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UEM GROUP BHD

v.

GENISYS INTEGRATED ENGINEERS PTE LTD & ANOR

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF FCJ
ABDULL HAMID EMBONG FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02-31-2009 (W)]

C

6 SEPTEMBER 2010

CIVIL PROCEDURE: *Appeal - Evaluation of evidence - Witness - Case depended largely on oral evidence - Documentary evidence tendered requiring explanation by material witnesses - Trial judge's conclusion that*

D

sole witness for respondent not a witness of truth - Whether reasonable and proper judicial appreciation of evidence - Whether appellate court erred in reversing findings of trial judge by referring to inadmissible documents

CIVIL PROCEDURE: *Appeal - Fact, findings of - Credibility of witnesses - Decision of trial judge - Weight to be given - Amenability to*

E

appellate interference - Whether findings of credibility could be severed from documentary evidence - Finding on witness's credibility based on demeanour not to be ordinarily disturbed at appellate stage

CIVIL PROCEDURE: *Appeal - Interference by appellate court -*

F

Questions of fact and credibility based on demeanour of witness - Whether appellate court should be slow to interfere

COMPANY LAW: *Members' rights - Petition under Companies Act 1965, s. 181 - Remedies - Company insolvent - Whether petition*

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sustainable - Whether winding up of company justified - Whether order for majority shareholder to buy out shares of minority shareholder justified

EVIDENCE: *Witness - Credibility of - Evaluation of evidence of witness based on demeanour - Whether appellate court should be slow to interfere*

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United Engineers (Malaysia) Bhd ("UEM") and Genisys Integrated Engineers Pte Ltd ("GIE") entered into a joint venture agreement under which a company called UEM Genisys Sdn Bhd ("UEG") was incorporated as the vehicle to carry out the joint venture. UEM

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held 51% of the shares in the UEG and GIE held the remaining 49%. The day to day management of UEG's business and affairs were delegated to Seow Boon Cheng ("Seow"), who was also the managing director and majority shareholder of GIE. Initially the venture between UEM and GIE started very well. However, subsequently UEM found Seow to be untrustworthy. What followed was a total breakdown of relationship between UEM and GIE. As a result, each party presented its petition under s. 181 of the Companies Act 1965, each contending that the other had acted oppressively. The UEM petition stated that Seow conducted the affairs of UEG with a lack of probity and oppressed UEM as a shareholder. UEM submitted that Seow had performed acts without proper board authorisation and kept UEM in the dark about certain transactions and payments. Accordingly, UEM sought that UEG be wound up or alternatively the GIE's shares in UEG be sold to UEM. The GIE petition stated that UEM acted in breach of the agreement and that UEM starved UEG of funds so as to eventually have it wound up. GIE also submitted that Seow did the acts complained of to keep UEG alive and UEM had acquiesced to those transactions that it now complained about. Therefore, GIE *inter alia* sought for an order that it be allowed to purchase all shares in UEG held by UEM. The learned High Court Judge dismissed GIE's petition. The trial judge found that the factual assertions as pleaded in the UEM petition had been proven on the balance of probabilities. Since UEG was gravely insolvent, the trial judge was of the view that a buy-out of GIE's shares in UEG was not a viable option. He accordingly made the order for UEG to be wound-up. The Court of Appeal dismissed GIE's appeal against the decision of the High Court in dismissing GIE petition. On the other hand, the Court of Appeal allowed GIE's appeal against the UEM petition and in doing so, the Court of Appeal overturned almost all findings of the trial judge. After setting aside the winding-up order, the Court of Appeal ordered UEM to buy out GIE 49% of shares in UEG based on a valuation of UEG at approximately RM81 million. UEM filed two appeals to the Federal Court. The 1st appeal was against the Court of Appeal's decision in reversing the decision of the High Court in winding up UEG. The 2nd appeal was against the Court of Appeal's decision ordering UEM to buy-out GIE's 49% shares in UEG.

A B C D E F G H I

A **Held (allowing both the appeals with costs)**
Per Raus Sharif FCJ delivering the judgment of the court:

(1) The case of UEM and GIE was not one that was premised only on documentary evidence. The positions of the respective
B parties depended largely on oral evidence as to the circumstances of the dispute between the parties as well as the circumstances underlying material documentary evidence. In respect of documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by
C material witnesses. Thus, the trial judge's conclusion that Seow, the only witness put forth by GIE, being not a witness of truth, was of great significance. This was because GIE's case was mounted on the strength of Seow's evidence. (paras 27 & 28)

D **(2)** The findings of credibility could not be severed from documentary evidence. The finding by the trial judge that Seow was being untruthful was an integral part of the whole case on the basis of a reasonable and proper judicial appreciation of the
E evidence. The trial judge had come to findings of specific facts, pertaining to the heads of oppression in the UEM's petition in rejecting the version put forth by Seow. (para 30)

(3) The Court of Appeal, on the other hand despite not having addressed the trial judge's conclusion that Seow was not a
F witness of truth nor itself finding that the trial judge's conclusion in that regard was erroneous, proceeded to reverse the findings of the trial judge on the alleged oppression of GIE by referring only to specific documents. This was where the Court of Appeal had gone wrong. Further, the Court of Appeal,
G in relying on inadmissible documents in reversing the findings of facts of the trial judge, was clearly in error on evidential issues. (para 31)

(4) A finding on a witness's credibility based on his demeanour is
H a personal opinion of a trial judge who had the audio-visual advantage of the performance of witnesses. It should not, ordinarily be disturbed at the appellate stage. (para 40)

(5) The Court of Appeal had done a complete injustice to UEM.
I The consequential orders were such that they were not sought for and yet astonishingly granted. The total effect of the orders

was tantamount to unjust enrichment. This was because the Court of Appeal in giving effect to the buy-out order and by adopting the valuation of the valuer which valued UEG at approximately RM81 million, had failed to consider Seow's own evidence that UEG had no money left and had no projects work left to do. Obviously, a buy-out of UEG's shares was not a viable option. (para 44)

Bahasa Malaysia *Translation Of Headnotes*

United Engineers (Malaysia) Bhd ("UEM") dan Genisys Integrated Engineers Pte Ltd ("GIE") telah memeterai satu perjanjian usahasama di bawah mana sebuah syarikat bernama UEM Genisys Sdn Bhd ("UEG") telah diperbadankan bagi menjalankan perniagaan usahasama tersebut. UEM memegang 51% dari saham-saham UEG sementara GIE memegang baki 49%. Pengurusan harian perniagaan UEG telah didelegasikan kepada seorang Seow Boon Cheng ("Seow"), yang juga merupakan pengarah urusan dan pemegang saham majoriti GIE. Pada mulanya usahasama antara UEM dan GIE berjalan dengan baik. Bagaimanapun, UEM kemudiannya mendapati Seow seorang yang tidak boleh dipercayai. Apa yang menyusul adalah keretakan perhubungan yang total antara UEM dan GIE. Sebagai akibatnya, setiap pihak mengemukakan petisyen di bawah s. 181 Akta Syarikat 1965, dengan masing-masing mengatakan pihak yang lain telah bertindak secara menindas. Petisyen UEM menyatakan bahawa Seow telah mengendalikan halehwal UEG secara tidak jujur dan menindas UEM sebagai pemegang saham. Dihujahkan lagi bahawa Seow telah melakukan tindakan-tindakan tanpa restu lembaga dan gagal memberitahu UEM mengenai beberapa transaksi dan pembayaran. UEM dengan yang demikian memohon supaya UEG digulung atau secara alternatifnya supaya saham-saham GIE di dalam UEG dijual kepada UEM. Petisyen GIE pula menyatakan bahawa UEM bertindak secara yang melanggar perjanjian dan bahawa UEM telah sengaja mengeringkan dana UEG dengan tujuan untuk menggulungkannya. GIE juga berkata bahawa Seow melakukan tindakan-tindakan yang disunguti semata-mata untuk memastikan UEG terus hidup dan UEM, walaupun bersungut, sebenarnya turut bersekongkol dalam tindakan-tindakan tersebut. GIE, dengan yang demikian, menuntut antara lain perintah bahawa ia dibenarkan membeli kesemua saham-saham UEG yang dipegang oleh UEM. Yang arif hakim Mahkamah Tinggi menolak Petisyen GIE. Hakim bicara mendapati bahawa pengataan fakta seperti yang diplidkan di dalam Petisyen UEM telah

dibuktikan atas imbangan kebarangkalian. Oleh kerana UEG sudah insolven dengan tenatnya, maka hakim bicara berpendirian bahawa pembelian saham-saham GIE di dalam UEG bukanlah satu opsyen yang baik. Beliau dengan itu membuat perintah supaya UEG digulungkan. Mahkamah Rayuan menolak rayuan GIE terhadap keputusan Mahkamah Tinggi yang menolak Petisyen GIE. Mahkamah Rayuan, sebaliknya, telah membenarkan rayuan GIE terhadap Petisyen UEM, dan dalam berbuat demikian, mengakas hampir kesemua dapatan-dapatan hakim bicara. Selepas mengenepikan perintah penggulungan, Mahkamah Rayuan memerintahkan UEM membeli 49% saham GIE dalam UEG berdasarkan kepada nilai UEG iaitu lebihkurang RM81 juta. UEM memfailkan dua rayuan ke Mahkamah Persekutuan. Rayuan pertama adalah terhadap keputusan Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi yang memerintahkan penggulungan UEG. Rayuan kedua adalah terhadap keputusan Mahkamah Rayuan memerintahkan UEM untuk membeli 49% saham GIE dalam UEG.

Diputuskan (membenarkan kedua-dua rayuan dengan kos)
Per Raus Sharif HMP menyampaikan penghakiman mahkamah:

(1) Kes UEM dan GIE bukan semata-mata diasaskan kepada keterangan dokumentari. Kedudukan masing-masing pihak banyak bergantung kepada keterangan lisan berkaitan halkeadaan pertikaian mereka dan keterangan dokumentari material. Berhubung keterangan dokumentari, ianya bukanlah sebegitu rupa sehingga boleh difahami tanpa diikuti dengan penjelasan oleh saksi-saksi material. Oleh itu, rumusan hakim bicara bahawa Seow, saksi tunggal yang dikemukakan oleh GIE, bukan merupakan seorang saksi yang boleh dipercayai, adalah amat penting. Ini kerana kes GIE adalah berasaskan kepada keterangan Seow.

(2) Dapatan-dapatan kredibiliti tidak boleh dipisahkan dari keterangan-keterangan dokumentari. Dapatan hakim bicara bahawa Seow bukanlah seorang saksi yang bercakap benar merupakan bahagian integral keseluruhan kes berdasarkan kepada penilaian kehakiman yang teratur dan munasabah keterangan-keterangan. Hakim bicara, dalam menolak versi seow, telah membuat dapatan-dapatan fakta yang spesifik, berkaitan tajuk-tajuk penindasan di dalam Petisyen UEM.

(3) Mahkamah Rayuan, sebaliknya, tanpa melihat kepada konklusi hakim bicara bahawa Seow adalah seorang saksi yang tidak bercakap benar dan tanpa membuat dapatannya sendiri bahawa konklusi hakim bicara yang sedemikian adalah salah, telah mengakas dapatan hakim bicara berkaitan penindasan GIE yang didakwakan itu dengan hanya merujuk kepada dokumen-dokumen tertentu. Di sinilah tempatnya di mana Mahkamah Rayuan telah khilaf. Selain itu, Mahkamah Rayuan, dalam bergantung kepada dokumen-dokumen yang tidak boleh diterima-masuk apabila mengakas dapatan-dapatan fakta hakim bicara, jelas khilaf atas isu keterangan.

(4) Dapatan mengenai kredibiliti seorang saksi berdasarkan kepada tingkahlakunya adalah merupakan pendapat peribadi seorang hakim bicara yang memiliki manfaat dengar-lihat akan kelakuan saksi-saksi. Ia tidak harus, pada kebiasaannya, diganggu di peringkat rayuan.

(5) Mahkamah Rayuan telah berlaku tidak adil secara yang menyeluruh kepada UEM. Adalah menghairankan bahawa perintah-perintah konsekuential, walaupun tidak pernah dipohon, tetap telah dibenarkan. Kesan keseluruhan perintah-perintah adalah bahawa ia membawa kepada pengkayaan tidak wajar. Ini kerana Mahkamah Rayuan, dalam memberi kesan kepada perintah pembelian dan dengan memperakui penilaian oleh jurunilai yang mentaksirkan nilai UEG sebagai lebih kurang RM81 juta, telah gagal mengambilkira keterangan Seow bahawa UEG tidak mempunyai wang yang tinggal atau apa-apa projek untuk dilaksanakan. Adalah jelas bahawa pembelian saham-saham UEG bukanlah satu opsyen yang viable.

Case(s) referred to:
Allied Bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***
Chong Khee Sang v. Phang Ah Chee [1983] 1 LNS 57 ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Ooi Yoke In & Anor v. Public Finance Bhd [1993] 2 CLJ 464 HC ***(refd)***
Watt or Thomas v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 131, 181
Evidence Act 1950, s. 73A

A *For the appellant - Dominic Putchucheary (Firoz Hussein, Malik Imtiaz Sarwar & Cheng Mai with him); M/s Putchucheary Firoz & Mai*
For the respondents - Gideon Tan (Cherrien Chan & Lee Wan Ning with him); M/s Gideon Tan Razali & Zaini

[Appeal from Court of Appeal, Appeal No: W-02-1158-2005]

B

Reported by Amutha Suppayah

JUDGMENT

C

Raus Sharif FCJ:

Introduction

D **[1]** There are two appeals before us: Rayuan No. 2-31-2009 (1st appeal) and Rayuan No. 02-32-2009 (2nd appeal). Both appeals are by UEM Group Berhad (formerly known as United Engineers (Malaysia) Berhad).

[2] The 1st appeal was directed against the decision of the Court E of Appeal on 14 July 2008. The Court of Appeal had reversed the decision of the High Court in granting a winding up petition by United Engineers (Malaysia) Bhd ("UEM") against UEM Genisys Sdn Bhd ("UEG"). The High Court had earlier found that the affairs of UEG were being conducted by Genisys Integrated F Engineers Pte Ltd ("GIE") in a manner contrary to s. 181 of the Companies Act 1965 ("the Act").

[3] The 2nd appeal was directed against the decision of the Court of Appeal on the consequential orders made on 7 November 2008. G What had happened was this. The Court of Appeal after reversing the decision of the High Court in winding up UEG went a step further by inviting the parties to make further submissions on the issue of costs and consequential orders. After hearing the parties, the Court of Appeal, *inter alia* ordered UEM to buy-out GIE's 49% H shares in UEG. The Court of Appeal also made some other consequential orders to give effect to the buy-out order. Hence, the 2nd appeal by UEM.

Background Facts

I **[4]** The facts and events leading to these two appeals are these. On 2 November 1993, UEM and GIE entered into a joint venture agreement ("Shareholders Agreement") for both these companies to jointly venture into and exploit the mechanical and electrical

engineering market in Malaysia. A private limited company called UEG was incorporated as the vehicle to carry out the joint venture. Under the Shareholders Agreement, UEM held 51% of the shares in the UEG and GIE held the remaining 49%.

[5] The Shareholders Agreement defined the roles of UEM and GIE in the joint venture. It also made it clear that the management and control of UEG was to be vested in its Board of Directors. However, the day to day management of its business and affairs were delegated to Chief Executive Officer (CEO), Seow Boon Cheng ("Seow"). Seow was also the managing director and majority shareholder of GIE.

[6] The venture between UEM and GIE started very well. Considerable amount of contract works was awarded by UEM and its related companies to UEG. However, in 1997, UEM decided to dispose of its non-core business. UEG was considered to be its non-core business and accordingly it set about identifying a buyer to dispose of its shares in UEG. UEM then entered into a sale and purchase agreement to sell its 51% shareholding in UEG to Nova Nusantara for RM1.02 million with an added sweetener that "listing of UEG is to be attempted within three years of the takeover".

[7] When GIE learned about the deal between UEM and Nova Nusantara, it wrote to UEM reminding UEM about cl. 12.3 of their Shareholders Agreement. Under cl. 12 of the Shareholders Agreement, a member intending to transfer its shares, should offer them to the existing members. It means UEM should have first offered its shares in UEG to GIE. In the same letter, GIE expressed its willingness to purchase from UEM its UEG shares on the same terms as those proposed by Nova Nusantara with one difference, that was, that the duty on GIE to take steps to have UEG listed would expire at the end of the three years after the sale or if the attempt at listing failed.

[8] In response UEM offered to sell its UEG shares to GIE in the sum of RM10.71 million and the purchase price was to be paid in full upon signing of the sale and purchase agreement. Thereafter, for a period of two years there were long and protracted negotiations between UEM and GIE about the sale of the shares. It was during these periods that the worms in UEG started to crawl in the open. UEM, who had placed Seow in great trust to manage UEG with minimum interference found Seow to be untrustworthy. What

followed was a total breakdown of relationship between UEM and GIE. As a result, litigations were commenced with each party presenting its petition under s. 181 of the Act and each contending that the other had acted oppressively.

[9] UEM petition was registered as Kuala Lumpur High Court Suit No. D3-26-29-2001 while GIE petition was registered under Kuala Lumpur High Court Suit No. D9-26-43-2000.

[10] In UEM petition, the complaint by UEM was that Seow conducted the affairs of UEG with a lack of probity and oppressed UEM as a shareholder. UEM submitted that Seow had performed acts without proper board authorisation and kept UEM in the dark about certain transactions and payments. The transactions complained of were the "Hanoi Sheraton Project", which was a sub-contract awarded to UEG, from which payments to be received by UEG were allegedly diverted by Seow to GIE; the transfer of RM1 million from UEG's account at Mayban Finance Bhd to GIE's bank account at Maybank Bhd by Seow and GIE; the payment of RM50,000 to an ex-employee of UEG by Seow which showed how the funds of UEG were misappropriated or misused by those having control of UEG; payment by Seow to a company called Metronic Engineering Sdn Bhd ("Metronic"), in which he held 62% of the shares, without declaring his interest in Metronic to UEG's board; inter-company payments instituted by Seow which were designed to circumvent the system of joint approval of payments which was in place in UEG; and finally the fact that the management of UEG was lacking in probity because UEG's account for the year ending 31 December 1998 had not been audited and because UEM was denied access to UEG's accounting documents. Accordingly, UEM sought that UEG be wound up or alternatively the GIE's shares in UEG be sold to UEM.

[11] In GIE petition, the complaint by GIE was based on those matters that transpired after UEM's decision to withdraw from the joint venture. The main grounds of complaint were first, that UEM acted in breach of the Shareholders Agreement by dealing with Nova Nusantara and second, that UEM starved UEG of funds so as to eventually have it wound up. GIE also submitted that Seow did the acts complained of to keep UEG alive and UEM had acquiesced to those transactions that it now complained about. Therefore, GIE *inter alia* sought for an order that it be allowed to purchase all shares in UEG held by UEM at net tangible asset valued at 31 December 1999.

[12] The two petitions were consolidated and heard together. On 20 October 2008, the learned High Court Judge (trial judge) dismissed GIE's petition with costs. The trial judge held there were no instances mentioned by GIE in its petition that the affairs of UEG were being conducted or that the powers of the directors were being used in a manner oppressive to GIE or in disregard of the interest of GIE, that would require the remedy under s. 181 of the Act.

[13] However, in UEM petition, the trial judge found that the factual assertions as pleaded by UEM in its petition have been proven on the balance of probabilities. He found that all the complaints raised by UEM, taken jointly and severally, clearly indicate that the affairs of UEG were conducted in a manner which was oppressive to UEM and wholly disregarded its interest as a shareholder of UEG. He concluded that it was gravely oppressive to allow the continuance of UEG as a joint venture where:

13.1 US$13,859,484.10 or RM52,666,040 due to UEG had been diverted to GIE in Singapore;

13.2 RM1,000,000 had been wrongly siphoned off to GIE in Singapore and had been spent;

13.3 Moneys in UEG were used for GIE's purposes;

13.4 GIE nominated directors made secret profits and this is a breach of fiduciary duties they owed to UEG and breach of s. 131 of the Act;

13.5 No audited accounts of UEG have been filed for more than six years and the auditors had confirmed that they were still unable to finalise the audited accounts for the financial year ending 31 December 1999;

13.6 The financial position of UEG was unknown;

13.7 Seow used the staff of UEG for GIE projects without compensating UEG;

13.8 Seow managed UEG unilaterally without reference to the Board of Directors when by operation of art. 72(h), he clearly was no longer even a director of UEG;

13.9 UEM was denied the right to appoint directors of its choice;

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13.10 UEM was prevented by Seow from replacing Azni Amran as its signatory to UEG accounts despite the fact that Azni Amran no longer represented UEG and had confessed to committing a criminal breach of trust in respect of RM375,000 belonging to UEG;

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13.11 The directors nominated by UEM were denied access to UEG's offices, records and document of UEG and were thereby prevented from discharging their duties as directors;

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13.12 The Board of Director of UEG was deadlock and unable to function;

13.13 UEG operated in breach of the conditions imposed by Foreign Investment Committee (FIC).

D

13.14 Staff of UEG incited against the directors of UEG nominated by UEM.

[14] The trial judge also found that UEG was gravely insolvent. Thus, he was of the view that a buy-out of GIE's shares in UEG was not a viable option. He accordingly made the order for UEG to be wound-up. A liquidator was appointed to manage the affairs of UEG.

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[15] Aggrieved, GIE appealed against the decision of the High Court. On 14 July 2008, the Court of Appeal dismissed GIE's appeal against the decision of the High Court in dismissing GIE petition. The Court of Appeal agreed with the High Court that the acts complaint of against UEM as stated in GIE petition does not constitute oppression that would grant relief under s. 181 of the Act.

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[16] However, the Court of Appeal allowed GIE's appeal against the UEM petition. UEM petition was dismissed. The orders of the High Court were set-aside. In doing so, the Court of Appeal overturned almost all findings of the trial judge. The Court of Appeal, *inter alia* held the following:

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16.1 The trial judge had failed to properly evaluate the facts presented to him as a part of a consequential story when deciding whether there was oppression in the particular circumstances of this case;

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16.2 The documentary evidence showed that UEG's board knew all about the subcontract and the payment that were to be made to GIE in respect of the Hanoi Sheraton Project. These expose UEM's allegations to be completely lacking in substance;

16.3 There was absolutely no basis for the learned trial judge to come to the conclusion that RM1 million was misappropriated from UEG's account by Seow and GIE. The trial judge's analysis of the evidence was confined to only certain portion of Seow's evidence without considering the other evidence that overwhelmingly pointed to Seow's innocence;

16.4 The trial judge's finding that a cheque for RM50,000, which was made out to an ex-employee of UEG, on the instruction of Seow as being another instance of how fund of UEG were misappropriated or misused by those having control of UEG was a serious misdirection on facts. That was because independent contemporaneous documentary evidence showed that the money never left UEG;

16.5 The learned trial judge further misdirected himself on the facts and the law when evaluating the facts and evidence. Although Seow testified that he had disclosed his interest in Metronic to UEM nominated directors of UEG, the said directors were not called as witnesses to clarify the position. It was a serious miscarriage of justice to put to a witness that he or she did not disclose material facts to named persons and then omit to call these persons with no offer of an explanation for the omission;

16.6 The learned trial judge appeared to have completely overlooked UEM's own participation in the inter-company transactions. This duality of approach to the evaluation of evidence constituted a serious misdirection resulting in a miscarriage of justice, which warranted appellate interference;

16.7 An objective viewing of the accounts showed that UEG was in a financially straitened position principally because of monies owed to it by UEM's subsidiaries

A and its group of companies. Thus, the finding that Seow conducted the management of UEG's financial affairs in a manner wholly lacking probity could not stand in the light of independent contemporaneous documentary evidence and was against the probabilities
B of the case; and

16.8 Taking into account the whole of the evidence, including the undisputed contemporaneous documents, none of the grounds of complaint raised by UEM and dealt
C with by the High Court were substantiated.

[17] After setting aside the winding-up order, the Court of Appeal ordered that the executive authority of UEG was to be re-vested to its board and Seow was restored to his position as the CEO of
D UEG. The Court of Appeal did not stop there. It fixed the matter for further submissions on the issue of consequential orders and costs.

[18] On 7 November 2008, the Court of Appeal, after hearing the parties made the following orders:

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18.1 UEM to buy out GIE 49% of shares in UEG;

18.2 A valuer to be appointed to value UEG, based on net tangible assets as at 1998 but to take into account, *inter alia* debts owned by UEM to UEG after 31
F December 1998;

18.3 UEM to pay interest on the purchase price at the rate of 8% per annum from 13 April 2001;

G 18.4 UEM to pay for all valuation costs;

18.5 UEM to pay GIE's costs on a common fund basis;

18.6 UEM not entitled to costs for GIE's petition.

H **[19]** Pursuant to the Court of Appeal's order of 7 November 2008, the valuer proceeded to value UEG. The valuer requested representation from UEM on the valuation of UEG. However, UEM did not provide any representations. Thereafter, the valuer sought an extension of time from the Court of Appeal to file its
I affidavit of valuation. The matter was fixed on 9 April 2009.

[20] On 9 April 2009, the Court of Appeal granted the extension of time and proceed to adopt the affidavit of valuation of the valuer which valued UEG at approximately RM81 million. The Court of Appeal further ordered that the buy-out be completed by 30 May 2009.

Leave To Appeal To The Federal Court

[21] Consequently, UEM applied for leave to appeal to this court against the decisions of the Court of Appeal of 14 July 2008, 7 November 2008 and 9 April 2009. On 23 June 2009, this court granted leave to appeal against the decisions of the Court of Appeal dated 14 July 2008 ("1st appeal") and 7 November 2008 ("2nd appeal").

[22] In respect of the 1st appeal the following questions were posed:

Question 1: In view of the deliberate refusal by the trial judge to accept the evidence of a material witness as truthful, whether the Court of Appeal was entitled to reject the said finding on inferences from documents?

Question 2: Whether the Court of Appeal can draw inferences on documents, the authenticity of which were challenged at trial and which were not proven by the makers of the said documents.

Question 3: Whether a finding of fact by the Court of Appeal on material issue without any evidential foundation occasions a miscarriage of justice?

Question 4: Whether a Shareholders' Agreement which has not been ratified by the company and which has not been incorporated into the Articles of Association of the company creates rights in favour of a member which are material for the purposes of determining a petition for oppression pursuant to s. 181 of the Companies Act 1965.

Question 5: Whether the relationship between two corporate shareholders dealing at arm's length in a joint venture company is one of *uberrima fides* or utmost good faith?

Question 6: Whether decisions made on an informal basis, which in effect, circumvent the formal requirements of holding a board meeting and passing resolutions as required by its articles of association of a company are valid and binding.

A Question 7: Whether an alleged informal disclosure of interest in a contract constitutes a declaration as per section 131 of the Companies Act 1965?

[23] In respect of the 2nd appeal, the following questions were posed:

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Question 1: Whether section 69(4) of the Court of Judicature Act 1964 vests the Court of Appeal with the jurisdiction and/or power to grant on appeal, any of the remedies provided under section 181(2) of the Companies Act notwithstanding the grounds set out under section 181(1) not being established by the party seeking remedy.

C

Question 2: Whether the Court of Appeal has powers to order the Appellant to purchase the shares of the 1st Respondent in the 2nd Respondent when it had determined that there is no oppression as provided under section 181(1) of the Companies Act 1965?

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Question 3: Whether a Court can order a party to pay costs on a common fund basis when such costs were never prayed for or claimed by the party awarded costs and where neither party was given the opportunity to submit on the matter?

E

Question 4: Whether a Court has jurisdiction and power to make ancillary orders that a Petitioner pay interest on the yet to be determined purchase price of the Respondent's shares in the company, calculated from the date of presentation of the Petitioner's Petition?

F

1st Appeal

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[24] We are of the view, although seven questions were posed before us, the crucial questions in the 1st appeal are Questions 1 to 3. We will begin by restating Questions 1 to 3 posed for determination by this court ie,:

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Question 1: In view of the deliberate refusal by the learned trial judge to accept the evidence of a material witness as truthful, whether the Court of Appeal was entitled to reject the said finding on inferences from documents?

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Question 2: Whether the Court of Appeal can draw inferences on documents, the authenticity of which were challenged at trial and which were not proven by the makers of the said documents?

Question 3: Whether a finding of fact by the Court of Appeal on material issue without any evidential foundation occasions a miscarriage of justice?

[25] Encik Malik Imtiaz, who submitted on Questions 1 to 3 on behalf of UEM, contended that the Court of Appeal had materially erred in the way it approached the appeal and its powers to intervene with the findings of facts of the trial judge. Encik Gideon Tan, learned counsel for GIE contended otherwise. He submitted that the Court of Appeal was right in overturning the decision of the trial judge as the decision was plainly wrong.

[26] Thus, the prime issue in respect of Questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt or Thomas v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[27] In the instant case, as found by the trial judge, that the case of UEM and GIE was not one that was premised only on documentary evidence. The positions of the respective parties depended largely on oral evidence as to the circumstances of the dispute between the parties as well as the circumstances underlying material documentary evidence. In respect of documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by material witnesses.

[28] It is for this reason that the trial judge's conclusion that Seow, the only witness put forth by GIE, being not a witness of truth, was of great significance. This is because GIE's case was mounted on the strength of Seow's evidence. Reliance was placed on Seow as to how documents were to be understood. Several affidavits were filed by Seow in the proceedings which were then relied upon on Seow's evidence in chief for the trial of both the petitions. Thus, what the trial judge had to say of Seow as a witness is crucial. This was what the trial judge said:

Seow's evidence in Court throughout the proceedings should be treated with great caution. He was not a straight-forward witness. He has evaded answers in cross-examination when he considered true answers would be damaging to his case. His demeanour during cross-examination instil doubt on the truthfulness of his statements. His countless effort in evading questions put forth by UEM's counsel and the reluctance in his answer is in stark contrast to his solid and meticulous answers when questioned by GIE's Solicitors. The Court finds that the weight attached to his statements would be considerably low taking into account his bad demeanour.

Seow was evasive in his answers during cross-examination. He contradicted himself numerous times that, his credibility as a witness has been totally diminished (see Seow's evidence on 15.3.2004 at pages 27 to 29 of the Notes of Proceedings). Other examples of his inconsistencies in his evidence are related below.

In giving evidence before this Court, Seow disagreed that he was the director of UEG who had primary responsibility for the financial affairs of UEG (see Notes of Proceedings dated 17.3.2004 at page 30). However, he had previously sworn a Statutory Declaration on 15.3.1998 (enclosure 11 at page 197) that he was the director of UEG who was primarily responsible for the financial management of UEG.

In another occasion, Seow testified in Court that he instructed Messrs. Gidoen Tan Razali Zaini to act for UEG in respect of the D3 Petition in his capacity as a director of UEG together with Christina Rani and not under the DAL (see Notes of Proceedings dated 23.7.2002 at page 18). However, Seow had also affirmed in the proceedings affidavit no. 10, Enclosure 56 where he stated under oath that he had appointed Messrs. Gideon Tan Razali Zaini in his capacity as Chief Executive Officer of UEG and relying on the DAL. When this contradiction was pointed out to him, he testified:

> I agree the version I gave in Court is true … I agree I contradicted myself in my affidavit … when I said that I appointed Gideon Tan in capacity as Chief Executive Officer and relying on the DAL …

Obviously, Seow was lying and had forgotten what he had affirmed in his affidavit previously.

Another instance of inconsistency, is about the Condominiums which Seow unilaterally accepted as a settlement of a debt due to UEG. In his evidence recorded on 24.7.2002 (at page 22) Seow initially stated that:

I cannot recall why I accepted this payment in kind.

However, minutes later, he explained the reason to accept the payment in kind as follows:

At the material times, Sungei Way Construction was renowned to be in dire financial straits and had not paid the amount owing to UEG for a long time. I would be failing my duty as Chief Executive Officer not to accept payment in kind.

(See Notes of Proceedings dated 24.7.2002 at page 25)

Another example of Seow's untruthfulness is when he confirmed that as a matter of fact that at the end of each financial year there was contra process whereby the "inter-company" accounts would be resolved (see Notes of Proceedings dated 17.3.2004 at page 66). However, subsequently Seow admitted that he did not know for a fact that there was contra-process at the end of each year (see Notes of Proceedings dated 17.3.2004 at page 68). This was extremely significant because Seow was seeking to persuade this Court that the "inter-company" account was reconciled annually but the truth of it was that it had not been reconciled since 1995 as there were items in exhibit P25 which were unreconciled since then.

On these issues of demeanour and inconsistency, the court relies on *Sarkar's Law of Evidence*, Fifteen Edition, Volume 1, Wadha and Company Nagpur 1999:

The demeanour and bearing of a witness should be very closely observed. Unless a witness is a skill actor, his demeanour frequently furnishes a clue to the weight of his testimony. It is because the trial judge had the advantage of seeing the witness that it has been repeatedly held that his decision on question of fact should not be lightly disturbed ... When the question of credibility depends on the demeanour in the box, the manner in which the witness answer and by how he seems to be affected by the question put and so on, the trial judge has an advantage.

In the present case, the demeanour of Seow when he gave evidence was to say the least, at its lowest ebb. There were pauses, cynical smiles, confusion and inconsistencies, all added into one. The credibility of Seow as the only witness for GIE is badly and adversely affected on the balance of probabilities. Seow's evidence is bristled with inconsistencies and half truth.

[29] It can be seen from the above that the trial judge's conclusion as to Seow's credibility was based on his observation not only on material attributes of Seow's demeanour but also on evident contradictions and inconsistencies on the relevant and material matters. The trial judge referred to specific examples of Seow's contradictions and inconsistencies. These examples were drawn from the different aspect of the case before him and threaded through the various heads of oppression identified by UEM in its case. To that end, the trial judge noted that Seow had lied on affidavit as well as during his oral evidence and was untruthful.

[30] In the light of the above, it is apparent that this is a case where the findings of credibility could not be severed from documentary evidence. The finding by the trial judge that Seow was being untruthful was an integral part of the whole case on the basis of a reasonable and proper judicial appreciation of the evidence. This is evident from a reading of the trial judge's judgment as a whole as well as his summary and conclusions. The trial judge had come to findings of specific facts, pertaining to the heads of oppression in the UEM's petition in rejecting the version put forth by Seow.

[31] The Court of Appeal, on the other hand despite not having addressed the trial judge's conclusion that Seow was not a witness of truth nor itself finding that the trial judge's conclusion in that regard was erroneous, proceeded to reverse the findings of the trial judge on the alleged oppression of GIE by referring only to specific documents. This was where the Court of Appeal had gone wrong. It had failed to recognize the significance of Seow's evidence to its case in response to UEM petition. It had also fallen into error in viewing the documents selectively and had in fact indirectly reinstated Seow as a credible witness, without assigning any reason for doing so.

[32] The disturbing feature of the judgment of the Court of Appeal is that, it had relied on some disputed documents, which had been challenged at the trial, as the basis of reversing the findings of facts of the trial judge. Two clear examples are the subcontract of the Sheraton-Hanoi Project and the alleged fax from GIE's accountant.

[33] With regard to the subcontract of the Sheraton-Hanoi Project, the Court of Appeal relied on its content extensively when reversing the finding of the trial judge that US$13,859,484.10 or

RM52,666,040 due to UEG had having surreptitiously diverted by Seow to his own company in Singapore GIE. The judgment of the Court of Appeal on this issue reads:

> Last, but not least, you have the subcontract itself. Clauses 10(A) and (B) of that document are self explanatory. This is what they say:
>
> > (A) In consideration of the services to be rendered by GIE under this Agreement, GIE shall be paid a sub-contract sum (the 'Sub-Contract Sum') equivalent to the contract sum (before deduction of 2% of profit tax which will be levied by authority in Vietnam and to be paid by GIE) payable by the Main Contractor to UEG under the M & E Contract (the 'M & E Contract Sum') less UEG's procurement fee of three per cent (3%) of the M & E Contract Sum (the 'Procurement Fees') in accordance with sub Clause (B) below. There shall be no variation of the Sub Contract Sum save as a result of any variation in the M & E Contract Sum or the Works to be performed by GIE in accordance with Clause 13.
>
> > (B) Without prejudice to UEG's primary obligation to make payment of the Sub-Contract Sum to GIE, UEG shall procure and ensure that the Main Contractor pays the M & E Contract Sum direct to GIE in accordance with the payment terms under the M & E Contract. GIE shall within a period of fourteen (14) days after receipt of the M & E Contract Sum from the Main Contractor pay to UEG the Procurement Fee by way of a telex transfer made out in favour of UEG.
>
> Now, the learned judge did not make a finding that this document was false or unreliable. In fact he makes no reference at all to it in his judgment.
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> It follows that the following finding of the learned judge:
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> > It is clear from the above that the board of directors of UEG were at all material times unaware that the US$13,859,484.10, which was due to UEG in respect of the Hanoi Sheraton Project, had been surreptitiously diverted by Seow to his own company in Singapore GIE.
> >
> > flies in the teeth of contemporaneous evidence going the other way. There is therefore merit in GIE's complaint that there was no judicial appreciation of the evidence on this point. Based on the authorities already cited, the learned judge's conclusion on this part of the case cannot stand.

[34] With utmost respect, we believe that the reason why the trial judge did not make any reference to the subcontract in his judgment is because the authenticity of the subcontract was challenged by UEM. At the trial, the subcontract was marked only as an 'ID' as its maker was never called. Thus, how could the Court of Appeal accept and rely upon a document in toto without even considering the issue of its authenticity, when its authenticity had been expressly challenged in the High Court as well as in Court of Appeal. In the High Court, it was expressly pointed out that the purported subcontract between UEG and GIE was undated and signed only by one party. In the notes of proceedings of the High Court trial on 8 March 2005, UEM had challenged the authenticity of the subcontract (p. 12506 vol. B29 of the appeal record). Further, in the notes of proceedings of the High Court on 9 March 2005, Seow was cross-examined on the issue of the alleged subcontract and its purported authenticity and signatory (p. 12671 vol. B29 of the appeal record). Cik Sulaihah Maimunni's affidavit filed in the High Court in support of UEM petition affirmed on 8 May 2001, had challenged the authenticity of the subcontract. Again, in the Court of Appeal, UEM in its submission expressly challenged the authenticity and the failure of GIE to produce the maker and/or signatory of the alleged subcontract. Thus, reliance on the subcontract by the Court of Appeal was a clear error on evidential issue.

[35] Another example where the Court of Appeal relied on a disputed document was in relation to an alleged fax sent by GIE to UEM in relation to RM1 million transferred by Seow from UEG account to GIE's bank. The fax reads as follows:

> Further to our teleconversation, this is to confirm that Genisys will be holding on behalf of UEG, in trust, the amount of RM1,000,000.00 remitted to our Maybank KL account on 28/8/00.

Based on the above, the Court of Appeal held that there was absolutely no basis on which the trial judge could have come to the conclusion that RM1,000,000 had been misappropriated by Seow. But, the Court of Appeal failed to recognise or consider the fact that the fax was challenged by UEM at trial. The Court of Appeal also failed to consider the evidence at the trial that the fax was never received and the fax log book evidence tendered by UEM showed that such fax was never received. In fact, the alleged fax was never marked as an exhibit at the trial as objection was raised by UEM as to its authenticity.

[36] It is fundamental that it is the requirement of the best evidence rule that the maker of a document must be called to prove it. (*Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33). Further s. 73A of the Evidence Act states that in civil proceedings, the maker must be called as a witness in order to render it admissible in evidence. (*Ooi Yoke In (f) & Anor v. Public Finance Berhad* [1993] 2 CLJ 464). And a document cannot be admitted into evidence and marked as such until properly proven. (*Chong Khee Sang v. Phang Ah Chee* [1983] 1 LNS 57). In the instant case, it is clear that both the subcontract and the fax were not properly proven and should have been disregarded. Thus, the Court of Appeal, by relying on those documents in reversing the findings of facts of the trial judge was clearly in error on evidential issues.

[37] Another error by the Court of Appeal was its finding that the RM50,000 was never misappropriated from UEG's fund, and thus reversing the finding of fact of the trial judge. The Court of Appeal ruled:

> What happened was this. A cheque for RM50,000.00 was made out to Elton Sun but cashed by UEG. The money was never paid out to Elton Sun. Instead, the cash was placed in UEG's safe. The police officer who investigated the report lodged by Sulaihah Maimunni confirmed that the money was indeed in UEG's safe. The evidence was never challenged by UEM. In the fact of the irrefragable evidence to the contrary it was a serious misdirection on the facts by the learned judge to hold as he did on this issue.

[38] We find that the above finding of the Court of Appeal was without any evidential foundation. This is because no police officer ever gave any such evidence in the High Court. No such evidence was ever before the trial judge. No doubt GIE had, by way of affidavit, exhibited purported notes of proceeding of the Sessions Court criminal trial of Seow, but as it was a criminal proceedings, UEM was not a party to those proceedings and it was not possible for UEM to challenge the evidence. GIE did not subpoena the police officer for the purpose of these petitions, and therefore, UEM never had the opportunity to challenge the same or cross-examine the police officer. Thus, the conclusion by the Court of Appeal that RM50,000 was never misappropriated from UEG's fund, contrary to what the trial judge had found cannot stand.

[39] In the final analysis we are unable to say that the findings of facts by the trial judge on the alleged oppression of GIE were unsustainable and were plainly wrong. The trial judge had painstakingly identified and dealt with the issues exhaustively in each of the two petitions before him. We find that his findings are supported by cogent reasons. Thus, we see no reason why the Court of Appeal should reverse them.

[40] Speaking on appellate intervention, we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, a finding on a witness's credibility based on his demeanour is a personal opinion of a trial judge who had the audio-visual advantage of the performance of witnesses. It should not, ordinarily be disturbed at the appellate stage. This is especially so in the instant case where the trial judge had found that Seow, the only witness put forth by GIE, was not a witness of truth. The trial judge had given reasons as to why he found that "Seow's evidence is bristled with inconsistencies and half truth". We think in the circumstances of the reasons given by the trial judge, the findings are entitled to great respect.

[41] Accordingly, our answers to Questions 1 and 2 are in the negative. While our answer to Question 3 is in the positive. In the light of our findings to Questions 1 to 3, we see no necessity to answer Questions 4 to 7 in the 1st appeal.

[42] For the reasons given, we therefore allowed this appeal with costs here and below. The orders of the Court of Appeal are set-aside. The High Court orders are hereby reinstated. Deposit to be refunded to UEM.

2nd Appeal

[43] As stated earlier, the 2nd appeal was directed against the consequential orders of the Court of Appeal. The Court of Appeal in a separate judgment dated 7 November 2009 stated:

> 6. That brings us to the issue of what consequential orders, if any, we should make in this case. The effect of the principal judgment of this court is that the parties are restored to the respective positions in which they stood before the presentation of their respective petitions. The result is a deadlock producing an obvious injustice to the parties. For it is clear from the evidence adduced

that neither side wants to have anything to do with the other. It is axiomatic that an order of this or indeed any other court should produce complete justice. This principle is embodied in section 69(4) of the Courts of Judicature Act 1964 which provides as follows:

> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

7. The subsection has been judicially considered in a number of cases including *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 where the Federal Court approved the approach of this court in *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 3 MLJ 489. In the latter case, this court adopted the following passage from the judgment of Ramaswami J in *Ganesh Ram v. Baikunthesh Prasad Singh & Ors* AIR 1951 Pat 291 (at p 293) explaining the scope of O. 41 r. 33 of the Indian Civil Procedure Code from which section 69(4) is drawn:

> The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the appellate court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated. Having regard to the wide language of the rule, it is not expedient to lay down any hard and fast rule regarding its true scope. Involving as it does an exercise of judicial discretion, the question whether the court should exercise the powers in a particular case would no doubt depend upon the special facts and circumstances of the case. It may be conceded that the discretion is not to be exercised in an arbitrary manner nor in such a way as to abrogate the other provisions of the Code with respect to the institution of appeals and cross-objections and the like. But there is ample authority for the view that the power contained in r. 33 extends to those cases where as a result of the appellate court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience (see, for instance, *Jawahar Banu v. Shujaat Hussain Beg* AIR [1921] All 367 and *Gangadhar v. Banabashi* AIR [1914] Cal 722.

[44] We are of the view that the above decision of the Court of Appeal in wanting to do "complete justice" was in fact doing the opposite. It has done a complete injustice to UEM. The consequential orders were such that they were not sought for and yet astonishingly granted. The total effect of the orders was tantamount to unjust enrichment. This is because the Court of Appeal in giving effect to the buy-out order and by adopting the valuation of the valuer which valued UEG at approximately RM81 million, had failed to consider Seow's own evidence, which the Court of Appeal indirectly held to be credible. Seow had said in his evidence that:

44.1 UEG has no money left. It has no cash balance left in its bank account;

44.2 UEG has no money to pay its creditors;

44.3 UEG has no money to pay salaries;

44.4 UEG has no money to pay any bills like electricity and utilities;

44.5 UEG has no projects work left to do; and

44.6 UEG's employees at its height, in 1999 numbered 130 employees, but at the time of trial only six employees remain.

[45] Obviously, a buy-out of UEG's shares is not a viable option. UEG as rightly found by the trial judge was insolvent. Nevertheless, since we are setting aside the orders of the Court of Appeal on the 1st appeal and that the orders of the High Court had been reinstated, the consequential orders of the Court of Appeal is no longer a living issue. Thus, we find no necessity to answer the Questions posed in the 2nd appeal. Accordingly, we allow 2nd appeal with costs here and below. The orders of the Court of Appeal on the 2nd appeal are set-aside. Deposit to be refunded to UEM.