Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-61–08 OF 2012(W)
RAUS SHARIF PCA, HASHIM YUSOF, ABDULL HAMID EMBONG, HASAN LAH AND JEFFREY TAN FCJJ
30 OCTOBER 2013

Civil Procedure — Remedy of account — Action founded on contract — Fiduciary relationship — Alleged fiduciary relationship between appellant and respondent — Whether dependent on terms of contract — Whether justification for fiduciary duty to account exists — Whether fiduciary relationship can be superimposed upon contract

Civil Procedure — Remedy of account — Application allowed by trial judge — Appeal against — Obligation to pay consultancy fees — Consultancy agreements — Whether appellant and respondent's contractual relationship established — Fiduciary relationship — Whether existed between appellant and respondent — Whether fiduciary duty to account arose

Civil Procedure — Trial – Defence — Defendant failing to offer any evidence — Whether evidence given by plaintiff ought to be presumed to be true — Whether appellate court precluded from interfering with determination of fact by judge — Whether principle in Takako Sakao v Ng Pek Yuen & Anor applicable

Companies and Corporations — Lifting of corporate veil — Remedy of account — Relationship between appellant and respondent — Whether appellant an associated company — Whether fraud proven — Whether absence of any justification to lift corporate veil

Contract — Terms — Entire agreement clause — Whether agreement included an entire agreement clause — Whether entire agreement clause precluded consideration of collateral contract

The appellant/plaintiff's claim was for an account from the respondent/defendant based on ten consultancy agreements entered into between the plaintiff and Alcatel Standard SA ('Standard'), acting on behalf of its associated company namely, Alcatel CIT and Alcatel-Lucent Italia/Alcatel

Italia (the 'Consultancy Agreements'). The purpose of the consultancy agreements was for the plaintiff to provide consultancy services to the associated company and the defendant in securing contracts with Telekom (M) Bhd ('Telekoms') and Celcom Bhd ('Celcom'). The defendant was not a contracting party to the consultancy agreements. The contracts were all entered into between the plaintiff and Standard. The obligation to pay the plaintiff's consultancy fees under the consultancy agreements laid with Standard, Alcatel CIT and Alcatel Italia. The consultancy agreements constituted the entire agreement between the parties. The plaintiff claimed that the mode and manner of payment as provided under the consultancy agreements were never followed from day one. Instead, by way of a collateral agreement between the plaintiff and the defendant, it was agreed that the defendant would notify the plaintiff of the value of all deliveries that had been made to Celcom and Telekoms, after which the plaintiff would send the invoices to the defendant whereupon payment would be made by the defendant on the invoices. The plaintiff alleged that based on this collateral agreement the plaintiff was paid in excess of USD 7m from the year 2000. This carried on until the defendant terminated the services of the plaintiff in 2009 at which point the defendant stopped rendering proper accounts and details of the deliveries to Celcom and Telekoms to enable the plaintiff to compute the payment due. The plaintiff thus in this suit sought from the defendant, inter alia, statement of accounts of all monies received by the defendant from Celcom and Telekoms. The defendant denied that it was the ultimate beneficiary of services rendered by the plaintiff. The defendant also denied the existence of the alleged collateral contract. At the close of the plaintiff's case the trial judge refused an application for adjournment by the defendant on the ground that its witness was not available. The case was therefore closed without the defence offering any evidence. The trial judge allowed the plaintiff's claim on the grounds that the defendant was an accounting party because the defendant, Standard and Alcatel CIT were a group enterprise rather than a separate legal entity of each company within the group included in the operation of the agreements and thus a fiduciary duty to account arose. The Court of Appeal allowed the defendant's appeal. Leave to appeal to the Federal Court was granted to the plaintiff on the following questions: (i) whether in ascertaining whether parties stand in a fiduciary relationship, a court is to have regard to the course of dealings between the parties in addition to any express agreement between them; (ii) whether in view of the decision of the Federal Court in *Takako Sakao(f) v Ng Pek Yuen(f) & Anor* [2009] 6 MLJ 751 *(Takako Sakao)*, the Court of Appeal was precluded from interfering with a determination of fact by a judge of the High Court at trial where the sole defendant had elected not to lead evidence; and (iii) where an agreement includes an 'entire agreement'

clause, whether such clause on as a matter of course precluded the consideration of a collateral contract.

Held, dismissing the appeal with costs:

(1) It had not been established that some payments were made by the defendant to the plaintiff for the services rendered. Furthermore the invoices for payment were not addressed to the defendant but were addressed either to Alcatel CIT or Alcatel Italia which was in accordance with the term of the consultancy agreements. As the plaintiff failed to establish that it was entitled to some sum from the defendant, the plaintiff was not entitled to the order of taking of account against the defendant under the common law (see paras 26–27).

(2) The trial judge erred in lifting the corporate veil of the defendant to make the defendant liable to account to the plaintiff. There must be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil (see para 46).

(3) The business relationship between the plaintiff and the defendant did not fall under the accepted traditional categories of fiduciary relationship. Even applying the flexible approach to the circumstances of the case, such fiduciary relationship did not exist in the case. This is because commercial transactions often do not give rise to fiduciary duties because they do not meet the criteria for characterisation as fiduciary in nature. The circumstances of the relationship in the instant case could not give rise to a relationship of trust and confidence (see paras 47–48).

(4) The notes of proceeding showed that the defendant did take part in the trial. The trial judge refused the adjournment and the case was therefore closed without the defence offering any evidence. The facts of this case could be distinguished from the facts in *Takako Sakao*. The principles in *Takako Sakao* did not apply under the circumstances (see paras 56–57).

(5) The trial judge failed to evaluate the evidence relating to the alleged collateral contract and make any finding on the existence of the alleged collateral contract (see para 64).

(6) The Court of Appeal erred in failing to appreciate that entire agreement clauses operated only as between the contracting parties. The defendant was not a party to the consultancy agreements and as such the alleged collateral contract between the plaintiff and the defendant should be treated as a separate and distinct contract and could not fall under the scope of the consultancy agreements. The entire agreement clause did not preclude the plaintiff from setting up the alleged collateral agreement between the plaintiff and defendant (see para 68).

(7) Even if the plaintiff had succeeded in establishing the existence of the

collateral contract, such contract was void for want of consideration. There was nothing to show that consideration was given by the plaintiff for the defendant to furnish the required information. Under the consultancy agreements the plaintiff was required to provide consultancy services for the benefit of the defendant. But that was the consideration for the consultancy agreements and not for the alleged collateral agreement and also the consultancy services were not rendered at the defendant's request (see para 71).

[Bahasa Malaysia summary

Tuntutan perayu/plaintif adalah untuk akaun dari responden/defendan berdasarkan sepuluh perjanjian perundingan yang dimasuki antara plaintif dan Alcatel Standard SA ('Standard'), yang bertindak bagi pihak syarikat bersekutunya iaitu Alcatel CIT dan Alcatel-Lucent Italia/Alcatel Italia ('Perjanjian Perundingan'). Tujuan perjanjian perundingan itu adalah untuk plaintif menyediakan perkhidmatan perundingan kepada syarikat bersekutu tersebut dan defendan dalam mendapatkan kontrak dengan Telekom (M) Bhd ('Telekom') dan Celcom Bhd ('Celcom'). Defendan bukan pihak yang berkontrak dengan perjanjian perundingan itu. Semua kontrak tersebut telah dimasuki antara plaintif dan Standard. Obligasi untuk membayar yuran perundingan plaintif di bawah perjanjian perundingan itu terletak pada Standard, Alcatel CIT dan Alcatel Italia. Perjanjian perundingan itu membentuk keseluruhan perjanjian antara pihak-pihak. Plaintif mendakwa bahawa kaedah dan cara membuat pembayaran sebagaimana yang diperuntukkan di bawah perjanjian perundingan itu tidak pernah diikuti dari hari pertama. Sebaliknya, melalui perjanjian kolateral antara plaintif dan defendan, telah dipersetujui bahawa defendan akan memberitahu plaintif tentang nilai semua penghantaran yang telah dibuat kepada Celcom dan Telekom, selepas itu plaintif akan menghantar invois-invois kepada defendan yang mana pembayaran akan dibuat oleh defendan berdasarkan invois-invois itu. Plaintif mendakwa berdasarkan perjanjian kolateral ini plaintif telah dibayar lebihan USD 7 juta dari tahun 2000. Ini berterusan sehingga defendan menamatkan perkhidmatan plaintif pada tahun 2009 yang mana mulanya defendan berhenti memberikan akaun dan butiran penghantaran yang sepatutnya kepada Celcom dan Telekom bagi membolehkan plaintif untuk mengira pembayaran yang perlu dibayar. Plaintif dengan itu dalam saman ini memohon daripada defendan, antara lain, penyata akaun untuk semua wang yang diterima oleh defendan daripada Celcom dan Telekom. Defendan menafikan bahawa ia adalah benefisiari utama untuk perkhidmatan yang diberikan oleh plaintif. Defendan juga menafikan kewujudan kontrak kolateral yang dikatakan itu. Di akhir kes plaintif hakim perbicaraan menolak permohonan penangguhan oleh defendan atas alasan bahawa saksinya tidak boleh didapati. Kes itu oleh itu ditutup tanpa pembelaan yang menawarkan apa-apa keterangan. Hakim perbicaraan membenarkan tuntutan plaintif atas alasan bahawa defendan merupakan sebuah pihak perakaunan kerana

defendan, Standard dan Alcatel CIT merupakan kumpulan perusahaan dan bukan satu entiti yang sah yang berasingan bagi setiap syarikat di dalam kumpulan yang dimasukkan ke dalam operasi perjanjian dan dengan itu wujud kewajipan fidusiari kepada akaun itu. Mahkamah Rayuan membenarkan rayuan defendan. Kebenaran untuk merayu kepada Mahkamah Persekutuan telah diberikan kepada plaintif berdasarkan soalan-soalan berikut: (i) sama ada dalam menentukan jika pihak-pihak mempunyai hubungan fidusiari, mahkamah hendaklah mengambil kira pengendalian urusan antara pihak-pihak ditambah dengan apa-apa perjanjian nyata antara mereka; (ii) sama ada berdasarkan keputusan Mahkamah Persekutuan dalam kes *Takako Sakao(f) v Ng Pek Yuen(f) & Anor* [2009] 6 MLJ 751*(Takako Sakao)*, Mahkamah Rayuan dihalang daripada mengganggu penentuan fakta oleh hakim Mahkamah Tinggi semasa perbicaraan di mana satu-satunya defendan telah memilih untuk tidak mengemukakan keterangan; dan (iii) di mana perjanjian memasukkan fasal 'keseluruhan perjanjian', sama ada fasal tersebut sebagai perkara yang sudah tentu menghalang balasan kontrak kolateral.

Diputuskan, menolak rayuan dengan kos:

(1) Tidak dibuktikan bahawa beberapa bayaran telah dibuat oleh defendan kepada plaintif bagi perkhidmatan yang diberikan. Tambahan pula invois untuk pembayaran itu tidak dialamatkan kepada defendan tetapi telah dialamatkan sama ada kepada Alcatel CIT atau Alcatel Italia yang menurut tempoh perjanjian perundingan itu. Memandangkan plaintif gagal membuktikan bahawa ia berhak untuk sejumlah wang tersebut daripada defendan, plaintif tidak berhak kepada perintah pengambilan akaun terhadap defendan di bawah *common law* (lihat perenggan 26–27).

(2) Hakim perbicaraan terkhilaf dalam menyingkap tabir korporat daripada defendan itu untuk menjadikan defendan bertanggungjawab menjelaskan akaun itu kepada plaintif. Perlu ada bukti sama ada penipuan sebenar atau beberapa perilaku yang boleh dianggap penipuan dalam ekuiti untuk mewajarkan tabir korporat disingkap (lihat perenggan 46).

(3) Hubungan perniagaan antara plaintif dan defendan tidak termasuk di bawah kategori tradisional diterima hubungan fidusiari. Walaupun menggunakan pendekatan yang fleksibel kepada hal keadaan kes itu, hubungan fidusiari sebegini tidak wujud dalam kes itu. Ini kerana urus niaga komersial sering tidak menimbulkan tugas fidusiari kerana tidak memenuhi kriteria untuk pencirian sebagai suatu yang bersifat fidusiari. Keadaan hubungan dalam kes ini tidak mungkin menimbulkan hubungan kepercayaan dan keyakinan (lihat perenggan 47–48).

(4) Nota prosiding menunjukkan bahawa defendan tidak mengambil bahagian dalam perbicaraan itu. Hakim perbicaraan menolak

penangguhan dan kes oleh itu tertutup tanpa pembelaan yang menawarkan apa-apa keterangan. Fakta kes ini boleh dibezakan daripada fakta-fakta dalam kes *Takako Sakao*. Prinsip dalam kes *Takako Sakao* tidak terpakai di bawah keadaan ini (lihat perenggan 56–57).

(5) Hakim perbicaraan gagal menilai keterangan berhubung kontrak kolateral yang dikatakan dan membuat apa-apa penemuan berhubung kewujudan kontrak kolateral itu (lihat perenggan 64).

(6) Mahkamah Rayuan terkhilaf apabila gagal untuk memahami bahawa seluruh fasal perjanjian beroperasi hanya antara pihak yang berkontrak. Defendan bukan pihak kepada perjanjian perundingan dan oleh itu kontrak kolateral yang dikatakan antara plaintif dan defendan hendaklah dianggap sebagai kontrak yang berasingan dan berlainan dan tidak boleh terangkum di bawah skop perjanjian perundingan. Perjanjian keseluruhan fasal tidak menghalang plaintif daripada membuat perjanjian kolateral yang dikatakan antara plaintif dan defendan (lihat perenggan 68).

(7) Walaupun plaintif berjaya membuktikan kewujudan kontrak kolateral, kontrak itu tidak sah kerana ketiadaan pertimbangan. Tiada apa-apa yang menunjukkan bahawa balasan telah diberikan oleh plaintif untuk defendan memberi maklumat yang diperlukan. Di bawah perjanjian perundingan plaintif itu dikehendaki untuk menyediakan perkhidmatan perundingan bagi manfaat defendan. Tetapi itu adalah balasan bagi perjanjian perundingan dan bukan untuk perjanjian kolateral yang dikatakan itu dan juga perkhidmatan perundingan itu tidak diberikan atas permintaan defendan (lihat perenggan 71).]

Notes

For a case on action founded on contract, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) para 7451.

For a case on application allowed by trial judge, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) para 7452.

For a case on entire agreement clause, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4647.

For a case on remedy of account in general, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 480.

Cases referred to

Baboo Janokev Doss v Bindabun Doss [1843] Moore Ind App 175, PC (refd)
Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)
Cyril Sharpe, Re [1992] FCA 616, FC (refd)
English v Dedham Vale Properties Ltd [1978] 1 All ER 382, Ch D (refd)
Frame v Smith and Smith (1987) 42 DLR (4th) 81, SC (refd)
Heilbut, Symons & Co v Buckleton [1913] AC 30, HL (refd)

Hospital Products Limited v United States Surgical Corporation & Ors (1986) 156 CLR 41, HC (refd)
Inntrepreneur Pub Co v East Crown Ltd [2000] 3 EGLR 31, Ch D (folld)
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd Matter No S309/2009 [2010] HCA 19 (refd)
Law Kam Loy v Boltex Sdn Bhd [2005] MLJU 225; [2005] 3 CLJ 355, CA (folld)
Master Strike Sdn Bhd v Sterling Height Sdn Bhd [2005] 3 MLJ 585, CA (distd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (distd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (not folld)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265; [1997] 2 CLJ 607, CA (folld)

Legislation referred to
Contract Act 1950 s 26

Appeal from: Civil Appeal No W-02 (NCVC)-764 of 2011 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Renu Zechariah and SC Ho with him) (Rosley Zechariah) for the appellant
Mohd Arief Emran (Elaine Yap with him) (Wong & Partners) for the respondent.

Hasan Lah FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal on the 27 June 2011, in allowing the respondent's appeal against the decision of the High Court. Leave to appeal was granted by this court on 13 August 2012 and the questions of law framed for determination in this appeal are as follows:

Question 1

Whether in ascertaining whether parties stand in a fiduciary relationship, a court is to have regard to the course of dealings between the parties in addition to any express agreement between them;

Question 2

Whether in view of the decision of this honourable court in *Takako Sakao v Ng*

Pek Yuen & Anor [2010] 1 CLJ 381, the Court of Appeal is precluded from interfering with a determination of fact by a judge of the High Court at trial where the sole defendant has elected not to lead evidence; and

Question 3

Where an agreement includes an 'entire agreement' clause, whether such clause on as a matter of course precludes the consideration of a collateral contract.

[2] The appellant is the plaintiff and the respondent is the defendant. For convenience, parties will be referred to as the plaintiff and the defendant as in the High Court.

BACKGROUND FACTS

[3] The facts which form the background of this appeal can be briefly set out as follows.

[4] The plaintiff's claim was for an account from the defendant based on ten consultancy agreements entered into between the plaintiff and Alcatel Standard SA ('standard'), acting in the name and on behalf of its associated company namely, Alcatel CIT and Alcatel-Lucent Italia/Alcatel Italia between 27 October 2000 to 20 June 2007 ('consultancy agreements'). The purpose of the consultancy agreements was for the plaintiff to provide consultancy services to the associated company and the defendant in securing contracts with Telekom (M) Bhd ('Telekoms') and Celcom Bhd ('Celcom') with regard to telecommunication network system in Malaysia.

[5] The common terms and features of the consultancy agreements were as follows:

(a) the defendant was not a contracting party to the consultancy agreements. The contracts were all entered into between the plaintiff and standard;

(b) the obligation to pay the plaintiff's consultancy fees under the consultancy agreements laid with standard, Alcatel CIT and Alcatel Italia;

(c) except for the first two consultancy agreements bearing Nos 532G29049 and 532H39371 which dated back to 2000 and 2001 respectively, consultancy fees payable were to be calculated based on invoices issued by Alcatel CIT/Alcatel Italia to the defendant and not based on the amount invoiced by the defendant to any of its client in Malaysia ie Telekoms or Celcom.

(d) the consultancy agreements constituted the entire agreement between the parties; and

(e) any dispute would have to be disposed of by way of arbitration in Geneva.

[6] The plaintiff claimed that the mode and manner of payment as provided under the consultancy agreements were never followed from day one. Instead, by way of a collateral agreement between the plaintiff and the defendant (by conduct and documents evidencing the same) it was agreed that the defendant would notify the plaintiff of the value of all deliveries that had been made to Celcom and Telekoms, be it by the defendant or any other company in the Alcatel Group, in the implementation of the projects and thereafter inform the plaintiff of the manner of computation of payment after which the plaintiff would send the invoices in the format as required by the defendant to the defendant whereupon payment would be made or arranged by the defendant on the invoices.

[7] The plaintiff alleged that based on this collateral agreement the plaintiff was paid in excess of USD7m from the year 2000. This carried on until the defendant effectively terminated the services of the plaintiff in 2009 at which point the defendant stopped rendering proper accounts, details of all orders received by them from Celcom and Telekoms and the value of deliveries to Celcom and Telekoms to assist and enable the plaintiff to compute the amount due to it for work done and yet to be invoiced.

[8] The plaintiff averred that despite repeated requests by the plaintiff for an account of the deliverables the defendant refused to furnish any information.

[9] By this action the plaintiff sought the following reliefs against the defendant:

(a) a statement of account or accounts (such statement/accounts certified by the person primarily responsible for the financial management of the defendant) be ordered to be given by the defendant to the plaintiff together with copies of all documents evidencing the value of deliveries issued by the defendant to Celcom and Telekoms for the entire duration of the projects, together with full details of all monies received by the defendant from Celcom and Telekoms, together with all certified and relevant supporting documents evidencing the same and if such documents were not in the defendant's possession that the defendant be compelled to obtain copies of the same from Celcom or Telekoms or any other party in possession of the same, to comply with this order;

(b) that the plaintiff's appointed auditor be entitled to conduct an independent audit of the said accounts and documents rendered by the defendant, to verify the same and be allowed access to all the relevant and supporting documents inclusive of the defendant's detailed project

account with regards to the projects in the defendant's office or at any place where such documents were maintained, and to thereafter prepare an audit report as soon as possible.

[10] In its defence the defendant denied that it was the ultimate beneficiary of services rendered by the plaintiff. The defendant stated that it was not a party to, nor a beneficiary under the consultancy agreements. The defendant denied the existence of the alleged collateral contract. The defendant said that it was involved in the invoicing process in connection with the consultancy agreements in a facilitative capacity at the request of the associated companies or Alcatel-Lucent Trade International AG. The defendant further stated that no consideration passed from the plaintiff to the defendant in the assistance rendered under the aforesaid capacity and there was no intention between the parties to create any legal relations by virtue thereof.

[11] The defendant also stated that the plaintiff's action was an abuse of process as the plaintiff had commenced arbitration proceedings against Alcatel-Lucent Trade International AG pursuant to the consultancy agreements seeking payment of alleged dues. Further the defendant averred that the plaintiff had disclosed no reasonable cause of action against the defendant.

[12] At the close of the plaintiff's case the learned trial judge refused an application for adjournment by the defendant on the ground that its witness was not available. The case was therefore closed without the defence offering any evidence.

DECISION OF THE HIGH COURT

[13] The learned trial judge allowed the plaintiff's claim with costs. The reasons given by the learned trial judge for coming to the decision are as follows:

(a) the defendant was an accounting party because the defendant, standard and Alcatel CIT which are described as associated co in the consultancy agreements are a group enterprise rather than a separate legal entity of each company within the group included in the operation of the agreements;

(b) the contracts were for the benefit of the defendant;

(c) the fiduciary duty to account arises; and

(d) as no witnesses had been called from the defendant to testify as to its role in the consultancy agreements and its relationship with standard the court was left to draw its own inferences.

A DECISION OF THE COURT OF APPEAL

[14] Dissatisfied with the decision of the learned trial judge the defendant filed an appeal against the said decision to the Court of Appeal. After hearing both parties, the Court of Appeal unanimously allowed the defendant's appeal.

B

[15] As reflected in its judgment, the Court of Appeal allowed the defendant's appeal on the following main grounds:

C (a) the learned trial judge had gone beyond the pleaded case when he decided to lift the corporate veil to find that the defendant was bound by the consultancy agreements. There was no justification to lift the corporate veil;

D (b) the learned trial judge had also gone beyond the pleaded case when he made a finding that the defendant was an accounting party on the basis that there was an alleged fiduciary relationship between the plaintiff and the defendant;

E (c) the entire agreement clause appearing in the consultancy agreements precluded the existence of any collateral contract between the plaintiff and the defendant;

F (d) the plaintiff's claim was a misconceived action for discovery of information and documents to enable it to institute proceedings against standard, Alcatel CIT and Alcatel Italia under the consultancy agreements for consultancy fees.

FIDUCIARY RELATIONSHIP

G

[16] The learned trial judge made a finding that based on the facts and the clauses in the consultancy agreements the defendant, standard and Alcatel Italia belonged to one entity and as such there was an accounting duty on the part of the defendant to disclose the purchase orders on which the plaintiff's compensation was calculated. Hence the learned trial judge found that the fiduciary duty to account arises.

H

[17] The plaintiff's claim was brought on the basis of a common law duty to account. This required the parties to be in a fiduciary relationship. Learned counsel for the plaintiff contended that the Court of Appeal did not consider the possibility of there being a fiduciary relationship in common law that gave rise to an accounting relationship. In support of that learned counsel for the plaintiff referred to the following passage from the judgment of the Court of Appeal:

I

> … it is a strong principle of law that in the context of contractual relationship, unless specifically provided for in the terms of the contract, no fiduciary relationship is owed by one party to the other …

[18] It is pertinent to note that the observation by the Court of Appeal was based on a passage from the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at p 97 of the report which reads as follows:

> That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

[19] Learned counsel for the plaintiff submitted that the Court of Appeal ought to apply a more flexible approach as the learned trial judge had done to ascertain whether there existed a fiduciary relationship between the plaintiff and the defendant in the instant case.

[20] We will deal with the issue of duty to account under the common law first. On the action for taking of accounts the Court of Appeal, after considering several authorities on the subject, made the following observation:

> 31. From the above authorities, for there to exist a complete cause of action for taking of accounts, the respondent has to plead and prove the following:
>
> (a) the appellant (as the defendant) must be liable to pay a certain sum of monies to the respondent (as the plaintiff); and
>
> (b) the appellant (as the defendant) is an accounting party to the respondent (as the plaintiff).

[21] In *Baboo Janokev Doss v Bindabun Doss* [1843] Moore Ind App 175, Dr Lushington of the Privy Council at p 197 said:

> Again, it must be remembered that the Decree cannot stand unless it be first clearly proved that the appellants are, if anything should be found due to the respondents arising from the acts and dealings of Ramchund, liable to answer that demand; we cannot make a Decree, ordering them to account, without first determining that they are liable to pay if anything be found due.

A Decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a Decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting.

[22] In *Re Cyril Sharpe* [1992] FCA 616, the Federal Court of Australia through Drummond J opined:

The taking of an account is only appropriate once it has been established that the parties involved are in an accounting relationship with each other, that is, only once it has been established that one party is liable to pay to the other anything that is found, on the taking of the account, to be due to that other …

[23] Under the consultancy agreements the parties liable to pay compensation to the plaintiff for the consultancy services rendered were standard, Alcatel Italia and Alcatel CIT and not the defendant.

[24] The learned trial judge made a finding that there was evidence that payments to the plaintiff were paid by the defendant. The Court of Appeal, on the other hand, made a finding that no claims for payment were ever issued by the plaintiff to the defendant under any of the consultancy agreements. The plaintiff's only witness, Mr Khalifa Abdel Rahman Mohamed Khalifa ('PW1'), in his testimony, testified under examination-in-chief (pp 100 and 101 of the appeal record) as follows:

After such instruction from the defendant, the plaintiff will send the invoice in the format as required by the defendant to the defendant whereupon payment will be made and/ or arranged by the defendant on the invoices.

[25] However, under cross-examination he testified as follows (pp 162 and 163 of the appeal record):

Q : And I put it to you that in all of these contracts, all this consultancy contracts the payments were made by Alcatel CIT or Alcatel France or Alcatel Italia?

A : Irrelevant.

Q : No do you agree or disagree?

A : I say it is irrelevant to who pays your bill. That's my answer.

Q : No answer whether you agree or this agrees (disagree)?

A : That's my answer.

Court : You have received payment haven't you?

A : Yes we have.

Q : Who do you get the payment from?

A : From any Alcatel related group or bank.

Court : Answer, payment came from Alcatel related group.

[26] In our view, it had not been established from PW1's evidence that some payments were made by the defendant to the plaintiff for the services rendered. Furthermore it was clear from the evidence that the invoices for payment were not addressed to the defendant but were addressed either to Alcatel CIT or Alcatel Italia which was in accordance with the term of the consultancy agreements.

[27] As the plaintiff failed to establish that it was entitled to some sum from the defendant, we agree with the Court of Appeal that the plaintiff was not entitled to the order of taking of account against the defendant under the common law.

[28] We now come back to the issue of fiduciary relationship. As mentioned earlier the Court of Appeal found that there was no fiduciary relationship between the plaintiff and the defendant. In its judgment the Court of Appeal held:

> 25 In the present case, we find that the allegation of the existence of a contractual relationship between the appellant and the respondent and that the appellant received consideration in the form of benefit of the consultancy agreements (which was denied), do not make the appellant a fiduciary vis-a-vis the respondent. The learned Judge should not have found the existence of any fiduciary duty to account between the appellant and the respondent. By doing so, the court had interpreted the terms and conditions contrary to the express terms appearing in the consultancy agreements.

[29] The class of fiduciary relationships is never closed (*English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, per Slade J). As can be seen from the English cases, the English judges have never attempted to formulate a comprehensive definition of who is a fiduciary. Certain relationships are well known to be fiduciary. In *Snell's Equity* (32nd Ed) [2010] *Thompson Reuters* at pp 172 to 178, the learned author stated that the accepted categories in which the courts presume the existence of a fiduciary relationship are as follows:

(a) director vis-a-vis their companies;

(b) solicitor-client relationships;

(c) agent-principal relationship; and

(d) partnerships.

[30] Notwithstanding that there are authorities to say that fiduciary duties may be owed where the circumstances justify the imposition of such duties. In this connection the learned author of *Snell's Equity* stated at pp 175 and 176 as follows:

> (c) Ad hoc fiduciary relationships
>
> (1) PRINCIPLES.30 The categories of fiduciary relationship are not closed.31 Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship,*32* preferring to preserve flexibility in the concept. Numerous academic commentators have offered suggestions,33 but none has garnered universal support. Thus, it has been said that the 'fiduciary relationship is a concept in search of a principle.'*34* There is, however, growing judicial support for the view that:
>
> 'a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.'*35*
>
> The concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.*36*
>
> The expectation is assessed objectively, and so it is not necessary for the principal subjectively to harbor the expectation.

[31] In *Bristol and West Building Society v Mothew* [1998] Ch 1 at p 18, Millet LJ made the following observation on the question of who is a fiduciary:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work Fiduciary Obligations (1977), p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

[32] It is to be noted that the plaintiff and the defendant were involved in commercial dealings relating to the telecommunication network system in Malaysia. Case law shows that the courts are quite reluctant to find a fiduciary relationship between businessmen who enter into commercial dealings. In *Snell's Equity* at pp 176 and 177 the learned author said:

> It has been said to be 'of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship,'*39* but 'it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime.'*40* It is clear that it is possible for fiduciary duties to arise in commercial settings.41 Agency, which is frequently a relationship between two commercial actors, provides a clear example*42*: the primary source of duty between principal and agent is a matter of contract law, often applied in a commercial setting, and yet fiduciary duties will be owed by the agent unless they have been excluded.*43* The reason fiduciary duties do not commonly arise in commercial settings outside the settled categories of fiduciary relationships is that it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party.*44* But if that expectation is not inappropriate in the circumstances of the relationship between the parties then fiduciary duties will arise.

[33] In *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 at p 294; [1997] 2 CLJ 607 at p 636 the Court of Appeal said:

> The flexible approach adopted by the Courts when according recognition to a particular relationship as being fiduciary in nature is, of course, one of judicial impression dependent upon the fact pattern of a given case. Flexibility of approach is the hall-mark of equity. For, when we deal with the principles governing equitable intervention, we enter a domain comprising, not rigid rules, but broad and liberal doctrines that are aimed at achieving a just result according to the facts of a particular case.
>
> Equity has, in keeping with the purpose of its origin, therefore, refrained from laying down any strict rules for determining whether a particular relationship is fiduciary in nature or gives rise to fiduciary obligations, leaving the development of its jurisprudence to a case by case basis. The maxim: 'The categories of fiduciary relations are never closed' exemplifies the approach that a Court of Equity adopts in this sphere of human activity. See, *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93.

[34] In that case one of the main issues to be decided was whether a fiduciary relationship existed on the basis that the appellants were promoters of the Raintree Club of Kuala Lumpur. In order to answer that question the Court of Appeal, through Gopal Sri Ram JCA (as he then was), had to consider a number of decisions from other jurisdictions on the matter. One of the cases referred to by the Court of Appeal was the decision of the High Court of Australia in *Hospital Products Limited v United States Surgical Corporation &*

Ors (1986) 156 CLR 41. As stated by the Court of Appeal in its judgment the case concerned a distributorship agreement between the parties. The primary judge, McLelland J, found a fiduciary duty to exist on the facts as found by him. His finding was affirmed by the New South Wales Court of Appeal. On further appeal, the High Court was divided in its opinion. The majority (Gibbs CJ, Wilson and Dawson JJ) held that in the particular circumstances of the case there was no fiduciary duty. They found liability on the footing that there had been a breach of contract. The minority (Mason and Deane JJ) took the view that the facts disclosed a fiduciary duty.

[35] For the purpose of this appeal we find it useful to refer to two of the passages in the judgment of the High Court of Australia which were referred to by the Court of Appeal it its judgment. The first passage is from the judgment of Gibbs CJ at p 68 of the report which reads:

> The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognised by the decisions of the Courts that there are other classes of persons who normally stand in a fiduciary relationship to one another — eg partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.

[36] The second passage is from the judgment of Mason J at p 102:

> The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. Fiduciary relationships range from the trustee to the errand boy, the celebrated example given by Fletcher Moulton LJ in his judgment in *In re Coomber* [1911] 1 Ch 723, in which, after referring to the danger of trusting to verbal formulae, he pointed out that the nature of the curial intervention which is justifiable will vary from case to case. In accordance with these comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case: *Phipps v Boardman* [1967] 2 AC 46; *New Zealand Netherlands Society 'Oranje' Inc v Kuvs* [1973] 2 NZLR 163; *Canadian Aero Service Ltd v O'Mai lev* [1973] 40 DLR (3d) 371. The often repeated statement that the rule in *Keech v Sandford* [1726] 25 ER 223, applies to fiduciaries generally tends to obscure the variable nature of the duties which they owe. The rigorous standards appropriate to a trustee will not apply to a fiduciary who is permitted by contract to pursue his own interests in some respects. Thus, in the present case the so-called rule that the fiduciary cannot allow a conflict to arise between duty and interest (Kuys) cannot be usefully applied in the absolute terms in which it has been stated.

[37] In its judgment the Court of Appeal also referred to the judgment of Wilson J in *Frame v Smith and Smith* (1987) 42 DLR (4th) 81 at p 99:

> Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent. Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) the fiduciary has scope for the exercise of some discretion or power;
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest;
>
> (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[38] At p 300 (MLJ); p 643 (CLJ) of its judgment the Court of Appeal opined:

> A review of the authorities reveals that the characteristics referred to by Wilson J are present in the well-established categories of relationships in which the duty has been held to arise. These include the relationships of spiritual adviser and penitent, doctor and patient, agent and principal, solicitor and client, company directors, partners and joint venturers. It is noteworthy that the fiduciary doctrine has even been extended to those in negotiation for a partnership or a joint venture. The concatenation of cases in which these relationships have been dealt with may be found in any standard textbook upon the subject, and for that reason we find it unnecessary to refer to all of them in this judgment.

[39] As regards the issue of whether the fiduciary doctrine was applicable to the promoters of proprietary clubs, the Court of Appeal opined at p 301 (MLJ); p 644 (CLJ) of the report as follows:

> In our judgment, the instant case is merely an illustration of equitable protection being extended to fiduciary undertakings by analogy with well-established fiduciary relationships. And that, as we have pointed out, is entirely in keeping with equity jurisprudence. Further, the factual analysis carried out by the learned Judge, with which we are entirely in agreement, reasonably supports the inclusion of promoters of a club within the scope of the fiduciary doctrine.

[40] It is also useful to refer to the following observation made by the Court of Appeal in the same case at p 293 (MLJ); at pp 637 and 638 (CLJ) of the report:

> Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the Courts of a particular jurisdiction may choose to impose upon parties to a

A transaction, having regard to the cultural background and circumstances of the society in which they function. And, as in so many other areas of the law, the views which our Courts entertain may differ from those expressed by the Courts of other jurisdictions in respect of the circumstances in which a fiduciary duty may be declared to exist. For this reason, our Courts may impose a fiduciary duty in circumstances in which the Courts of another jurisdiction may decline to find the existence of such a duty. Often, the standards imposed may be the same as those in other jurisdictions. But it is open to our Courts to find the existence of a fiduciary duty in order to reflect our own standards which, in particular cases, may prove to be higher than those imposed by judges in other jurisdictions. This is a necessary consequence of the policy differences of which we spoke a moment ago.

That there may be a marked difference in judicial opinion even within the same jurisdiction when determining whether a fiduciary duty exists in a given set of circumstances is well illustrated by the decision of the High Court of Australia in *Hospital Products Limited v United States Surgical Corporation & Ors* (1986) 156 CLR 41 …

[41] We agree with the above observation.

[42] Based on the authorities mentioned above we agree with the submission of learned counsel for the plaintiff that a fiduciary could be found on the facts rather than a contract and the court ought to apply a flexible approach in ascertaining whether a fiduciary relationship exists in a given circumstance.

[43] For the reason given our answer to the first question of law posed in this appeal has to be in the affirmative.

[44] By answering the first question of law it does not dispose of the issue of whether there existed a fiduciary relationship between the plaintiff and the defendant. It is therefore necessary for us to determine based on the evidence adduced and the law as discussed above whether in law there existed a fiduciary relationship between the plaintiff and the defendant.

[45] As mentioned earlier, the learned trial judge made a finding that the defendant, standard, Alcatel CIT and Alcatel Italia belonged to one entity. In order to arrive at that decision the learned trial judge had to lift the corporate veil to find that the defendant was bound by the consultancy agreements even though the defendant was not a party to the consultancy agreements.

[46] We agree with the Court of Appeal that the learned trial judge erred in lifting the corporate veil of the defendant to make the defendant liable to account to the plaintiff. The reason given by the learned trial judge was that it was in the interest of justice to prevent associated companies of Alcatel Group including the defendant from darting in and out with the corporate labyrinth

before the court. We also agree with the Court of Appeal that there must be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil. The position of the law on this subject had been clearly stated by Gopal Sri Ram JCA (as he then was) in *Law Kam Loy v Boltex Sdn Bhd* [2005] MLJU 225; [2005] 3 CLJ 355 at p 362 as follows:

> In my judgment, in the light of the more recent authorities such as *Adams v Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity …

[47] In the instant case the business relationship between the plaintiff and the defendant did not fall under the accepted traditional categories of fiduciary relationship. Even if we were to apply the flexible approach to the circumstances of the case we are of the view that such fiduciary relationship did not exist in the case. This is because commercial transactions often do not give rise to fiduciary duties because they do not meet the criteria for characterization as fiduciary in nature (see *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (Matter No S309/2009] [2010] HCA 19 High Court of Australia). We also find it useful to refer to the judgment of the High Court of Australia in *Hospital Products Limited v United States Surgical Corporation & Ors* at p 69 where Gibbs CJ said:

> On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose: see *Jones v Bouffier* (1911) 12 CLR 579; *Dowsett v Reid* (1912) 15 CLR 695; *Para Wirra Gold & Bismuth Mining Syndicate NL v Mather* [1934] 51 CLR 582; *Keith Henry & Co Ptv Ltd v Stuart Walker & Co Ptv Ltd* (1958) 100 CLR 342. A similar view was taken in *Canada in Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639.

[48] The circumstances of the relationship in the instant case could not, in our view, give rise to a relationship of trust and confidence. It was not appropriate to expect a commercial party to subordinate its own interests to another commercial party as they had dealt with each other at arm's length and on equal footing.

[49] For the reasons given above we agree with the Court of Appeal's decision, but on a different ground, that the plaintiff and the defendant were not in a fiduciary relationship.

A SECOND QUESTION — TAKAKO SAKAO V NG PEK YUEN & ANOR

[50] In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, the appellant, a Japanese national, and the first respondent were partners in the business of a restaurant. They decided to acquire the building in which their restaurant had its business. Both the appellant and the first respondent were to contribute towards the purchase price. The appellant claimed that there was a mutual understanding between her and the first respondent that the building, when acquired, was to be purchased and registered in the joint names of herself and the first respondent in equal shares. The appellant subsequently provided a sum of RM194,610 towards the purchase. However, the first respondent purchased the property for RM950,000 and registered it solely in her name. Later, the first respondent sold the property to the second respondent, a private limited company owned by her husband. The appellant then commenced proceedings to enforce a trust she claimed had arisen in her favour. The appellant claimed that she and the first respondent were co-owners and the latter held the appellant's share under a trust. The first respondent did not attend court nor give evidence nor take any part in the case.

[51] The Federal Court, in allowing the appellant's appeal, held inter alia that when the first respondent, who was fully conversant with the facts studiously refrained from giving evidence two consequences inevitably followed from that. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. Secondly, the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent.

[52] At p 759 (MLJ); p 398 (CLJ) of the judgment the Federal Court opined:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:
>
> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[53] Learned counsel for the plaintiff submitted that based on the plaintiff's evidence the learned trial judge found it was sufficient to shift the legal burden to the defendant. The defendant elected not to lead any evidence to rebut the case of the appellant and took the position that there was no case to answer. Learned counsel for the plaintiff submitted that it was on this basis, and by reference to the applicable legal principles, that the trial judge found as he did. It was therefore contended by learned counsel for the plaintiff that the Court of Appeal had misdirected itself when it failed to appreciate the significance of the election on the part of the defendant. In other words, the Court of Appeal did not apply the law as stated in *Takako Sakao v Ng Pek Yuen & Anor*.

[54] Learned counsel for the plaintiff further submitted that the case for the plaintiff was also premised on there being a collateral agreement and, in any event, a relationship that at common law obliged the defendant to deliver an account. The learned trial judge found there was a case to answer and therefore the burden shifted to the defendant. Applying the principles in *Takako Sakao*'s case, learned counsel for the plaintiff submitted that the Court of Appeal was constrained to conclude that there was a collateral agreement under which the defendant was obliged to deliver the account.

[55] In response to that learned counsel for the defendant submitted that the Court of Appeal was entitled to set aside the order of the High Court as the learned trial judge had decided the case based on issue that was not pleaded. Secondly, it was submitted that in reversing the decision of the High Court the Court of Appeal did not interfere with the finding of facts made by the learned trial judge. Thirdly, it was submitted that as the learned trial judge did not make any finding of facts on the existence of the alleged collateral contract, the Court of Appeal was therefore entitled to draw inference of facts and make its own finding based on the evidence before it.

[56] In the instant case the notes of proceeding showed that the defendant did take part in the trial. The plaintiff's sole witness was thoroughly

cross-examined by the defence counsel. The trial went on and at the close of the plaintiff's case the defendant's counsel sought an adjournment to another date for the defendant's witness to attend. The learned trial judge refused the adjournment and the case was therefore closed without the defence offering any evidence. In our view the facts of this case can be distinguished from the facts in *Takako Sakao*'s case.

[57] In our view the question of whether the parties were in accounting relationship involved a mixed question of fact and law. In its judgment the Court of Appeal had extensively dealt with the law relating to the duty to account under the common law. Having carefully considered the authorities on this issue the Court of Appeal came to the conclusion that on the evidence adduced by the plaintiff at the trial it was not sufficient in law to establish the case for duty to account. The Court of Appeal therefore did not interfere with the determination of fact by the learned trial judge. The learned trial judge's decision on this issue was reversed on a point of law and as such we agree with the submission of learned counsel for the defendant that the principles in *Takako Sakao*'s case did not apply under the circumstances.

[58] With regard to the issue of whether there was a collateral contract the plaintiff pleaded in para 8 of the statement of claim as follows:

> In line with the above consultancy agreements and to give effect to the same, and by way of a collateral agreement (Collateral Agreement) between the plaintiff and the defendant (by conduct and documents evidencing the same) it was agreed that the defendant would notify the plaintiff of the value of all deliveries that have been made to the customers of the defendant, be it by the defendant or any other company in the Alcatel Group involved in the transactions and the implementation of the Projects and thereafter inform the plaintiff of the manner of computation of payment to the plaintiff after which the plaintiff will send the invoice in the format as required by the defendant to the defendant whereupon payment will be made and/or arranged by the defendant on the invoices …

[59] In his testimony PW1 testified that by way of a collateral agreement between the plaintiff and the defendant by conduct, practice and documents evidencing the same, it was agreed that the defendant would give instruction and notify the plaintiff of the value of what was supposed to be deliveries that had been made to the end customers of the defendant namely, Celcom and Telekoms and thereafter inform and instruct the plaintiff of the figures based on the supposed value of deliveries. PW1 also testified that initially the defendant only rendered a list of the purchase orders and informed the plaintiff of the amount that was due to them and requested the plaintiff to raise their invoice for payment.

[60] The plaintiff was paid the sum of USD7,937,219.58 towards their said

invoices for consultancy services rendered to August 2008. PW1 further testified that at all times, the plaintiff sought the accounts and breakdown from the defendant to show how they had arrived at the amount due to the plaintiff, but this information was never given by the defendant.

[61] From the evidence adduced by the plaintiff, the defendant only provided the plaintiff with information as to the value of deliveries that it had made to its customers only for Consultancy Agreement No 532G29049 and Consultancy Agreement No 532H39371. It was also established in evidence that accounts for the two agreements were already rendered and closed.

[62] It is to be observed that only in the first two agreements ie No 532G29049 and No 532H39371 was it provided that the plaintiff's compensation was to be calculated based on the amount invoiced by the defendant to the client. For the other eight agreements the compensation was to be calculated based on the relevant invoices in a form acceptable to the associated company As mentioned earlier the obligation to pay the plaintiff in the consultancy agreements did not lie on the defendant.

[63] As regards the issue of the collateral contract the Court of Appeal, inter alia, made the following observations:

> 36. There is no evidence that the appellant had provided the respondent with the value of deliveries that it had made to its customers throughout the validity period of all, but for the first and second consultancy agreements. In respect of the said two agreements above, it was established in evidence that accounts as required were already rendered and closed vide the appellant's letter dated 23 July 2004 to the respondent. Therefore the conduct and practice relied upon by the respondent to prove the existence of the so called collateral agreement was not consistent with what the respondent set out to prove.
>
> 37. Even if there existed an alleged separate collateral agreement (as pleaded by the respondent) the alleged agreement did not amount to a valid contract enforceable under the law as no consideration passed from the respondent to the appellant based on the requirement of s 26 of the Contract Act 1950.
>
> 38. As the statement of claim stood, no consideration for the agreement was pleaded and no consideration could be discerned from the bundle of pleadings. The purported collateral contract is therefore void for want of consideration. (see *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 1 CLJ (Rep) 295 — Supreme Court).

[64] We have carefully considered the judgment of the learned trial judge and we agree with learned counsel for the defendant that the learned trial judge failed to evaluate the evidence relating to the alleged collateral contract and make any finding on the existence of the alleged collateral contract. The learned trial judge, as mentioned earlier, found that there was fiduciary

relationship between the plaintiff and the defendant and that the defendant was an accounting party on the ground that the defendant and the associated companies, as well as Alcatel CIT belonged to one entity and that the contracts were also for the benefit of the defendant. The relevant passages of the judgment of the learned trial judge are as follows:

> When the Agreements are looked at in totality (see Bundle B1 p 24), the defendant ALCATEL STANDARD SA and ALCATELCIT are all described as Associated Company. Further, the benefits of the contracts were for the defendant. Applying the test of one entity as far as these companies were concerned, it was open to the court to deem them as such …
>
> …
>
> Based on this approach where the court were prepared to in the interest of justice pierce the corporate veil to prevent associated companies of ALCATEL including the defendant from darting in and out within the corporate labyrinth before this court. Therefore, it is not open for the defendant to take a simplistic approach that they are not a party to the various agreements when in fact they were all associated companies involved in the operation of the agreements. See the case of *Re a Company* [1986] BCLC 333.

[65] For the reasons given we find it unnecessary to answer the second question posed in this appeal.

ENTIRE AGREEMENT CLAUSE

[66] The Court of Appeal made the following observations:

> 39. In all the consultancy agreements between the respondents and Alcatel Standard SA, there existed what is termed as the entire agreement clause to the effect that This Agreement constitutes the entire agreement between the parties as to the subject matter hereof, it sets forth all intended rights and obligations and supersedes any and all previous agreements and understandings between the parties with respect to the subject matter hereof.
>
> …
>
> 41. The effect of the entire agreement clause in all the consultancy agreements, is that the respondent (as a party to the consultancy agreements) was bound by the terms of the consultancy agreements with regard to all the matters mentioned in the said agreements, particularly on matters relating to the terms of payments of the consultancy fees and manner in which such payments were to be made. Such entire agreement clause, in our judgment does not permit any term to be implied or to import any other considerations not in the contract, including any other collateral agreements with another party (not a party in the consultancy agreements). All matters relating to the payment of consultancy fees to be paid by Alcatel Standard SA and the respondent (both are parties to the consultancy agreements) as well the manner of computation of the fees must be read within the four walls of the

consultancy agreements themselves. (See Court of Appeal's decisions in *Master Strike Sdn Bhd v Sterling Height Sdn Bhd* [2005] 2 CLJ 596; and *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337). A

[67] Learned counsel for the plaintiff submitted that the Court of Appeal had erred in failing to appreciate that such clauses were operative only as between contracting parties. They did not impede a separate and distinct contract being entered into between a party and a non-party in respect of matters that fall within the scope of the primary agreement. In support of that learned counsel cited the following cases: B C

(a) *Inntrepreneur Pub Co v East Crown Ltd* [2000] 3 EGLR 31; and

(b) *Heilbut, Symons & Co v Buckleton* [1913] AC 30.

[68] We agree with the submission of learned counsel for the plaintiff that the Court of Appeal erred in failing to appreciate that such clauses operated only as between the contracting parties. The defendant was not a party to the consultancy agreements and as such the alleged collateral contract between the plaintiff and the defendant should be treated as a separate and distinct contract and could not fall under the scope of the consultancy agreements. In our view the entire agreement clause did not preclude the plaintiff from setting up the alleged collateral agreement between the plaintiff and the defendant. The cases referred to by the Court of Appeal namely, *Master Strike Sdn Bhd v Sterling Height Sdn Bhd* [2005] 3 MLJ 585 and *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 dealt with issue involving the same parties to the principal agreement unlike our case. On this issue, suffice for us to rely on the following observation by Lightman J in *Inntrepreneur Pub Co v East Crown Ltd*: D E F

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search, and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence, as is suggested in *Chitty on Contract* (28th Ed), Vol 1 paras 12–102; it is to denude what would otherwise constitute a collateral warranty of legal effect. G H I

[69] It is to be observed that the third question posed in this appeal did not say whether the collateral contract was between the contracting parties to the principal agreement or otherwise. For the reason given above our answer to the third question is as follows:

> Such an 'entire agreement clause' does not preclude the consideration of a collateral contract made between a party and a non-party to the principal contract.

[70] The Court of Appeal gave three main grounds as to why it found that the plaintiff had failed to prove the alleged collateral agreement. Firstly, on the evidence the Court of Appeal found that the informations/accounts were given by the defendant for the first two agreements only and the accounts for the two had been closed. Secondly, there was no consideration given by the plaintiff to the defendant and as such the agreement was void. Thirdly, the entire agreement clause in the consultancy agreements prevented the plaintiff and the defendant from entering into a collateral agreement.

[71] We agree with the Court of Appeal that even if the plaintiff had succeeded in establishing the existence of the collateral contract as alleged, such contract was void for want of consideration. Under s 26 of the Contract Act 1950 it is provided that agreement without consideration is void unless it comes under one of the exceptions. From PW1's evidence there was nothing to show that consideration was given by the plaintiff for the defendant to furnish the required information. We are aware that under the consultancy agreements the plaintiff was required to provide consultancy services for the benefit of the defendant. But that was the consideration for the consultancy agreements and not for the alleged collateral agreement and also the consultancy services were not rendered at the defendant's request.

CONCLUSION

[72] For the reasons given, we dismiss the appeal with costs and affirm the decision of the Court of Appeal.

Reported by Kanesh Sundram