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SUBRAMANIAM AV SANKAR & ORS

v.

PETER TANG SWEE GUAN

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
[CIVIL APPLICATION NO: W-02-845-2003]

C

8 MARCH 2010

CIVIL PROCEDURE: *Appeal - Hearing of appeal - Whether Court of Appeal may decide an appeal by framing an issue not raised by either side - Courts of Judicature Act 1964, s. 69(4)*

D

CIVIL PROCEDURE: *Appeal - Review - Application to Court of Appeal to review and set aside decision of another coram of Court of Appeal - Scope of Court of Appeal's jurisdiction to review own decision - Whether inherent jurisdiction of court includes power to review its own decision - Whether miscarriage of justice occasioned by decision of earlier coram*

E

CIVIL PROCEDURE: *Judgment - Review - Application to Court of Appeal to review and set aside decision of another coram of Court of Appeal - Scope of Court of Appeal's jurisdiction to review own decision - Whether inherent jurisdiction of court includes power to review its own decision - Whether miscarriage of justice occasioned by decision of earlier coram*

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CIVIL PROCEDURE: *Jurisdiction - Court of Appeal - Review - Whether Court of Appeal may review and set aside decision of another coram of Court of Appeal - Scope of Court of Appeal's jurisdiction to review own decision - Whether inherent jurisdiction of court includes power to review own decision - Whether miscarriage of justice occasioned by decision of earlier coram*

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The three applicants/plaintiffs commenced an action against the appellant/defendant for monies owed by the defendant in connection with the sale of shares in a company. The plaintiffs' primary contention was that the monies owed to them were their share in profits derived by the defendant from the sale of the shares. The High Court judge gave decision in favour of the plaintiffs. The

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defendant appealed against that decision. The Court of Appeal ('first coram') allowed the appeal on 9 January 2007. The plaintiffs claimed that the first coram had: (i) reversed the burden on the parties as far as the appeal was concerned; (ii) given little weight to the fact that the defendant had appealed against the decision of the High Court to the first coram after a full trial and after ten witnesses had given their evidence; (iii) misapprehended the appropriate tests to be applied; (iv) arrived at a decision unsupported by the evidence as found in the record of appeal and without the benefit of the submissions by counsel for both sides; (v) misapprehended the nature of the plaintiffs' claim; and (vi) misapprehended their role as appellate judges. The appellants contended that the first coram by its decision had occasioned a serious miscarriage of justice. Therefore, by way of a notice of motion, the plaintiffs prayed that pursuant to the inherent jurisdiction of the Court of Appeal, the decision of the Court of Appeal dated 9 January 2007 ("decision of the first coram") be set aside and/or reviewed. It was also prayed for the appeal to be re-heard.

Held (dismissing the notice of motion with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) There is no provision in the Rules of the Court of Appeal 1994 giving the requisite power to the second coram to do what the plaintiffs were asking the second coram to do. (para 44)

(2) The first coram was at liberty to decide the case by framing an issue not raised by either side in order to reach a just decision based on the facts adduced before it and the first coram too was not bound by the outline submissions and the authorities advanced by both parties. What the first coram did found statutory support in s. 69(4) of the CJA. The written grounds of judgment of the first coram was impeccable and beyond reproach. (para 46)

(3) The Court of Appeal has the jurisdiction to review its own decisions on limited grounds only. These grounds relate to the absence of jurisdiction as laid down in *Penang Port Commission v. Kanawagi a/l Seperumaniam* as well as when there is a denial of procedural justice as reflected in *Ramanathan Chelliah v. PP*; and *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* FC. *Ramanathan Chelliah v. PP* CA is not an authority or basis for the proposition that a second coram can review the decision of the first coram. (para 47)

(4) The inherent jurisdiction of any court does not include the power to review its own decision. Power to review is not the inherent power of the adjudicating officer, rather it is a right and that right must be conferred by statute. Public policy demands that there must be an end to litigation. (para 59)

(5) Before the first coram, the defendant's counsel was not asked submit. The plaintiffs' counsel was asked to submit and he did submit. This was certainly not the case where the plaintiffs' counsel was not given an opportunity to address the first coram. In fact, the first coram heard the whole appeal. The undisputed facts and the pleadings were considered by the first coram. The first coram did not stray from the memorandum of appeal. (paras 61 & 62)

Bahasa Malaysia *Translation Of Headnotes*

Ketiga-tiga pemohon/plaintif telah memulakan tindakan terhadap perayu/defendan bagi mendapat kembali wang yang dihutangi oleh defendan berkait dengan satu transaksi penjualan saham sebuah syarikat. Hujah utama plaintif-plaintif adalah bahawa wang yang terhutang kepada mereka tersebut adalah bahagian keuntungan mereka dari penjualan yang diambil oleh defendan. Hakim mahkamah Tinggi telah memberi keputusan yang berpihak kepada plaintif-plaintif dan defendan merayu. Pada 9 Januari 2007, Mahkamah Rayuan ('koram pertama') membenarkan rayuan. Plaintif-plaintif menuntut bahawa koram pertama telah: (i) menterbalikkan beban yang dipikul oleh pihak-pihak setakat yang berkaitan dengan rayuan; (ii) memberi terlalu sedikit perhatian kepada fakta bahawa defendan telah merayu terhadap keputusan Mahkamah Tinggi selepas satu perbicaraan penuh dan selepas 10 orang saksi memberikan keterangan-keterangan mereka; (iii) tersalah faham ujian sebenar yang perlu digunapakai; (iv) mencapai keputusan yang tidak disokong oleh keterangan seperti yang dilihat dari rekod rayuan dan tanpa manfaat penggulungan hujah oleh kedua-dua pihak; (v) tersalah faham sifat tuntutan plaintif-plaintif; dan (vi) tersalah faham peranan mereka sebagai hakim-hakim rayuan. Plaintif-plaintif berhujah seterusnya bahawa koram pertama melalui keputusannya telah melakukan salah laksana keadilan. Dan oleh hal yang demikian, mereka memohon supaya Mahkamah Rayuan, di bawah bidangkuasa inherennya, mengenepikan dan/atau mengkaji semula keputusan Mahkamah Rayuan bertarikh 9 Januari 2007 tersebut ('keputusan koram pertama'). Juga dipohon supaya rayuan didengar secara pendengaran semula.

Diputuskan (menolak rayuan):
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah

(1) Tidak ada peruntukan di dalam Kaedah-Kaedah Mahkamah Rayuan 1994 yang memberi kuasa kepada koram kedua untuk melakukan apa yang plaintif-plaintif ingin koram kedua lakukan di sini.

(2) Koram pertama bebas untuk memutarkan kes dengan cara merangka isu yang tidak dibangkitkan oleh mana-mana pihak bagi mencapai suatu keputusan yang adil berdasarkan fakta-fakta yang dikemukakan di hadapannya dan begitu juga koram pertama tidak tertakluk kepada rangka penghujahan serta autoriti-autoriti yang dikemukakan oleh kedua pihak. Apa yang dilakukan oleh koram pertama disokong oleh s. 69(4) Akta Mahkamah Kehakiman 1964. Alasan penghakiman bertulis koram pertama adalah sempurna dan tiada ruang untuk menegurnya.

(3) Mahkamah Rayuan mempunyai bidangkuasa untuk mengkaji semula keputusannya sendiri atas alasan-alasan yang terhad. Alasan-alasan ini berkait dengan ketiadaan bidangkuasa seperti yang dijelaskan di dalam *Penang Port Commission lwn. Kanawagi a/l Seperumaniam* serta di mana terdapat kegagalan keadilan prosedur seperti yang terserlah dari kes-kes *Ramanathan Chelliah v. PP*; dan *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd. Ramanathan Chelliah v. PP* bukanlah autoriti atau asas bagi proposisi bahawa sebuah koram kedua boleh mengkaji semula keputusan koram yang pertama.

(4) Bidangkuasa inheren mana-mana mahkamah tidak merangkumi kuasa untuk mengkaji semula keputusannya sendiri. Kuasa untuk mengkaji semula bukanlah kuasa inheren pegawai yang mengadili, sebaliknya merupakan suatu hak dan hak tersebut hendaklah diberikan oleh statut. Polisi awam menuntut supaya wujud pengakhiran terhadap sesuatu litigasi.

(5) Di hadapan koram pertama, peguam defendan tidak diminta untuk menggulung hujah. Sebaliknya peguam plaintif-plaintif telah diminta untuk menggulung hujah dan beliau telah berbuat demikian. Ini bukanlah kes di mana peguam plaintif-plaintif tidak diberi peluang untuk berhujah di hadapan koram pertama.

A Koram pertama malahan telah mendengar keseluruhan rayuan. Fakta dan pliding yang tidak dipertikai telah diambilkira oleh koram pertama. Koram pertama tidak lari dari memorandum rayuan.

B **Case(s) referred to:**
Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***
Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Clarke v. Edinburgh & District Tramways Co [1919] SC (HL) 35 ***(refd)***
C *Flower v. Lloyd (No. 1) [1877] LR 6 Ch D 297* ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Hanshim Corp Sdn Bhd v. New York Plastic Co Pte Ltd [1989] 1 LNS 129 CA ***(refd)***
D *Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd [2004] 4 CLJ 18 CA* ***(refd)***
Penang Port Commission v. Kanawagi Seperumaniam (No 1) [1997] 1 CLJ 423 CA ***(refd)***
Ramanathan Chelliah v. PP [2009] 6 CLJ 55 CA ***(refd)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 HC
E ***(refd)***
Taylor and Another v. Lawrence and Another [2003] QB 528 ***(refd)***
Watt Or Thomas v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:
F Courts of Judicature Act 1964, ss. 69(4), 96(a), (b)

For the plaintiffs/applicants - Malik Imtiaz Sarwar; M/s Thomas Philip
For the defendant/respondent - S Periasamy; M/s Maha & Peri

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D3-22-558-1996]

G *Reported by Amutha Suppayah*

JUDGMENT

H **Abdul Malik Ishak JCA:**

Introduction

[1] By way of a notice of motion in encl. 50a, the three
I applicants (hereinafter referred to as "the plaintiffs") filed an application and sought for the following orders pursuant to the inherent jurisdiction of this court:

(a) that the decision of the Court of Appeal, Malaysia dated 9 January 2007 which allowed the appellant's (hereinafter referred to as "the defendant") appeal against the whole of the decision of the Kuala Lumpur High Court given on 8 September 2003 be set aside and/or reviewed;

(b) that the appeal herein to be re-heard;

(c) costs of the application be made costs in the cause; and

(d) any further and/or other order that this Honourable Court deems fit and/or appropriate.

[2] The written grounds of judgment of the learned High Court judge dated 13 December 2004 can be seen at pp. 1086 to 1091 of the appeal record at Jilid 4 and it was this very judgment that was pronounced in open court on 8 September 2003 as seen at p. 1170 of the appeal record at Jilid 4.

[3] The decision of the Court of Appeal Malaysia dated 9 January 2007 was a decision of another panel of this court (hereinafter referred to as the "first coram") and the written grounds of judgment dated 24 July 2008 can be seen at pp. 1179 to 1188 of the appeal record at Jilid 5.

Chew Weng Kit's Affidavit In Support Of encl. 50a

[4] By way of encl. 50a, the plaintiffs sought to set aside and/or review the decision of the first coram. The plaintiffs also sought that the appeal that was heard by the first coram be re-heard once again.

[5] Chew Weng Kit, the second plaintiff, affirmed an affidavit on 21 April 2009 in support of encl. 50a. Chew Weng Kit also affirmed the same affidavit for and on behalf of the first and the third plaintiffs. In that affidavit Chew Weng Kit sought for the re-hearing of the appeal before this coram (see para. 6 of the affidavit).

[6] In relation to the High Court proceedings, this was what Chew Weng Kit deposed to.

[7] In the High Court, the plaintiffs commenced an action against the defendant for monies owed to the plaintiffs by the defendant in connection with the sale of shares in a company known as Giat Galian Sdn Bhd. The plaintiffs' primary contention was that the monies owed to them were their share in profits derived by the defendant from the sale of the shares.

[8] Chew Weng Kit then alluded to the following factual matrix:

(a) That the defendant and the plaintiffs were at all material times practising accountants providing accounting, auditing and tax consultancy services. That the defendant and the plaintiffs were business associates and not strangers to one another.

(b) That in the course of events, the defendant and the plaintiffs came to know of a potential sale of the said shares. They decided that the said shares should be acquired by them with a view to re-sell those shares at a profit at a later stage. Towards this end, it was averred that Chew Weng Kit would locate a suitable purchaser who was willing to purchase the said shares at a price agreeable by them.

(c) That the defendant and the plaintiffs agreed that there would be a back-to-back purchase and sale of the said shares. They agreed that the transactions would be effected in the name of the defendant but on the understanding that the profits would be shared equally amongst all four of them.

(d) Towards this end, all the necessary agreements were entered into and the shares were transferred as planned. And, as agreed, consideration passed between them. All this resulted in a net gain of RM2,362,498.60.

(e) That in furtherance of the understanding between the various parties including the vendor and the purchaser of the said shares, the defendant issued letters using the stationary of "Horwath & Horwath" – a firm which was said to be one of the businesses within the group that the defendant was associated with. It was averred that the defendant had in fact represented to the world at large that he was a partner of one of the businesses in the group.

(f) Chew Weng Kit averred that he was paid the commission in the sum of RM415,000 and for this purpose it was averred that a cheque was made out in favour of Chew Weng Kit by the defendant.

(g) It was also averred that the defendant, in part satisfaction of his obligations, paid the sum of RM50,000 each to the first and the third plaintiffs.

(h) Thereafter the defendant failed and further refused to pay any further sums. For these reasons, the plaintiffs commenced the civil proceedings in the High Court.

(i) The defendant defended himself in these High Court proceedings on the basis that at all times he was only expected to pay a commission of RM415,000 and he had paid that sum. The defendant further contended that the sum of RM50,000 each paid to the first and the third plaintiffs was to ensure that no legal action would be taken against him for having utilised the "Horwath & Horwath" letterheads.

[9] The trial before the High Court lasted for ten days. The plaintiffs called six witnesses while the defendant called four witnesses.

[10] The learned High Court judge finally determined the hearing in favour of the plaintiffs. The learned High Court judge concluded that the version of the events presented by the defendant was not believable and that the defence raised by the defendant was a "sham" raised for the purpose of avoiding payment to the plaintiffs of their share to the profits from the sale of those shares. In arriving at his decision, it was argued that the learned High Court judge relied on the audio-visual advantage that he had in having seen and heard the various witnesses.

[11] The defendant appealed against the decision of the learned High Court judge. On 17 December 2003, a stay of execution was obtained from the High Court. And this order of stay was affirmed by another coram of the Court of Appeal *vide* Civil Appeal W-02-84-2004 on 15 March 2005.

[12] In relation to the proceedings before the first coram, Chew Weng Kit explained it in this way.

[13] That he was advised to say by his solicitors that the appeal before the first coram was called up on 7 September 2005. Unfortunately, the learned counsel for the defendant was taken ill and the matter was adjourned. The appeal was subsequently case managed and re-fixed on 28 September 2006.

[14] That he was advised by his solicitors to say that the appeal was called up again on 9 January 2007 before the first coram. On that day, according to his solicitors, this was what had transpired:

A (a) The first coram indicated to the defendant's counsel that they were not required to make any submissions.

(b) The first coram instead called upon the learned counsel for the plaintiffs to address the question of whether the plaintiffs and
B the defendant were in law "partners". The first coram indicated that it was essential for this to be established because the claim had been brought on the basis that the parties were "partners".

(c) The learned counsel for the plaintiffs informed the first coram that this was not the case because the fact of their being
C partners were intended to establish that they were the parties in the business and not strangers to each other and as such they were capable of arriving at an independent agreement as to the nature of their relationship as reflected in the statement of claim and as contended by the plaintiffs before the High Court.
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(d) At any rate, the first coram was informed of the position taken by the defendant himself in that he was a "partner" of "Horwath & Horwath".

E (e) The first coram then took the position that in any event the plaintiffs had no case and indicated that they had formed this view based on the reading of the record of appeal.

(f) The learned counsel for the plaintiffs then indicated to the first coram that he was prepared to plough through the evidence and
F take the first coram through the whole evidence in detail in order to establish that there was no basis for the argument that the learned High Court judge as the trial judge had erred in coming to the conclusions that he did in the light of the diametrically opposed version of the events presented by the
G plaintiffs and the defendant respectively. Despite the offer, the first coram indicated that there was no need for such an exercise because the first coram had considered the record of appeal.

H (g) The first coram then proceeded to allow the appeal with costs in the Court of Appeal as well as in the High Court.

(h) That the proceedings before the first coram lasted approximately 10 to 15 minutes.

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[15] That he was advised by his solicitors to say that the first coram had in effect:

(a) reversed the burden on the parties as far as the appeal was concerned;

(b) gave little weight to the fact that the defendant had appealed against the decision of the High Court to the first coram after a full trial and after ten witnesses had given their evidence;

(c) misapprehended the appropriate tests to be applied;

(d) arrived at a decision unsupported by the evidence as found in the record of appeal and without the benefit of the submissions by counsel for both sides;

(e) misapprehended the nature of the plaintiffs' claim; and

(f) misapprehended their role as appellate judges.

[16] That he was advised by his solicitors to say that the first coram by its decision had occasioned a serious miscarriage of justice. The conclusion arrived at by the first coram could not be supported by the available evidence and was wrong in law.

[17] In regard to the application for leave to appeal to the Federal Court under s. 96(a) and (b) of the Courts of Judicature Act 1964 ("CJA"), Chew Weng Kit was advised to say that as at the date of the filing of the notice of motion for leave to appeal to the Federal Court, the first coram had not written its grounds of judgment. Subsequently, on 16 July 2007 the Federal Court gave directions that the written grounds of judgment be made available for purposes of the application for leave. The written grounds of judgment dated 24 July 2008 was filed on 7 August 2008 through an additional affidavit of the plaintiffs.

[18] Chew Weng Kit was advised to say that the written grounds of judgment of the first coram revealed that the hearing in the Court of Appeal was conducted in the usual way when in fact it was not the case. The plaintiffs' solicitors affirmed an affidavit to support such an averment.

[19] In regard to the basis to set aside and/or review the decision of the first coram, Chew Weng Kit was advised to say that the decision of the first coram had occasioned a miscarriage of justice for the following reasons:

(a) the plaintiffs were deprived of an opportunity to be heard based on the grounds as stated in the memorandum of appeal dated 17 March 2004; and

(b) the issues raised by the plaintiffs in the appeal were defined in the memorandum of appeal as follows:

(i) whether the transaction in issue was illegal in view of a moratorium having been imposed by the regulators?;

(ii) whether the plaintiffs and the defendant were partners as purportedly found by the High Court judge?;

(iii) whether the plaintiffs' version of the events was credible?;

(iv) whether the High Court judge had failed to sufficiently appreciate the evidence of material witnesses?; and

(v) whether the decision of the High Court judge was against the weight of the evidence?

[20] All these issues, according to Chew Weng Kit, were raised and addressed in the written submission of counsel for the plaintiffs before the first coram.

[21] Chew Weng Kit deposed that the written grounds of judgment of the first coram showed that the appeal was disposed of on the basis of only one issue, namely the construction of the agreements as stated at para. 12 of the written grounds of judgment:

> Upon a true construction of the two agreements *viz* the Giat Galian agreement exhibit P1 and the Tanda Perwira agreement exhibit D11, were these agreements executed by the defendant (Peter Tang Swee Guan) on his own behalf only?

[22] According to Chew Weng Kit this sole issue was never framed by the plaintiffs nor the defendant. Neither was it submitted by either counsel nor was it raised by either side.

[23] Chew Weng Kit was advised by his solicitors to say that the question of the construction of the two agreements did not arise during the course of the High Court proceedings nor was it raised in the submissions by both the parties before the first coram. Yet, according to him, the construction of the two agreements became the pivotal issue in the written judgment of the first coram. It was

emphasised that the first coram did not ask counsel on both sides to submit on this sole issue and, consequently, the parties were not given the opportunity to ventilate their views on this issue.

[24] For these reasons, it was deposed that there was a miscarriage of justice in that the plaintiffs were deprived of the rights to be heard. An order in terms of encl. 50a was then prayed for.

Peter Tang Swee Guan's Affidavit In Reply – The Defendant's Reply Affidavit

[25] The defendant affirmed an affidavit in reply on 28 August 2009 by way of a rebuttal to Chew Weng Kit's affidavit in support of encl. 50a.

[26] The defendant was advised to say by his solicitors, *inter alia*, that:

(a) there was no miscarriage of justice occasioned by the first coram when the defendant's appeal was heard and the first coram had unanimously allowed the appeal on 9 January 2007 and, consequently, there was no reason for this second coram to set aside and/or review the decision of the first coram nor was there any reason for the defendant's appeal to be re-heard by this second coram; and

(b) the plaintiffs' notice of motion in encl. 50a was devoid of merit and untenable.

[27] The defendant averred that he was not present in court before the first coram on 9 January 2007 when his appeal was heard and allowed. The defendant averred that he was informed by his solicitors to say that all the three plaintiffs were also absent on 9 January 2007 when the first coram heard the defendant's appeal.

[28] The defendant alluded to para. 5 of the affidavit in support of Chew Weng Kit where the latter averred that, "Subramaniam, Chan and I (the applicants) commenced an action against Tang for monies owed to the applicants by Tang in connection with the sale of sales in a company named Giat Galian Sdn Bhd" which conveyed the meaning that the defendant owed, as a fact, the three plaintiffs' monies in connection with the sale of the said shares. The defendant averred that the allegation was misleading and untrue. The defendant said that the plaintiffs claimed that they

were entitled to 3/4 share of the profits and so they filed the action against him. According to the defendant this was the allegations of the plaintiffs and that the defendant disagreed with their allegations and defended the action.

[29] In regard to para. 6 of Chew Weng Kit's affidavit in support, the defendant averred that he denied and disputed the plaintiffs' allegations and contentions and had explained the reasons for him using the letterheads of "Horwath & Horwath." The defendant averred that he had also explained the payment of the amounts mentioned in para. 6.7 of Chew Weng Kit's affidavit in reply to Subramaniam and Chan and he too had explained the role of Chew Weng Kit in the sale and the commission paid to him. The defendant averred categorically that he had defended the action by them against him in the High Court.

[30] In regard to the matters raised by Chew Weng Kit's affidavit in reply pertaining to what had transpired during the proceedings at the first coram, the defendant was informed by his solicitors that the following narratives unfolded before the first coram:

(a) when the defendant's lead counsel stood up to make his submission, he was told by the learned judges of the first coram that they had studied the appeal record and the outline submissions of both parties and they wanted the lead counsel for the plaintiffs to clarify certain matters first;

(b) the learned judges of the first coram then informed the lead counsel for the plaintiffs that they had read the appeal record and could not find any evidence of a partnership and asked the lead counsel for the plaintiffs to show evidence of the partnership;

(c) the lead counsel for the plaintiffs replied that it was not his case that the plaintiffs and the defendant were partners in the firm of "Horwath & Horwath"; his argument was that the plaintiffs and the defendant were partners in the transactions involving the sale and purchase of the said shares;

(d) the learned judges of the first coram then pointed out that the plaintiffs' reliance on the use of the letterheads by the defendant to show the existence of the partnership was insufficient unless there was other evidence and the lead counsel for the plaintiffs was asked to show such evidence;

(e) the learned judges of the first coram also referred to the commission of RM415,000 received by Chew Weng Kit and asked why the commission was paid to him if he and the other two plaintiffs were partners with the defendant in the transaction;

(f) when the lead counsel for the plaintiffs offered to take the learned judges of the first coram through the evidence, the first coram observed that they had gone through the appeal record and could not find such evidence and asked him to show evidence of partnership in the transactions other than the use of the letterheads by the defendant; and

(g) the lead counsel for the plaintiffs then suggested to the first coram that he will prepare another written outline submission; and the first coram informed him that that was not necessary and again asked him to show the evidence of partnership in the transactions as contended by the plaintiffs.

[31] The defendant was informed by his solicitors that the following matters took place during the proceedings before the first coram:

(a) the learned judges of the first coram repeatedly said that they had gone through the appeal record; and

(b) the learned judges of the first coram asked the lead counsel for the plaintiffs questions and made pertinent observations which clearly showed that their Lordships had considered carefully the appeal record in detail.

[32] According to the defendant, the learned judges of the first coram made observations and posed questions to the learned counsel for the plaintiffs to the following effect:

(a) that the learned trial judge of the High Court had ignored the evidence of Tan Sri Aziz Zain (DW1) who was the beneficial owner and actual seller of the shares that were sold to the defendant and had also failed to consider the defendant's evidence and the evidence of the other witnesses for the defendant;

(b) that the learned trial judge of the High Court did not consider the comprehensive submission by the defendant's learned counsel; and

A (c) that this was a case where the learned trial judge of the High Court had seriously erred in his findings of fact and allowed the plaintiffs' claim which warranted the appellate court to intervene and reverse the decision of the High Court.

B **[33]** The learned trial judge of the High Court did not take advantage of the privilege of audio-visual accorded to him in hearing and trying the case when he failed to judicially appreciate the evidence that was adduced before him. Such blatant failure entitled the first coram to intervene (*Clarke v. Edinburgh & District* C *Tramways Co* [1919] SC (HL) 35, at p. 36, the judgment of Lord Shaw of Dunfermline; *Chow Yee Wah & Anor. v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41, PC, at p. 42; *Hanshim Corp Sdn Bhd v. New York Plastic Co Pte Ltd* [1989] 1 LNS 129; *Watt Or Thomas v. Thomas* [1947] AC 484, HL, at pp. 487 to 488; *Tay Kheng Hong* D *v. Heap Moh Steamship Co. Ltd.* [1964] 1 LNS 202, PC; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, FC).

[34] In regard to the averments of Chew Weng Kit's affidavit in support in paras. 12 and 13, the defendant was advised to say by his solicitors that:

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(a) no miscarriage of justice was occasioned by the first coram in the conduct of the proceedings when the defendant's appeal was heard;

F (b) the first coram, as an appellate court, was entitled to reverse the finding of facts and/or the decision of the High Court; and

(c) that the decision of the first coram was unanimous in reversing the decision of the High Court.

G **[35]** In regard to the matters raised under the heading "Leave to Appeal" in the affidavit in support of Chew Weng Kit, the defendant was advised by his solicitors to say that the plaintiffs withdrew the application for leave when the same was called up for hearing before the Federal Court on 22 April 2009. The order of H the Federal Court in question was worded in this way in its original Malay language text:

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PERINTAH

ATAS USUL yang dihadapkan ke dalam Mahkamah pada hari ini oleh Cik Lavinia Kumaraedran, Peguamcara bagi pihak Pemohon dan Encik S. Periasamy (bersamanya Encik M. Nagarajah dan Encik Lau Kee Sern) Peguamcara bagi pihak Responden-Responden DAN SETELAH MEMBACA Notis Usul Kandungan (2A) bertarikh 08-02-2007, Afidavit Sokongan Pemohon yang diikrarkan oleh Chew Weng Kit pada 08-02-2007 yang kesemuanya difailkan di sini DAN SETELAH MENDENGAR hujahan Peguam-Peguam yang tersebut di atas MAKA ADALAH DENGAN INI DIPERINTAHKAN bahawa:

(i) Permohonan Pemohon untuk kebenaran merayu ke Mahkamah Persekutuan yang bertarikh 8 haribulan Februari 2007 (Lampiran 2A) adalah dibatalkan dengan kos; dan

(ii) Deposit mengikut taksiran kos.

DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 22 haribulan April 2009.

Sgd. Illegible

SURITA BINTI BUDIN
Timbalan Pendaftar
Mahkamah Persekutuan Malaysia
Putrajaya.

[36] In regard to the matters raised in Chew Weng Kit's affidavit in support under the heading "Basis For Review", the defendant was advised by his solicitors to say that:

(a) the issue formulated by the first coram was whether the defendant had executed the two agreements for the defendant's own behalf only, and this issue was answered in the affirmative by the first coram having adopted the approach of the cases referred to in the written grounds of judgment of the first coram;

(b) the written grounds of judgment of the first coram clearly stated that the defendant had executed the two agreements for the defendant's own behalf only; and the decision of the first coram was based on the clear and unambiguous clauses in the two agreements that the plaintiffs or any other persons were never referred to in the two agreements; and that it was the

A defendant who paid the purchase consideration for the said shares and not the plaintiffs or any other persons; and that the sale consideration was paid by Tanda Perwira to the defendant in the defendant's personal capacity;

B (c) the first coram also alluded to in its written grounds of judgment to the evidence of the beneficial owner of the shares who never dealt with the plaintiffs or any other persons and, consequently, the first coram concluded that the defendant had executed the two agreements for the defendant's own behalf;

C (d) the conclusion of the first coram was arrived at after the first coram had studied the appeal record as well as the comprehensive submissions made in the High Court as well as the outline submissions of both parties;

D (e) the first coram was not bound by the outline submissions and the authorities referred to by both parties;

(f) the first coram was not bound to follow the issues framed by the parties and the first coram was at liberty to refer to its own
E cases and frame any issues which it deemed fit in order to reach a just decision;

(g) these were matters fit for submission when this second coram heard the notice of motion in encl. 50a; and

F (h) there was no miscarriage of justice occasioned by the first coram when the defendant's appeal was heard by the first coram which unanimously allowed the defendant's appeal on 9 January 2007.

[37] For these reasons, the defendant prayed that the notice of
G motion in encl. 50a be dismissed with costs.

The Affidavit In Reply Of Chew Weng Kit Affirmed On 9 September 2009

[38] In this affidavit in reply, Chew Weng Kit replied to the
H defendant's affidavit in reply that was affirmed by the defendant on 28 August 2009.

[39] Chew Weng Kit's affidavit in reply contained denials, rebuttals and explanations.

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[40] In regard to the application for leave to the Federal Court, Chew Weng Kit had this to say:

> I am advised by my solicitors and verily believe that having regard (to) the judgment, it was not a case in which leave can be granted under section 96(2) of the Courts of Judicature Act 1964. This in fact was the position taken by the Respondent. In this regard, the Application for Leave to the Federal Court was withdrawn on 22.4.2009. Further, I verily believe that the said issue will be dealt with by my solicitors at the hearing of the Application for Review.

[41] In regard to the basis for review, Chew Weng Kit had this to say:

> 8.1. the determinant issue of the Court of Appeal, namely 'the construction of the agreements' was never raised by the parties in the Court of Appeal. In this regard, I refer to the Memorandum of Appeal and the parties respective submissions tendered in the Court of Appeal;
>
> 8.2. despite the issue of construction of the agreements never being an issue appealed against by the Appellant/Applicant, the Appellant was never given an opportunity to make any representations with regard (to) this said issue; and
>
> 8.3. in any event, I am advised by my solicitors and verily believe that the approach taken by the Court of Appeal with regard to (the) construction of commercial agreements cannot be applied in Malaysia for reasons which will be dealt with by my solicitors at the hearing of this Application.

[42] Based on these averments, Chew Weng Kit averred that there was a miscarriage of justice which must be rectified and he prayed that an order in terms of the notice of motion in encl. 50a be allowed.

Analysis

[43] We have set out all the facts in relation to the notice of motion in encl. 50a. No stones were left unturned.

[44] Simply put encl. 50a questioned the decision of the first coram and asking this second coram to "set aside and/or review" the decision of the first coram and asking this second coram to "re-hear" the appeal against the decision of the High Court all over again. Has this second coram the statutory power to do so? There

A is no provision in the Rules of the Court of Appeal 1994 giving the requisite power to this second coram to do what the plaintiffs are asking this second coram to do. In fact, the plaintiffs are relying on the inherent jurisdiction of this court in seeking the reliefs in encl. 50a.

B

[45] In seeking for a review of the decision of the first coram, the plaintiffs argued that by reason of a breach of natural justice and the consequent denial of procedural justice to the plaintiffs, a miscarriage of justice seriously prejudicing the plaintiffs had been C occasioned. It was also argued that the first coram having determined the appeal on an issue that was never taken up in the High Court be it in the pleadings or in the submissions after trial nor before the first coram based on the memorandum of appeal as well as in the oral and written submissions of the parties, this D second coram was entitled to intervene and right the wrong done to the plaintiffs.

[46] We categorically ,say that the first coram was at liberty to decide the case by framing an issue not raised by either side in order to reach a just decision based on the facts adduced before it E and the first coram too was not bound by the outline submissions and the authorities advanced by both parties. Indeed what the first coram did found statutory support in s. 69(4) of the CJA in that the first coram was entitled to "draw inferences of fact, and give any judgment, and make any order which ought to have been given or F made, and make such further or other orders as the case requires." We find the written grounds of judgment of the first coram to be impeccable and beyond reproach.

[47] From the available authorities, it can be said that the Court G of Appeal has the jurisdiction to review its own decisions on limited grounds only. These grounds relate to the absence of jurisdiction as laid down in *Penang Port Commission v. Kanawagi a/l Seperumaniam (No 1)* [1997] 1 CLJ 423, CA as well as when there is a denial of procedural justice as reflected in *Ramanathan Chelliah v. PP* [2009] H 6 CLJ 55, CA; and *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, FC.

[48] It would be sufficient to refer to the headnote to the case of *Penang Port Commission lwn. Kanawagi a/l Seperumaniam (supra)* I particularly at p. 303 where it was held as follows:

(3) The general rule does not permit a court that has heard a matter and disposed of the same, to hear that same matter again unless the court had no jurisdiction to grant the order it previously did. Pursuant to that also, s. 44(3) of the Courts of Judicature Act 1964 allowed every order so made to be discharged or varied by a full court. Therefore, in this case, the issue estoppel *res judicata* was not applicable to restrain the appellant's application because in the first place it was not proper for the Court of Appeal to consider the appellant's application for the injunctions (see pp 307G-I and 308D); *Munks v. Munks* [1984] 129 SJ 65 and *Wilkinson v. Barking Corp* [1948] 1 KB 721 followed.

[49] In *Ramanathan Chelliah v. PP (supra)*, Gopal Sri Ram JCA (later FCJ) aptly said at p. 59:

First, whether this court has jurisdiction to review its earlier decision in an appeal heard and disposed by it. Second, if there is jurisdiction, then the circumstances in which the review is available.

(2) We will take the question of jurisdiction first. It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See, *Taylor v. Lawrence* [2002] EWCA Civ 90, where it was held as follows:

> The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised.

See also, *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931.

[50] Continuing at p. 60 of the same case, his Lordship said:

> (4) That brings us to the second issue. The residual jurisdiction will be exercised:
>
> if it can be shown that there was a probability of a significant injustice which must be clearly established and that there was no effective alternative remedy to correct this injustice. It must be shown that the trial or the appeal has been critically undermined. The jurisdiction is not solely concerned with the case where the earlier process has or may have produced a wrong result. It must also be shown that there was special circumstances which resulted in the process having been corrupted. In short, the purpose is to correct the injustice, (per Zaki Tun Azmi CJ in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833).

[51] In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd (supra)*, Tun Abdul Hamid Mohamad CJ writing a separate judgment for the Federal Court had this to say at pp. 7 to 8 of the report:

> (6) However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting that inherent jurisdiction may be exercised in the following instances.
>
> (7) First, where there is a lack of quorum as in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his functions as a judge of that court.
>
> (8) Secondly, where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577.
>
> (9) Thirdly, where there is a clear infringement of statutory law. In this respect, a clear example would be where the court has mistakenly applied a repealed law. But, where it is a matter of interpretation or application of the law, it is in my view not a suitable case for a review. The judgment of this court in *Adorna Properties Sdn. Bhd. v. Kobchai Sosothikul* [2005] 1 CLJ 565 does throw some light in this respect.
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> (10) Fourthly, where application for review has not been heard by this court but, through no fault of the applicant, an order was inadvertently made as if he has been heard as in *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai and Others* AIR (1941).

(11) Fifthly, where bias has been established as in *Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353.

(12) Of course, there may be other circumstances. But, the review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts.

(13) That leads us to the instant application. What is this applicant seeking to do? It is simply to ask this court to exercise its review jurisdiction to set aside the decision of this court overturning the finding of facts made by the Court of Appeal and reinstating the decision of the trial judge on the facts. That is clearly outside the scope of the review jurisdiction of this court. To allow the application is to invite all the vices that this court has been repeatedly warning against ie, there will be no finality in its judgment and, it will encourage judge-shopping.

(14) I would dismiss the application with costs.

[52] And Zaki Tun Azmi PCA (now CJ), in the same case, at p. 17 aptly said:

(45) There must be a finality to deciding any dispute. It cannot be reviewed ad infinitum. It must end somewhere and in our system, it is the Federal Court. If there is any intention that r. 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself. (See art. 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201).

[53] *Ramanathan* appears to lay down the principle that the review jurisdiction favours particularly those applicants for whom there is no further recourse. But, with respect, *Ramanathan* is neither an authority nor the basis for the proposition that this second coram can review the decision of the first coram. We must highlight the following facts:

(a) *Ramanathan*'s case was a criminal matter which originated from the sessions court and the Court of Appeal was the apex court.

(b) The facts in *Ramanathan*'s case very different from the instant case.

[54] In *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833, FC, Gopal Sri Ram, Mohd Ghazali Yusoff and Tengku Baharudin Shah JJCA writing a joint separate judgment and after reproducing the judgment of Tun Abdul Hamid Mohamad CJ in *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd (supra)* aptly said at p. 861 of the report:

> Pausing for a moment it may be seen that the common thread that runs through all the instances mentioned by the Chief Justice is that in each of them the affected party had suffered procedural injustice: not substantive injustice.

[55] Continuing at p. 865, their Lordships said:

> (70) The question that therefore arises is whether the power of a court to review its own judgment is a common law power under the inherent jurisdiction. In our judgment this is a matter of classification. And courts have classified the jurisdiction of a court to review its own decisions as statutory. Just as has been done with appellate and reversionary jurisdiction. In short, the inherent jurisdiction of any court does not include a power to review its decisions. In *Fernandes v. Ranganayakulu* AIR [1953] Mad 236, Ramaswami J said:
>
> > So far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be conferred by Statute. This is based upon the common sense principle that *prima facie* a party who has obtained a decision is entitled to keep it unassailed unless the Legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. Therefore, the course of decisions in this country has been to the effect that a right to review is not an inherent power: see – *David Nadar v. Manicka Vachaka Desika Gnana Sambanda Pandara Sannathi* AIR 33 Mad 65; *Prayag Lal v. Jai Narayan Singh* AIR 22 Cal 419; *Baijnath Ram Goenka v. Nand Kumar* AIR 34 Cal 677 and *Anantharaju Shetty v. Appu Hegade* [1919] 37 MLJ 162.

[56] Continuing further at pp. 867 to 869, their Lordships said:

> (73) That brings us to the decision of the Court of Appeal in *Taylor v. Lawrence* [2003] QB 528, a case repeatedly relied upon by previous decisions of this court to assert an inherent power to review its own decisions. The facts of that case are of critical

importance to place in context the observations of Lord Woolf CJ made in relation the court's jurisdiction to re-open an appeal that had been heard and decided on its merits. We will refer to that learned Lord Chief Justice's observations later. But first the facts. There was a boundary dispute between the parties. It came before the county court presided over by His Honour Peter Goldstone, sitting as a deputy circuit judge. The appellants were unrepresented. The respondents were. They had counsel and solicitors. At the commencement of the trial, the judge informed the parties that he had been a client of the respondents' solicitors. However, he said that it had been 'many years' since he had last instructed them. The parties did not object to the judge trying the case. At the conclusion of the trial the judge entered judgment for the respondents. The appellants appealed to the Court of Appeal. One of the grounds of appeal advanced was that there was an appearance of bias because of the judge's relationship with the respondent's solicitors. The appellants were permitted to show that that the trial judge and his wife had in fact used the services of the respondent's solicitors the very night before judgment was given against the appellants to amend their wills. In response, at the appeal, the judge provided further information about his involvement with the solicitors in question. The appeal was dismissed. Later, the appellants, by unfair means, (described by Lord Woolf CJ as 'disgraceful' and 'discreditable') obtained information that the trial judge did not pay for the services provided by the solicitors. It followed that the judge had received a financial benefit from the respondents' solicitors when he gave judgment. This fact was never disclosed by the judge although he had the opportunity to do so. The Court of Appeal when it dismissed the earlier appeal was unaware of this fact. The appellants moved for permission to admit this fact as further evidence and sought an order that the appeal be re-opened. On the issue of admitting further evidence Lord Woolf CJ said this:

> It is a firm rule of practice that the Court of Appeal will not allow fresh evidence to be adduced in support of an appeal if that evidence was reasonably accessible at the time of the original hearing (see *Ladd v. Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489). Counsel for the respondents argued that this rule should preclude the appellants from seeking at this stage to base an allegation of bias on material that they could and should have deployed at the hearing of the original appeal. We consider that there is force in this submission. Arguably, this application should have been dismissed at the outset for this reason. A court of five judges has, however, been constituted in order to address the important issue of jurisdiction that arises on the facts of this case. In these

A circumstances we have decided to proceed on the basis that the appellants could not reasonably have become aware of the fact that the judge had not paid for MAB's services at the time of the original appeal and to overlook the discreditable manner in which that information was subsequently obtained. This will enable us to address the issue B of jurisdiction that is raised by this application.

(74) The Lord Chief Justice then identified the issue that fell for decision. He said:

C The present application raises the question of whether the Court of Appeal has jurisdiction to reopen an appeal if an appearance of bias can be demonstrated on the part of the court below.

Be it noted that the Court of Appeal was not considering the issue D of whether it had jurisdiction to re-open on the ground of apparent bias on its part. It was concerned with the issue of re-opening an appeal on the ground of apparent bias on the part of the court of first instance. We emphasise this point because it is vital to appreciate the context in which the Lord Chief Justice uttered the words fairly accurately summed up in the headnote to the case and E which have been relied upon by this court in its previous decisions (see, *Chu Tak Fai v. Public Prosecutor* [2007] 1 MLJ 201) as enabling it to found jurisdiction under r. 137 to review its own decisions:

F The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, G and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction H to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction and the need to have finality in litigation, so that I it was necessary to have a procedure which would ensure

that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established, and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune would also be relevant considerations. Where the alternative remedy would be an appeal to the House of Lords, the Court of Appeal would only give permission to reopen an appeal which it had already determined if it were satisfied that the House of Lords would not give permission to appeal.

At the risk of repetition we would say once again that the foregoing statement of the law was made in the context of a case in which the Court of Appeal had dealt with an appeal in ignorance of apparent bias on the part of the trial court. It was not a case in which bias was being alleged on the part of a member or members of the Court of Appeal itself.

(75) But that is not the case before us. The case before us is that at least one judge of this court – not the trial court – was guilty of apparent bias because of the nature of the comment he made in his judgment. And upon that point the decision in *Taylor v. Lawrence* has no relevance or application. There is a further ground on which what was said in *Taylor v. Lawrence* is not applicable to proceedings in this court. The Court of Appeal has power conferred upon it by the Courts of Judicature Act to admit further evidence in both criminal (s. 61) and civil appeals (s. 69(1) and r. 7 of the Rules of the Court of Appeal 1994). But while this court has power to admit further evidence in criminal appeals (see s. 93 of the Courts of Judicature Act) it has no such power in civil appeals. Accordingly, it is our considered judgment that what was said in *Taylor v. Lawrence* about the existence of an inherent jurisdiction to re-open an appeal on the grounds of apparent bias of the trial court is applicable to civil appeals before the Court of Appeal but not to appeals heard by this court.

[57] Finally, at p. 870 of the same case, their Lordships said:

(77) To sum up, this court has no inherent jurisdiction to review its earlier decision save on the very limited ground (i) that it contains clerical mistakes that makes its order unclear to such an extent that it will cause a miscarriage of justice; and (ii) that one or more of

A the parties have suffered procedural unfairness in the sense already discussed in the making of an order, eg, because through no fault of his, he was never heard before the order was made or because decision on an appeal is tainted by a real danger of bias or a reasonable apprehension or suspicion of bias on the part of one or more members of the court who handed down the impugned judgment.

(78) Some may see the view we take of the law on the subject under discussion as purchasing finality at the expense of justice. To them we can do no better than commend the words of Lord Simon of Glaisdale in the *Ampthill Peerage Case* [1977] AC 547, at p. 576:

> ... the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law – by every system of law – of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such exceptional cases apart, the judgment must be allowed to conclude the matter. That, indeed, is one of society's purposes in substituting the lawsuit for the vendetta. Sometimes it is the parties to the litigation and those who claim through them who are bound by the judgment; but sometimes it is the whole world which must accept the decision.

[58] Now, when the residual jurisdiction established by the judgment of *Taylor and Another v. Lawrence and Another* [2003] QB 528, CA is sought to be invoked, the court must be satisfied that the case falls within the exceptional category there describe-before it will accede to the application and re-open the case. Perhaps, one may ask this question, how exceptional is exceptional? The answer is quite obvious. It all depends on the facts of the case.

[59] The following legal propositions must be put to the forefront:

(a) that the jurisdiction of the court to review its own decision must be based on statute;

(b) that the inherent jurisdiction of any court does not include the power to review its own decision;

(c) that the power to review is not the inherent power of the adjudicating officer, rather it is a right and that right must be conferred by statute; and, finally,

(d) public policy demands that there must be an end to litigation.

[60] In *Flower v. Lloyd (No. 1)* [1877] LR 6 Ch. D 297, CA, Jessel M.R. said at pp. 300 to 301, that if the Court of Appeal "has once determined an appeal, it has no further jurisdiction". The residual jurisdiction of the court to avoid injustice in exceptional circumstances is often linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a need to balance the residual jurisdiction with the need to have finality in litigation.

[61] Be that as it may, it must be recalled that before the first coram, the defendant's counsel was not asked submit. The plaintiffs' counsel was asked to submit and he did submit. This was certainly not the case where the plaintiffs' counsel was not given an opportunity to address the first coram. In fact, the first coram heard the whole appeal.

[62] The first coram also considered para. 4 of the memorandum of appeal as seen at p. 55 of encl. 50a. The undisputed facts and the pleadings were considered by the first coram as reflected in its written grounds of judgment at pp. 1180 to 1182 of the appeal record at Jilid 5. In short, the first coram did not stray from the memorandum of appeal. It is germane, at this juncture, to refer to the speech of Gopal Sri Ram JCA (later FCJ) in *Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd* [2004] 4 CLJ 18, CA. There at p. 26, his Lordship rightly said that:

> In the first place, r. 18(2) of the Rules of the Court of Appeal 1994 makes it amply clear that this Court in deciding an appeal is not confined to the grounds relied on by an appellant in his or her memorandum of appeal. In the second place, this appeal is by way of rehearing and it is our solemn duty to make those orders that the learned judge ought to have made. As Suffian LP said in *Government of Malaysia v. Zainal bin Hashim* [1977] 2 MLJ 254:
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> > Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court) and make such further or other orders as the case requires, section 69(1) and (4) of the Courts of Judicature Act No. 7 of 1964. This means, on the

A authority of *Quilter v. Mapleson* [1881-2] 9 QBD 672 that we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of the trial but at the time of this appeal.

B **[63]** It is our judgment that this was not a fit and proper case for this second coram to allow the notice of motion in encl. 50a. The facts as presented in the early part of this judgment through the affidavits did not warrant us to set aside the decision of the first coram nor make an order to review the decision of the first coram. In our judgment, there was no necessity to make all those orders as C sought for by the plaintiffs in encl. 50a. The appeal need not be re-heard by this second coram.

[64] I must reiterate that the plaintiffs withdrew their leave application before the Federal Court. The learned counsel for the D plaintiffs ventured an explanation. He said that the Federal Court may not allow the application to review after leave has been given. That we say is nothing more than a mere conjecture. Assuming for a moment that the Federal Court do not give leave, can the plaintiffs now ask this second coram to review their case? We do E not think so.

[65] For the reasons adumbrated above, we dismissed the notice of motion in encl. 50a with costs fixed at RM2,000.

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