, however, they informed the respondents that, following negotiations with their principal, ACW (USA), the cancellation fee would be reduced to US$200,000 (`reduced cancellation fee`). This happened on or about 18 September 1995. They therefore claimed the sum of US$200,000 only as a deposit and reduced cancellation fee due and payable under the charter agreement.

14.The respondents did not pay the appellants the sum claimed, nor did they proceed with the charter. The appellants then commenced an action against the respondents for breach of an oral agreement made on 14 September 1995 for

Version No 1: 20 Nov 2026 (00:35 hrs)

the charter by the respondents of a Boeing B747 aircraft from the appellants for the transportation of peacekeeping troops from Malaysia to Bosnia and from Bosnia back to Malaysia (`the oral agreement`).

15. ***The decision below***

The learned judge disallowed the appellants` claim. He disbelieved the evidence of Teo and Abdul Hamid that they had made an oral agreement over the telephone on 14 September 1995, as he found their evidence to be `confused and unsatisfactory`. He therefore found that no oral agreement had been made on 14 September on either the deposit or the cancellation fee. In addition, although the statement of claim described the US$200,000 claimed as a deposit and reduced cancellation fee payable under the oral agreement, it was not really for that. The invoice was for the `advance contractual fee` payable by the appellants to their principal, which was not provided for in either draft of the charter agreement or the oral agreement. It was thus doubtful whether the appellants` claim came within the alleged agreement. In the result, the appellants` claim was dismissed.

16. ***Contentions of the appellants***

The appellants essentially contended first, that there was an oral agreement between the respondents and themselves made on 14 September 1995; second, that the learned judge had erred in failing to consider the contemporaneous documentary and other evidence which showed not only that the respondents were aware of the deposit required to book the aircraft but also that they considered themselves liable to pay it (the appellants referred especially to the fact, which was not disputed, that the respondents had made a claim for US$200,000 from Mindef by submitting the appellants` invoice); and third, that

Version No 1: 20 Nov 2026 (00:35 hrs)

the learned judge had misinterpreted some of the documents and evidence of the respondents in their favour.

17.Thus the thrust of the challenge was to the learned judge`s finding that no oral agreement was concluded on 14 September 1995. Indeed, the appellants` second and third contentions appeared to be directed toward that end rather than to any argument that the contemporaneous documentary and other evidence (including the conduct of the parties) per se raised an inference or suggested the conclusion that there was a binding agreement between the parties on 14 September 1995. For reasons that will become apparent, the finding that no oral agreement was concluded between the appellants and the respondents was really beyond argument. However, there was considerable force in the appellants` second and third contentions which, in our view, were not to be taken as support for the appellants` allegation that there was an oral agreement, but rather compelled the conclusion that an agreement was constituted between the appellants and respondents on 14 September 1995.

The appeal

18. **Whether there was an oral agreement between the appellants and the respondents**

The learned judge`s finding that no oral agreement was concluded between the appellants and the respondents on 14 September 1995 was a finding of fact. In particular, as what was alleged was an oral agreement, the correctness of the finding turned in large part on the credibility of the parties` respective representatives, Abdul Hamid and Teo. Although both testified that they had spoken on the telephone and that the agreement was made thereby, the learned judge was not impressed with their evidence and rejected it. This was a decision

Version No 1: 20 Nov 2026 (00:35 hrs)

which was amply warranted by the evidence. As such, the appellants` contention that the learned judge had erred in not weighing their evidence properly and in coming to a wrong assessment of their credibility was simply unsustainable.

19.Before proceeding to an examination of the evidence and the learned judge`s findings thereon, it may be appropriate to briefly consider the principles governing the role of the Court of Appeal vis--vis issues of fact. These principles are well known and have been stated and re-stated in numerous authorities. A good starting point is **Powell v Streatham Manor Nursing Home** [1935] AC 243, where Viscount Sankey LC declared at p 249 that the Court of Appeal should not set aside a finding of fact `unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way`. In the oft-cited case of **Chow Yee Wah & Anor v Choo Ah Pat** [1978] 2 MLJ 41 , the Privy Council approved the following statement of principle on appellate intervention expressed by Lord Shaw in ***Clarke v Edinburgh and District Tramways Co*** 1919 SC (HL) 35 at p 36:

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

Version No 1: 20 Nov 2026 (00:35 hrs)

> *which are the privileges of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.*

We would add, a fortiori where the trial judge has expressed an opinion as to the credibility of the witnesses. Lord Thankerton stated the matter another way in **Watt v Thomas** [1947] AC 484 at pp 487-488:

> *... an appellate court which is disposed to come to a different conclusion should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge`s conclusion. ... The appellate court, either because the reasons given by the trial judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.*

20.In the present case, could it be said that the decision of the learned judge to reject the evidence of Abdul Hamid and Teo on the alleged oral agreement was plainly wrong so as to justify the intervention of this court?

21.As mentioned earlier, the oral agreement was alleged to have arisen from a telephone conversation between Abdul Hamid and Teo. Both gave evidence for the appellants. Abdul Hamid said at para 18 of his affidavit:

> *I spoke to Teo on 14 September 1995 to confirm that the charter was proceeding. I wanted Teo to confirm to me on the telephone that the contract was firm and he did so confirm. I then on behalf of the [respondents] sent the [appellants] a confirmation [the facsimile of the same date]. ...*

He then went on to depose that Teo had on the next day (ie 15 September) sent him a facsimile enclosing a copy of a draft charter agreement; and exhibited a copy of the second draft agreement, but omitted any reference to the first draft.

Version No 1: 20 Nov 2026 (00:35 hrs)

Teo`s evidence was to similar effect. He said at para 22 of his affidavit of evidence-in-chief:

> *On 14 September 1995, an oral agreement was made between [Abdul Hamid] for and on behalf of the [respondents] and I for and on behalf of the [appellants] over the telephone. The [appellants] agreed to lease the ... aircraft on a wet charter basis to the [respondents] for the purposes of the movement of the troops ... . The [respondents`] fax of 14 September 1995 to the [appellants] confirmed in writing that the [appellants] were to `make all the arrangement [sic] to execute the service as per the terms and conditions of the tender document`. The [respondents] also requested for the copy of the charter agreement for their perusal and required that I attend a meeting that Saturday, 16 September 1995 at 0900 hours at the Ministry of Defence, Malaysia, to confirm all the necessary arrangements for the service. ...*

He also claimed that he had forwarded the second draft agreement (which, it will be recalled, included the cancellation clause) on 15 September, but omitted to mention the first draft agreement without that clause. He explained that upon receiving the respondents` confirmation, the appellants confirmed the booking of the aircraft with their principal, ACW (USA) and thereby became liable to pay ACW (USA) a non-refundable booking fee. No documents relating to the agreement between the appellants, ACW (USA) and the owners of the aircraft were disclosed, except for a facsimile from ACW (USA) dated 18 September 1995 to the appellants stating that the lessor was prepared to reduce the cancellation fee from US$396,000 to US$200,000, which led to the issuance of the appellants` invoice for the sum of US$200,000 to the respondents on 25 September 1995.

22.Neither Abdul Hamid`s nor Teo`s evidence stood up to scrutiny in court. Abdul Hamid gave evidence over two days. On the first day, he said that he did not speak to Teo before he sent the facsimile dated 14 September 1995, then he clarified that he called Teo while the facsimile was being typed. When he called

Version No 1: 20 Nov 2026 (00:35 hrs)

Teo, he had not seen either draft of the charter agreement. They agreed that the appellants were to proceed to book the aircraft. He saw both drafts of the charter agreement on 15 September, spoke with his senior manager Nor Salam, and then called Teo on the telephone. Prior to 15 September there was no discussion between him and Teo on the payment of the US$200,000 deposit or the cancellation fee, and both he and Teo regarded the booking fee as refundable. The learned judge found that his evidence on the first day did not support the appellants` case that there was an oral agreement made on 14 September 1995 that gave rise to the appellants` claim for US$200,000.

23.However, when he continued with his evidence on the second day, his account of the conversation was transformed. He asserted that the oral agreement included the cancellation term; that everything in the second draft agreement was discussed and agreed to on 14 September; and that the deposit was non-refundable. When confronted with these inconsistencies, his reply was that `this matter happened in 1995. Now is 1998. I may tend to forget.` As the learned judge observed, this was not a satisfactory explanation:

> *There was no expression of any difficulty with his memory when he gave evidence on the first day. He must have known before he came to court that he would be giving evidence on the conversation, and could not have been surprised to be questioned on it. On the second day he was not filling gaps in his recollection after further reflection. He was making radical overnight changes to his evidence for reasons best known to him.*

24.As for Teo, he conceded that two draft agreements were sent to the respondents: the first on the evening of 14 September and the second on 15 September, and that the cancellation clause was present only in the second draft. However, he insisted that the cancellation clause had been agreed to on 14 September. When he realised that the clause had been omitted from the first draft agreement sent to the respondents, he instructed his secretary to prepare

Version No 1: 20 Nov 2026 (00:35 hrs)

the second draft and called Abdul Hamid on the morning of 15 September to advise him of the amendment. Counsel for the respondents asked him whether the appellants` claim was for the deposit or the cancellation fee. His reply was that it was for the `[d]eposit to fix the aircraft`. When asked whether the deposit was refundable or non-refundable, he said that they had not discussed that. When it was pointed out to him that the invoice was for the `advance contractual fee` payable by the appellants to ACW (USA), he said that it was for the down payment, adding that

> *[t]his $200,000 is to fix the aircraft contracted, whether cancellation or deposit it is my contract with Kontena Nasional [the respondents].*

Finally, he stated that it did not matter to him whether the sum payable was termed a cancellation charge, advance contractual fee or deposit, because the appellants wanted the respondents to bear the payment they had to make to ACW (USA) in order to secure the aircraft.

25.Abdul Hamid was unsure whether he spoke to Teo on 14 September or 15 September, or whether he spoke to Teo at all for that matter. He also contradicted himself on whether they had mentioned the deposit and the cancellation fee. Both he and Teo only referred to the second draft agreement of 15 September in their affidavits and failed to disclose the first draft agreement of 14 September which did not have the cancellation clause. His evidence was that the second draft agreement was faxed to him only after he told Teo on 14 September that he had not received the first draft; whereas Teo`s evidence was that he sent the second draft on his own accord only when he realised that the cancellation clause had been omitted from the first draft, and he called to inform Abdul Hamid of the amendment. There was no evidence from Abdul Hamid that he received this call from Teo.

Version No 1: 20 Nov 2026 (00:35 hrs)

26.The learned judge found their evidence to be confused and unsatisfactory, and that it left a serious doubt over whether the cancellation fee was brought up on 14 September 1995. In the circumstances, he concluded that no oral agreement was made on 14 September on either the deposit or the cancellation fee and dismissed the appellants` claim accordingly. It could hardly be said, in the light of Abdul Hamid`s and Teo`s testimony, that the learned judge`s decision that there was no oral agreement was plainly wrong, or that it was not justified by the evidence. It followed that the finding that no oral agreement was concluded on 14 September between the appellants and respondents must stand.

27.We would add that this conclusion is not in any way affected by the other matters raised by the appellants; viz (a) that the respondents had invoiced Mindef for RM500,000 which was the equivalent of US$200,000 at the relevant time; (b) that Mindef`s position was that the compensation charges were exorbitant and not that it was not liable to pay them (although it might be said that Mindef`s response was hearsay as there was no direct evidence of it - no written reply, if there was one, was disclosed - and there was only Abdul Hamid`s statement to that effect; (c) that in their letters to the appellants dated 16 and 26 February 1996, the respondents made statements to the effect that if they had booked the aircraft before 31 July 1995, they would be liable to pay the deposit, and that this meant that when the appellants booked the aircraft, the deposit was payable; and (d) that in a letter dated 11 June 1996, the respondents` solicitors made a statement to the same effect. Insofar as the alleged oral agreement was concerned, these matters were irrelevant. What was important for the purposes of establishing such an agreement were the circumstances surrounding its formation, such as the conduct of the parties at that time; matters subsequent thereto, such as those enumerated above, did not impinge on the antecedent and separate question of its existence or non-existence. To put it

Version No 1: 20 Nov 2026 (00:35 hrs)

another way, the fact that the respondents had sought payment from Mindef, and that they may for a time have regarded themselves liable for the US$200,000, if that be the case, did not detract from the fact that the appellants had failed to establish the existence of an oral agreement due to the quality of evidence adduced by them for that purpose. Thus, statements by the respondents to the effect, for instance, that the draft agreements were unsigned because they were a mere formality really begged the question.

28. **Whether an agreement was constituted by the respondents` facsimile of 14 September**

The finding that no oral agreement was concluded between the appellants and the respondents on 14 September 1995 was not a finding that the alleged conversation between Abdul Hamid and Teo, if it took place, was in law insufficient to satisfy the essentials for the creation of a contract. In other words, it was not a finding that, had there been such a conversation as alleged, it did not amount to a legally binding contract. Rather, it was a finding premised on the inadequacy of the evidence adduced by the appellants in support of their claim that there was an oral agreement. However, when the documentary evidence, in particular the respondents` facsimile of 14 September, is considered, the picture is entirely different. The appellants contended that this evidence was a confirmation of the alleged oral agreement, and not that it was sufficient in its own right to constitute an agreement between themselves and the respondents. In our opinion, this contention was misplaced. As has already been explained, the finding that there was no oral agreement, a finding which involved an assessment of the credibility of the witnesses, Abdul Hamid and Teo, was really quite unarguable. The fact, therefore, that the contemporaneous documentary evidence may have appeared to afford some support for the alleged oral agreement did not affect the true position. Instead, the difference

Version No 1: 20 Nov 2026 (00:35 hrs)

brought about by the respondents` facsimile was that it suggested that a firm agreement between the appellants and the respondents was constituted thereby. The facsimile was from Abdul Hamid to Teo and was in the following terms:

> *We are pleased to inform you that we (Air Charter KN) [ie the appellants and the respondents] have been appointed by Mindef/UN to provide the service for the above movement [of peacekeeping troops to Bosnia].*
>
> ***Please make all the necessary arrangement[s] to execute the service as per the terms and condition[s] of the tender document.*** *[Emphasis added.]*
>
> *Please forward us [sic] the draft copy of the charter agreement for our perusal.*
>
> *We are required to be present at Mindef on Saturday 16/09/95 at 0900 hours to confirm all the necessary arrangement[s] for the services and also on the additional condition[s] as listed in our fax dated 11/09/95.*
>
> *We look forward to working together with you and provide excellent service [sic]. ...*

29.Specifically, could the second paragraph - the request to `please make all the necessary arrangement[s] to execute the service` - be construed as an acceptance of an offer that the appellants had made so that an agreement between the appellants and the respondents came into being as a consequence?

30.According to the learned authors of ***Chitty on Contracts*** (27th Ed, 1994) at p 89 et seq, the normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other. In deciding whether the parties have reached agreement, the courts normally apply the objective test. Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party, therefore, do not prevent the

Version No 1: 20 Nov 2026 (00:35 hrs)

formation of a contract. The objective test of agreement applies as much to an acceptance as it does to an offer. An offer, simply defined, is an expression of willingness to contract made with the intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed. At this juncture, it is perhaps convenient to state that, in the context of tenders, it is established that an invitation for tenders for the supply of goods or services, or for the execution of works, as the case may be, is generally not an offer, even though the preparation of the tender may involve considerable expense. The offer comes from the person who submits the tender and there is no contract until the person asking for the tenders accepts one of them. So in the present case, the appellants when they submitted their quotation were the offerors while the respondents were the offerees, and there was no contract until the respondents accepted the appellants` offer - which is precisely the question in issue here. Reverting to the objective test of agreement, from the perspective of the offeree, an apparent intention to be bound may suffice, ie the alleged offeror (A) may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention.

31.Whether A is actually bound by an acceptance of his apparent offer depends on the state of mind of the alleged offeree (B); to this extent, the test is not purely objective. With regard to B`s state of mind, there are three possibilities. First, B actually believes that A has the requisite intention: here the objective test is satisfied so that B can hold A to his apparent offer even though A did not, subjectively, have the requisite intention. The general view is that there is no requirement that A must also be aware of B`s state of mind. Second, B knows that, in spite of the objective appearance, A does not have the requisite intention: here A is not bound; the objective test does not apply in favour of B as he knows

Version No 1: 20 Nov 2026 (00:35 hrs)

the truth about A`s actual intention. Third, B has simply not addressed his mind to the question of A`s intention, so that B neither believes that A has the requisite intention nor knows that A does not have the intention: this situation has given rise to a conflict of judicial opinion. Since the third situation has no application to our situation, it is not proposed to go into a discussion of the opposing views; suffice it to note that the learned authors of ***Chitty on Contracts*** at p 91 para 2-002 state that the objective test does not apply to the third situation because in it there is, by reason of B`s state of mind, no risk of his suffering any prejudice as a result of the objective appearance of A`s intention. Similarly, the objective test of agreement applies to an acceptance. An acceptance is a final and unqualified expression of assent to the terms of an offer. From the point of view of the offeror, an apparent intention to be bound may suffice, ie the alleged offeree (B) may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention. Again, however, whether B is actually bound by his apparent acceptance depends on the state of mind of the offeror (A); to this extent, the test is not purely objective. With regard to A`s state of mind, the same three possibilities arise as in relation to B`s state of mind, mutatis mutandis, and we do not propose to go through them again.

32.That the objective test of agreement is not wholly objective, but is in fact partly objective and partly subjective, is clear from the following passages. In **Smith v Hughes** [1871] LR 6 QB 597 at p 607, Blackburn J said:

> *If, whatever a man`s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party,* ***and that other party upon that belief enters into the contract with him****, the man thus conducting himself would be equally bound as if he had intended to agree to the other party`s terms. [Emphasis added.]*

Version No 1: 20 Nov 2026 (00:35 hrs)

And in **Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal** [1983] 1 AC 854 at pp 915-916, Lord Diplock said:

> *To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other what is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide. That is what English lawyers mean when they resort to the Latin phrase consensus ad idem and the words that I have italicised are essential to the concept of consensus ad idem, the lack of which prevents the formation of a binding contract in English law.*
>
> *Thus if A (the offeror) makes a communication to B (the offeree), whether in writing, orally or by conduct, which in the circumstances at the time the communication was received, (a) B, if he were a reasonable man, would understand as stating A`s intention to act or refrain from acting in some specified manner if B will promise on his part to act or refrain from acting in some manner also specified in the offer, and (b) if B does in fact understand A`s communication to mean this, and in his turn makes to A a communication conveying his willingness so to act or refrain from acting which mutatis mutandis satisfied the same two conditions as respects A, the consensus ad idem essential to the formation of a contract in English law is complete.*

33.Returning to the words of the respondents` facsimile, the appellants complain that, although the learned judge dealt on three occasions in his grounds of decision with the issue of the unsigned draft agreements (his honour noted that the respondents had asked for `the draft copy of the charter agreement` for their perusal, not execution), he failed to take into account the words of the second paragraph (set out above). The appellants submit that, by these words, the respondents were requesting the appellants to go ahead and book the aircraft, and that could only mean that there was a contract between the appellants and the respondents. In addition, they point out that counsel for the respondents had conceded in his closing submissions that `we can conclude that on 14 September [Abdul Hamid] had told [the appellants] to go ahead and book`. In response, the respondents contend that their position from the beginning until the conclusion

Version No 1: 20 Nov 2026 (00:35 hrs)

of the trial was that there was no oral agreement on 14 September 1995. Their counsel`s submission to the learned judge was that if (ie in the event that) the court found that there was an oral agreement, then what was agreed was with regard to the cancellation charges (a contention which, in our opinion, was inconsistent with their case). They submit that the learned judge was at all times aware of the respondents` submissions and did not err in his decision thereon.

34.It was the considered opinion of this court that the appellants` complaint was legitimate. From a perusal of the learned judge`s grounds of decision, it is clear that he only dealt with the effect of the third paragraph of the respondents` facsimile, and concluded that no agreement had been made, but did not consider the effect of the second paragraph and the question whether an agreement had been constituted thereby. As for the respondents` submissions on this point, they were open to the objection that, although there was no oral agreement, that did not answer the further question whether an agreement had come into being by virtue of the second paragraph of the respondents` facsimile. Their gloss on counsel`s submission was really an attempt to resile from a statement that could be seen as damaging (or even fatal) to their case; and their contention that the learned judge was at all times aware of the respondents` submissions in coming to his decision was, with respect, not borne out by the evidence.

35.Indeed, applying the objective test of agreement to the facts of the present case, there was no doubt that the respondents` facsimile of 14 September 1995, in particular the second paragraph thereof, constituted an acceptance of the appellants` existing offer (of which more will be said later) so that an agreement was formed thereby. Even if pure objectivity is eschewed, and the subjective intentions of the parties are taken into account, the respondents would still be bound. The issue here was not whether the appellants had the requisite intention in making their offer, and thus not whether the respondents had the requisite

Version No 1: 20 Nov 2026 (00:35 hrs)

belief that the appellants had the requisite intention when they accepted it - which both parties undoubtedly had; but rather, whether the respondents in accepting the appellants` offer had the intention to be bound thereby. Even if the requisite intention were absent, as is now alleged by the respondents, the test would still be satisfied as the appellants actually believed that the respondents had the requisite intention. The respondents were bound as their words or conduct (in sending the facsimile as worded) were such as would induce a reasonable person to believe that they intended to be bound, even though in fact they may have had no such intention.

36.In this respect, it is noteworthy that the learned judge placed much reliance on the minutes of the Freight Forwarding Tender Committee (`FTC`) meeting on 14 September in coming to his decision that there was no oral agreement. The relevant facts were that on 14 September, the FTC of the respondents met to consider tenders received for the charter, and eventually decided to accept the appellants` offer over bids from three other parties. The minutes of the FTC meeting (which were not challenged) stated, inter alia, the following: (a) that the objective of the meeting was to `seek approval from the FTC members on the awardment [sic] of the job to the successful bidder`; (b) that six tenderers were invited to participate but only four actually participated; (c) that the `FTC members agreed to award the job ... to Aircharter World due to their experience`; and (d) that it was `noted from AMGS [Assistant Manager Government Services] that ... Aircharter World could not give the commission but offered an upgradable [sic] aircraft, ie B747`, and that `AMGS [was] to clarify with ... Aircharter World whether there [were] any additional charges incurred due to the offer`. The price quoted by the appellants was stated to be US$1,528,000 and the respondents` `selling rate` was stated to be US$1,664,660. The last point (point (d)) was an allusion to the respondents`

Version No 1: 20 Nov 2026 (00:35 hrs)

request on 13 September 1995 made through Abdul Hamid for the appellants to reduce the price of their quotation. The appellants` reply was that they were unable to do so as their principal stood firm on the rate offered, but offered an upgraded aircraft to `a B747`. It was in this context that the AMGS was instructed to find out whether there were any additional charges in the light of the appellants` offer. The learned judge found that, although Abdul Hamid was instructed to inform the appellants that the respondents had decided to `award the job` to them, he was not instructed to settle the terms of the charter agreement on 14 September. He accepted the evidence of one Azmin bin Che Yusoff (`Azmin`), the senior finance manager of the respondents at the time, who was present at the FTC meeting, that the FTC did not approve the terms of the charter agreement which was not before it, as it wanted more information from the appellants, and that the matter was to be considered further. Whatever had actually transpired at the FTC meeting, and whatever was the correct interpretation of it, was immaterial. What was material was the message conveyed to the appellants; and this message was such as to induce them, as it would have any reasonable person, to believe that the respondents intended to accept their offer, when in fact they had no such intention. Regardless of the respondents` true intention, they were bound.

37.As an aside, we noticed from the minutes of the FTC meeting that what was before the FTC, inter alia, was the appellants` tender at a price of US$1,528,000. This was incorrect as the appellants` offer of 12 September 1995 quoted a price of US$1,528,000 plus war risk insurance of US$165,000, resulting in a total charter price of US$1,693,000. It is reasonable to postulate that, had this figure been before the FTC, it would not have accepted the appellants` offer. The respondents` agreement with Mindef was at a `ceiling rate` of US$1,664,660, and had the respondents accepted the appellants` offer, they would have

Version No 1: 20 Nov 2026 (00:35 hrs)

incurred a loss. In this context, the instruction to the AMGS to enquire whether there were any additional charges was a reference to the appellants` offer of an upgraded aircraft, and the question of war risk insurance was not mentioned at all. The inference to be drawn from all this, and from the other evidence, was that the total price of the charter quoted by the appellants had somehow been omitted for consideration by the FTC, and this resulted in the FTC making a decision on an erroneous basis. This conclusion is supported by (a) the fact that on 22 September Abdul Hamid on behalf of the respondents wrote to the appellants to enquire whether they were willing to reduce the price of war risk insurance (which was quoted at US$165,000) for the flights; and (b) the evidence in cross-examination of Azmin to the following effect:

> Q: DB30 - war risk was not mentioned?
>
> A: Yes.
>
> Q: War risk discussed?
>
> A: It was not.
>
> Q: Why are you so sure?
>
> A: There is no figure involved. Three committee members and accountants. Anything dealing with figures will be minuted [sic].
>
> Q: On 14/9 was war risk an important matter?
>
> A: It was not mentioned.
>
> Q: Was it important to you?`
>
> A: Yes.
>
> Q: Did you ask what the war risk was?
>
> A: No.
>
> Q: Did the other committee members ask?
>
> A: To the best of my recollection, no.
>
> Q: How many FTC meetings have you sat on?

Version No 1: 20 Nov 2026 (00:35 hrs)

> A: A lot.
>
> Q: War risks is something which affect the charter price?
>
> A: Agree.
>
> Q: It affects how much the defendants are going to pay?
>
> A: Yes.
>
> Q: It affects the defendants` profits?
>
> A: Yes.
>
> Q: Part of the FTC`s job is to see how much the defendants can make?
>
> A: Yes.
>
> Q: Why did it not occur to the committee to ask about war risks?
>
> A: ***Because it was not mentioned by [Abdul Hamid]. We were not aware of war risks*** . [Emphasis added.]

The truth of the matter was that the respondents had committed themselves to an improvident bargain, but a bargain it nonetheless was. It may be objected that this conclusion is at variance with that of the learned judge, and that it contravenes the well-established principle that the Court of Appeal will always be slow to overturn findings of fact. However, it is also well-established that, where the credibility of witnesses is not in issue, and the only concern of the Court of Appeal is to determine whether the trial judge has drawn the proper inferences from the facts, the Court of Appeal is in just as good a position as the trial judge to evaluate the evidence. In these circumstances, the Court of Appeal will give the appropriate weight to the opinion of the trial judge, but may form its own independent opinion on the inferences to be drawn. The present case was such an instance: the question whether the respondents` facsimile of 14 September 1995 constituted an acceptance of an offer made by the appellants, did not turn on the credibility of the witnesses (unlike, it will be recalled, the question of the existence of the alleged oral agreement), but on the construction or interpretation of an uncontroverted fact - in this case a document. The Court

Version No 1: 20 Nov 2026 (00:35 hrs)

of Appeal was not obliged to attach the appropriate weight to the opinion of the learned judge, since he had not expressed one, and was entitled to examine the matter afresh for itself.

38.What, then, was the significance of the respondents` request for the appellants to forward the draft copy of the charter agreement for their perusal? Did this prevent the immediate formation of an agreement? In our view, it did not. The preceding paragraph constituted an unqualified acceptance so that an agreement was then and there concluded; the fact that the parties were to continue negotiations after that point as to the precise terms of their agreement did not affect the existence of the agreement between them, unless the continued correspondence could be construed as an agreement to rescind the earlier agreement, or unless without such further agreement the earlier agreement was unworkable or too uncertain to be enforced: ***Chitty on Contracts*** at pp 101-102 para 2-017 and p 136 para 2-081. Neither of these possibilities was the case here.

39.If there was an agreement, what were its terms? In other words, what was the acceptance an acceptance of? To state the matter another way, what were the terms of the offer? The second paragraph of the respondents` facsimile makes reference to the `terms and condition[s] of the tender document`. The question here was, what was meant by the expression `tender document`? The appellants contended that `tender document` was a reference to the correspondence between the appellants and the respondents from 7 to 14 September 1995, as it was on the basis of these documents that the FTC made an informed decision to award the tender to the appellants. On the other hand, the respondents contended that `tender document` meant the documents submitted to Mindef. The reason was that the appellants` offer of 12 September 1995 quoted the total price as

Version No 1: 20 Nov 2026 (00:35 hrs)

US$1,693,000, and `the FTC would not have accepted a tender at a loss to themselves`.

40.Unlike the situation where the formation of a contract is in issue, once it has been established that a contract has been formed, the actual intentions of the parties as to the meaning or effect of the contract becomes irrelevant. In such a situation, the court adopts an objective approach to the construction of the contract. Of course, the object sought to be achieved in construing any contract is `to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them`: **Pioneer Shipping Ltd v BTP Tioxide Ltd; The Nema** [1982] AC 724 at p 736 per Lord Diplock; but the court is concerned to ascertain, not what were the mutual intentions of the actual parties to the contract, but what would have been the intentions of the hypothetical reasonable parties, placed in the same position as the actual parties, and contracting in the words used by the actual parties. Thus in **Reardon Smith Line Ltd v Yngvar Hansen-Tangen** [1976] 3 All ER 570 at p 574; [1976] 1 WLR 989 at p 996, Lord Wilberforce said:

> *When one speaks of the intention of the parties to the contract one speaks objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.*

It is therefore more accurate to say that the object of a court of construction is to ascertain the presumed intention of the parties, on the assumption that both parties are reasonable. In **Codelfa Construction Pty Ltd v State Rail Authority of New South Wales** [1982] 149 CLR 337 at p 352, Mason J said:

> *... when the issue is which of two or more possible meanings is to be given to a contractual provision we look not to the actual*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties` presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the contract.*

41.For the purpose of construction, the intention of the parties is the meaning of the words they have used; there is no intention independent of that meaning. As Lord Shaw explained in **Great Western Rly v Bristol Corp** [1918] 87 LJ Ch 414 at p 424:

> *... one hears much use made of the word `intention`, but courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employed showed that they did; in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean? That when ascertained is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion.*

The parties are taken as having intended what they have said, and intention means `intention as expressed`; not as `motive, purpose, desire, or state of mind`. In other words, `intention` is equivalent to `meaning`, and is to be considered in the light of the surrounding circumstances and the object of the contract, in so far as that has been agreed or proved. However, the court is not confined to looking at the contract itself. Hardie Boys J pointed out in **Quainoo v NZ Breweries Ltd** [1991] 1 NZLR 161 at p 165 that:

> *[o]ften the words the parties use have only one meaning, and then there is unlikely to be occasion to look outside the contract itself. But where the words are susceptible of more than one meaning the court is entitled to look, indeed it must look, at the*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *surrounding circumstances in order to ascertain from them, if it can, what the intention was. This is quite different from listening to the parties` version of what they each meant. A contract must be construed objectively, but not in disregard of its factual context and purpose.*

And Saville J in **Vitol BV v Compagnie Europeene des Petroles** [1988] 1 Lloyd`s Rep 574 at p 576 gave a lucid summary of the relevant principles:

> *The approach of English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.*

42.Applying these principles to the present case, what was the meaning of the term `tender document`? Clearly, what the actual intentions of the respondents were, and what the actual understanding of the appellants were, was irrelevant. Taking into account the surrounding circumstances and the factual matrix of the agreement, including the object of the agreement and the negotiations between the parties, we found that the term `tender document` was a reference to the terms and conditions of the appellants` offer as embodied in their facsimile of 12 September 1995. It could not have been a reference to the respondents` tender documents submitted to Mindef, as the appellants would have had no knowledge of them, having had no access to them, for obvious reasons. The appellants` facsimile of 12 September 1995 could, without any stretch of

Version No 1: 20 Nov 2026 (00:35 hrs)

language, be called a `tender document`, as it was an offer containing terms and conditions for acceptance by the respondents. These terms and conditions included, in addition to the flight schedule, type of aircraft and price (US$1,693,000), a provision that the respondents were to pay the sum of US$200,000 as a `deposit due confirmation`. As the appellants` offer was accepted by the respondents without qualification, save as to further terms to be agreed, a binding agreement on the terms and conditions spelt out in the appellants` facsimile dated 12 September 1995 came into existence. The respondents were thus prima facie liable to pay to the appellants the sum of US$200,000 as a deposit due upon confirmation.

43.The remaining question was, whether the deposit was liable to be forfeited, or whether the respondents were entitled to claim the return of the money, had they paid it. It is trite law that a deposit is paid as an earnest of performance of a contract, and that if nothing is said expressly about the conditions governing it, it will be taken to be required as a security for the completion of the contract by the payer and will be forfeited to the other party if the payer fails to perform his side of the contract. Conversely, if the contract is completed, the deposit will be applied towards payment of the price. In the present case, since the contract was not, in the event, executed, the sum claimed as a deposit, had it been paid, was liable to forfeiture. The appellants were entitled to sue for it on the basis of the principle that rescission does not retrospectively release the party in breach from accrued obligations. This conclusion may have been different had the appellants been aware that the respondents` agreement with Mindef was subject to the approval of the United Nations, but this was not established by the evidence. First, that the respondents` agreement with Mindef was subject to the approval of the United Nations was not a term of the agreement between the respondents and the appellants. Second, extrinsic (oral) evidence to the effect

Version No 1: 20 Nov 2026 (00:35 hrs)

that the appellants were aware of this fact was not admissible as the instant situation did not fall within one of the exceptions to the parol evidence rule. Third, even if extrinsic evidence could be adduced, it would have fallen far short of the standard required to prove the requisite knowledge on the part of the appellants.

44. ***Conclusion***

There was, however, some uncertainty as to the true quantum of loss suffered by the appellants, apart from the deposit payable to their principal, ACW (USA). We therefore allowed the appeal but ordered damages to be assessed by the registrar.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Yap Teong Liang (Salem Ibrahim & Partners) for the appellants
RS Bajwa and CA Monteiro (Bajwa & Co) for the respondents

Version No 1: 20 Nov 2026 (00:35 hrs)