**IN THE COURT OF APPEAL MALAYSIA IN PUTRAJAYA**
**(APPELLATE JURISDICTION)**
**IN THE FEDERAL TERRITORY OF PUTRAJAYA**
**CIVIL APPEAL NO: W-02(NCVC)(W)-2194-10/2018**

**BETWEEN**

**MALAYAN BANKING BERHAD … APPELLANT**
**(Company Registration No.: 3813-K)**

**AND**

1. **TAN SOEK PHEE**
   **(Identity Card No.: 710608-08-6292/A1854456)**
2. **NOR AKHFA BINTI JALAL**
   **(Identity Card No.: 800212-08-5452)**
3. **IZMA BT IDRIS**
   **(Identity Card No.: 680210-10-6076/A1166876)**
4. **CHEN KAIT LEONG**
   **(Identity Card No.:530223-10-5917/4397519 ) … RESPONDENTS**

In the High Court of Malaya at Kuala Lumpur
Civil Suit No.: WA-22NCVC-314-05/2016

Between

MALAYAN BANKING BERHAD … Plaintiff
(Company Registration No.: 3813-K)

And

1. TAN SOEK PHEE
   (Identity Card No.: 710608-08-6292/A1854456)
2. NOR AKHFA BINTI JALAL
   (Identity Card No.: 800212-08-5452)
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   (Identity Card No.: 680210-10-6076/A1166876)
4. CHEN KAIT LEONG
   (Identity Card No.:530223-10-5917/4397519 ) … Defendants

**HEARD TOGETHER WITH**

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**(APPELLATE JURISDICTION)**
**IN THE FEDERAL TERRITORY OF PUTRAJAYA**
**CIVIL APPEAL NO: W-02(NCvC)(W)-2220-10/2018**

**BETWEEN**

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   **(Identity Card No.: 710608-08-6292/A1854456)**
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**AND**

**MALAYAN BANKING BERHAD … RESPONDENT**

**(Company Registration No.: 3813-K)**

In the High Court of Malaya at Kuala Lumpur
Civil Suit No.: WA-22NCVC-314-05/2016

Between

MALAYAN BANKING BERHAD … Plaintiff

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4. CHEN KAIT LEONG
   (Identity Card No.:530223-10-5917/4397519 ) … Defendants

**CORAM:**

**ABDUL KARIM BIN ABDUL JALIL, JCA.**

**ABU BAKAR BIN JAIS, JCA.**

**LIM CHONG FONG, JCA.**

## GROUNDS OF JUDGMENT

## INTRODUCTION

**[1]** These are appeals against the trial judgment of the High Court that partially allowed the claim pertaining to solicitor's professional negligence.

**[2]** The learned High Court judge on 25th September 2018 adjudged and ordered as follows:

(i) The Defendants are to make payment of the sum of RM127,994.00 to the Plaintiff together with interest on the said amount at 5% per annum from 30th May 2016 until full settlement;

(ii) The Plaintiff's claim for damages for loss of chance is dismissed; and

(iii) No order as to costs.

**[3]** We have on 10th April 2023 unanimously allowed the Appeal No. W-02(NCVC)(W)-2194-10/2018 **("Appeal 2194").** In this regard, we varied the High Court judgment dated 25th September 2018 by allowing and ordering the Defendants to make payment of the Plaintiff's claim for damages for loss of a chance and hence judgment was accordingly

entered in the sum of RM622,006.00 to the Plaintiff. However, we dismissed Appeal No. W-02(NCVC)(W)-2220 **("Appeal 2220").** There shall be no order as to costs as agreed by the parties.

**[4]** We now provide the grounds of judgment below and continue to address the parties as Plaintiff and Defendants for convenience.

**BACKGROUND**

**[5]** The Plaintiff gave banking loan facilities to a CSPM Technology Sdn Bhd (**"Borrower"**) which have been personally guaranteed by Chin Kwong Wah and Ng Lee Eng (**"Guarantors"**).

**[6]** By reason of the default of the Borrower and Guarantors in re-paying the loan disbursed by the Plaintiff together with interest accrued, the Appellant instructed the firm Messrs. Abd Aziz Chen, Advocates & Solicitors to recover the losses sustained by the Appellant from the Borrower and Guarantors. At all material times, the Defendants are the partners of Messrs. Abd Aziz Chen.

**[7]** Consequently, Messrs. Abd Aziz Chen on behalf of the Plaintiff initiated legal proceedings against the Borrower via Kuala Lumpur High Court Suit No. D3-22-43-2008 (**"Suit 43"**) and the Guarantors via Penang High Court Suit No. 22-121-2002 (**"Suit 121**"). By reason that Suit 121 was not served upon the Guarantors before the expiration of the writ,

Messrs. Abd Aziz Chen thereafter re-initiated Penang High Court Suit No. 22-162-2004 (**"Suit 162"**) against the Guarantors.

**[8]** In respect of Suit 162, the suit was dismissed after a full trial. Messrs. Abd Aziz Chen appealed to this Court via Civil Appeal No. W-02-2684-10/2011 on behalf of the Plaintiff but the appeal was struck off because of Messrs. Abdul Aziz Chen's failure to file the appeal record within the prescribed time. As for Suit 43, the suit was struck off for want of prosecution and Messrs. Abd Aziz Chen failed to re-instate the suit within the limitation period.

**[9]** The Borrower was wound up on 5 November 2015.

**[10]** As a result, the Plaintiff initiated KL High Court Suit No. WA-22NCVC-314-05/2016 (**"Suit"**) against the Defendants premised on professional negligence and claimed the following:

(i) refund of all legal fees amounting to RM127,994.00;

(ii) damages for the loss of a chance/opportunity;

(iii) interest;

(iv) costs on a solicitor and client basis; and

(v) such further and other relief as this Honourable Court deems fit.

**[10]** After trial of the Suit, the learned High Court judge found the Defendants professionally negligent for failure to timeously file the appeal record on the appeal against the trial decision of Suit 43 as well as for failure to prosecute Suit 162 and re-instate the suit within the prescribed limitation period notwithstanding the Plaintiff did not adduce expert evidence on the standard of care of solicitors.

**[11]** Consequently, the learned High Court judge found that the Defendants must refund the legal fees of RM127,994.00 received following this Court's decision in ***Public Bank Berhad v. Datuk Mohd Ali bin Haji Abdul Majid*** **[2013] 2 MLJ 709**.

**[12]** However, the learned High Court judge did not find the Defendants liable for damages that arose from the loss of a chance/opportunity because the Plaintiff did not prove its loss in that the Plaintiff was at the material time still able to re-institute a new suit against the Guarantors as principal debtor of the Borrower when Suit 43 was struck out for want of prosecution. More pertinently, the learned High Court judge did not award damages for loss of a chance/opportunity because the Plaintiff could at best recover only nominal damages from the Borrower which has been wound up. In other words, there was no actual loss sustained by the Plaintiff. Reliance was made on the case of this Court in ***Pang Yeow Chow (practising as Messrs. YC Pang, Chong & Gordon) v. Advance Specialist Treatment Engineering Sdn Bhd*** **[2015] 1 MLJ 490** wherein Hamid Sultan Abu Backer JCA held as follows with emphasis added:

*"[9] In addition, it must be noted when a matter is struck out there will be at least two types of damages for client. One is actual damage for costs to reinstate or refilling inclusive of instructing new solicitors to take conduct of the matter as the case may be and the other the 'loss of chance to sue'. To say 'actual damage' will not arise upon the case being struck out is a fact quite difficult to comprehend.* ***However, on the second part of 'loss of chance' there will not be any liability if there is no actual loss and/or reasonable prospect of success*** *as advocated in the submission of the appellant."*

**[13]** The Plaintiff was dissatisfied with the findings of the learned High Court judge and thus filed Appeal 2194 on 23rd October 2018. The Defendants were likewise dissatisfied with the findings of the learned High Court judge and thus also filed Appeal 2220 on 24th October 2018.

**FINDINGS OF THIS COURT**

**[14]** Before us in both their written submissions and oral arguments, the parties repeated their contentions made in the High Court.

**[15]** We are accordingly guided by the decision of this Court in ***Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd*** **[2017] 5 CLJ 58** where Harmindar Singh JCA (now FCJ) held as follows:

*"[20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:*

*(a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal [2010] 3 CLJ 377; [2010] 3 MLJ 509);*

*(b) where there was no proper evaluation of the evidence by the trial judge (see Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626; [2009] 6 MLJ 1);*

*(c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309; [2005] 2 MLJ 1);*

*(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd [2008] 2 CLJ 284; [2008] 2 MLJ 87);*

*(e) where the trial judge was plainly wrong in arriving at his decision (see Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19; [2003] 2 MLJ 97);*

*(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40; [1984] 2 MLJ 165); and*

*(g) where the judgment is based upon a wrong premise of fact or of law (see Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 1 LNS 1416; [2012] 4 MLJ 149).”*

**Liability**

**[15]** Hence in respect of the finding of liability raised by the Defendants, we refer and rely on the recent case of this Court of ***Suresh Subramaniam v. Majlis Perbandaran Selayang*** **[2023] MLRAU 108** which adopted the earlier findings in ***Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v. Advance Specialist Treatment***

***Engineering Sdn Bhd*** **(supra)** where Hamid Sultan Abu Backer JCA held as follows with emphasis added:

> *"[7]* ***There are authorities to suggest that in a case of this nature the respondent still has to prove his case against the third party on the balance of probabilities****. This was not done in this case. In Sharif & Ors v. Garrett & Company [2002] 1 WLR 3118, the court with similar issues had relied on Lord Justice Simon Brown in Mount v. Barker Austin [1998] PNLR 493 at pp 510/511, where His Lordship had summarised the relevant consideration as follows:*
>
> *(i)* ***The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim, he has lost something of value ie, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success****.*
>
> *(ii) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.*
>
> *(iii)* ***If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors****. It is quite likely that the delay would have caused such difficulty and quite possible, indeed, that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.*
>
> *(iv)* ***If and when the court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make***

> ***a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure****.*
>
> *These principles are largely taken from the leading cases of Kitchen v. Royal Air Force Association [1958] 1 WLR 563 and Allied Maples Group Ltd v. Simmons and Simmons [1995] 1 WLR 1602 and have been applied in a number of cases to which we were referred..."*

**[16]** We observed the Defendants relied on the cases of this Court **in *Shearn Delamore & Co v. Sadacharamni a/l Govindasamy* [2017] 1 MLJ 486** as well as ***Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368** that it was fatal to the Plaintiff *in limine* by its failure to call a practising solicitor to testify as expert witness at the trial to establish the requisite standard of care of a solicitor in ascertaining the prospect of success of the original case. The learned High Court judge however held against the Defendants.

**[17]** We acknowledged that the Plaintiff must establish it has lost the opportunity to pursue a claim that has a good prospect of success. We are however of the view that the ***Shearn Delamore & Co* (supra)** and ***Tetuan Theselim Mohd Sahal & Co & Ors* (supra)** cases are distinguishable in that the alleged breach there pertained to non-contentious intellectual property and conveyancing solicitor's practice respectively. As to contentious advocate's litigation practice, we find there is no necessity for expert evidence of a practising advocate to apprise the Court because the Court is equally well place to independently appraise and evaluate the requisite standard of care of an advocate; see ***Wong***

***Kim v. Loh Kim Foon*** **[2003] 4 MLJ 535**. Thus, Suraya Othman JCA held as follows in ***Nyo Nyo Aye v. Kevin Sathiaseelan a/l Ramakrishnan & Anor*** **[2020] 4 MLJ 380** with emphasis added:

> *"[64] On the need to call expert evidence, we are of the view that in our instant case the fact that no expert was called to give evidence on the standard of care, is not fatal. The case of Shearn Delamore and Tetuan Theselim Mohd Sahal has to be distinguished. Shearn Delamore it is a case on intellectual property and the case of Tetuan Theselim Mohd Sahal involves a SPA. Both these cases on intellectual property and conveyancing require an expert to be called to establish the standard of care required or expected from competent practitioners practicing in those specialised fields to establish whether the standard of care has been breached.* ***In our instant case, it is a simple case. It pertains to the duty of a practitioner to inform and advise the client of the consequence of non-payment of SFC which would result in the case being struck off. It involves the duty of the practitioner to be diligent, to ask for an extension of time if time has expired and foremost to inform the client on the prospect of success of the client's case and not lead the client on and when the case got struck off to turn the table against the client by alleging that the case has no prospect or chances of winning after all****."*

**[18]** On the facts here, we are satisfied that the learned High Court judge has not misdirected himself when he found the Defendants professionally negligent for failure to timeously file the appeal record on the appeal against the trial decision of Suit 43 as well as for failure to prosecute Suit 162 and re-instate the suit within the prescribed limitation period; see ***Miranda v. Khoo Yew Boon*** **[1968] 1 MLJ 161** and Jackson & Powell on Professional Negligence (5th ed.) at p. 641. It is our view that the omissions committed by Messrs. Abd Aziz Chen are plainly inexcusable advocate's carelessness which resulted in the Plaintiff having lost the opportunity to claim which is not negligible against the Borrower and Guarantors.

**[19]** That notwithstanding, we are aware that the Defendants relied on the learned High Court judge's adverse finding against the Plaintiff in that the Plaintiff could have then still re-litigate against the Guarantors as the result of the striking out of Suit 43 for want of prosecution without being fettered by limitation by virtue of the principal debtor clause found in the guarantee which provides:

> *"17. As a separate and independent stipulation, I/We agree that any sum or sums of money which may not be recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation, disability or incapacity on or of the Customer or by any fact or circumstances and whether known to you or not shall nevertheless be recoverable from me/us or each of us as sole or principal debtors and shall be paid by me/us on demand."*

Reliance was made by the Defendants on the case of ***Credit Corporation (M) Berhad v. Choi Sang & Another*** **[1999] 1 CLJ (Rep) 440**.

**[20]** With respect, we find that this principal debtor clause is meant only to preserve the guarantor's liability in limited circumstances where he would otherwise be discharged from the guarantee such as where the creditors improperly releases a security or gives extra time to the debtor to repay the debt; see O'Donovan and Philips on The Modern Contract of Guarantee (English ed.) at para. 1-101. Consequently, we hold that the Plaintiff would on the facts here be unable to re-pursue against the Guarantors in reliance on this principal debtor clause when court action against them is barred by limitation under the Limitation Act 1963. The case of ***Credit Corporation (M) Berhad*** **(supra)** is in our view distinguishable on dissimilar facts which did not concern limitation. Hence in our view, the learned High Court judge erred in concluding that the Plaintiff did not lose any opportunity to claim its loss against the Borrower

because a similar action can be re-instituted against the Guarantors. Appellate intervention here is justified on the mistaken premise of law adopted by the learned High Court judge.

**[21]** We are also satisfied that the Plaintiff has a good prospect of success against the Borrower and Guarantors in both Suit 43 and Suit 162 because they are straightforward loan recovery cases.

**[22]** In the premises, we find there is merit in Appeal 2194 that justified appellate intervention but not in Appeal 2220.

**Damages**

**[23]** As the result of the learned High Court judge's finding on liability, we are mindful that the learned High Court Judge only allowed the Plaintiff's claim for recovery of legal fees paid to the Defendants amounting to RM127,994.00 but dismissed the Plaintiff's claim for loss of chance because the Plaintiff failed to prove its actual loss as well as there was no reasonable chance of the Borrower re-paying any part of the loan sum whatsoever because the Borrower had been wound up due to its financial impecuniosity.

**[24]** We firstly find that the learned High Court judge has properly found and held that the Defendants must re-pay the Plaintiff for the legal fees paid following this Court's decision in ***Public Bank Berhad v. Datuk Mohd Ali bin Haji Abdul Majid*** **(supra)**.

**[25]** Next, it is trite that damages for loss of opportunity/chance is an established head of claim following this Court's decision in ***Techrew Sdn Bhd v. Nurhamizah bt Hamzah (sued as a sole proprietor of Chamber of Nur Hamizah Hamzah) & Ors*** **[2022] 4 MLJ 633**. We are satisfied from the evidence adduced that the Borrower and in consequence the Guarantors too are indebted to the Plaintiff in excess of RM3,000,000.00 for the loan disbursed. However, the Plaintiff has confined its discounted claim here to only RM750,000.00 offered to the Defendants in full and final settlement of the Suit. In the premises, we find and hold that there is hence actual loss of RM750,000.00 reasonably suffered by the Plaintiff that is recoverable from the Defendants. The learned High Court judge has erred that there was no actual loss suffered by the Plaintiff and appellate intervention is thus warranted here as well.

**[26]** Moreover, we observed that the learned High Court judge went on to find and hold that the Borrower was already insolvent when the Suit 43 was still ongoing, hence there is no prospect of success of recovery relying on the case of ***Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon)*** **(supra)**; see paragraph [12] above.

**[27]** With respect, we find and hold there is no necessity that the Plaintiff must be able to successfully recover the damages from the Borrower in actuality. In other words, it is immaterial if the Borrower was financially insolvent or even wound-up. We are of the view that it suffices so long the damages suffered by the Plaintiff are recoverable as a reasonable measure of damage and not too remote. Thus for completeness, we are, with respect, constrained to hold that paragraph [9] of ***Pang Yeow Chow***

***(practising at Messrs YC Pang, Chong & Gordon)*** **(supra)** is *per incuriam*.

**[28]** As to the quantum of damages, we noted that the Plaintiff claimed a total of RM750,000.00. Since the learned High Court judge has already awarded the sum of RM127,994.00, we therefore find that the Plaintiff is only entitled to the further sum of the difference amounting to RM622,006.00.

**CONCLUSION**

**[29]** It is for the foregoing reasons that we allowed Appeal 2194 and dismissed Appeal 2220 as so ordered.

Dated this 04th August 2023

*-Sgd-*

**LIM CHONG FONG**

**JUDGE**

**COURT OF APPEAL MALAYSIA**

**LIST OF COUNSELS:**

| | |
|---|---|
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| Solicitors for Plaintiff: | Messrs. Lee Hishamuddin Allen & Gledhill<br>Advocates & Solicitors<br>Level 6, Menara 1 Dutamas<br>Solaris Dutamas<br>No. 1, Jalan Dutamas 1<br>50480 Kuala Lumpur |
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| Solicitors for Defendants: | Messrs. Lim Kian Leong & Co.<br>Advocates & Solicitors<br>Suite 10-8, Level 10<br>Wisma UOA II<br>No. 21, Jalan Pinang<br>50450 Kuala Lumpur |

***CASES REFERRED TO:***

*Public Bank Berhad v. Datuk Mohd Ali bin Haji Abdul Majid [2013] 2 MLJ 709;*

*Pang Yeow Chow (practising as Messrs. YC Pang, Chong & Gordon) v. Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLJ 490;*

*Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58;*

*Suresh Subramaniam v. Majlis Perbandaran Selayang [2023] MLRAU 108;*

*Shearn Delamore & Co v. Sadacharamni a/l Govindasamy [2017] 1 MLJ 486;*

*Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368;*

*Wong Kim v. Loh Kim Foon [2003] 4 MLJ 535;*

*Nyo Nyo Aye v. Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380;*

*Miranda v. Khoo Yew Boon [1968] 1 MLJ 161;*

*Credit Corporation (M) Berhad v. Choi Sang & Another [1999] 1 CLJ (Rep) 440; and*

*Techrew Sdn Bhd v. Nurhamizah bt Hamzah (sued as a sole proprietor of Chamber of Nur Hamizah Hamzah) & Ors [2022] 4 MLJ 633.*