

**Syarikat Logistik Petikemas Sdn Bhd**

1

v

**Maruzen SH Logistics Sdn Bhd**

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**High Court, Johor Bahru – Civil Suit No. JA-22NCvC-201-11/2019**  
 Evrol Mariette Peters JC

July 14, 2020

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*Civil procedure – Striking out – Writ and statement of claim – Claim for damages premised on negligent misrepresentation and breach of duty, based on purported business relationship between the parties – Failure to plead fundamental and material facts to support cause of action – Expression of intention by defendant to rent and/or purchase plaintiff’s warehouse – Whether tantamount to misrepresentation – Whether gave rise to compulsion or obligation on part of defendant to enter contract with plaintiff – Whether basis of negligent misrepresentation established*

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The defendant had sometime in March 2018 approached the plaintiff and expressed its interest to enter into a tenancy of the plaintiff’s warehouse and the possibility of purchasing the same. The defendant however in May 2019 changed its mind whereupon the plaintiff commenced proceedings against the defendant for failing to enter into a contract with it. The claim was premised on negligent misrepresentation and/or breach of duty of care under the purported business relationship between the parties and as a result of which the plaintiff allegedly incurred losses namely, the loss of rental and damages consequent to the defendant’s failure to proceed with the negotiations.

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The defendant in response applied to strike out the claim on the grounds that no contract had been entered into between the parties and as no evidence as to the existence of any such contract was adduced. It was further contended that the absence of any such contract is indicated by the contemporaneous documents between the parties.

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**Issue**

Whether the plaintiff’s statement of claim is defective for failure to plead fundamental and material facts.

1 **Held**, allowing the application with costs of RM5,000 subject to allocatur

1. It is vital to establish that there was an underlying relationship between  
the parties i.e. where one party relies on the other and where one is in a  
5 dominant position which requires some fiduciary relationship. Even if  
there was a business relationship between the parties, that in itself is  
insufficient to give rise to a fiduciary relationship such as that between  
a solicitor and client. As was held in *New Straits Times (Malaysia) Bhd v*  
10 *Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, the court is  
bound to peruse only the pleadings i.e. the statement of claim, to  
conclude if the same discloses a reasonable cause of action. In this  
regard, there was absent from the plaintiff's statement of claim, any  
15 clear and precise pleading of any special relationship or skill on the  
part of the defendant so as to justify a professional duty of care to the  
plaintiff. No reference at all was made therein to "fiduciary duty" which  
is the essence of any such alleged duty. [see p 414 para 13 - p 415 para 14;  
20 p 415 para 16 - p 416 para 17; p 417 para 19]

2. The alleged misrepresentation i.e. that the defendant had intended to  
purchase and/or rent the plaintiff's warehouse, is merely an expression  
25 of the defendant's intention that preceded the negotiations that  
followed, and does not amount to a misrepresentation. It follows  
therefore that there could not have been any negligent  
misrepresentation as alleged. On the facts and in the circumstances, the  
30 plaintiff's claim is defective for failure to plead fundamental and  
material facts in order to form a reasonable cause of action against the  
defendant. [see p 417 paras 20-21; p 417 para 24]

35 **Cases referred to by the court**

*Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd*  
[1993] 2 AMR 1969; [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (ref)  
40 *CIMB Bank Bhd v Goh Ah Thiam & Anor (and Another Appeal)* [2018] AMEJ  
1659; [2018] 1 LNS 1662, CA (ref)  
*Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465, HL (UK) (ref)  
*Ketua Pengarah Jabatan Kerja Raya v Strongkota Development Sdn Bhd (and*  
*Another Appeal)* [2016] 2 AMR 413; [2016] 3 CLJ 741, CA (ref)  
*Metroplex Development Sdn Bhd v Mohd Mastana b Makaddas & Anor* [1995] 2  
MLJ 276, HC (ref)  
*Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1966] 1 LNS 109, HC (ref)  
*New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1  
MLJ 226, FC (foll)

<i>Raja Zainal Abidin b Raja Haji Tachik &amp; 3 Ors v British-American Life &amp; General Insurance Bhd</i> [1993] 2 AMR 2073; [1993] 3 MLJ 16, SC (ref)	1
<i>See Thong &amp; Anor v Saw Beng Chong</i> [2013] 3 AMR 385; [2013] 3 MLJ 235, CA (ref)	
<i>Seow Hoon Hin v Hartalega Holdings Bhd &amp; 4 Ors</i> [2019] AMEJ 0602; [2019] 1 LNS 779, CA (ref)	5
<i>Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur &amp; Anor</i> [2016] 2 AMR 795; [2016] 3 CLJ 1, FC (foll)	
<i>Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim</i> [2003] 4 AMR 460; [2003] 3 MLJ 460, CA (ref)	10
<i>Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (dahulu dikenali sebagai Alcatel Network Systems (M) Sdn Bhd)</i> [2014] 1 AMR 348; [2014] 3 MLJ 785, FC (foll)	15
<i>Suppulechimi a/p Karpaya v Palmco Bina Sdn Bhd</i> [1994] 2 AMR 1191; [1994] 2 CLJ 561, HC (ref)	
<i>Tetuan Abdul Aziz &amp; Associates v Sunshine Haven Sdn Bhd</i> [2016] 4 AMR 357; [2016] 9 CLJ 385, CA (ref)	20
<i>Tractors Malaysia Bhd v Tio Chee Hing</i> [1975] 2 MLJ 1, PC (ref)	
<b>Legislation referred to by the court</b>	25
<i>Malaysia</i>	
Rules of Court 2012, Order 18 r 19(1), (1)(a), (b), (d)	
<i>KH Choo</i> (KH Choo & Co) for plaintiff	30
<i>Justin Voon Tiam Yu and Christina Chin Tee Shan</i> (Justin Voon Chooi & Wing) for defendant	
<i>Judgment received: July 23, 2020</i>	35
<b>Evrol Mariette Peters JC</b>	
<b>This application</b>	40
[1] This is the defendant's application ("this application") in encl 6 to strike out the plaintiff's writ and statement of claim dated November 20, 2019 pursuant to Order 18 r 19(1)(a) or (b) or (d) of the Rules of Court 2012 ("Rules of Court").	
[2] I allowed the application and the following are my reasons:	
<b>The brief facts</b>	
[3] The plaintiff and defendant are companies incorporated respectively in Malaysia. Sometime in March 2018, the defendant visited the plaintiff and its	

1 *Keluli Warehouse* to discuss the facilities of the warehouse and logistics  
services offered by the plaintiff. Correspondence was exchanged and the  
defendant expressed its intention to enter into a tenancy of the *Keluli*  
Warehouse and even the possibility of purchasing it, and asked if vacant  
5 possession of it could be given by August 1, 2019.

[4] However in May 2019, the defendant changed its mind. The plaintiff then  
issued a letter of demand dated June 20, 2019 claiming for MYR2.24 million  
10 which, it averred, was the total amount of one year's tenancy and damages in  
the amount of MYR2 million for the loss of business income incurred by the  
plaintiff.

#### 15 **The plaintiff's case**

[5] The plaintiff's claim against the defendant was based on, amongst others,  
failing to enter into a contract with the plaintiff to rent the *Keluli Warehouse*  
from the plaintiff, and the alleged:

- 20 a) Negligent misrepresentation; and/or
- b) Breach of duty of care towards the plaintiff under the purported  
business relationship between both parties.

25 [6] The plaintiff relied on the purported negligent misrepresentation, and  
averred that there was a special relationship between the parties, and that the  
defendant had a duty of care towards the plaintiff pursuant to such  
30 relationship. The plaintiff further claimed that as a result of the breach of that  
duty, losses were incurred as a result of the defendant's failure to enter into a  
contract with the plaintiff to rent the *Keluli Warehouse* from the plaintiff.

#### 35 **The defendant's case**

[7] The defendant's application to strike out was based on the following:

- 40 (a) That there was no contract formed between the parties that could  
sustain the plaintiff's claim;
- (b) That no document whatsoever was produced by the plaintiff to  
indicate the existence of any form of agreement reached between both  
parties; and
- (c) That the contemporaneous documents between parties indicated the  
absence of a contract between parties.

**The law**

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[8] The starting point of reference in this application is Order 18 r 19(1) of the Rules of Court, which reads as follows:

Order 18 – *Pleadings*

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Rule 19. *Striking out pleadings and endorsements*

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

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(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious:

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(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

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[9] The law on striking out is trite and has been encapsulated by the Supreme Court in *Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd* [1993] 2 AMR 1969; [1993] 3 MLJ 36; [1993] 4 CLJ 7, where it was distilled by Mohamed Dzaidin SCJ (as he then was) in the following words:

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The principles upon which the court acts in exercising its power under any of the four limbs of Order 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson Heywood & Clark Ltd* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v London & North Western Railway* [1892] 3 Ch 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33 r 3 (which is in pari materia with our Order 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*) (supra). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

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[Emphasis added.]

1 [10] I am guided also by the Federal Court in *Seruan Gemilang Makmur Sdn*  
*Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 2 AMR 795; [2016]  
3 CLJ 1, where it was stated by Ramly Ali FCJ:

5 The principles for striking out pleadings pursuant to Order 18 r 19 of the ROC are  
well settled. It is only in a plain and obvious case that recourse should be had to  
the summary process under this rule; and this summary process can only be  
adopted when it can clearly be seen that a claim on the face of it is obviously  
10 unsustainable (see *Bandar Builder* (supra), *Hubbuck & Sons Ltd v Wilkinson*,  
*Heywood & Clard Ltd* [1889] 1 QB 86; *Attorney General of the Duchy of Lancaster v*  
*London and North Western Railway Company* [1892] 3 Ch 274).

15 The test for striking out application under Order 18 r 19 of the ROC as adopted by  
the Supreme Court in *Bandar Builder* (supra) are inter alia as follows:

- 15 a) it is only in plain and obvious cases that recourse should be had to the  
summary process under the rule;
- 20 b) this summary procedure can only be adopted when it can be clearly seen  
that a claim or answer is on the face of it "obviously unsustainable"  
(emphasis added);
- 25 c) it cannot be exercised by a minute examination of the documents and facts  
of the case in order to see whether the party has a cause of action or a  
defence;
- 30 d) if there is a point of law which requires serious discussion, an objection  
should be taken on the pleadings and the point set down for argument  
under Order 33 r 3 of the ROC; and
- 35 e) the court must be satisfied that there is no reasonable cause of action or that  
the claims are frivolous or vexatious or that defences raised are not  
arguable.

40 [11] The question that arises is what do these phrases in Order 18 r 19(1)  
mean? "Scandalous" generally refers to matters which improperly cast a  
derogatory light on someone, usually a party to an action with respect to  
moral character or uses repulsive language; "frivolous or vexatious"  
generally refers to a groundless action, with no prospect of success, often  
raised to embarrass or annoy the other party to an action; and "abuse of the  
process of the court" generally refers to situations where the court's process is  
used for an unlawful object and not for the actual purpose intended for  
justice: per Ramly Ali JCA (as he then was) in *See Thong & Anor v Saw Beng*  
*Chong* [2013] 3 AMR 385; [2013] 3 MLJ 235.

[12] It is, therefore, the duty of the court to scrutinise, with a fine-tooth comb,  
the evidence and the merits of the case to determine whether the action was  
bound to fail. This principle was set out by the Privy Council in *Tractors*

*Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, and the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors v British-American Life & General Insurance Bhd* [1993] 2 AMR 2073; [1993] 3 MLJ 16. 1

## Contentions and findings 5

### *Whether there was a special relationship between the parties*

[13] Since the plaintiff averred that there was negligent misrepresentation on the part of the defendant, what is vital to establish at this juncture is an underlying relationship between parties, where one party relies on the other and where one is in a dominant position which requires some fiduciary relationship. This is in line with the principle in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 (*Hedley Byrne*) which has been assimilated into Malaysian jurisprudence via a plethora of cases including *Seow Hoon Hin v Hartalega Holdings Berhad & 4 Ors* [2019] AMEJ 0602; [2019] 1 LNS 779, *Ketua Pengarah Jabatan Kerja Raya v Strongkota Development Sdn Bhd (and Another Appeal)* [2016] 2 AMR 413; [2016] 3 CLJ 741, and *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 4 AMR 460; [2003] 3 MLJ 460. In *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim*, it was stated by Gopal Sri Ram JCA: 10 15 20

If the misrepresentation was made negligently, the remedy of the representee lies in damages in the tort of negligence *under the assumption of responsibility and reliance doctrine* laid down in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465. In such a case, *the representee must plead and prove a special relationship giving rise to a duty of care as well as the other elements that go to constitute the tort of negligence*. So far as the relevance of the tort in relation to pre-contractual and contractual statement is concerned, we would quote with approval the following passage from Visu Sinnadurai on the *Law of Contract* (3rd Edn) at p 243: 25 30

"Under English Law, until the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller and Partners Ltd*, innocent misrepresentation included negligent misrepresentation. However since *Hedley Byrne* and the coming into force of the Misrepresentation Act 1967, there appears now to be a distinction between negligent misrepresentation and innocent misrepresentation. Negligent misrepresentation is generally confined to cases where a duty is imposed to take care in making statement. *Such a duty may arise under a contract, where the parties stand in a fiduciary relationship: Nocton v Ashburton* [1994] AC 932 or out of a 'special relationship': *Hedley Byrne*. Where a special relationship exists, a negligent misstatement may not only be a breach of contractual warranty, but also an actionable tort as a breach of the duty which exists throughout pre-contractual negotiations until making of the final contract. In *Selangor United Rubber Estates Ltd v Cradock & Ors* [1965] 1 Ch 896 the court held that *where a plaintiff alleged a breach of duty arising from any given relationship, he has to specify with precision the relationship under which the duty arose*: in this case it was 35 40

1 not clear whether the plaintiff was alleging the ordinary relationship of banker  
and customer or some other special relationship."

[Emphasis added.]

5 [14] Furthermore even if there was a business relationship between the  
parties, that by itself did not give rise to a fiduciary relationship, such as  
between a solicitor and client (*CIMB Bank Berhad v Goh Ah Thiam & Anor (and*  
10 *Another Appeal)* [2018] AMEJ 1659; [2018] 1 LNS 1662; *Tetuan Abdul Aziz &*  
*Associates v Sunshine Haven Sdn Bhd* [2016] 4 AMR 357; [2016] 9 CLJ 385) or  
any kind of relationship of proximity between the plaintiff and the  
defendant.

15 [15] In the statement of claim the plaintiff relies on the "duty of care" and  
"business relationship" in the following paragraphs:

20 29. Defendan mempunyai tanggungjawab ("*duty of care*") di dalam "*business*  
*relationship*" terhadap pernyataan dan/atau maklumat yang diberikan  
kepada Plaintiff.

25 30. Di dalam suatu "*business relationship*" adalah tidak dapat dinafikan bahawa  
Defendan bertanggungjawab akan kenyataan dan/atau representasi  
yang diberikan kepada Plaintiff kerana Plaintiff sememangnya akan  
mempercayai dan/atau bertindak berdasarkan representasi tersebut.

30 34. Plaintiff telah bertindak mengikut representasi yang diberikan oleh  
Defendan berdasarkan "*business relationship*" yang wujud di antara Plaintiff  
dan Defendan.

35 35. Oleh yang demikian, Defendan sememangnya dan sewajarnya mempunyai  
tanggungjawab ("*duty of care*") terhadap Plaintiff atas pernyataan  
dan/atau representasi yang diberikan berdasarkan kepada kewujudan  
"*business relationship*" antara kedua-dua pihak.

[Emphasis added.]

40 [16] There was no reference whatsoever in the statement of claim to  
"fiduciary duty", which is the very essence of any such alleged duty; or any  
kind of relationship of proximity between the plaintiff and the defendant.

[17] At this juncture, I am guided by *New Straits Times (Malaysia) Bhd v*  
*Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 for the principle that  
the court is bound to peruse only the pleadings, that is, the statement of  
claim, to conclude if it disclosed no reasonable cause of action. Reference is  
also made to *Suppulechimi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 AMR  
1191; [1994] 2 CLJ 561, and *Mooney & Ors v Peat, Marwick, Mitchell & Company*



*& Anor* [1966] 1 LNS 109 where in the latter case, it was stated by Raja Azlan Shah (as he then was): 1

... it is firmly established that the power exercisable under r 4 "is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for": see the judgment of Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 at 91. Where the situation arises, *the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true*, and it is only on that assumption that any statable case can be made for this application: see *Peck v Russell* [1923] 4 FMS LR 32 at 34. *The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action*. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler v Holder* [1886] 54 LT 298. 5 10 15

[Emphasis added.]

[18] I also find instructive the observations of Hasan Lah FCJ in the Federal Court case of *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (dahulu dikenali sebagai Alcatel Network Systems (M) Sdn Bhd)* [2014] 1 AMR 348; [2014] 3 MLJ 785, where his Lordship stated: 20

[47] In the instant case *the business relationship between the plaintiff and the defendant did not fall under the accepted traditional categories of fiduciary relationship*. Even if we were to apply the flexible approach to the circumstances of the case we are of the view that such fiduciary relationship did not exist in the case. *This is because commercial transactions often do not give rise to fiduciary duties because they do not meet the criteria for characterisation as fiduciary in nature* (see *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (Matter No. S309/2009)* [2010] HCA 19, High Court of Australia). We also find it useful to refer to the judgment of the High Court of Australia in *Hospital Products Limited v United States Surgical Corporation & Ors* at p 69 where Gibbs CJ said: 25 30 35

"On the other hand, *the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this court as important, if not decisive, in indicating that no fiduciary duty arose*: see *Jones v Bouffier* (1911) 12 CLR 579; *Dowsett v Reid* (1912) 15 CLR 695; *Para Wirra Gold & Bismuth Mining Syndicate NL v Mather* [1934] 51 CLR 582; *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342. A similar view was taken in Canada in *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639." 40

[48] The circumstances of the relationship in the instant case could not, in our view, give rise to a relationship of trust and confidence. *It was not appropriate to expect a commercial party to subordinate its own interests to another commercial party as they had dealt with each other at arm's length and on equal footing*.

[Emphasis added.]

1 [19] On that note, it is also my finding that the plaintiff had not pleaded with  
precision or clarity, any "special relationship" or "skills" on the part of the  
defendant to justify a professional duty of care to the plaintiff.

5 *Whether the defendant had made any misrepresentation*

10 [20] The "misrepresentation" alleged by the plaintiff is that the defendant  
had intended to purchase and/or rent the *Keluli Warehouse*. In my view, this  
did not amount to a misrepresentation, but an expression of the defendant's  
intention that preceded the negotiations that followed. Harboursing or  
expressing an intention did not give rise to any compulsion or obligation on  
the part of the defendant to enter into a contract with the plaintiff, bearing in  
15 mind that the negotiations were in contemplation of an arm's length  
transaction.

[21] Accordingly, since it was my finding that there was no such  
misrepresentation, it follows that there could not have been any negligent  
20 misrepresentation.

*Whether the defendant's plea of legal consequences is sufficient*

25 [22] The plaintiff had claimed for a purported 12 months' rental amounting  
to MYR2,240,000, and damages in the amount of MYR2 million, respectively,  
as the consequence of the defendant's purported failure to proceed with the  
negotiations.

30 [23] It is trite that it is not sufficient to plead the legal consequences without  
setting out in the pleadings the facts which give rise to that claim, or which  
impose on the defendant the particular duty or liability. Reference on this  
point may be made to *Metroplex Development Sdn Bhd v Mohd Mastana bin*  
35 *Makaddas & Anor* [1995] 2 MLJ 276.

[24] In the upshot, the plaintiff had failed to plead fundamental and material  
facts in order to form a reasonable cause of action against the defendant, and  
40 this, in turn, rendered the plaintiff's statement of claim defective, and  
eventually fatal to its claim.

**Conclusion**

[25] In the upshot, based on the aforesaid reasons, and after careful  
consideration of all the evidence before this court, and written and oral  
submissions of counsel for both parties, this application is allowed with costs  
in the sum of MYR5,000 (subject to allocatur fees).