CUBIC ELECTRONIC SDN BHD (IN LIQUIDATION) v. MKC CORPORATE & BUSINESS ADVISORY SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
[CIVIL APPEALS NO: B-02(NCVC)(W)-993-06-2015 &
B-02(NCVC)(W)-1100-07-2015]
29 FEBRUARY 2016

CONTRACT: *Agreement – Tenancy agreement – Breach – Landlord entered tenancy agreement with third party while master tenancy agreement with first party still subsisting – Third party sub-let subject property to fourth party – Whether there was breach of contract by landlord – Whether parties conspired to deprive first party of its rights – Whether vacant possession had been delivered – Allegation that tenancy agreement had been terminated because first party failed to pay rent – Whether tenancy agreement valid – Whether enforceable*

TORT: *Conspiracy – Lawful means conspiracy – Landlord entered tenancy agreement with third party while master tenancy agreement with first party still subsisting – Third party sub-let subject property to fourth party – Whether landlord and other parties conspired to deprive first party of its rights – Whether there was combination or agreement between landlord and other parties to injure first party – Whether certain acts were carried out pursuant to combination or agreement – Whether first party suffered loss and damages due to alleged conspiracy by landlord and other parties*

Cubic Electronic Sdn Bhd ('the first defendant'), the registered owner of a piece of land ('the property'), had entered into a master tenancy agreement ('MTA') with the respondent ('the plaintiff') where the former was to let out the property to the latter. While the MTA was still subsisting, the first defendant entered into a tenancy agreement over the same property with Mars Telecommunications Sdn Bhd ('the third defendant'). Prior to that, the third defendant had also entered into a sub-tenancy agreement with Universiti Teknikal Malaysia Melaka ('the fourth defendant') over the same property. The plaintiff commenced an action against the first defendant and its director ('the second defendant'), along with the third and fourth defendants at the High Court on the contentions that (i) the first to fourth defendants had conspired to deprive the plaintiff of its right under the MTA; and (ii) the first defendant had breached the MTA by failing to give vacant possession of the property to the plaintiff. In reply, the first defendant argued that the MTA had been terminated because the plaintiff failed to pay the rental and refused to take vacant possession. The first defendant counterclaimed against the plaintiff seeking, *inter alia*, a declaration that the MTA between the first defendant and the plaintiff had been terminated and

was unenforceable. The High Court Judge ('HCJ') granted judgment in favour of the plaintiff against all the defendants and dismissed the first defendant's counterclaim. The HCJ further held, *inter alia*, that the tenancy agreement between the third and fourth defendants was invalid. Hence, the present appeals by the first and fourth defendants. It was submitted that the HCJ erred in law and in fact in (i) deciding that the plaintiff had proven its claim of tort of conspiracy against all the defendants; (ii) deciding that the rentals received by the first, second and third defendants were held in trust by them respectively as constructive trustee for the plaintiff; and (iii) holding that delivery of vacant possession of 1,234,197 sq ft of the property must be given to the plaintiff.

Held (dismissing appeals)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) There are four elements to a conspiracy claim, namely (i) a combination or agreement between two or more individuals; (ii) an intent to injure; (iii) pursuant to which combination or agreement and with that intention, certain acts were carried out; and (iv) resulting loss and damage to the claimant. The instant appeals concerned lawful means conspiracy. The element of lawful means conspiracy are the same as for unlawful means conspiracy, with the exception of requirement of the intention to injure. Lawful means conspiracy is a conspiracy in which the participants combine to perform acts which, although not themselves *per se* unlawful, are done with the sole predominant purpose of injuring the claimant. It is in the fact of the conspiracy that the unlawfulness reside. (paras 10, 11 & 14)

(2) It is difficult to prove lawful means conspiracy by direct evidence. The plaintiff is never required to show the existence of the arrangements between the conspirators in the nature of an express agreement, whether formal or informal. Therefore, the agreement or combination is to be inferred from the evidence. The facts or circumstances of the case, taken singly or together, did not justify or even support an inference of dishonest participation by the first defendant and other defendants to injure the plaintiff. The plaintiff failed to adduce sufficient evidence to establish a conspiracy among the defendants. (paras 20 & 21)

(3) There was no conspiracy between the defendants when they entered into the tenancy agreements. The predominant purposes of the tenancy agreements were the lawful promotion of their lawful interests. The fourth defendant had entered a tenancy agreement with the third defendant for the purpose of securing premises for its two new faculties and incoming students. The fourth defendant had been renting a part of the premises well before the plaintiff came into picture. (paras 16 & 17)

(4) The HCJ fell into serious error by declaring that the rentals received by the first, second and third defendants were held on trust by them respectively as constructive trustees for the plaintiff. The plaintiff failed to plead or lead any evidence that (i) it was contractually entitled to any of the proceeds under the tenancy agreement; or (ii) it had sourced or earned the total proceeds which it claimed must be held on trust for the plaintiff by the first respondent; or (iii) that the plaintiff could have procured similar rentals to the rental rates paid by the third and/or fourth defendants or any rentals received by the first defendant. The finding of the HCJ in relation to constructive trust was set aside. (paras 37, 38 & 41)

(5) The areas of the property that the first defendant was obliged to give vacant possession to the plaintiff were clearly stipulated in the MTA. The court must give effect to the intention of the parties as embodied in the terms of the MTA. There was no reason to disturb the finding of fact by the HCJ that no vacant possession of the property was given by the first defendant to the plaintiff. As such, the first defendant had breached the tenancy agreement by failing to deliver vacant possession. The matter in respect of the breach of the MTA was ordered to be remitted back to the High Court for assessment of damages. (paras 33, 35, 36 & 42)

Bahasa Malaysia *Headnotes*

Cubic Electronic Sdn Bhd ('defendan pertama'), pemilik berdaftar sebidang tanah ('hartanah'), telah memasuki perjanjian induk sewaan ('MTA') dengan responden ('plaintif') di mana defendan pertama menyewakan hartanah kepada plaintif. Semasa MTA masih berkuat kuasa, defendan pertama memasuki perjanjian sewaan untuk hartanah yang sama dengan Mars Telecommunications Sdn Bhd ('defendan ketiga'). Sebelum itu, defendan ketiga telah memeterai perjanjian sub-sewaan dengan Universiti Teknikal Malaysia Melaka ('defendan keempat') bagi hartanah yang sama. Plaintif memulakan tindakan terhadap defendan pertama dan pengarahnya ('defendan kedua'), serta defendan ketiga dan keempat di Mahkamah Tinggi dengan hujahan (i) defendan pertama hingga keempat berkonspirasi menafikan plaintif akan haknya di bawah MTA; dan (ii) defendan pertama telah melanggar MTA apabila gagal menyerahkan milikan kosong hartanah kepada plaintif. Dalam responnya, defendan pertama mendalihkan bahawa MTA ditamatkan kerana plaintif gagal membayar sewa dan enggan mengambil milikan kosong. Defendan pertama menuntut balas terhadap plaintif dengan memohon, antara lain, satu deklarasi bahawa MTA antara defendan pertama dengan plaintif telah ditamatkan dan tidak berkuat kuasa. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif terhadap semua defendan dan menolak tuntutan balas defendan pertama. Hakim Mahkamah Tinggi selanjutnya memutuskan, antara lain, perjanjian sewaan antara defendan ketiga dan keempat tidak sah. Oleh itu, timbul rayuan-rayuan ini oleh

defendan pertama dan keempat. Dihujahkan bahawa HMT khilaf di bawah undang-undang dan fakta dalam (i) memutuskan bahawa plaintif berjaya membuktikan tuntutan tort konspirasi terhadap defendan-defendan; (ii) memutuskan bahawa sewa yang diterima oleh defendan pertama, kedua dan ketiga masing-masing dipegang sebagai amanah konstruktif buat plaintif; dan (iii) memutuskan milikan kosong 1,234,197 per meter mesti diserahkan kepada plaintif.

Diputuskan (menolak rayuan-rayuan)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Ada empat elemen bagi tuntutan konspirasi, iaitu (i) pakatan atau perjanjian antara dua atau lebih individu; (ii) niat untuk menjejaskan; (iii) susulan pakatan dan perjanjian dan dengan niat, beberapa pelakuan dilakukan; dan (iv) menyebabkan kerugian dan kerosakan kepada pihak yang menuntut. Rayuan-rayuan ini berkenaan konspirasi melalui cara sah. Elemen bagi konspirasi melalui cara sah sama dengan konspirasi melalui cara tidak sah, kecuali niat untuk menjejaskan tidak diperlukan. Konspirasi melalui cara sah berlaku apabila pihak-pihak terlibat berpakat melakukan perlakuan-perlakuan yang, walaupun dengan sendiri bukan tidak sah, dilakukan dengan niat utama untuk menjejaskan pihak yang menuntut. Ketaksahan terletak pada fakta konspirasi.

(2) Sukar membuktikan konspirasi melalui cara sah dengan keterangan langsung. Plaintif tidak perlu menunjukkan wujudnya perancangan antara pihak-pihak berkonspirasi dalam bentuk perjanjian nyata, sama ada formal atau tidak. Oleh itu, perjanjian atau pakatan disimpulkan berdasarkan keterangan. Fakta atau hal perkara kes, dengan sendirinya atau secara kolektif, tidak berjustifikasi mahupun menyokong inferens pakatan tidak jujur antara defendan pertama dengan defendan-defendan lain untuk menjejaskan plaintif. Plaintif gagal mengemukakan keterangan yang cukup untuk membuktikan konspirasi antara defendan-defendan.

(3) Tiada konspirasi antara defendan-defendan semasa mereka memeterai perjanjian-perjanjian sewaan tersebut. Tujuan utama perjanjian sewaan tersebut adalah untuk mengetengahkan kepentingan-kepentingan mereka yang sah. Defendan keempat memeterai perjanjian sewaan dengan defendan ketiga bagi tujuan mendapatkan premis untuk dua fakulti baru dan kemasukan pelajar-pelajar. Defendan keempat telah menyewa sebahagian premis lama sebelum plaintif.

(4) Hakim Mahkamah Tinggi melakukan kekhilafan serius dengan mengisytiharkan bahawa sewa yang diterima daripada defendan pertama, kedua dan ketiga masing-masing dipegang oleh mereka sebagai pemegang amanah konstruktif buat plaintif. Plaintif gagal memplidkan

atau mengemukakan apa-apa keterangan bahawa (i) ia berhak secara kontraktual atas hasil kutipan bawah perjanjian sewaan; atau (ii) ia mendapat atau memperoleh hasil kutipan yang didakwa dipegang sebagai amanah buat plaintif oleh responden pertama; atau (iii) plaintif boleh mengutip sewa yang sama dengan kadar sewa yang dibayar oleh defendan ketiga dan/atau keempat atau apa-apa sewa yang diterima oleh defendan pertama. Dapatan HMT tentang amanah konstruktif diketepikan.

(5) Kawasan hartanah yang wajib diberi milikan kosong oleh defendan pertama kepada plaintif jelas dinyatakan dalam MTA. Mahkamah mestilah menguatkuasakan niat pihak-pihak seperti yang termaktub dalam terma-terma MTA. Tiada alasan untuk mengganggu dapatan fakta HMT bahawa milikan kosong hartanah tidak diberi oleh defendan pertama kepada plaintif. Oleh itu, defendan pertama melanggar perjanjian sewaan apabila gagal menyerahkan milikan kosong. Hal perkara berkenaan pelanggaran MTA diarahkan agar dikembalikan ke Mahkamah Tinggi bagi taksiran ganti rugi.

Case(s) referred to:

Arnold v. Britton [2015] 2 WLR 1593 ***(refd)***
BCCI v. Ali [2001] 1 AC 251 ***(refd)***
Gallant Acres Sdn Bhd v. Kepong Development Sdn Bhd [2004] 1 LNS 333 HC ***(refd)***
Khoo Teng Chye v. Cekal Berjasa Sdn Bhd & Anor [2015] 6 CLJ 449 CA ***(refd)***
Leha Jusoh v. Awang Johari Hashim [1977] 1 LNS 59 FC ***(refd)***
Lonrho Plc v. Fayed & Others [1991] 3 All ER 303 ***(refd)***
Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors [2012] 2 CLJ 1076 HC ***(refd)***
NYK Logistics (UK) Ltd v. Ibrend Estates BV [2011] EWCA Civ 683 ***(refd)***
OBG Ltd v. Allan [2008] 1 AC 1 ***(refd)***
SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389 CA ***(refd)***
Topfell Ltd v. Galley Properties Ltd [1979] 1 WLR 446 ***(refd)***
YES F&B Group Pte Ltd v. Soup Restaurant Singapore Pte Ltd [2015] SGCA 55 ***(refd)***

(Civil Appeal No: B-02(NCVC)(W)-993-06-2015)
For the appellant - K Mohan (K Prakash & S Kalashi with him); M/s Mohanadass Partnership
For the respondent - Justin Voon (CP Lee & Sam How with him); M/s Justin Voon Chooi & Wing

(Civil Appeal No: B-02(NCVC)(W)-1100-07-2015)
For the appellant - Manian Raju (Mohd Farid Ismail & Zatul Azra Zulkeflee with him); M/s Hamidi & Farid
For the respondent - Justin Voon (CP Lee & Sam How with him); M/s Justin Voon Chooi & Wing

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-1383-11-2012 (affirmed).]

Reported by Najib Tamby

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JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

B **[1]** For ease of reference, in the judgment, we will refer to the appellants as "defendants" and the respondent as "plaintiff".

[2] These appeals have been filed against the common judgment and order dated 10 June 2015 given by the Shah Alam High Court in Civil Suits No: B-02 (NCVC)(W)-993-06-2015, B-02(NCVC)(W)-1100-07-2015 and B-02 (NCVC)(W)-1101-07-2015. By the said impugned judgment, Her Ladyship C granted judgment in favour of the plaintiff against all the defendants and dismissed the first defendant's counterclaim.

[3] Her Ladyship held that the plaintiff had proven its case against the defendants for breach of contract as well as its claim of tort of conspiracy to D injure against all the defendants and ordered a compensation sum of RM6,299,971.72 with 5% interest per annum from the date of the writ to the date of satisfaction. Further, Her Ladyship declared that the tenancy agreement dated 3 January 2011 between the third defendant and the fourth defendant was invalid.

E **[4]** Dissatisfied, all the defendants appealed to this court but the second defendant's appeal was struck out on 4 November 2015.

Parties

[5] The parties at the High Court are as follows:

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Plaintiff	Defendants
MKC Corporate & Business Advisory Sdn Bhd	1. Cubic Electronic Sdn. Bhd 2. Goh Seng Chong 3. Mars Telecommunication Sdn Bhd 4. Universiti Teknikal Malaysia Melaka

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Facts Of The Case

[6] Shorn of unnecessary details, the material facts giving rise to these H appeals may be shortly stated as follows:

(a) The plaintiff and first defendant are private limited companies incorporated in Malaysia. The first defendant was a registered owner of a land situated at Mukim Bukit Katil, District of Melaka Tengah, Melaka ("the subject property").

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(b) The second defendant is the director and the majority shareholder of the first defendant.

(c) The plaintiff and the first defendant entered into the master tenancy agreement ("MTA") for a period of three years commencing from 12 August 2009 and expiring on 11 August 2012 where the first defendant was to let out the subject property to the plaintiff.

(d) Pursuant to the MTA, the plaintiff paid a security deposit of RM500,000 and utility deposit of RM50,000 to the first defendant. A monthly rental of the subject property was fixed at RM250,000.

(e) According to the plaintiff, whilst the MTA was still subsisting, the first defendant had entered into a tenancy agreement dated 14 January 2011 with the third defendant over the same subject property with monthly rental of RM116,099.25.

(f) Prior to that, the third defendant had entered into a sub-tenancy agreement dated 3 January 2011 with the fourth defendant with monthly rental agreed at RM1,486,070.40, also over the same subject property.

(g) The plaintiff averred that the first and second defendants together with the third and fourth defendants had conspired to deprive the plaintiff of its right under the MTA.

(h) The plaintiff further averred that the first defendant had breached the MTA by failing to give vacant possession of the subject property to the plaintiff. Consequently, the plaintiff initiated this action.

(i) The defendants resisted the suit and filed their respective statements of defence. The first defendant alleged that the plaintiff had failed to pay the rental and refused to take vacant possession. Therefore, the first defendant by its solicitor's letter dated 31 March 2011, terminated the MTA. The first defendant filed a counterclaim against the plaintiff seeking, *inter alia*, for a declaration that the MTA dated 12 August 2009 between the first defendant and the plaintiff was be deemed terminated and unenforceable.

The Appeal

[7] The memorandum of appeal raised several grounds to assail the impugned judgment but before us the arguments were centred mainly on the following:

(a) The learned trial judge erred in law and in fact in deciding that the plaintiff had proven its claim of tort of conspiracy to injure against all defendants;

(b) the learned trial judge erred in law and in fact in holding that delivery of vacant possession of 1,234,197 sq ft. of the subject property must be given to the plaintiff; and

(c) the learned trial judge erred in law and in fact in deciding that the rentals received by the first, second and third defendants are held in trust by them respectively as constructive trustee for the plaintiff.

Analysis And Decision

First Ground

[8] The plaintiff submitted that the first defendant had deliberately stalled the delivery of vacant possession of the subject property to the plaintiff and meanwhile had "back door" dealing with the third defendant and fourth defendant to deprive the plaintiff of its rights and entitlements under the MTA. According to the plaintiff, the first defendant and other defendants had entered into five agreements whilst the MTA was still existing and still on foot without the plaintiff's knowledge. Therefore, there was a conspiracy and/or fraud among all the defendants to completely deprive the plaintiff of its right under the MTA.

[9] The learned trial judge found in favour of the plaintiff and awarded damages. Her Ladyship had this to say at p. 37 of "Ikatan Teras Penghakiman Perayu":

> The 1st, 2nd and 3rd defendants had one common interest namely to make money because they are not financially stable. The 4th defendant had the money and was badly in need for premises to house its students. The 4th defendant agreed to pay rental of RM1,486,070.40 for 464,397 sq ft. and wanted a tenancy for three years. Compared to the RM250,000.00 rental payable by the plaintiff for the entire property, the 1st to 3rd defendants saw the opportunity of making monies. There is a rental proceeds of RM1,236,070.40 (RM1,486,070.40 - MR250,000.00). This is a huge sum. For 36 months, the rental is RM44,498,534.40. Realising the amount of monies about to be made if the plaintiff sign an agreement with the 4th defendant, they decided to grab monies themselves.

[10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the "economic torts". There are four elements to a conspiracy claim:

(i) a combination or agreement between two or more individuals;

(ii) an intent to injure;

(iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and

(iv) resulting loss and damage to the claimant.

(See *Khoo Teng Chye v. Cekal Berjasa Sdn Bhd & Anor,* Civil Appeal No: P-02-542-03-2015 (CA) [2015] 6 CLJ 449 (CA)).

[11] There are two kinds of conspiracy, the elements of which are distinct:

(i) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and

(ii) lawful means conspiracy: a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole predominant purpose of injuring the claimant - it is in the fact of the conspiracy that the unlawfulness resides. (See *Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393 (CA)).

[12] The distinction between the two was succinctly elucidated by Lord Bridge in *Lonrho Plc v. Fayed & Others* [1991] 3 All ER 303 as follows:

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[13] The elements required to bring an action for unlawful means conspiracy and lawful means conspiracy are as follows:

> A combination or agreement between two or more individuals
>
> It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. The court looks at the overt acts of the conspiracy and infers from those acts that there was agreement to further the common object of the combination. It is sufficient that two or more persons combine with the necessary intention or that they deliberately co-operate, *albeit* tacitly, to achieve a common end (*R v. Siracusa* [1990] 0 Cr App R 340). Neither is it necessary that all those involved should have joined the conspiracy at the same time; but all those said to be parties to the conspiracy should be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design. (*R v. Simmonds* [1969] 1 QB 691).
>
> It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that they join the conspiracy; they are not liable retrospectively for the damage that has been suffered prior to their joining (*O'Keefe v. Walsh* [1903] 2 IR 681).

[14] In these instant appeals, we are concerned with lawful means conspiracy. The element of lawful means conspiracy are the same as for unlawful means conspiracy detailed above, with the exception of the intention to injure requirement.

An intention to injure

For lawful means conspiracy, it is necessary to prove that the conspirators had the sole or predominant intention of injuring the claimant. As it was put in *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* [1942] AC 435: "If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person".

The mental element of intention to injure the claimant will be satisfied where the defendant intends to injure the claimant either as an end in itself or as a means to an end such as to enrich themselves or protect or promote their own economic interests. It will not be satisfied where injury to the claimant is neither a desired end nor a means of attaining it but merely a foreseeable consequence of the defendants' actions.

[15] In *OBG Ltd v. Allan* [2008] 1 AC 1, Lord Nicholls held at 57:

166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct, in the words of Cooke J in *Van Camp Chocolates Ltd v. Aulsebrooks Ltd* [1984] 1 NZLR 354, 360, the majority of the Court of Appeal fell into error on this point in the interlocutory case of *Miller v. Bassey* [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.

[16] Tested on the backdrop of aforesaid enunciation of the legal principles, on the evidence available on record, we are not prepared to hold that there was a conspiracy between the defendants when they entered into the tenancy agreements. The predominant purpose of those tenancy agreements are the lawful promotion of their lawful interests.

[17] In so far as the fourth defendant is concerned, it had entered into a tenancy agreement dated 3 January 2011 with the third defendant for the purpose of securing premises for its two new faculties and incoming students. The fourth defendant is a public university established under the Universities and University Colleges Act 1971 (Act 30). It is pertinent to note that the fourth defendant had been renting a part of the premises since 2005, well before the plaintiff came into picture in 2009.

[18] The nub of the plaintiff's case is that all the defendants had entered into all kinds of agreements among themselves while the MTA was still existing and not terminated and none of the defendants could explain to the court how much rental was actually paid; how it was paid and to whom it was paid to.

[19] We have painstakingly and carefully scrutinised the evidence on record and find no evidence to support the plaintiff's contention that the rental paid by fourth defendant was for first defendant's ultimate benefit or that the first, second and third defendants must have a share in the profits. With respect, the learned trial judge's finding is against the weight of the evidence presented at the trial and merely grounded on pure fanciful conjuncture.

[20] Lest we be accused of an oversight, we must say that we are mindful of the fact that in conspiracy cases of this type, it would be difficult to prove by direct evidence. The plaintiff is never required to show the existence of the arrangements between the conspirators in the nature of an express agreement, whether formal or informal. Therefore, as is often the case, the agreement or combination is to be inferred from the evidence.

[21] We have given anxious consideration to facts and circumstances relied upon by learned counsel for the plaintiff in support of his contention that the first defendant had conspired with other defendants to injure the plaintiff. We are of the view that none of those facts or circumstances, taken singly or together, justify or even support an inference of dishonest participation by the first defendant and other defendants to injure the plaintiff. The plaintiff failed to adduce sufficient evidence to establish a conspiracy among the defendants. We reiterate that a party who alleges a fact has the burden of proving it and mere allegation is not evidence. It must be stressed that the evidence to prove this allegation must be clear, positive and convincing.

[22] Therefore, the conspiracy claim against the defendants failed and the defendants' appeal on ground (a) must succeed.

Second Ground

[23] Learned counsel for the first defendant submitted that the learned trial judge failed to adequately appreciate contemporaneous evidence and witness testimony in concluding that delivery of vacant possession of 1,234,197 sq ft. of the subject property must be given to the plaintiff.

[24] Learned counsel for the first defendant posited that the term "vacant possession" of the subject property is not defined in the MTA. Instead, the agreement stipulates that the delivery of vacant possession of the subject property is subject to existing sub-tenancies with IAC Manufacturing Sdn Bhd and Mitsui-Soko Sdn Bhd. Thus, there could never be a situation where the entire 1.2 million sq ft. of the subject property would be delivered to the plaintiff, wholly vacant.

[25] Learned counsel further contended that the plaintiff's assertion in oral testimony that vacant possession was not delivered is contradicted by documented admissions as follows:

(a) By the plaintiff's letter dated 9 November 2010 in which the plaintiff expressly admitted that "vacant possession of the factory had already been given to us *vide* Cubic's letter dated 6 April 2010"; and

(b) By the plaintiff's second letter of even date in which the plaintiff said:

> … we wish to inform you we have entered the factory this afternoon and we wish to thank you for acknowledging our right of possession over the factory as per the tenancy agreement mentioned above.
>
> Further, since vacant possession was only delivered to us today it is only appropriate that the total rental payable shall be pro-rated accordingly.

[26] According to learned counsel, the following conducts of the plaintiff fly in the face of its denials of not having received possession of the subject property:

(i) the plaintiff in its capacity as the main tenant, began negotiating with the R&M, among others, the rent to be paid by the first defendant over the space within which the first defendant occupied;

(ii) the plaintiff did not seek refund of the payment of RM59,456 purportedly paid towards April, September and October 2010 rental;

(iii) the plaintiff handed over the keys to the main gate (post I) and lobby office and admin 3 to the first defendant on 6 April 2010;

(iv) the plaintiff set up its own office within the premises of the subject property;

(v) the plaintiff admitted in its pleading that they did pay a sum of RM59,456 monthly rental payable under the MTA for April 2010;

(vi) the plaintiff installed signboards on the subject property;

(vii) the plaintiff was given full control of the subject property by the R&M;

(viii) the plaintiff went ahead and tenanted out other certain areas in the subject property to one PC Marine System Sdn Bhd and one Protection Technologies (M) Sdn Bhd; and

(ix) by letter dated 6 January 2011, the plaintiff informed the third defendant that it is the master tenant of the subject property and it had effectively taken full possession of the subject property with effect from January 2011.

Meaning Of "Vacant Possession"

[27] Before we proceed to consider the submissions it is perhaps useful to discuss the meaning of "vacant possession". The phrase "vacant possession" has never been authoritatively defined. The meaning of the word "vacant possession" has been said to vary according to the context in which they are used. (See *Topfell Ltd v. Galley Properties Ltd* [1979] 1 WLR 446; *Gallant Acres Sdn Bhd v. Kepong Development Sdn Bhd* [2004] 1 LNS 333).

[28] The obligation to give vacant possession consists of both a legal and factual dimension. Where a vendor expressly or impliedly contracts to convey a property free from encumbrances, the purchaser shall on completion obtain the legal right to actual possession of the property transferred. However, the term "vacant possession" goes beyond the legal transfer of the property. It also concerns possession in a factual sense of the property - the purchaser would be given such substantial, actual and empty possession as would allow him to occupy and use the property transferred without any impediments.

[29] In *NYK Logistics (UK) Ltd v. Ibrend Estates BV* [2011] EWCA Civ 683, CA (Eng), the English Court of Appeal had to consider whether a tenant had given possession of property to the landlord. The lease contained a break clause allowing the tenant to give notice to terminate the lease. One of the conditions for the valid exercise of the break right was that the tenant had to give vacant possession of the property to the landlord on the date when the lease was to come to an end. The tenant served the notice under the break clause. Its workman and security guards remained on the property for several days after the date specified in the notice. They did so in order to finish off the repairs that the landlord and tenant had agreed were necessary. It was held that the tenant had not given vacant possession (and that it had not effectively brought the lease to an end). Rimer CJ explained "vacant possession" means that, at the moment that "vacant possession" is to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must be also be empty of chattels, although the obligation in this regard is likely only to be breached if any chattels left on the property substantially prevent or interfere with the enjoyment of the right to possession of a substantial part of the property (at p. 44).

[30] We are in full agreement with the learned trial judge's finding that vacant possession of the said subject property meant possession of 1,234, 197 sq ft. We find support in s. 6(a) of the first schedule of the MTA which states, *inter alia*, that the reserved rental of RM250,000 per month is for an existing areas of 1,234,197 sq ft. and the first reserved rental shall be made within 14 days from the delivery of vacant possession.

[31] We also find support in s. 18 of the second schedule of the MTA which further states, *inter alia*, that the plaintiff had acknowledged the existing tenancy between the first defendant and IAC Manufacturing Malaysia Sdn Bhd as well as the tenancy with Mitsui-Soko Sdn Bhd and it was an agreed term that the rentals of these two tenancies shall be paid directly to the plaintiff and the first defendant has the obligation to notify and secure confirmation of the same.

[32] Uncontroverted evidence established that on 9 April 2010, only the keys to the main gate (post 1) and lobby office (admin 3) were given by the first defendant to the plaintiff. The remaining areas such as "factory 1", "factory 2", "admin 1", "admin 2", remaining areas of "admin 3", remaining areas of "manufacturing admin 1", remaining areas of "factory 3", remaining areas of "factory 1", and remaining areas of "logistic 1 & 2" in the said subject property were not handed to the plaintiff and the first defendant's service providers were still operating in the said subject property. The first defendant themselves were occupying 123,800 sq ft. at all material time.

[33] In our opinion, the areas of the subject property that the first defendant is obliged to give vacant possession to the plaintiff are clearly stipulated in the MTA. The court must give effect to the intention of the parties as embodied in the terms of MTA. While the relevant context is important, the text of the agreement ought always to be the "first port of call". (See *Arnold v. Britton* [2015] 2 WLR 1593 (UKSC); *YES F&B Group Pte Ltd v. Soup Restaurant Singapore Pte Ltd* [2015] SGCA 55).

[34] In *BCCI v. Ali* [2001] 1 AC 251, Lord Bingham of Cornhill summarised the canons of construction and the approach to be adopted by a court in interpreting contracts as follows:

> To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective state of mind but makes an objective judgment based on the materials already identified.

[35] We find no reason to disturb the finding of facts by the learned trial judge that no vacant possession of the subject property was given by first defendant to the plaintiff. As such, the first defendant had breached the tenancy agreement by failing to deliver vacant possession.

[36] Consequently, we order that the matter in respect of the breach of the MTA be remitted back to the High Court for assessment of damages by Deputy Registrar or Senior Assistant Registrar, as the case may be.

Third Ground

[37] The learned trial judge declared that the rentals received by the first, second and third defendants are held on trust by them respectively as constructive trustees for the plaintiff.

[38] With respect, we are of the opinion that the learned trial judge fell into serious error. The plaintiff had failed to plead or lead any evidence that (i) it was contractually entitled to all any of the rental proceeds under the tenancy agreement; or (ii) it had sourced or earned the rental proceeds which it claims must be held on trust for the plaintiff by the first respondent; or (iii) that the plaintiff could have procured similar rentals to the rental rates paid by the third and/or fourth defendants or any rentals received by the first defendant.

[39] We agree with the submission of learned counsel for the first defendant that the plaintiff merely seeks to reap the benefits of first defendant's efforts whether through the RPM or the liquidator in:

(i) securing rent-paying tenants to occupy the subject property;

(ii) operating and maintaining the subject property;

(iii) retaining and paying for the services of the service providers including that of the security guards, cleaners, etc; and

(iv) paying for all basis necessities to operate the subject property attending to statutory requirements such as lift, maintenance, paying annual quit and assessment rents, etc.

[40] We cannot comprehend the train of reasoning of the learned trial judge in finding that the tenancy agreement dated 14 January 2011 was invalid and at the same time declared that the rentals paid by the third and fourth defendants belonged to the plaintiff. It is trite that one cannot enforce an agreement which is void *ab initio* (*Leha Jusoh v. Awang Johari Hashim* [1977] 1 LNS 59; [1978] 1 MLJ 202).

[41] We, therefore, set aside the findings of the learned trial judge which relate to constructive trust.

Counterclaim

[42] The first defendant's counterclaims are premised on the basis that the MTA is deemed terminated and unenforceable and that either party has the existing right to assert over the MTA. In the light of our decision that it was the first defendant who was in breach of MTA in failing to give vacant possession of the subject property to the plaintiff, the cross-appeal is not maintainable and should be dismissed.

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Costs

[43] In respect of Civil Appeal No: B-02(NCVC)(W)-993-06-2015, we made no order as to costs and the costs awarded by the High Court is reduced to RM52,000.

B **[44]** In respect of Civil Appeal No: B-02(NCVC)(W)-1100-07-2015, we award the costs of RM10,000 to the appellant. Deposits to be refunded.

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