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**SHVT BUILDING SOLUTION SDN BHD**  
**v.**  
**TAN KENG MENG & ORS**

High Court Malaya, Shah Alam  
Elaine Yap Chin Gaik JC  
[Civil Suit No: BA-22NCC-129-10/2023]  
28 October 2025

**Case(s) referred to:**

*Biggin & Co Ltd. v. Permanite, Ltd., Berry Wiggins & Co Ltd.* [1951] 1 KB 422, 438 (refd)  
*Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 4 MLRA 180; [2016] 3 MLJ 479; [2016] 6 CLJ 666 (refd)  
*Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2007] 2 MLRA 448; [2008] 2 MLJ 856; [2007] 6 CLJ 613 (refd)  
*Lai Fee & Anor v. Wong Yu Vee & Ors* [2023] 3 MLRA 495; [2023] 3 MLJ 503; [2023] 4 CLJ 1 (refd)  
*Tay Keong Kok & Ors v. Eastmont Sdn Bhd & ANOTHER APPEAL* [2025] 1 MLRA 85; [2024] 5 MLJ 683; [2025] 1 CLJ 583 (refd)

**Legislation referred to:**

Companies Act 1965, s 304  
Companies Act 2016, ss 472, 528, 540(1)

**Counsel:**

*For the plaintiff: Nicholas Hor Suen Pin (together with Nik Aliya Natasha Rahmat); M/s Nicholas Hor & Co*  
*For the defendant: Christine Toh (together with Ryan Cheong); M/s Christine Toh & Co*

*[Allowing the Plaintiff's claim.]*

**JUDGMENT**

**Elaine Yap Chin Gaik JC:**

**Introduction**

[1] Plaintiff is a contractor in the construction industry and a creditor of MYG Construction Sdn Bhd (in liquidation) ("MYG"). The Plaintiff seeks to recover a debt of RM1,815,924.20 ("Alleged Debt") owed to it by MYG, from the director of MYG personally, MYG's alleged preferred creditors and his alleged co-conspirators. The pleaded causes of action are fraudulent trading under s 540 of the Companies Act 2016 ("CA") and conspiracy.

**Background Facts**



[2] In 2021, MYG appointed the plaintiff as a subcontractor for two (2) construction projects, namely upgrading works along the Cheras-Kajang Expressway ("CKE Project") and the construction of a bridge from Youcity to the Grand Saga Highway ("Youcity Project"). The Alleged Debt is said to comprise unpaid progress claims (certified and uncertified) under these projects.

[3] On 17 August 2022, the plaintiff filed Companies (Winding Up) Petition No.: BA-28NCC-460-08/2022 after MYG failed to pay the Alleged Debt ("Winding Up Petition"). It was heavily opposed by MYG. It unsuccessfully applied for a Fortuna injunction to stay the Winding Up Petition pending an application to strike it out at the Winding-up Court. Both applications failed.

[4] On 16 February 2023, MYG was wound up ("Winding Up Order") and a private liquidator, Wong Cham Mew, was appointed. Upon taking office, the liquidator discovered the disposal of 23 vehicles and construction machines belonging to MYG to the 3rd Defendant ("Disposal of Vehicles"), and fund transfers out of MYG ("Transfer of Funds") effected within six (6) months of presentation of the Winding Up Petition.

[5] There is a pending action filed by the liquidator of MYG against the 3rd Defendant in Shah Alam High Court Suit No.: BA-22NCC-83-05/2025 in relation to the Disposal of Vehicles.

### **Analysis And Findings**

[6] There is no doubt that the plaintiff is a creditor of MYG. MYG was wound up on the plaintiff's petition in a contested winding up proceeding. However, neither the liquidator nor any court has previously adjudicated on the quantum of the Alleged Debt. As there is no adjudicated Proof of Debt in the winding up, this is dealt with at the end of this judgment on remedies.

[7] The first order of business is to establish the defendants' liability to pay the Alleged Debt at all. In this context, the pleaded acts of wrongdoing against the Defendants are essentially the Disposal of Vehicles and the Transfer of Funds. The question in this action is whether these transactions amount to fraudulent trading within the meaning of s 540 of the CA and/or a conspiracy to defraud by the defendants.

### **Fraudulent Trading**

[8] > Section 540(1) of the CA provides as follows:

"If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that



any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs. "

[9] Recently, in *Tay Keong Kok & Ors v. Eastmont Sdn Bhd & ANOTHER APPEAL* [2025] 1 MLRA 85; [2024] 5 MLJ 683; [2025] 1 CLJ 583 ("*Tay Keong Kok*"), the Court of Appeal confirmed the position made clear in *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 4 MLRA 180; [2016] 3 MLJ 479; [2016] 6 CLJ 666 ("*Chin Chee Keong*") that a s 540 CA fraudulent trading action may be taken against the alleged wrongdoers as a separate in personam claim like the present.

[10] The applicable principles when invoking s 540 of the CA have been set out by the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* [2023] 3 MLRA 495; [2023] 3 MLJ 503; [2023] 4 CLJ 1 ("*Lai Fee*") and need not be reproduced here. It is a civil cause of action and a statutory offence that stands as an exception to the corporate personality doctrine. Its ingredients are:

- a) That the business of the company has been carried out with the intent to defraud creditors or for any fraudulent purpose; and
- b) The defendants were knowingly a party to the carrying on of the business in that manner.

[11] The burden of proof in civil cases is on the plaintiff to establish fraudulent trading on a balance of probabilities. Fraud here must mean actual fraud i.e. dishonesty of some sort. It is useful to highlight the summary of principles from *Lai Fee* on this point: "(vii) in order to establish dishonesty under s 304 of the Companies Act 1965 [now s 540 of the CA], it must be shown firstly that what was done was dishonest according to the ordinary standard of reasonable and honest people, and secondly that the actor himself must have realized that the act was by those standards dishonest (Tradewinds)"

[12] A classic formulation of fraudulent trading is when the company carries on business and incurs debts with the knowledge that there is no reasonable prospect of the creditors ever receiving payment for those debts. As highlighted in *Lai Fee*, it has also been interpreted to include an intent to deprive creditors of an economic advantage or inflict upon them some economic loss. Here, 'intent' is used in the sense that it is the natural or foreseen consequences of actions taken.

[13] In *Tay Keong Kok*, the Court of Appeal held that "carrying on business with intent to defraud" is not limited to its classic formulation, finding that the deliberate orchestration of the company's winding up in that case met the criteria:

"[85] This is also because **the word "business" in s 540 of the CA 2016 must be given a broad interpretation. It is by no means limited to the business actually undertaken by the company in the ordinary course of**



its commercial existence or in the usual nature of its business operations, such as, in this case, on the part of Mega Planner, property development and construction. It is also not wrong to say that a case under s 540 can be made out even if the company has ceased its business operations at the time of the commission of fraudulent trading.

...

[87] Whilst carrying on the company's business would involve the operations necessary for the functioning of the company, it would also extend to the collection of assets acquired in the course of business and distribution of the proceeds in reduction of business liabilities (see *Re Sarflax Ltd* [1979] 1 All ER 529). Regardless of the status of a company's business operations, the statutory phrase "the business of the company has been carried on with intent to defraud the creditors" would thus be readily engaged whenever the persons in question, with intent to defraud any creditor, deal with the assets and liabilities of the company, inclusive of the company's contractual rights over its assets and liabilities.

[Emphasis Added]

[14] Based on the above authorities, the essence of s 540 of the CA is the prohibition against any person from carrying on business to defraud the company's creditors or for any fraudulent purpose, and it includes actions that have the natural and foreseen consequences of avoiding payment of debts incurred, as the dishonest actor must know to be the case.

[15] The Plaintiff pleaded that the Disposal of the Vehicles and Transfer of Funds are such actions to defraud the plaintiff as a creditor. To this end, substantial trial time was devoted to demonstrating that the transactions fall foul of s 528 of the CA, the law against preferring certain creditors during the 'twilight period' of six (6) months preceding the presentation of a winding up petition. Relevant subsections read as follows:

"(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which is unable to pay its debts, as the debts become due, from its own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors in the event of the company being wound up on a winding up petition presented within six months from the date of making or doing the same and every such act shall be deemed fraudulent and void.

...

(4) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company in



contravention of this section shall be void **except if it is in favour of any person dealing with the company for valuable consideration and without any actual notice of the contravention.**

...

(6) For the purposes of this section, "notice" includes knowledge of inability to pay a debt by the company or any winding up proceedings against the company or of the facts sufficient to indicate to the person dealing with the wound up company."

[Emphasis Added]

[16] If the Disposal of Vehicles and Transfer of Funds took place before the presentation of the Winding Up Petition and prefer other creditors over the Plaintiff, the law deems that they are fraudulent unless transacted for valuable consideration without actual notice of the contravention. To attach personal liability under s 540 of the CA, the Plaintiff must further prove actual fraud by the persons involved.

**(i) Defendants' Knowledge**

[17] It is convenient to deal with the state of the defendants' knowledge about the impugned transactions first. The 1st Defendant, testified at the trial as DW1. The 2nd Defendant testified as DW2.

[18] The 1st Defendant was the sole director and a substantial shareholder of MYG at all material times, with one Tan Che holding a minority 4.2% shareholding. The 2nd Defendant was employed by MYG as an Accounts Assistant until July 2022. She was married to the 1st Defendant at all material times until sometime in September 2022 when they claim to have divorced.

[19] The 1st Defendant was also the sole director of the 3rd Defendant until 1 July 2022, with said Tan Che and the 2nd Defendant holding shares. The 2nd Defendant then replaced the 1st Defendant as the sole director of the 3rd Defendant on 1 July 2022 and acquired all the shares of Tan Che on 23 April 2023 to become the sole shareholder of the 3rd Defendant.

[20] The 1st and 2nd Defendants were the only human actors involved in effecting the Disposal of Vehicles. The 3rd Defendant acquired the vehicles in the Disposal of Vehicles and the knowledge of the 1st and 2nd Defendants may be imputed to the 3rd Defendant. Additionally, all three (3) defendants are alleged creditors who received payments in the majority of the Transfer of Funds.

[21] As such, this Court has no difficulty finding that the defendants participated in the Disposal of Vehicles and the Transfer of Funds, knowing of the Alleged Debt and the plaintiff's Winding Up Petition.

**(ii) Defendants' Intention**



[22] The bigger question is whether, by the ordinary standard of reasonable and honest people, the defendants were aware that the natural and foreseen consequences of the Disposal of Vehicles and Transfer of Funds is that MYG will be able to avoid paying the Alleged Debt to the plaintiff.

#### **Disposal Of Vehicles**

[23] The facts established from the documentary evidence adduced at the trial are that on 15 May 2022, MYG documented in two (2) letters to the 3rd Defendant, its agreement to sell 20 machines to the 3rd Defendant for RM83,087.00 and an excavator and two (2) vehicles for RM3.00. By a letter of the same date, the 3rd Defendant agreed. The content of the correspondence was substantially identical.

[24] On 15 June 2022, the 1st Defendant approved a Directors' Resolution declaring his direct interest in the disposals of the vehicles and machinery, and a series of Directors' and Members' Resolutions to approve the disposals of some of the items. Payment of RM83,090.00 in two (2) instalments was made by the 3rd Defendant on 8 September 2022.

[25] The significance of this is self-explanatory from the list of machines and vehicles and its sale price as set out below:



	Equipment	Date of Purchase	Life as at 15.6.2022	Original Cost (RM)	Net Book Value (RM)
(a)	Boring Machine	30.9.2016	More than 5 years	111,870.09	2
(b)	Topcon AT-84 Auto-Level	15.10.2016	More than 5 years	1,200	1
(c)	Kyusen Concrete Mixer	1.6.2017	More than 5 years	4,600	1
(d)	Kyusen Depos Pneumatic Breaker	5.6.2017	More than 5 years	2,200	1
(e)	Ah-Versa-Matic Pump	30.6.2017	5 years	3,400	1
(f)	Laku-Vibro Air	4.10.2017	5 years	2,200	420

	Equipment	Date of Purchase	Life as at 15.6.2022	Original Cost (RM)	Net Book Value (RM)
(g)	Kyusen-Wikyno Diesel Engine	14.12.2017	5 years	4,200	840
(h)	Gemipite-Grout Mixer	11.7.2017	5 years	17,800	3,400
(i)	Gemipite-Grout Mixer	4.12.2018	3.5 years	17,800	6,800
(j)	Civil Soil Nail Portable Drilling Machine	30.3.2019	3.2 years	118,000	47,200
(k)	Kyusen-Coring Machine	4.4.2019	3.3 years	3,500	1,400
(l)	Kyusen-Power Cutter	13.8.2019	2.3 years	4,600	2,760
(m)	Kyusen-Puncher Pump c/o Robin EK20	28.10.2020	1.7 years	1,200	960
(n)	Kyusen-Atlas Copco Portable Generator Model P400	28.10.2020	1.7 years	3,400	2,720
(o)	Kyusen-Hisaki Plate Compactor Model YF80	28.10.2020	1.7 years	1,200	1,200
(p)	Kyusen-Hisaki Concrete Cutter c/o GA390 Honda Engine	29.6.2021	Estimated 1 year	3,700	2,980
(q)	New 888 Brand ARC 2000E-1 Inverter Welding Machine	6.9.2021	Estimated 1 year	400	320
(r)	SM Drilltech-Hammer	23.1.2017	More than 5 years	14,000	1
(s)	Majumtra-Hammer	11.7.2018	3.8 years	50,000	10,000

	Equipment	Date of Purchase	Life as at 15.6.2022	Original Cost (RM)	Net Book Value (RM)
(t)	SM Drilltech-Hammer	28.6.2018	3.9 years	10,500	2,100
(u)	Excavator AH53542	13.1.2016	More than 5 years	90,000	1
(v)	Toyota Hilux CD5 2628	30.11.2015	More than 5 years	91,511.08	1
(w)	Toyota Hilux PMT 6679	19.10.2016	More than 5 years	84,548.04	1
Total Net Book Value (RM)					83,096.00

[26] To prove the original purchase price and age of these vehicles and machinery, the defendant sought to tender a bundle of invoices marked at the trial as IDD1 as proof of their purchase between 2015 and 2021. The Plaintiff objected to the admissibility of these documents at the trial, although the same documents were already adduced in the defendant's affidavit in an earlier claw-back action\* filed by the liquidator against the 3rd Defendant in Part B of another trial bundle.





\* Originating Summons No BA-24NCC-51-05/2023 was apparently withdrawn with liberty to refile.

[27] As DW2 deposed in the affidavit exhibiting the documents and repeated at this trial, she had procured photocopies of these documents from the originals at the liquidator's office. Since there is no allegation of fabrication of evidence for the purposes of litigation or any challenge to DW2's evidence of how she procured the documents, IDD1 is converted to D1 for consideration.

[28] On reviewing D1, it is noted that for some machines, the purchase prices listed by the defendant in the table above were understated and did not account for interest, cost of parts, import charges and other taxes. For example, the boring machine had an initial cost of about double the price stated in the table. Apart from these inconsistencies, the content of the table is substantially proved by D1, the content of which was unchallenged.

[29] Relative to D1, the defendant argued that the sale price was based on the net book value of the assets after depreciation, and that the vehicles and machinery were therefore not sold at undervalue. However, it has to be said that the information in D1 did not particularly help the defendants, as this is not a claw-back action but a fraudulent trading action premised on a sale at undervalue.

[30] This Court finds that the "sale" is obviously not an arm's-length transaction and is not persuaded that the defendants honestly entertained the view that the assets of MYG were being sold for valuable consideration. It is improbable that in respect of functioning construction machinery and vehicles, some of them would be valued by MYG in a genuine sale at less than their scrap value. Case in point are the RM2.00 boring machine and RM1.00 Toyota Hilux.

[31] Further, as a matter of law, s 528(5) of the CA defines "valuable consideration" as:

"a consideration of fair and reasonable money value in relation to:

(a) the value of the property conveyed, assigned or transferred;  
or

(b) the known or reasonably anticipated benefits of the contract, dealing or transaction."

Based on the Defendants' own contention, the machinery and vehicles were "sold" to the 3rd Defendant because they were intended to be used by the 3rd Defendant to focus on carrying on earthworks in major construction projects that MYG had allegedly procured.

[32] This Court found that the evidence of the 1st and 2nd Defendants on both the purpose of the "sale" and the valuation of the assets was also discredited





for these other reasons:

a) DW1 claimed that he "sold" the vehicles and machinery to the 3rd Defendant because he decided to segregate the business of MYG and the 3rd Defendant to allow MYG to focus on managing major construction projects from Minetech Construction Sdn Bhd (mainly Guocoland projects).

However, there was no mention of these projects when he listed MYG's projects to prove that it was a going concern in resisting the Winding Up Order. In reality, the 3rd Defendant does not appear to be operating as an independent earthworks contractor, as the construction machinery and vehicles have admittedly not been in use at all.

b) DW1 also testified that he resigned as a director of the 3rd Defendant on 1 July 2022 for a similar reason, i.e. that he managed to secure multiple contracts from Minetech Construction Sdn Bhd.

However, the projects that he referred to in support of that statement were related to the CKE Project, Youcity Project and another project for Wangsa Keringat Development Sdn Bhd.

c) For reasons that are unclear, DW1 further testified at the trial for the first time that another reason for "selling" the vehicles and machinery to the 3rd Defendant and then resigning as director of the 3rd Defendant, was so that as a Professional Engineer, he could be engaged in the CKE Project and Youcity Project in that capacity without any conflict of interest.

The participation of DW1 in these projects must have been very fluid since they were awarded in 2020/2021. The professed arrangement also stank of an attempt to circumvent professional restrictions by the use of corporate vehicles he would control as de facto director, by installing his wife as the director of the 3rd Defendant.

d) Based on the above narratives, DW2 was to have run the 3rd Defendant's operations as an earthworks contractor as a separate enterprise, after the 1st Defendant ostensibly relinquished his interest in the 3rd Defendant on 1 July 2022 and divorced the 2nd Defendant in September 2022.

However, the 2nd Defendant was the former Accounts Assistant in MYG with no demonstrable operational experience in construction. The 2nd Defendant did not even know that three (3) of the machinery "purchased" (Kyusen-Depro Pneumatic Breaker, AA-Versa-Matic Pump and excavator) were never transferred to the 3rd Defendant until the Winding Up Order in February 2023.

[33] Based on the evidence, the Disposal of the Vehicles was a classic case of a



void disposition after the presentation of the Winding Up Petition under s 472 of the CA. Further, this Court finds on a balance of probabilities that the 23 machinery and vehicles were also not "sold" for valuable consideration and represented an undue preference in favour of the 3rd Defendant. As noted, under s 528 of the CA, the Disposal of Vehicles to the 3rd Defendant is deemed fraudulent and void.

[34] This Court also had no difficulty in further finding that there was dishonest participation by the Defendants based on the following factors:

- a) the different justifications for the Disposal of the Assets, none of which were demonstrably true;
- b) the undervaluation of the vehicles and machinery in the sale of capital assets;
- c) the timing of the payment of consideration on 8 September 2022, well after the Winding Up Petition had been presented; and
- d) the contrived correspondence and corporate resolutions dated in May and June 2022.

all of which are detailed above. By the ordinary standard of reasonable and honest people, the defendants must have known that their actions would effectively diminish the plaintiff's chances of recovering the Alleged Debt or any part thereof.

[35] This Court finds that the Disposal of Vehicles satisfies the requirements of s 540 of the CA as a sham transaction to hive off the business and assets of MYG to the 3rd Defendant. This constitutes a fraud on unpaid creditors like the plaintiff, and the defendants were knowing participants in this transaction.

### **Transfer Of Funds**

[36] Based on the liquidator's examination of MYG's ledgers after the Winding Up Order, one Tan Kah Beng who was the manager involved in assisting the liquidator was authorised by the liquidator to testify on his behalf (PW1). He explained that RM679,401.20 from the bank accounts of MYG had been transferred to the defendants and the 1st Defendant's brother after the Winding Up Petition was presented as follows:

- a) RM98,204.29 to the 1st Defendant between 25 August 2022 and 15 February 2023
- b) RM274,371.94 to the 2nd Defendant between 23-8-2022 and 15 February 2023
- c) RM301,399.02 to the 3rd Defendant between 7 September 2022 and 15 February 2023



d) RM5,425.95 to Tan Keng Kah, the 1st Defendant's brother on 14 October 2022.

There was a list of smaller payments made during the six (6) months before the presentation of the Winding Up Petition.

[37] DW1 and DW2 testified that these were repayments to them and to the 3rd Defendant for monies that were owed to them by MYG for various categories of transactions, namely (a) various forms of personal advances given by DW1 and DW2 to MYG; (b) various loans that DW1 and DW2 had procured the 3rd Defendant to give to MYG; and (c) cash payments by MYG to workers were routed through the personal accounts of DW1 and DW2.

[38] This Court was given no reason to doubt the truthfulness of PW1's evidence that monies identified in the Transfer of Funds were paid out to the Defendants after the Winding Up Petition was presented. As the explanations were given in response to the allegations that the defendants received money from MYG after the Winding Up Petition was presented, it stands to reason that they do not dispute that they received such funds and when they received the funds i.e. after the Winding Up Petition was presented.

[39] As there is no credible denial that the defendants continued to receive monies from MYG after that date, the payments identified by the liquidator are automatically void under s 472 of the CA. As the defendants claim to be creditors in their explanation for the transactions, the payments may also fall foul of s 528 of the CA.

[40] The explanations given by the 1st and 2nd Defendants were mostly supported by records that, on their face, supported the creation of debts owed by MYG to the defendants as contended by them, including some which were created after the Winding Up Petition was presented. The issue in this action was with the so-called repayments that MYG made to the defendants. The questions raised for determination were:

a) Whether the creation of MYG's debts is genuine, and were ordinary business transactions of MYG; and

b) Whether the payments made by MYG after the presentation of the Winding Up Petition were in repayment of such genuine debts.

[41] This Court finds the explanation given by DW1 and DW2, supported by selected records that DW2 retrieved from her visits to the liquidator's office for this purpose, suffered from several discrepancies:

a) Numerous "Official Receipts" issued by MYG for loans allegedly given by the 3rd Defendant pre-dated the remittance of funds

b) Several other "Official Receipts" issued by MYG with the description "Repayment" were apparently the 3rd Defendant's



repayment of loans given earlier by MYG to the 3rd Defendant. These did not support the explanation that the sums loaned by the 3rd Defendant that could have justified subsequent payments made by MYG to the 3rd Defendant.

[42] More crucially, the defendants were unable to show any accounting records to prove the purpose of the Transfer of Funds identified by the liquidator, which were far in excess of the debts allegedly created in their favour as aforesaid. In her multiple visits to the liquidator's office, DW2 did not extract such documents that would have been available if they existed.

[43] Ironically, counsel for the defendants also objected to the attempted production of some of these documents through PW1 as eleventh-hour documents served in contravention of court directions, which this Court declined to admit at the outset of the trial.

[44] Further, it was obvious from the 2nd Defendant's demeanour that she was uncomfortable, evasive and reluctant to answer questions about her continued cooperation with the 1st Defendant in moving funds between MYG and the 3rd Defendant.

[45] For the imposition of liability under s 540 of the CA, a single act with the intent to defraud creditors is sufficient. This Court finds that it is more probable than not that at least some if not all of the Transfer of Funds to the defendants were not for the stated purpose. At the minimum, there is a completely unexplained payment of money by MYG to DW1's brother.

[46] In any case, it is evident that the defendants did help themselves as creditors while contesting the plaintiff's claims to be paid. This is dishonest since it has been established in the winding up that the Plaintiff is a *bona fide* unpaid creditor of MYG.

### Conspiracy

[47] The Plaintiff also pleaded an unlawful means conspiracy between the defendants, the overt acts being the Disposal of Vehicles and Transfer of Funds and the unlawfulness being their contravention of s 528 of the CA (and corresponding statutory offences under the CA).

[48] As the defendants knowingly participated in the overt acts with notice of the contravention of the CA, it may be inferred that they did so in pursuit of a common intention, forged through an agreement and understanding between them beforehand.

[49] The tort of conspiracy can be made out on the same facts surrounding the Disposal of Vehicles and Transfer of Funds set out in the preceding section of this judgment i.e. the defendants knew and/or turned a blind eye to the fact that their actions diminished the chances of the plaintiff's recovery of any part of the Alleged Debt from MYG.



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**Remedi.e.s**

[50] In the light of the findings above, s 540 of the CA empowers the Court, if it thinks proper to do so, to declare that any person who was knowingly a party to the Disposal of Vehicles and Transfer of Funds, shall be personally liable without any limitation of liability, for any of the debts of MYG.

[51] The Plaintiff has not recovered any part of the Alleged Debt in the liquidation and claims the sum either pursuant to s 540 of the CA or as damages from the conspiracy. In either case, it is necessary to ascertain if MYG does owe the Alleged Debt to the plaintiff as claimed.

[52] According to the plaintiff, its work on the CKE Project and the Youcity Project was completed, but progress claims were not fully paid. As at July 2022, the Alleged Debt is said to comprise:

(a) RM817,162.64 on certifi.e.d payments No 1 to 13 for the CKE Project and certifi.e.d payments No 1 and 2 for the Youcity Project;

(b) RM632,834.80 on uncertifi.e.d progress claims No 1 to 16 for the CKE Project and No 1 to 3 for the Youcity Project; and

(c) RM365,926.76 for the cost of supplying safety supervisors, platform inspectors, safety inspectors, backhoe loaders, dumpers and boom lifts, deducted by MYG at progress claim No 9 for the CKE Project.

[53] Whether as a liquidated debt or special damages for the tort of conspiracy, the fact and quantum of the Alleged Debt must be proven. As often cited, Devlin J in *Biggin & Co Ltd. v. Permanite, Ltd., Berry Wiggins & Co Ltd.* [1951] 1 KB 422, 438 said that "Where precise evidence is obtainable, the court naturally expects to have it [but] where it is not, the court must do the best it can."

**Certifi.e.d Claims**

[54] The defendant's witness gave only a bare denial of this part of the Alleged Debt in his testimony. Following *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2007] 2 MLRA 448; [2008] 2 MLJ 856; [2007] 6 CLJ 613, the certified payments totalling RM817,162.64 constitute undisputed debt not subjected to set off. The Winding-up Court would have already made this finding when it ordered MYG to be wound up.

[55] The defence case in respect of the Certifi.e.d Claims is that their certification was subject to a) joint inspection and valuation b) defects rectification. These contentions are unconvincing since it was established that there was never a practice of inspection and valuation when certifying past progress claims, and MYG had a retention sum to deal with defects.

[56] In any case, the defendants did not furnish any evidence before



termination due to the Winding Up Order of any re-measurement to justify any over-certification or of a single *bona fide* complaint of defective works throughout the plaintiff's performance of its scope of work in the CKE Project and Youcity Project to justify a set-off.

[57] Accordingly, MYG's non-payment of the undisputed debt of RM817,162.64 and its incapacity to now pay it due to the actions of the defendants as set out above, constitute a sum recoverable personally from the defendants under s 540 of the CA.

#### **Uncertified & Rejected Claims**

[58] Based on a review of the plaintiff's Interim Progress Claims ("PC") No 1 to 16 for the CKE Project, it was tolerably clear that:

- a) The plaintiff's works were only about 89% completed as at the last claim submitted i.e. PC No 16;
- b) The uncertified claims for Certificates No 1 to 13 for the CKE Project were consistently for Preliminaries (staff and labour accommodation, miscellaneous charges) which the defendants noted the plaintiff did not provide.
- c) The uncertified claims for Certificates No 9 to 13 for the CKE Project, were also consistently for Preliminaries (safety supervisors, platform inspectors, safety inspectors, backhoe loaders, dumpers and boom lifts) that the defendants noted the plaintiff did not provide;
- d) Similarly, for PC No 14 to 16 for the CKE Project, the entirety of the PCs were uncertified, including the items of Preliminaries that had been consistently rejected by the defendants.

[59] Based on a review of the plaintiff's PC No 1 to 3 for the Youcity Project, MYG had consistently rejected the plaintiff's claim for the cost of two (2) labourers under the item "Site supervision and operations" in the BQ.

[60] No project correspondence was adduced at the trial to indicate that the plaintiff had objected to the non-certification of the portion of Preliminaries claimed for staff and labour accommodation and miscellaneous charges. The first evidence of a remark that they were provided is a handwritten note on PC No 9 when other items in the Preliminaries were rejected.

[61] In any case, no evidence was adduced to demonstrate that these were indeed provided by the plaintiff. The plaintiff's witness candidly admitted at the trial, that Items 5 and 7 were not provided.

CT Item 5 and 6, 5 and 7, do you agree with me the Plaintiff did not provide

Item 5 and 7?



LAM Yes, agree.

...

CT Page 154. Do you agree with me that the Plaintiff did not provide Item

5 and 7?

LAM Yes, agree.

In fact, there was no claim for Item No 7 in PC No 16, and inconsistent handwritten remarks on PC No 9 that Items 5 and 7 were provided, when these were admittedly not provided.

[62] This Court noted that the total uncertifi.e.d claims from PC No 1 to 16 for the CKE Project and PC No 1 to 3 for the Youcity Project claimed by the plaintiff is in the sum of RM632,834.80. However, it was not explained how this sum was derived:

a) The uncertifi.e.d PCs No 14-16 for the CKE Project totaled RM558,601.56;

b) The uncertifi.e.d PC No 3 for the Youcity Project totaled RM21,660.00.

The aggregate of uncertifi.e.d work done based on these progress claims is only RM580,261.56, not RM632,834.80.

[63] There is an unexplained difference, and no explanation for what comprised the uncertifi.e.d amounts from PC No 1-13 (for the CKE Project) and PC No 1-2 (for the Youcity Project) and why they were wrongly uncertifi.e.d.

[64] It is also entirely unclear to this Court how the sum RM365,926.76 claimed for the cost of supplying safety supervisors, platform inspectors, safety inspectors, backhoe loaders, dumpers and boom lifts was derived. Based on PC No 16, which is understood to be cumulative, the amounts claimed were as follows:





Item	Amount (RM)
Safety site supervisor	52,800.00
Temporary platform inspectors	11,640.00
Safety helpers	139,680.00
Backhoe loader	132,000.00
Dumper	110,580.00
Boomlift	51,000.00
<b>TOTAL</b>	<b>RM 497,700.00</b>

[65] There is here, also an unexplained difference. Further, this Court also noted that PW2 conceded during cross-examination that the plaintiff did not in fact provide a boomlift, but used alternative methods i.e. modular platforms using scaffolding. However, the alternative costing was not provided in evidence.

[66] The Plaintiff was less than forthright in claiming for items not provided, namely BQ items 5 and 7 from PC No 14-16 for the CKE Project and the boomlift in BQ item 6 for the CKE Project, although the truth was later revealed at trial. As a claim for a liquidated sum however, this Court is unable to speculate on the correct quantum of claims that were wrongly uncertified and/or rejected by MYG.

[67] Where precise evidence is obtainable, the court naturally expects to have it and in this case, the plaintiff has thrown hundreds of pages of construction claim documents at the court without a summary of what to make of it. As such, this Court finds on a balance of probabilities that the Alleged Debt was not proven in full, and only the certified claims of RM817,162.64 is proven and recoverable from the defendants.

### **Exemplary Damages**

[68] This Court further finds merit in the claim for exemplary damages against the 1st and 2nd Defendants for their scheming, and awards RM30,000.00 against the 1st Defendant and RM20,000.00 against the 2nd Defendant based on the Court's estimation of their relative culpability in the scheme.

### **Conclusions**

[69] The operative orders are accordingly as follows:

- a) Defendants are declared liable, without any limitation, to pay the plaintiff the sum of RM817,162.64 proved to be owed by MYG Construction Sdn Bhd to the plaintiff;
- b) It is therefore adjudged that:



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- i) Defendants do, jointly and/or severally, pay the aforesaid sum of RM817,162.64;
  - ii) The 1st and 2nd Defendants do additionally pay exemplary damages in the sum RM30,000.00 and RM20,000.00 respectively;
  - iii) Interest shall accrue on the judgment sums at the rate of 5% p.a. from the date of this judgment until full payment; and
  - iv) Defendants do, jointly and/or severally, further bear the costs of this action in the sum RM50,000.00.
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