DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. 02(f) – 72 – 10/2013 (A)

ANTARA

SINNAIYAH & SONS SDN. BHD.
(No. Syarikat: 029051-X) ... **PERAYU**

DAN

DAMAI SETIA SDN. BHD.
(No. Syarikat: 73000-M) ... **RESPONDEN**

[Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Sivil No. A-02-(NVCV)(W)-1114-05/2012

Antara

Damai Setia Sdn. Bhd.
(No. Syarikat: 73000-M) ... Perayu

Dan

Sinnaiyah & Sons Sdn. Bhd.
(No. Syarikat: 029051-X) ... Responden]

[Dalam Perkara Mahkamah Tinggi Malaya Di Ipoh
Guaman Sivil No. 22NCVC-4-01/2012

Antara

Sinnaiyah & Sons Sdn. Bhd.
(No. Syarikat: 029051-X) ... Plaintif

Dan

Damai Setia Sdn. Bhd. ... Defendan]
(No. Syarikat: 73000-M)

Corum: Richard Malanjum, CJSS
Abdull Hamid Bin Embong, FCJ
Hasan Bin Lah, FCJ
Abu Samah Bin Nordin, FCJ
Ramly Bin Hj. Ali, FCJ

JUDGMENT OF THE COURT

Introduction:

1. This Court granted the Appellant leave to appeal on 10.10.2013.

2. There is only one leave question to consider which reads:

> *'Whether the Federal Court should rely on the ratio set in Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 in determining the burden of proof in civil fraud?'*

3. At the outset we note that the leave question uses the term '*burden of proof in civil fraud*'.

4. There is of course a difference between the terms '*burden of proof* and '*standard of proof*'.

5. Briefly the former relates to the burden or obligation of proving a fact on the party who exerts the existence of any fact in issue and wishes the court to believe in its existence – sections 102 - 103 of the **Evidence Act 1950** ('the Act'). The burden of proof of a party never shifts.

6. The latter refers to '*the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen*'. **(In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)**.[1]

7. With respect, after hearing the submissions of learned counsel for the parties we are of the view that the real issue for determination is on the standard of proof required in civil claim when fraud is alleged. Accordingly we will take that the use of

[1] (2008) UKHL 35 - Per Lord Hoffmann para. 4.

the term '*burden of proof*' in the leave question is meant to be the '*standard of proof*'.

8. Now, before we dwell into the leave question we need to first consider the facts involved in this appeal. This is necessary so that irrespective of our answer to the leave question we would at the same time be able to determine the final outcome of this appeal.

9. Further, in this Judgment the Appellant will be referred to as the Plaintiff and the Respondent as the Defendant unless the context otherwise requires.

Background Facts:

10. In early 2005, the Defendant, Damai Setia Sdn Bhd was awarded a contract by Public Works Department ('PWD') to upgrade Federal Road A13 into a four-lanes road from Jalan Sultan Azlan Shah Junction to Tanjung Rambutan in the State of Perak ('the Project'). On 01.02.2005 the Defendant appointed a company VN Sunrise ('Sunrise') as their sub-contractor for the Project. Work on the Project commenced on 01.02.2005. It was duly completed on 15.10.2005. There was a

2 months delay in the completion. Concurrently the Defendant appointed the Plaintiff, Sinnaiyah & Sons Sdn Bhd as the Project Manager for the Project. As the Project Manager the Plaintiff was to manage the accounts for the Project and to make payments to subcontractors for the Project including Sunrise for goods and materials supplied.

11. In order to receive payments from PWD for the Project and to facilitate the arrangement with the Plaintiff, the Defendant opened a current bank account with Bank Bumiputera Commerce in Johore Bahru. The Plaintiff pre-signed all cheques and authorized the Defendant to make the necessary payments from time to time from the said bank account. It was also agreed between the Defendant and the Plaintiff that the latter would be paid management fees for the services rendered for the duration of the Project period (i.e. 01.02.2005 until 15.10.2005).

12. Unfortunately, the arrangement between the Defendant and the Plaintiff did not go smoothly. Dispute arose. The Plaintiff sued the Defendant for the sum of RM301,767.40 which it claimed to be the unpaid management fees and financial advances given.

13. In turn the Defendant not only disputed the claim but also counterclaimed for the sum of RM535,836.04, being an amount the Defendant alleged the Plaintiff to have fraudulently paid itself instead of paying Sunrise.

14. In defence to the counterclaim the Plaintiff asserted that the sums it paid itself was for set-offs or contra payments for goods and materials supplied to Sunrise for the completion of the Project.

Before The High Court:

15. After hearing the evidence the learned trial Judge dismissed both the claim of the Plaintiff and the counterclaim of the Defendant. It was the finding of the learned trial Judge that the Plaintiff had been duly paid for the management fees, that any financial advances made would be on illegal money lending and that the Defendant failed to prove its counterclaim.

Before The Court of Appeal:

16. Dissatisfied with the decision of the High Court both parties appealed to the Court of Appeal. In coming to its decision the

Court of Appeal dismissed the appeal by the Plaintiff. The Court of Appeal held that the Plaintiff had failed to prove its claim for financial advances to the Defendant. The Defendant did not sign the payment vouchers for the alleged financial advances and with the Project almost completed there was also no necessity for the alleged financial advances. As to the claim for management fees the Court of Appeal held that it was in fact a claim for interests. The Project was already completed. Management was no longer required.

17. In respect of the counterclaim of the Defendant the Court of Appeal held that the finding of the High Court was against the weight of the evidence adduced. The Plaintiff was not authorized to pay itself but to Sunrise. The set-offs and contra payments as alleged by the Plaintiff were unfounded as the Defendant was still indebted to Sunrise. The appeal of the Defendant was therefore allowed.

Before This Court:

Submissions Of Parties:

18. Briefly, learned counsel for the Plaintiff submitted:

i. that the correct standard of proof for fraud in civil claims should be on the balance of probabilities;

ii. that the learned trial Judge was not satisfied even on the balance of probabilities that the Defendant had proved its counterclaim based on fraud; and

iii. that the Court of Appeal therefore erred in finding that the diversion of the fund by the Plaintiff was unauthorized. The Defendant was aware of the diversion and explanation given but was not considered by the Court of Appeal.

19. In response learned counsel for the Defendant argued:

i. that the present standard of proof for fraud in civil claims in Malaysia is not in tandem with the standard applied in other common law jurisdictions;

ii. that the present standard adopted for fraud in civil claims in Malaysia is not premised on policy ground. It is a product of misinterpretation of the judgment of Lord Atkin

in ***Narayanan Chettyar v. Official Assignee of the High Court, Rangoon***[2];

iii. that the principle propounded by this Court in ***Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal Representative of the estate of Chan Weng Sun, deceased)***[3] is impossible to apply;

iv. that the standard of proof for fraud in civil claims should be on the balance of probabilities. However, where the allegation of fraud is serious in nature as for instance criminal in nature, a higher quality of evidence should be demanded while maintaining the standard of proof to be on the balance of probabilities;

v. that in this case neither the learned trial Judge nor the Court of Appeal applied the proper standard. Nevertheless they must be assumed to have applied the correct test;

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[2] (28) A.I.R 1941 Privy Council 93
[3] [1997] 2 MLJ 45

vi. that in this case irrespective of which standard of proof to apply the Plaintiff should be liable for the counter claim of the Defendant. There was a misappropriation of trust by the Plaintiff when it diverted the use of the pre-signed cheques to pay itself. Further, if indeed the diversion of the fund was pursuant to an arrangement made between the Plaintiff and Sunrise, there should be no longer any demand made by Sunrise to the Defendant. Yet there were 6 demand letters served on the Defendant; and

vii. that the learned trial Judge failed to properly consider the documentary evidence while preferring the oral evidence adduced. As such the Court of Appeal was right to review and reassess the evidence adduced and coming to its own factual finding.

Decision Of This Court:

20. We begin with our observation that there is no specific provision in the Act or for that matter any legislation in Malaysia that stipulates the relevant standard of proof required in both criminal and civil proceedings. Section 3 of the Act in interpreting the words '*proved*' and '*disproved*' only makes

reference to a '*prudent man*'. As such the principles of law in relation to burden of proof and standard of proof are therefore common law principles. (See: ***Public Prosecutor v Yuvaraj***[4]; ***Bater v Bater***[5]; ***Miller v Minister of Pensions***[6]).

21. On casual perusal of the reported judgments by the Courts in this country it can be elicited that there are at least three principles propounded in addressing the issue of what is the standard of proof required in civil claims when fraud is the subject matter.

22. The first principle is premised on the standard of beyond reasonable doubt as applied in criminal cases. Such principle began in the case of ***Saminathan v Pappa***[7] in which the Privy Council upheld the decision of the then Federal Court that adopted the principle enunciated in ***Narayanan*** (supra). Lord Atkin in that case said this at page 95:

> "*There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the*

[4] (1970) 2 WLR 226
[5] (1951) P35
[6] (1947) 2 All ER 372
[7] (1981) 1 MLJ 121

High Court. Fraud of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. The High court were justified in holding that the trial judge's finding was largely based on suspicion and conjecture.'

23. After ***Saminathan*** (supra) most of the subsequent decisions by the Courts in Malaysia followed this first principle. (See: ***Chu Choon Moi v Ngan Siew Tin***[8] and ***Datuk Jaginder Singh v Tara Rajaratnam***[9]).

24. But it would be quite erroneous to say that prior to ***Saminathan*** (supra) the Courts in this country had also applied the first principle as enunciated. On the contrary before ***Saminathan*** (supra) the Courts in this country applied albeit *'a very high degree of'* the balance of probability standard in civil claims when fraud was alleged. In the case of ***Lau Kee Ko & Anor v Paw Ngi Siu***[10], Raja Azlan Shah J (as His Majesty then was)

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[8] [1986] 1 MLJ 34
[9] [1986] 1 MLJ 105
[10] [1974] 1 MLJ 21

delivering judgment for the then Federal Court said this at page 23:

> *'It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.'*

(See also the earlier case of ***Ratna Ammal v Tan Chow Soo***[11]).

25. Meanwhile we take note that this Court in ***Ang Hiok Seng*** (supra) declared that '*to the extent that the general statement of the law in* ***Lau Kee Ko*** *(supra) is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law.*' Whether this pronouncement is tenable today depends on our answer to the leave question.

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[11] [1967] 1 MLJ 296

26. Anyway, even after ***Saminathan*** (supra) the then Federal Court appeared to have reverted to the earlier position. In the case of ***Lee You Sin v Chong Ngo Khoon***[12], the civil standard of proof for civil claims, that is, on the balance of probabilities was adopted despite the allegation of fraud. However, the Court imposed the requirement of a higher degree of probability for a serious allegation of fraud. We take it as the second principle.

27. In delivering the judgment of the Court Lee Hun Hoe CJ (Borneo) after making reference to ***Bater v Bater*** (supra) said this at page 17:

> *'We would therefore with respect suggest the test to be applied is one set out in Bater v Bater [1950] 2 All ER 458, i.e. the learned judge was correct in relying on Bater v. Bater though his mistake was in not saying that the statement of claim in substance alleges fraud.'*

28. The foregoing view expressed in ***Lee You Sin*** (supra) was in tandem with what Winslow J. said in the Singapore case of

[12] [1982] 2 MLJ 15

Eastern Enterprises v Ong Choo Kim[13]. He said this at page 242:

> *'I would therefore conclude for purposes of this action that the plaintiffs must establish their allegation against the defendant on a balance of probability as laid down by Doe d. Devine v. Wilson subject to the qualification that in tilting the balance against the defendant, they must attain a higher degree of probability than is required in an ordinary case of civil negligence though not the very high standard of the criminal law. Although the difference in the standards of proof in civil and criminal cases "may well turn out to be more a matter of words than anything else" (per Denning L.J. in Bater's case), the Australian High Court in the Rejfek case held that it was no mere matter of words but a matter of critical substance.'*

29. In other words, both the cases of ***Eastern Enterprises*** (supra) and ***Lee You Sin*** (supra) applied the balance of probabilities standard when fraud was alleged subject to the requirement of a higher degree of probability depending on the seriousness of

[13] [1969] 1 MLJ 236

the allegation. The more serious it is such as tilting towards criminal liability the higher degree of probability is required before it can be said that the standard of proof on the balance of probabilities has been satisfied.[14]

30. But while the two earlier conflicting principles[15] adopted by the highest Court of this country were yet to be reconciled, this Court in the case of ***Ang Hiok Seng v Yim Yut Kiu*** (supra) crafted the third principle. It was held that the standard of proving fraud should be dependent on the nature of the fraud alleged. In delivering the judgment for the Court Mohd Azmi FCJ said this at pages 59 - 60:

> *'...where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities.'*
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> .....

[14] See: Hornal v Neuberger Products Ltd [1957] 1 QB 247
[15] Re: Saminathan (supra) and Lee You Sin (supra)

'...But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud — and not based on a criminal conduct or offence — the civil burden is applicable.'

31. We would say that the ***Ang*** case (supra) seemed to have made a distinction between civil fraud and criminal fraud even in civil proceedings. Examples of fraud with criminal nature in civil claims were given such as conspiracy to defraud or misappropriation of money or criminal breach of trust while for fraud of civil nature were those provided under sections 17 and 18 of the **Contracts Act 1950.** Those sections define certain acts as '*fraud*' and '*misrepresentation*' if they have induced the entering or deceived someone into entering a contract. Unfortunately even with such illustrations the demarcation between civil and criminal fraud remained ambiguous.[16]

32. The confusion was further compounded when this Court quite recently in the case of ***Yong Tim v Hoo Kok Cheong***[17] was

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[16] Note on the view expressed on the difficulties in distinguishing between civil and criminal fraud in Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd [2000] 4 AMR 3784

[17] [2005] 3 CLJ 229

emphatic and adopted the first principle, namely, that *'the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has been consistently applied by the courts in Malaysia. We see no reason to disturb that trend.'* (See also: ***Asean Security Paper Mills Sdn Bhd v CGU Insurance Berhad***[18]).

33. It is therefore not surprising that subsequent to ***Yong Tim*** (supra) the lower Courts, being bound by the principle of stare decisis, adopted the criminal standard of proof for fraud in civil claims. (See: ***Chong Song @ Chong Sum & Anor v Uma Devi a/p V Kandiah***[19]; ***Shell (M) Trading Sdn Bhd v Tan Bee Leh @ Tan Yue Khoen & Ors***[20].

34. In view of such uncertainty in the law both learned counsel for the parties in this appeal strenuously urged us to revisit the earlier decisions of the Courts in this country. It was submitted that the position of the law should be rectified so as to be in tandem with the generally accepted standard as applied in other common law jurisdictions, in particular among the

[18] (2007) 2CLJ 1
[19] [2011] 2 MLJ 585
[20] [2013] 8 MLJ 533

Commonwealth countries such as England, Canada, Australia and Singapore.

35. Now, before we respond to that urging it is only appropriate that we begin by examining the English position. Based on the various decisions of the English courts it is clear that under English law the standard of proof for fraud in civil claim has been on the balance of probabilities. But '*the elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities*'.[21]

36. While the English position appeared to be clear, some confusion came about when the Privy Council through Lord Atkin held otherwise[22] and failed to consider an earlier decision of the same tribunal.[23] This resulted in some common law jurisdictions including this country adopting the criminal standard of proof on a beyond reasonable doubt in civil claims

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[21] See: Bater v Bater (supra); Hornal v Neuberger Products Ltd (supra) -' ...for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities.'

[22] See: New York v Heirs of Phillips Decd [1939] 3 All ER 952; Narayanan (supra);

[23] See: Doe d Devine v Wilson (1855) 14 ER 851 –'In a civil case...The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities'.

when fraud is alleged. But there were also some other jurisdictions, after considering the rationale of the proposition by Lord Atkin, declined to follow it.[24]

37. Be that as it may, the English position is now settled once and for all in the case of ***In re B (Children)*** *(supra).*[25] In that case the House of Lords held that there is '*only one civil standard of proof and that is proof that the fact in issue more probably occurred than not*'. The '*range of circumstances which have to be weighed when deciding as to the balance of probabilities*'[26] or '*heightened civil standard*'[27] is no longer a factor to consider '*when deciding as to the balance of probabilities*'. This is what Lord Hoffmann said at page 7:

> '*My Lords, I would invite your Lordships fully to approve these observations. I think that the time has come to say, once and for all, that here is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove*

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[24] Canada and Australia courts declined to follow Lord Atkin's preposition.
[25] See Note 1 above; See also *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 where Lord Hoffmann first stated the law
[26] Hornal v Neuberger Products Ltd (supra)
[27] See: R (McCann) v Crown Court at Manchester (2003) 1 AC 787 per Lord Steyn

any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in McCann's case, at p 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.'

38. And Baroness Hale of Richmond was even more forceful in emphasizing on the law when she said this at page 11 and page 22 respectively:

'In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is

able to make up his mind where the truth lies without needing to rely upon the burden of proof.

.....

My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.'

39. It is worthy to note that the English Supreme Court in the case of ***In re S-B Children***[28] followed the law as pronounced in ***In re B (Children)*** (supra). The Supreme Court firmly approved that '*there is only one civil standard of proof and that is proof that*

[28] (2009) UKSC 17

the fact in issue more probably occurred than not'. The Court also rejected the "*nostrum, 'the more serious the allegation, the more cogent the evidence needed to prove it*". This rejection goes to show that even for hybrid cases[29] the same civil standard of proof applies.

40. The Canadian courts took the same position as the English courts. ***In F.H. v McDougall***[30] the Canadian Supreme Court held that '*in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.*'

41. And in rejecting the suggestion that there are different levels of scrutiny of evidence depending on the seriousness of the allegation, Rothstein J. delivering the judgment of the Canadian Supreme Court said this at paragraph 45:

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[29] Civil cases but containing material allegations implying criminal conduct. There are some judicial views that for a hybrid case a higher degree of probability or a higher standard of proof is required. In the words of Lady Hale in re S-B Children (supra) such views 'had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said' in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563.

[30] [2008] SCC 53

'To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.'

42. In fact long before ***McDougall*** (supra) the position of the law in Canada[31] was in line with the jurisprudence as stated in ***Bater v Bater*** (supra).

43. In Australia the approach then by the courts there could be surmised in the case of ***Rejfek & Anor v McElroy & Anor***[32] in which the High Court of Australia stated this at paragraph 11:

'But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the

[31] See: Hanes v Wawanesa Mutual Insurance Co (1936) 36 DLR (2d)
[32] (1965) 39 ALJR 177

mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.'

44. It is to be noted that ***Rejfek & Anor v McElroy & Anor*** (supra) followed an earlier decision of the High Court in ***Helton v Allen***[33] that preferred the decision in ***Doe d Devine v Wilson*** (supra) to that of Lord Atkin's pronouncements in ***New York v Heirs of Phillips Dec'd*** (supra) and ***Narayanan*** (supra). Indeed the pronouncements of Lord Atkin were considered as a mere dicta.

[33] (1940) 63 C.L.R 691

45. Nearer home, in Singapore, the principle of law on the standard of proof for fraud in civil claims is also on the balance of probabilities. And although the notion of a third standard of proof where fraud is the subject in a civil claim has been rejected, the courts there nevertheless added a caution that '*the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case*'.[34]

46. It is therefore quite obvious that the current law in Singapore on the standard of proof for fraud in civil claims is the pre ***In re B (Children)*** (supra) position under the English law.

47. In view of the positions of the law in the respective common law jurisdictions as summarized above, we agree with both learned counsel for the parties in this appeal that the position of the law on the standard of proof for fraud in civil claims in this country is far from satisfactory. With respect, there is merit in the submission of learned counsel for the Defendant that the adoption of the criminal standard of proof for fraud in civil

[34] Tang Yoke Kheng v Lek Benedict (2005) 3 SLR (R) 263; Yogambikai Nagarajah v Indian Overseas Bank (1996) 2 SLR (R) 774

claims is due to the misinterpretation or even a blind adoption of the judgment of Lord Atkin in ***Narayanan Chettyar v. Official Assignee of the High Court, Rangoon*** (supra).

48. As such, in our judgment the time has come to realign the position of the law in this country on the standard of proof for fraud in civil claims. While learned counsel for the Defendant seemed to favour the adoption of the Singapore position, learned counsel for the Plaintiff urged us to adopt the principle in ***In re B (Children)*** (supra).

49. With respect, we are inclined to agree with learned counsel for the Plaintiff that the correct principle to apply is as explained in ***In re B (Children)*** (supra). It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '*(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts.*'

50. Hence, it is therefore up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim to find whether the standard of proof has been attained. '*The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.*' The criminal aspect of the allegation of fraud and the standard of proof required thereof should be irrelevant in the deliberation.

51. Accordingly as stated earlier we agree with the reasons given by learned counsel for both parties that the present standard of proof for fraud in a civil claim in this country is not in line with the principle as applied in other common law jurisdictions and should therefore be reviewed.[35] Indeed it is quite obvious in ***Narayanan*** (supra) that Lord Akin did not provide any cogent reason for applying the criminal standard of proof in a civil claim when fraud is alleged. Similarly in ***Saminathan*** (supra) the principle in ***Narayanan*** (supra) was applied without any discussion on its rationale.

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[35] See: Chua Kwee Chen v Koh Choon Chin [2006] 3 SLR 469 which discusses the thorny issues related to the application of the criminal standard in a civil claim involving the allegation of fraud.

52. We therefore reiterate that we agree and accept the rationale in ***In re B (Children)*** (supra) that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply. And perhaps it is not out of place here to restate the general rule at common law that, "*in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities*". (See **Boonsom Boonyanit v Adorna Properties Sdn. Bhd. [1997] 2 MLJ 62**, at page 74).

53. Accordingly, despite the reaffirmation of the law on the issue in ***Yong Tim v Hoo Kok Cheong*** (supra) we hold that it is no longer the law in this country. Similarly, the principles as pronounced in ***Ang Hiok Seng*** (supra) and ***Lee You Sin v Chong Ngo Khoon*** (supra) despite applying the civil standard to a certain extent are also no longer the law. Hence, the disapproval of ***Lau Kee Ko*** *(supra)* in ***Ang Hiok Seng*** (supra) is no longer relevant.

54. However, we should make it clear that this Judgment only applies to this appeal and to future cases and should not be utilized to set aside or review past decisions involving fraud in civil claims.

55. Our answer to the leave question is therefore in the negative.

56. Reverting to the present appeal, we have duly perused the facts and evidence adduced. And applying the principle we have just pronounced on the standard of proof for fraud in civil claims which is less onerous than the standard applied by the Courts below, we agree with the reasons, findings and conclusions of the Court of Appeal in allowing the counter claim of the Defendant.

57. In the upshot this appeal is therefore dismissed with costs.

Signed.
(RICHARD MALANJUM)
Chief Judge Sabah and Sarawak

Date: 10th August, 2015

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.....
(NORIDAH BT. GHAZALI)
Secretary To
Mr. Justice Tan Sri Richard Malanjum
Chief Judge Of Sabah & Sarawak
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