A **GOH BAK MING v. YEOH ENG KONG & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA
SURAYA OTHMAN JCA
B [CIVIL APPEALS NO: B-02(NCVC)(W)-1562-08-2016,
B-02(NCVC)(W)-1563-08-2016, B-02(NCVC)(W)-1677-09-2016,
B-02(NCVC)(W)-1679-09-2016
& B-02(NCVC)(W)-1684-09-2016]
7 AUGUST 2018

C

TORT: *Conspiracy – Elements of – Claim for damages for tort of conspiracy – Whether elements of tort of conspiracy established – Whether cause of action for conspiracy accrued when damages suffered – Whether complete set of facts giving rise to cause of action accrued after expiration of limitation period – Whether there*
D *was sufficient evidence to support allegation of tort of conspiracy – Whether prima facie case made out*

LIMITATION: *Actions in contract and tort – Accrual of cause of action – Claim for damages for tort of conspiracy – Time period for bringing action – Whether before expiration of six years from date accrual of cause of action – Whether*
E *limitation does not begin to run until there is complete cause of action – Whether cause of action for conspiracy accrued when damages suffered – Whether claim time barred*

The consolidated appeals emanated from the decision of the High Court
F allowing the respondent's ('plaintiff') claim for damages for the tort of conspiracy against the appellants ('defendants') and for the return of advances given by the plaintiff to the first defendant. The cross-appeal by the plaintiff was against the inadequacy of damages awarded against the defendants. The first defendant was a director and shareholder of Liqua Plc as well as the managing director of Liqua Health Marketing Sdn Bhd ('Liqua Marketing').
G The first and second defendants ('the founders') held the majority shareholding interest in Liqua Plc. Of this shareholding, 73,447,000 ordinary shares ('the charged shares') held by the founders and nominees were charged in favour of Mayban Securities. The charged shares were subject to foreclosure by Mayban Securities for an outstanding amount of
H about RM51,000,000 in respect of trading losses. Sometime in March 2006, the founders agreed to sell to the plaintiff the charged shares for RM36 million whereby the plaintiff would ultimately become the majority controlling shareholder of Liqua Plc ('the main agreement'). In reliance of the representations made by the founders, the plaintiff: (i) acquired
I substantial Liqua Plc shares from the open market in order to increase the

substantial stake toward obtaining majority shareholding in Liqua Plc; (ii) purchased the founders' unencumbered shares of Liqua Plc; (iii) gave the founders interest free advances totalling RM1,638,000 ('the advances'); and (iv) nominated himself with two others and subsequently appointed as directors of Liqua Plc and Liqua Marketing with resignation letters by the first defendant and his nominees lodged with the plaintiff. In order to facilitate the main agreement, the founders negotiated with Mayban Securities to enter into a shares sale agreement as well as a settlement agreement whereby Mayban Securities agreed to allow the charged shares to be redeemed by the plaintiff. However, from 28 November 2006 onwards, the founders started reneging from the main agreement. It was the plaintiff's pleaded case that he was precluded from buying the charged shares by reason of (i) the alleged breach of the main agreement by the founders; and (ii) the alleged conspiracy to deprive him of the charged shares.

Held (allowing defendants' appeals with costs; dismissing plaintiff's cross appeals)

Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The key ingredients to be proven by the plaintiff in order to make out a *prima facie* case of tort of conspiracy were: (i) an agreement, combination, understanding or concert between two or more persons; (ii) to commit an act with the intention to injure or cause damage to the plaintiff; (iii) the act was executed and the plaintiff was injured or suffered damages; and (iv) if the act executed was not an unlawful act, then it must also be shown that the intention to cause injury or damage to the plaintiff was the predominant or main purpose. (para 19)

(2) The time period for the bringing of an action founded on the tort of conspiracy shall not be after the expiration of six years from the date the cause of action accrued. The period of limitation does not begin to run until there is a complete cause of action, and a cause of action is not complete when all the facts have not happened which are material to be proved to entitle the plaintiff to succeed. In this case, the point of time when all the material facts were said to be in existence was crucial and it was a serious bone of contention. The limitation was indeed pleaded in all instances and therefore, the plaintiff's argument that limitation was not pleaded by the defendants was without basis and merit. (paras 20 & 22)

(3) The cause of action for conspiracy accrued when the damages were suffered. The founders allowed the settlement agreement and the shares sale agreement to lapse on 27 July 2006 to effectively preclude the plaintiff from acquiring the charged shares. The plaintiff suffered

damages when he was denied the opportunity to purchase the charged shares. Apart from the claim for the repayment of the interest-free advances from the founders, the plaintiff also claimed for general, aggravated and/or exemplary damages. The onus of proof and quantification of the alleged damages was on the plaintiff. It was clear that on 27 July 2006 or in August 2006, the complete set of facts which gave rise to a cause of action was present. As such, the plaintiff's claim was time-barred and therefore, was unsustainable. (para 24)

(4) The appeal record disclosed no evidence linking the sixth defendant to the alleged conspiracy. The statement of claim also disclosed no reasonable cause of action against the sixth and 14th defendants as the pleaded case for breach of representation and return of the advance were only against the founders. Further, the loss claimed by the plaintiff as a result of the force sale of the charged shares was wholly independent of the alleged conspiracy. The loss, as pleaded, was suffered by Liqua Marketing, a separate legal entity. As such, the plaintiff had no *locus standi* to make such claim since the plaintiff suffered no personal loss. (para 29)

(5) The allegation that the fifth defendant knew about the founders' offer or representations to the plaintiff was not pleaded. There was also no evidence in the appeal record to support the allegation of conspiracy or wrong doing against the fifth defendant. The plaintiff's pleaded case also contained no averment that the 11th defendant or the 12th defendant had come to an agreement with the other defendants to further a wrongful purpose against the plaintiff. The omission to aver the fact in issue was fatal. (para 30)

(6) The evidence produced by the plaintiff fell short of establishing a *prima facie* case on the allegation of conspiracy and the advances made, and therefore, the plaintiff's claim was doomed to fail at the close of the plaintiff's case. It did not matter that some of the defendants had elected not to give evidence in their defence. The burden of proof did not shift to the defendants. In the circumstances, the plaintiff's claim was statute barred by limitation and, on the totality of the evidence, the tort of conspiracy had not been established by the plaintiff. (paras 32, 34 & 35)

Bahasa Malaysia *Headnotes*

Rayuan-rayuan yang digabungkan timbul daripada keputusan Mahkamah Tinggi membenarkan tuntutan responden ('plaintif') untuk ganti rugi tort konspirasi terhadap perayu-perayu ('defendan-defendan') dan untuk pemulangan wang pendahuluan yang diberi oleh plaintif kepada defendan pertama. Rayuan balas oleh plaintif adalah terhadap ketidakcukupan ganti

rugi yang diawardkan terhadap defendan-defendan. Defendan pertama ialah pengarah dan pemegang saham Liqua Plc dan pengarah urusan Liqua Health Marketing Sdn Bhd ('Liqua Marketing'). Defendan pertama dan kedua ('pengasas-pengasas') memegang kepentingan pegangan saham majoriti dalam Liqua Plc. Daripada pegangan saham ini, 73,447,000 saham biasa ('saham-saham yang dicagar') dipegang oleh pengasas-pengasas dan penama-penama digadaikan berpihak pada Mayban Securities. Saham-saham yang dicagar tertakluk pada rampasan oleh Mayban Securities untuk jumlah tertunggak kira-kira RM51,000,000 berkaitan dengan kerugian dagangan. Kira-kira pada Mac 2006, pengasas-pengasas bersetuju menjual kepada plaintif saham-saham yang dicagar untuk RM36 juta dan plaintif akan menjadi pemegang saham majoriti mengawal Liqua Plc ('perjanjian utama'). Bergantung pada representasi-representasi yang dibuat oleh pengasas-pengasas, plaintif: (i) memperoleh sebahagian besar saham Liqua Plc dari pasaran terbuka untuk menambah kepentingan substansial untuk memperoleh pegangan saham majoriti dalam Liqua Plc; (ii) membeli saham-saham tak dihalang Liqua Plc; (iii) memberikan pengasas-pengasas wang pendahuluan tanpa faedah berjumlah RM1,638,000 ('wang pendahuluan'); dan (iv) mencalonkan dirinya bersama-sama dua yang lain dan kemudian dilantik sebagai pengarah-pengarah Liqua Plc dan Liqua Marketing dengan surat-surat peletakan jawatan oleh defendan pertama dan penama-penamanya diberi kepada plaintif. Untuk memudahkan perjanjian utama, pengasas-pengasas berbincang dengan Mayban Securities untuk memasuki perjanjian jualan saham serta perjanjian penyelesaian dan Mayban Securities bersetuju membenarkan saham-saham yang dicagar, ditebus oleh plaintif. Walau bagaimanapun, dari 28 November 2006, pengasas-pengasas mula memungkiri perjanjian utama. Kes plaintif yang diplidkan adalah, dia dihalang daripada membeli saham-saham yang dicagar atas alasan: (i) pelanggaran perjanjian utama oleh pengasas-pengasas; dan (ii) konspirasi yang didakwa untuk menafikan kepadanya saham-saham yang dicagar.

Diputuskan (membenarkan rayuan defendan-defendan dengan kos; menolak rayuan balas plaintif)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Elemen-elemen utama yang perlu dibuktikan oleh plaintif untuk membuktikan kes *prima facie* tort konspirasi adalah: (i) satu perjanjian, gabungan, persefahaman atau penyertaan antara dua orang atau lebih; (ii) untuk melakukan tindakan dengan niat mencederakan atau mengakibatkan kerugian kepada plaintif; (iii) tindakan tersebut dilaksanakan dan plaintif mengalami kecederaan atau kerugian; dan (iv) jika tindakan yang dilaksanakan bukan tindakan menyalahi undang-undang, niat mengakibatkan kecederaan atau kerugian kepada plaintif perlu ditunjukkan sebagai tujuan asas atau utama.

(2) Tindakan yang berasaskan tort konspirasi tidak boleh dimulakan selepas tamat tempoh enam tahun dari tarikh kausa tindakan terakru. Tempoh had masa tidak bermula sehingga kausa tindakan lengkap tidak berlaku, dan kausa tindakan tidak lengkap sehingga kesemua fakta yang perlu dibuktikan untuk memberi hak kepada plaintif untuk berjaya, tidak berlaku. Dalam kes ini, tempoh masa kesemua fakta material dikatakan wujud, adalah penting dan menjadi asas penting hujahan. Tempoh had masa sememangnya diplidkan dan oleh itu, hujahan plaintif bahawa had masa tidak diplidkan oleh defendan-defendan tidak berasas dan bermerit.

(3) Kausa tindakan konspirasi terakru apabila kerugian dialami. Pengasas-pengasas membenarkan perjanjian penyelesaian dan perjanjian jualan saham luput pada 27 Julai 2006 untuk menghalang plaintif, secara efektif, daripada memperoleh saham-saham yang dicagar. Plaintif mengalami kerugian apabila dia dinafikan peluang membeli saham-saham yang dicagar. Selain tuntutan pembayaran balik wang pendahuluan tanpa faedah daripada pengasas-pengasas, plaintif juga menuntut ganti rugi am, teruk dan/atau teladan. Beban pembuktian dan pengiraan kerugian yang dikatakan terletak pada plaintif. Jelas, pada 27 Julai 2006 atau Ogos 2006, fakta-fakta lengkap, yang menjurus pada kausa tindakan, telah berlaku. Oleh itu, tuntutan plaintif dihalang oleh had masa dan oleh itu, tidak boleh dikekalkan.

(4) Rekod rayuan tidak mendedahkan keterangan yang melibatkan defendan keenam dengan konspirasi yang didakwa. Penyataan tuntutan juga tidak mendedahkan kausa tindakan munasabah terhadap defendan keenam dan ke-14 kerana kes yang diplidkan untuk pelanggaran representasi dan pemulangan wang pendahuluan hanya terhadap pengasas-pengasas. Selanjutnya, kerugian yang dituntut plaintif akibat jualan paksa saham-saham yang dicagar tidak berkait langsung dengan konspirasi yang didakwa. Kerugian, seperti yang diplidkan, dialami oleh Liqua Marketing, entiti undang-undang berasingan. Oleh itu, plaintif tiada *locus standi* membuat tuntutan tersebut kerana tiada kerugian persendirian yang dialami plaintif.

(5) Dakwaan bahawa defendan kelima mengetahui tentang tawaran pengasas-pengasas atau representasi-representasi kepada plaintif, tidak diplidkan. Malahan, tiada keterangan dalam rekod rayuan menyokong dakwaan konspirasi atau salah laku terhadap defendan kelima. Kes plaintif yang diplidkan juga tiada penyataan bahawa defendan ke-11 atau ke-12 memasuki perjanjian dengan defendan-defendan lain untuk melanjutkan tujuan salah terhadap plaintif. Ketinggalan menyatakan fakta dalam isu tersebut menjejaskan.

(6) Keterangan yang dikemukakan plaintif tidak membuktikan kes *prima facie* atas dakwaan konspirasi dan wang pendahuluan yang diberikan, dan dengan itu, tuntutan plaintif wajar gagal di akhir kes plaintif. Walaupun beberapa defendan memilih untuk tidak memberi keterangan mereka sebagai pembelaan, ini tidak penting dan beban pembuktian tidak beralih kepada defendan-defendan. Dalam keadaan tersebut, tuntutan plaintif dihalang oleh statut dengan had masa dan, atas keseluruhan keterangan, tort konspirasi tidak dibuktikan plaintif.

Case(s) referred to:
AmBank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Goh Kiang Heng v. Mohd Ali Abd Majid [1997] 4 CLJ Supp 320 HC ***(refd)***
Lim Kean v. Choo Koon [1969] 1 LNS 94 HC ***(refd)***
Loh Wai Lian v. Sea Housing Corp Sdn Bhd [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223 FC ***(refd)***
Machinchang Skyways Sdn Bhd & Anor v. Lembaga Pembangunan Langkawi & Anor And Another Appeal [2015] 3 CLJ 775 CA ***(refd)***
McKernan v. Fraser [1931] 46 CLR 343 ***(refd)***
Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] 1 LNS 127 FC ***(refd)***
Nann v. Raimist [1931] 255 NY 307 ***(refd)***
Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA ***(refd)***
Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 1 LNS 1416 CA ***(refd)***
Quah Kay Tee v. Ong and Co Pte Ltd [1996] 3 SLR(R) 637 ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***
Sorrell v. Smith [1925] AC 700 ***(refd)***
Tan Sri Dato' Tajudin Ramli & Anor v. Celcom (Malaysia) Bhd & Anor (No 2) [2014] 1 LNS 178 CA ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101(1), 102
Limitation Act 1953, s. 6(1)(a), (2)

Other source(s) referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, 16th edn, vol 2, Sweet & Maxwell at pp 856, 857
Clerk & Lindsell on Torts, 21st edn, Sweet & Maxwell, p 1688

(Civil Appeal No: B-02(NCVC)(W)-1562-08-2016)
For the appellant - Gideon Tan & Khong Jo Ee; M/s Gideon Tan Razali Zaini
For the respondent - LL Woon & Zack Lim; M/s Izral Partnership

(Civil Appeal No: B-02(NCVC)(W)-1563-08-2016)
For the appellant - Owee Chia Ming & Audrey Lim; M/s Owee & Ho
For the respondent - LL Woon & Zack Lim; M/s Izral Partnership

(Civil Appeal No: B-02(NCVC)(W)-1677-09-2016)
For the appellant - Prakash Mehta; M/s Prakash & Co
For the respondent - LL Woon & Zack Lim; M/s Izral Partnership

(Civil Appeal No: B-02(NCVC)(W)-1679-09-2016)
For the appellant - Steven CF Wong; M/s Arifin & Partners
For the respondent - LL Woon & Zack Lim; M/s Izral Partnership

(Civil Appeal No: B-02(NCVC)(W)-1684-09-2016)
For the appellant - M Raja Kumaran & Priscilla Chin; M/s Ram Yogan Sivam
For the respondent - LL Woon & Zack Lim; M/s Izral Partnership

[Editor's note: For the High Court judgment, please see Yeoh Eng Kong v. Goh Bak Ming & Ors [2016] 1 LNS 1012 (overruled).]

Reported by S Barathi

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] The consolidated appeals emanate from the decision of the High Court which allowed the plaintiff's claim for damages for the tort of conspiracy against the defendants and for the return of advances given by the plaintiff to the first defendant. The cross-appeals by the plaintiff are against the inadequacy of damages awarded against the defendants.

[2] Appeal [1562] is the first defendant's appeal, whilst appeal [1563] is by the seventh to ninth defendants, appeal [1677] by the sixth and 14th defendants, appeal [1679] by the fifth defendant and appeal [1684] by the 11th defendant. We heard arguments on 5 September 2017 and 23 October 2017 and delivered our decision on 10 November 2017. We allowed all the appeals with costs and dismissed the plaintiff's cross-appeals. In this written judgment, the parties shall be referred to as they were in the court below.

Summary Of Plaintiff's Claim

[3] The first defendant was a director and shareholder of Liqua Plc as well as the managing director of Liqua Health Marketing Sdn Bhd ('Liqua Marketing'). The first defendant was also a signatory of the banking accounts of Liqua Plc and Liqua Marketing at all material times.

[4] At all material times, the first and second defendants ("the founders") held the majority shareholding interest in Liqua Plc. Of this shareholding, 73,447,000 ordinary shares ('the charged shares') held by the founders and nominees were charged in favour of Mayban Securities. The charged shares were subject to foreclosure by Mayban Securities for an outstanding amount of about RM51,000,000 in respect of trading losses.

[5] Sometime in March 2006, the founders agreed to sell to the plaintiff the charged shares for RM36 million whereby the plaintiff would ultimately become the majority controlling shareholder of Liqua Plc ('the main agreement'). The founders made the following representations to the plaintiff:

(i) That they will procure Mayban Securities to sell the charged shares to the plaintiff for RM36 million;

(ii) That the plaintiff shall have two board representation in both Liqua Plc and Liqua Marketing;

(iii) That the plaintiff to be appointed as the chief operation officer of Liqua Marketing as well as the compulsory signatory of all banking accounts of Liqua Plc and Liqua Marketing;

(iv) That the founders and their nominees shall submit their resignations letters to the plaintiff to be effected on the completion of the sale of the charged shares;

(v) The plaintiff was to purchase the founders' unencumbered shares of Liqua Plc ('the unencumbered shares'); and

(vi) The plaintiff to give interest-free advances to the founders which was repayable on demand.

[6] In reliance of the aforesaid representations, the plaintiff: (i) acquired substantial Liqua Plc shares from the open market in order to increase the substantial stake toward obtaining majority shareholding in Liqua Plc, (ii) purchased the unencumbered shares, (iii) gave the founders interest free advances totalling RM1,638,000 ('the advances'), and (iv) nominated himself with Yee Yit Yang and Antony Tan Yee Koon and were subsequently appointed as directors of Liqua Plc and Liqua Marketing with resignation letters by the first defendant and his nominees lodged with the plaintiff.

[7] In order to facilitate the main agreement, the founders negotiated with Mayban Securities to enter into a shares sale agreement as well as a settlement agreement whereby Mayban Securities agreed to allow the charged shares to be redeemed by the plaintiff.

[8] From 28 November 2006 onwards, the founders started reneging from the main agreement by committing the following breaches when the founders and the other defendants:

(i) Removed the plaintiff's nominees as directors and subsequently the plaintiff as Liqua marketing's chief operating officer as authorised signatory;

(ii) Nullified the undated resignation letters;

(iii) Consummated a sham distribution agreement dated 23 February 2007 ('the distribution agreement') between Wynsum Healthy Living (M) Sdn Bhd ('Wynsum') and Liqua Marketing;

(iv) Further obtained substantial financing facilities from HSBC Bank Malaysia Bhd and Kuwait Finance House purportedly for the purchase of Stevico health products worth in excess of RM15,000,000 from Wynsum; and

(v) Conspired and precluding the plaintiff from acquiring the charged shares from Mayban Securities.

[9] In short, the plaintiff's pleaded case is that he was precluded from buying the charged shares by reason of (i) the alleged breach of the main agreement by the founders and (ii) the alleged conspiracy to deprive him of the charged shares. It is pertinent to set out the particulars in support of the claim as pleaded in paras. 26 to 29 of the re-amended statement of claim. In gist, they are:

(i) That the distribution agreement was a fraudulent scheme. The seventh to 13 defendants ('the Alice Group') wrongfully channelled funds available to Liqua Marketing under the same, in order to underwrite the acquisition of the charged shares;

(ii) As a result of the acquisition, the 12th defendant emerged as a substantial shareholder and nominated several directors in the Alice Group to effectively control the board of Liqua Plc and/or Liqua Marketing; and

(iii) The seventh defendant was the mastermind behind the distribution agreement and the share sale agreement between the 13th defendant and Mayban Securities.

Findings Of The High Court

[10] At the trial of the action, only the fifth and sixth defendants elected to give evidence. The remaining defendants elected not to call evidence and entered a plea of no case to answer. The key findings of the learned Judicial Commissioner (JC) are as follows:

(i) The conspiracy to defraud is a proven fact and the issue is which of the 16 defendants were complicit in the conspiracy to defraud the plaintiff;

(ii) The plaintiff's claim is not time-barred as (a) the lapsing of the settlement agreement and the shares sale agreement with Mayban Securities does not entail a breach of the main agreement, and (b) there is no simultaneous accrual of causes of action for breach of contract and tort of conspiracy;

(iii) The existence of the main agreement has been sufficiently proven by the plaintiff because the founders had performed and adhered to the terms of the main agreement and the defendants had admitted to the same by virtue of them taking the point on limitation;

(iv) The distribution agreement was a sham;

(v) The seventh defendant is the mastermind of the conspiracy. The seventh defendant was the alter ego of Wynsum and had orchestrated the distribution agreement as a façade with the other defendants; and

(vi) The plaintiff was defrauded of his contractual right to purchase the charged shares and deprived of the profits and value of the unencumbered shares purchased from the founders.

Submission Of Parties

[11] The first point is that of limitation. The common thread of the arguments articulated by learned counsel for the respective defendants/appellants is this. Limitation accrues from the earliest time when there is a complete cause of action. On the pleaded claim and on the evidence adduced at the trial, the loss of the charged shares, whether as a result of the breach of the main agreement or a result of the alleged conspiracy, occurred when the timeline to conclude the settlement agreement and the share sale agreement with Mayban Securities lapsed on 26 July 2006. As such, the cause of action accrues on this breach and the time to commence the action lapses after six years on 26 July 2012. As the plaintiff's writ was filed on 27 November 2012, the claim is four months out of time and statute barred (s. 6(1) & (2) of the Limitation Act 1953 (LA 1953); *Loh Wai Lian v. Sea Housing Corp Sdn Bhd* [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223; [1984] 2 MLJ 280 (FC); *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663); *Machinchang Skyways Sdn Bhd & Anor v. Lembaga Pembangunan Langkawi & Anor And Another Appeal* [2015] 3 CLJ 775 (CA); *Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] 1 LNS 127; [1978] 2 MLJ 59 (FC); *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157; *Goh Kiang Heng v. Mohd Ali Abd Majid* [1997] 4 CLJ Supp 320).

[12] The second point relates to the allegation of conspiracy. We considered the following submissions of learned counsel for the respective defendants. For the first defendant it was argued that the learned JC failed to appreciate that there was only the oral evidence of the plaintiff and no documentary evidence produced to support the allegation. Therefore, the plaintiff failed to prove conspiracy as the plaintiff merely made bare allegations of misrepresentation by the founders and conspiracy based on his opinions of the documents and his own inferences.

[13] For the seventh to ninth defendants, it was submitted that the overt acts pleaded in respect of the conspiracy took place after the settlement agreement and the shares sale agreement had lapsed on 27 July 2006, ie, between December 2006 and February 2007 (see para. 26(A) & (B) of the re-amended statement of claim). It follows that the overt acts pursuant to the conspiracy must have caused the loss claimed by the plaintiff. However, since the plaintiff had lost his alleged right to the charged shares on 27 July 2006 when the settlement agreement and the shares sale agreement lapsed, the pleaded conspiracy from December 2007 onwards is a non-starter as the plaintiff's loss of the charged shares occurred before the alleged overt acts of conspiracy took place. The plaintiff admitted under cross-examination that there was no allegation of conspiracy prior to December 2006 and there is no evidence to show conspiracy before the agreements lapsed. Therefore, the conspiracy could not have caused the plaintiff's loss, as he never had the charged shares. It was also argued that the learned JC failed to appreciate that the distribution agreement had no nexus to the alleged loss of the charged shares claimed by the plaintiff; which fact was admitted by the plaintiff under cross-examination.

[14] Learned counsel for the sixth and 14th defendants argued that the sixth defendant was never a party and neither did he have knowledge of the deal that was struck between the plaintiff and the founders in 2006. The sixth defendant was only appointed as an independent non-executive director of Liqua Plc on 9 February 2007 and that he also did not have any knowledge of the distribution agreement. There is no evidence to show that the sixth defendant was a co-conspirator together with the other defendants. Learned counsel also argued that there was no case for the sixth and 14th defendants to answer. First, the statement of claim discloses no reasonable cause of action against the sixth and 14th defendants. The claim for breach of representation and return of the advance are only against the founders, and not the sixth and 14th defendants. Second, the pleaded claim for conspiracy is also devoid of a reasonable cause of action as the alleged agreement to injure and overt acts pursuant to the alleged conspiracy took place after the representations by the founders and after the breach by the founders. Further, the loss claimed by the plaintiff as a result of force sale of the charged shares is an event separate, distinct and wholly independent of the alleged conspiracy. At any rate, the loss as pleaded is suffered by Liqua Marketing, a separate legal entity; as such Liqua Marketing is the proper plaintiff to claim such loss and the plaintiff has no *locus standi* to make such claim since the plaintiff suffered no personal loss. Ultimately, there is no evidence to show any nexus between the plaintiff and the 14th defendant.

[15] For the fifth defendant, learned counsel argued that the learned JC failed to appreciate that the allegation that the fifth defendant knew about the founders' offer or representations to the plaintiff is not pleaded and that there is also no evidence to support that allegation. The fifth defendant only joined the board of directors of Liqua Plc and Liqua Marketing after the distribution agreement was entered into. Further, there is no evidence to show that the fifth defendant knew about the distribution agreement or that he was involved in the formation of the same. As such, it was submitted that the learned JC failed to appreciate that there was no evidence of conspiracy or wrongdoing led by the plaintiff against the fifth defendant.

[16] Learned counsel for the 11th defendant took a number of issues. First, there is no case for the 11th defendant to answer. The plaintiff's claim was premised on a conspiracy to injure by unlawful means, mainly *vide* the distribution agreement, perpetuated by the defendants. The claim of conspiracy ought to be dismissed outright as the plaintiff's pleaded case contained no averment that the 11th defendant or the 12th defendant had come to an agreement with the other defendants to further a wrongful purpose against the plaintiff. The failure to aver this fact is fatal; there was no question of the 11th defendant's participation in any conspiracy. Second, as the main agreement was central to the plaintiff's claim, time had started running from 26 July 2006 when the Mayban Securities offer had lapsed, or alternatively, in August 2006 when the plaintiff admitted awareness of a potential claim of an interest over the charged shares when the meeting at Mandarin Oriental Hotel took place. As such, the plaintiff's claim was time-barred under s. 6(1) of the LA 1953 as he had filed the suit on 26 November 2012. Third, the plaintiff's pleaded case was not that the founders and the Alice Group had conspired to lure the plaintiff into the purported main agreement for purposes of their own which were injurious to the plaintiff. Rather, it was the plaintiff's case that as a consequence of the double-dealing between the founders and the Alice Group that he suffered injury and loss: that the impossibility of performance of the main agreement arose at this point from 27 July 2007 onwards when the charged shares were no longer available to the plaintiff. As such, the matters sought to be relied on, in particular the subsequent distribution agreement and the matters surrounding it, were not material at all to the plaintiff's claim.

Decision

[17] On the settled facts and on the pleaded case, it is patently clear that the plaintiff's claim against the defendants is for the tort of conspiracy to procure the breach of the main agreement so as to deny the plaintiff the opportunity of taking up the charged shares. The tort of conspiracy is generally described as 'economic torts'. They form the core of the liabilities for intentional torts in respect of economic interests (*Clerk & Lindsell on Torts* 21st edn, Sweet & Maxwell at p. 1688).

A **Tort Of Conspiracy To Injure**

[18] In law, the tort of conspiracy may take two forms: (i) conspiracy by unlawful means; and (ii) conspiracy by lawful means. A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and
B the act is carried out and the intention achieved. In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. But there is an additional requirement of proving a "predominant purpose" by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved (*Quah Kay Tee v. Ong and Co Pte Ltd*
C [1996] 3 SLR(R) 637 the Singapore Court of Appeal at p. 653).

[19] In essence, the key ingredients to be proven by the plaintiff in order to make out a *prima facie* of the tort of conspiracy are as follows:

(i) an agreement, combination, understanding, or concert between two or
D more persons;

(ii) to commit an act with the intention to injure or cause damage to the plaintiff;

(iii) the act is executed and the plaintiff is injured or suffered damage; and

E (iv) if the act executed is not an unlawful act, then it must also be shown that the intention to cause injury or damage to the plaintiff was the predominant or main purpose.

In *Quah Kay Tee* (*supra*) it was emphasised that a predominant purpose is not the same as intention; that, where lawful means are used, the purpose of the
F combination must be "spiteful and malicious" (*Sorrell v. Smith* [1925] AC 700 at 748) or actuated by "disinterested malevolence" (*Nann v. Raimist* [1931] 255 NY 307, per Cardozo CJ at 319; *McKernan v. Fraser* [1931] 46 CLR 343 at 398). The conspirators' actions must therefore serve none of their own commercial purpose; their predominant purpose must be to do harm to the
G plaintiff.

Whether The Plaintiff's Claim Is Time Barred?

[20] We will now address the first issue relating to limitation. It is trite that the time period for the bringing of an action founded on the tort of conspiracy shall not be after the expiration of six years from the date the cause of action
H accrued: s. 6(1)(a) of the LA 1953. The main contention of the parties relates to when the cause of action accrued. It is also settled law that the period of limitation does not begin to run until there is a complete cause of action, and a cause of action is not complete when all the facts have not happened which are material to be proved to entitle the plaintiff to succeed: Yong J in
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Lim Kean v. Choo Koon [1969] 1 LNS 94; [1970] 1 MLJ 158 at 159. Therefore, a cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to judgment. In this case, the point in time when all the material facts are said to be in existence is crucial; and it is this question of fact which is a serious bone of contention.

[21] The defendants' common stand is that the cause of action arose on the date the settlement agreement and the shares sale agreement with Mayban Securities lapsed on 26 July 2006 or alternatively in August 2006 when the plaintiff became aware of the potential claim at the meeting at Mandarin Oriental Hotel. Therefore, limitation had set in on 26 July 2012; and as the writ was filed on 27 November 2012, the claim was filed out of time. Conversely, the plaintiff's argument is that (i) the learned JC was correct in disregarding the defendants' argument on the ground that limitation was not a pleaded issue, (ii) the breach by the founders occurred on 28 November 2006 when they reneged from the main agreement struck with the plaintiff, (iii) the cause of action is only completed when the plaintiff has suffered loss and damage and not earlier (*Tan Sri Dato' Tajudin Ramli & Anor v. Celcom (Malaysia) Berhad & Anor (No 2)* [2014] 1 LNS 178; [2014] 3 MLJ 842), and (iii) there was a continuing warranty that was given by the founders (through their conduct and in maintaining the *status quo*) until the founders wrote to nullify their resignation letters on 28 November 2006; as such, limitation set in on 27 November 2012. Since the writ which was filed on 27 November 2012, the claim is not time-barred.

[22] The first point relates to the argument that limitation was not pleaded by the defendants. We have perused the respective statements of defence filed by the defendants and find that limitation was indeed pleaded in all instances. As such, the plaintiff's argument is without basis and merit. In the circumstances, the learned JC ought not to have disregarded the defence of limitation raised by the defendants at the trial.

[23] The question to be determined is when time would begin to run from the date on which the cause of action accrues in a tort of conspiracy. According to the pleaded case, the loss which the plaintiff claims is the loss as a result of the forced sale of his Liqua Plc shares, acquired by the plaintiff in the open market under margin financing and the loss of investment in Liqua Plc due to the fall in the share price of Liqua Plc shares.

[24] The tort of conspiracy is complete only if the agreement is carried out into effect so as to damage the plaintiff. As such we agree with the plaintiff's proposition that the cause of action for conspiracy accrues when the damage was suffered (*Tan Sri Dato' Tajudin Ramli (supra)*). In conspiracy, damages are

at large and the court is not over-concerned to require a claimant to prove precise quantification of his losses (*Bullen & Leake & Jacob's Precedents of Pleadings* 16th edn, vol 2, Sweet & Maxwell at pp. 856, 857). However, at what point in time was the damages suffered is a question of fact. It is the plaintiff's case that the founders allowed the settlement agreement and the shares sale agreement to lapse on 27 July 2006 to effectively preclude the plaintiff from acquiring the charged shares. Further, the plaintiff was well aware of that fact when he attended a meeting with the defendants in August 2006 in the Mandarin Oriental Hotel. On the established facts, we agree that the plaintiff's damages was suffered when he was denied the opportunity to purchase the charged shares. Apart from the claim for the repayment of the interest-free advances from the founders, the plaintiff also claimed for general, aggravated and/or exemplary damages. The onus of proof and quantification of the alleged damages is on the plaintiff at the trial of the action. On the aforesaid facts, it is clear that on 27 July 2006 or in August 2006 the complete set of facts which gave rise to a cause of action was present. As such, we are constrained to hold that the plaintiff's claim is time-barred and therefore unsustainable.

[25] Even if the plaintiff's claim is not time-barred, we are of the considered view that the findings of the learned JC that the tort of conspiracy is a proven fact is without evidential foundation and ought to be set aside. We say this for the following reasons.

[26] As this is an appeal by way of re-hearing on the appeal record, it is important to reiterate that the central feature of appellate intervention is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 at p. 800). In this regard, the court is entitled to examine the process of evaluation of the evidence by the trial court. The court must be satisfied that the learned JC who was required to adjudicate upon the dispute must arrive at her decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before her.

[27] It is also settled law that an appellate court will intervene to rectify the error so that injustice is not occasioned. *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149, 154 (CA). Such instances may arise where it is shown that a judgment cannot be explained or justified by the special advantage enjoyed by the trial judge of having seen and heard *viva voce* evidence and an injustice is said to have been caused by any error of the trial judge.

[28] On the evidence as reflected in the appeal record, we are constrained to agree with the defendants' submission that there was no documentary evidence to support the allegation and the only evidence in support was the plaintiff's own oral evidence. Further, the overt acts pleaded in respect of the conspiracy occurred after the settlement agreement and the shares sale agreement had lapsed on 27 July 2006. However, since the plaintiff had lost his alleged right to the charged shares on 27 July 2006, the pleaded conspiracy from December 2007 onwards is a non-starter as the plaintiff's loss of the charged shares occurred before the alleged overt acts of conspiracy took place. It was also admitted by the plaintiff that the distribution agreement had no nexus to the alleged loss of the charged shares claimed by the plaintiff. As such, the alleged conspiracy could not have caused the plaintiff's loss, as he never had the charged shares.

[29] Further, the appeal record discloses no evidence linking the sixth defendant to the alleged conspiracy. We also note that the statement of claim discloses no reasonable cause of action against the sixth and 14th defendants as the pleaded case for breach of representation and return of the advance are only against the founders. Further, the loss claimed by the plaintiff as a result of the forced sale of the charged shares is wholly independent of the alleged conspiracy. At any rate, the loss as pleaded is suffered by Liqua Marketing, a separate legal entity; as such the plaintiff has no *locus standi* to make such claim since the plaintiff suffered no personal loss.

[30] We also find that the allegation that the fifth defendant knew about the founders' offer or representations to the plaintiff is not pleaded. There is also no evidence in the appeal record to support the allegation of conspiracy or wrongdoing against the fifth defendant. In the same vein, the plaintiff's pleaded case contained no averment that the 11th defendant or the 12th defendant had come to an agreement with the other defendants to further a wrongful purpose against the plaintiff. In our view, the omission to aver this fact in issue is fatal.

[31] We also observe that the plaintiff's pleaded case was not that the founders and the Alice Group had conspired to lure the plaintiff into the purported main agreement for purposes of their own which were injurious to the plaintiff. Rather, it was the plaintiff's case that as a consequence of the

double-dealing between the founders and the Alice Group that he suffered injury and loss: that the impossibility of performance of the main agreement arose at this point from 27 July 2006 onwards when the charged shares were no longer available to the plaintiff. As such, the matters sought to be relied on, in particular the subsequent distribution agreement and the matters surrounding it, were not material at all to the plaintiff's claim.

[32] By reason of the foregoing, we are constrained to hold that there was insufficient judicial appreciation by the learned JC of the evidence of circumstances placed before her. The deductions and findings of the learned JC were unwarranted and based on faulty judicial reasoning from the established facts. In our considered view, the evidence produced by the plaintiff fell short of establishing a *prima facie* case on the allegation of conspiracy and the advances made.

[33] It is trite that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s. 101(1) of the Evidence Act 1950). The burden of proof on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect, it is the plaintiff who must establish his case. If he fails to do so, it will not do for the plaintiff to say that the defendants have not established their defence (*Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA; s. 102 Evidence Act 1950).

[34] As the plaintiff has failed to make out a *prima facie* case, the plaintiff's claim was doomed to fail at the close of the plaintiff's case. It matters not that some of the defendants have elected not to give evidence in their defence. The burden of proof did not shift to the defendants. There was no evidential burden on the defendants to discharge.

[35] For the foregoing reasons, we held that the plaintiff's claim is statute barred by limitation and that on the totality of the evidence on record, the tort of conspiracy has not been established by the plaintiff. The defendants' appeals are therefore allowed with costs. The plaintiff's cross appeals are also dismissed with costs. The decision of the High Court is set aside. The plaintiff's claim against the defendants is dismissed.