IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. Q-02-1075-2004

BETWEEN

1. SARAWAK SHELL BERHAD
2. SABAH SHELL PETROLEUM COMPANY LIMITED
3. PAULUS ALBERTUS MARIA GERLA
4. DING CHUNG NYEA
5. SURYA HIDAYAT BIN HAJI ABDUL MALIK
6. GERAWAT GALA ... **APPELLANTS**

AND

CHONG THIAN FOOK
and 398 other Plaintiffs in the High Court of Miri Civil Suit No. 22-69 of 2002 (MR) ... **RESPONDENTS**

CIVIL APPEAL NO. Q-02-1177-2004

BETWEEN

CHONG THIAN FOOK
and 398 other Plaintiffs in the High Court of Miri Civil Suit No. 22-69 of 2002 (MR) ... **APPELLANTS**

AND

1. SARAWAK SHELL BERHAD
2. SABAH SHELL PETROLEUM COMPANY LIMITED
3. PAULUS ALBERTUS MARIA GERLA
4. DING CHUNG NYEA
5. SURYA HIDAYAT BIN HAJI ABDUL MALIK
6. GERAWAT GALA ... **RESPONDENTS**

[In the matter of the determination of the questions and issues of law pursuant to Order 14A of the Rules of the High Court 1980
In the High Court of Sabah and Sarawak at Miri

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Between

Chong Thian Fook ... Plaintiffs
and 398 other Plaintiffs in the High Court of Miri
Civil Suit No. 22-69 of 2002 (MR)

And

1. Sarawak Shell Berhad
2. Sabah Shell Petroleum Company Limited

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3. Paulus Albertus Maria Gerla
4. Harun bin Johari
5. Ding Chung Nyea
6. Surya Hidayat bin Haji Abdul Malik
7. Gerawat Gala
8. Lim Tau Kien
9. Norhafiza binti Mohd.

(The 3rd to 9th Defendants are sued as the

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Board of Trustees of the Shell Sarawak and
Sabah Retirement Benefit Fund and
Shell Sarawak and Sabah Provident Fund) ... Defendants]

Coram: Abdul Aziz Mohamad, JCA (now FCJ)
Mohd Ghazali Mohd Yusoff, JCA
Zaleha Zahari, JCA

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JUDGMENT
OF THE COURT

1. The parties in these two appeals will be referred to as the plaintiffs and defendants. These two appeals arose from orders made by the High

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Court at Miri on 20 September 2004 in an action brought by the plaintiffs. The plaintiffs are 399 former employees of either the first or the second defendant company. All of them were, as employees of the companies, members of the Shell Sarawak and Sabah Retirement Benefit Fund ("the

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A RBF"). 57 of them were also members of the Shell Sabah and Sarawak Provident Fund ("the PF"). Both the RBF and the PF are trust funds established by the companies. The PF was established in March 1968 as a fund to which members made or could make contributions and the employer company had to make contributions in respect of each B contributing member. The plaintiffs' action concerned their entitlement under the RBF, which was established with effect from 1 January 1976 by a Trust Deed made on 6 December 1976 by the "Member Companies", namely, the two defendant companies and several other Shell companies, C who desired to establish the RBF "for the benefit of those of their employees whose domicile is in Sarawak or Sabah or (being domiciled outside Malaysia) are employed in Sarawak or Sabah". The RBF is not a contributory fund, that is to say, the employee members do not contribute to the fund. The moneys in the fund are derived from contributions by the D Member Companies and from other sources. Besides the Trust Deed, the fund is subject to the regulations annexed to it. The affairs of the RBF are managed by the Trustees of the fund. The plaintiffs' action was also, besides the two defendant companies, against the Trustees, seven of them E originally, but subsequently the number was reduced to four. The plaintiffs were also members of the Employees Provident Fund ("the EPF"), which was established under the Employees Provident Fund Act 1951, which in turn was repealed and replaced by the Employees Provident

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A Fund Act 1991. The Acts required the plaintiffs to contribute to the EPF and the two defendant companies to make employer's contributions to it in respect of the plaintiffs.

2. The plaintiffs' grievance was stimulated by their reading of certain
B provisions of the aforementioned regulations relating to the RBF, namely, parts of regulations 5, 7 and 8. Of regulation 5, it is necessary to look only at sub-clauses (1), (2) and 3(a)(b):

> "5. (1) When a Member leaves Company Service (other than a Member who dies in Company Service) the
> C benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8. No benefit shall be due to a Member who leaves Company Service, other than at age 55 or because of chronic disability, with less than 5 years' Accredited Service (unless in view of some exceptional circumstances the Trustees at the request of the
> D Employing Company determine otherwise).
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> (2) The benefit due from this Fund shall be a lump sum sufficient to bring the aggregate of:-
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> (a) so much of a Member's balance at the time he leaves Company Service as amounts to contributions made by his Employing
> E Company or Companies for the time being (whether or not such Company or Companies are Member Companies of the Fund) during any period which counts as Accredited Service, plus interest thereon in
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> (i) the Local Provident Fund, and
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> (ii) the State Fund, and

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(iii) such other funds as the Trustees may from time to time designate for the purposes of this sub-clause; and

(b) the benefit (if any) actually paid by this Fund or by any such fund as is mentioned in or designated under paragraph (a) of this sub-clause in respect of any previous period of Company Service which is included in his Accredited Service,

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up to the level of benefit specified in sub-clause (3) hereof. In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7.

(3) (a) The level of benefit applicable to a Member who

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(i) has reached age 55, or

(ii) has reached age 50 and has left Company Service with the consent of his Employing Company, or

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(iii) has left Company Service because of chronic disability,

shall be either the aggregate of

2.25 x Relevant Earnings x years of Accredited Service up to 31/12/1990,

2.8 x first M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991,

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2.5 x next M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991, and

2.2. x balance of Relevant Earnings x years of Accredited Service from 1/1/1991;

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2.25 x Relevant Earnings x years of Accredited Service;

whichever level of benefit is the greater.

(b) The level of benefit for each year of Accredited Service applicable to a Member who has not reached age 55 but has Accredited Service of 25 years or more shall be 2.25 x Relevant Earnings."

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3. Of regulation 7, it is necessary to look only at sub-clause (1) and, of the four paragraphs of amounts under it, to look only at paragraph (c):

"7.(1) The Authorised Deductions to be made in calculating the amount of Member's benefit will be the sum of the following amounts:-

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(c) Subject to sub-clause (3) hereof, the amount of any payments which any Company shall by law or pursuant to any collective contract or to any award, judgement or order of any Court or Tribunal be or have been required to make to the Member or any other person in respect of any part of the Member's Accredited Service by way of additional remuneration or benefit beyond his ordinary remuneration or in connection with any termination of his service with that Company; and for the purposes of this paragraph the expression "collective contract" shall mean any agreement between the employer and any trade union or group of employees or any body or person on behalf of any employees; compound interest on the amounts stated in this paragraph shall run from the respective dates of each payment down to the relevant date;".

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4. Of regulation 8, it is necessary to look only at sub-clause (1):

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"8. (1) When a Member leaves Company Service:-

(a) on or after reaching age 55, or

(b) because of chronic disability,

he shall be entitled to be paid the net amount of his benefit calculated in accordance with Regulation 5 and, subject to the provisions of Regulation 9 hereof (if applicable), payment shall be made to him as soon as possible and in any event within 3 months after cessation of Company Service."

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5. The plaintiffs' essential grievance was expressed in paragraphs 22 and 23 of their amended statement of claim. There they averred that when they severally received their RBF entitlement from the first or second defendant company they discovered that from their entitlement there had been made deductions, which they listed as four items, of their employers' contributions to the EPF and the PF and of the interest or dividends declared on those contributions. They contended that the deductions, which will be referred to simply as the "EPF deductions" and "PF deductions", were in contravention of law, "particularly" the EPF Acts of 1951 and 1991. The provisions of the EPF Acts that they said were contravened are, as they said in paragraph 24 of their amended statement of claim, section 9(1) of the 1951 Act and section 47(1) of the 1991 Act.

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6. It is convenient at this point to set out those sections. Section 9(1) of the 1951 Act said:

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> "9. (1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct from the wages or remuneration of, or otherwise to recover from, the employee the employer's contribution."

Section 47(1) of the 1991 Act says:

> "47. (1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer's contribution, from the employee."

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7. In paragraph 35 of their amended statement of claim the plaintiffs prayed for several reliefs. Subparagraphs (1) and (2) were for declarations that "Regulation 5(2) read with Regulation 7(1)(c) ... contravenes" those sections. Subparagraph (3) was for a declaration that the alleged EPF deductions were illegal. Obviously the alleged illegality hinged on the alleged contravention of those sections of the EPF Acts. Subparagraph (4) was for a declaration that the alleged PF deductions were illegal. Unlike it was in the case of the EPF deductions, the basis for the allegation of illegality of the alleged PF deductions was not the subject of any declaration that was sought. It was merely averred generally in paragraphs 28 and 29, where the plaintiffs asserted that the alleged deductions were done "without any authority in law" and that "the ... Trust Deed and Regulations of the PF itself do not authorize the ... deductions". As far as can be seen, there has been no submission in this appeal on the averments in paragraphs 28 and 29. Subparagraphs (5) to (8) of paragraph 35 were

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A essentially for an order of restitution of the sums allegedly deducted and for ancillary orders to give effect to the order for restitution. Subparagraph (9) was for a declaration that the first and second defendant companies had unjustly enriched themselves by the alleged wrongful deductions. Subparagraph (10) was for a declaration that the Trustee defendants were B in breach of trust in failing to make restitution of the alleged deductions to the plaintiffs. Subparagraph (11) was for an order for damages for the alleged breach of trust.

C 8. The defendants denied the alleged deductions. Their case was, as may be understood from paragraphs 20 and 22 of the statement of defence of the Trustee defendants, that by virtue of regulation 5(2) the benefit due to a member from the RBF was a lump sum sufficient to bring the D aggregate of the EPF and PF contributions and the interest on them up to the appropriate level specified in regulation 5(3), that the sufficient lump sum was therefore the difference between that level and the said aggregate, and that the payment of that lump sum did not involve any deduction whatsoever. The defendants' case therefore did not involve regulation E 7(1)(c) at all.

9. The defendants applied under O 14A of the Rules of the High Court 1980 for the determination by the High Court of four questions. By

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A consent the application was granted with the addition of eight questions brought up by the plaintiffs. There were therefore twelve questions. Question No. 1, which was the defendants' question, was as follows:

> "1. Upon a construction of the Regulations of the Shell Sarawak and Sabah Retirement Fund as to whether the benefit payable to a member is either;
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> (a) the sum equal to what is specified as the 'level of benefit applicable' as mentioned in Regulation 5 (3) (a); or
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> (b) is a lump sum which is sufficient to bring the aggregate of the contributions (as hereinafter defined) up to the level of benefits specified in Regulation 5 (3) (a).
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> (The term 'contributions' is defined to mean the contributions made by the Employing Company to the Employees Provident Fund, the Shell Sarawak and Sabah Provident Fund and other specified Funds and the interest thereon.)"

Paragraph (b) of the question reflected the defendants' case. Paragraph (a)

D reflected what the defendants conceived the plaintiffs' case to be and what was in fact the plaintiffs' case. The learned judge (Judicial Commissioner), decided on paragraph (a) as the answer. The next three questions, also the defendants' questions, were on the basis that paragraph

E (b) was the answer to question No. 1. The questions were whether the paragraph (b) calculation was in breach of the EPF Acts (question No. 2), and whether the employer companies, by paying the RBF benefits according to the paragraph (b) calculation, had unjustly enriched

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A themselves (question No. 3) or had acted in breach of trust (question No. 4).

10. The rest of the questions were the plaintiffs'. Question No. 5 was whether the making of the alleged EPF deductions was in contravention of
B the EPF Acts. Question No. 6 was whether "Regulation 5(2) read with Regulation 7(1)(c)", which the question said "purports to authorize deductions of the employers' contributions to the EPF", was ultra vires the EPF Acts. The learned judge answered questions Nos. 5 and 6 in the
C affirmative. Question No. 7 need not be stated because the learned judge declined to answer it on the ground that it was framed too broadly, and nothing has turned on it in this appeal. Question No. 8 was whether, "pursuant to" the two EPF sections, an employer was entitled to deduct, in
D any manner howsoever described, from the wages or remuneration of the employee, the employer's EPF contributions and the dividends declared on them. The learned judge answered that an employer was not so entitled. Question No. 9 was whether the first and second defendant companies could "in law" deduct the employers' contributions to the PF and the
E interest on them from the plaintiffs' RBF entitlement. The judge answered that they could not. Question No. 10 was about unjust enrichment. The judge answered that there was no unjust enrichment. Question No. 11 was whether the plaintiffs were entitled to a full reimbursement and restitution

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A of their total RBF and PF entitlements. The learned judge answered that they were. Question No. 12 was about breach of trust. The learned judge's answer was that there was no breach of trust.

11. The learned judge therefore granted the prayers in subparagraphs B (1) to (8) of paragraph 35 of the amended statement of claim. From that arose the defendants' appeal No. 1075. The learned judge refused the prayers in subparagraphs (9) to (11) about unjust enrichment and breach of trust. From that arose the plaintiffs' appeal No. 1177.

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12. Having considered the regulations in question and the arguments of both sides, we will state our understanding of the regulations. It is clear from the aforesaid paragraphs of the statement of defence and the D defendants' questions Nos. 1 to 4, that, as far as concerned what they saw the deductions that the plaintiffs were aggrieved about to be, they had acted in accordance with and within the confines of regulation 5, especially sub-clause (2) thereof up to, but not including, its last sentence, which leads to regulation 7, so that that last sentence and regulation 7 did not E enter into what they did.

13. Sub-clause (3) of regulation 5 concerns the "level of benefit applicable to a Member". The level of benefit will differ from member to

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A member. It depends on his years of service, earnings, and other factors. Sub-clause (3) sets out the various formulas to be used in arriving at the level of benefit in the particular circumstances of a member. Take a case that falls under the simple formula "2.25 x Relevant Earnings x years of Accredited Service". If the relevant earnings were RM9,000 and the years B of service were 33, the level of benefit applicable to the member concerned would be RM668,250.

14. There are set out in sub-clause (2) of regulation 5, in paragraphs (a) C and (b), certain benefits that have already accrued or been paid to a member. The accrued benefits are under paragraph (a). These are employers' contributions to two funds, the "Local Provident Fund", that is the PF [subparagraph (i)], and the "State Fund", that is the EPF [subparagraph (ii)], and interest on such contributions. There are no funds D under subparagraph (iii). The benefits that have been paid are under paragraph (b). These have hardly featured in this case. The controversy in this case has centred on employers' contributions in the EPF and the PF, especially the EPF. For the sake of convenience and for want of a better E term, the benefits under paragraphs (a) and (b) will be referred to as "accrued benefits".

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15. Now sub-clause (2) says that the benefit due from the RBF "shall be a lump sum", but not any lump sum. It is a lump sum – and these words are of critical importance – "sufficient to bring the aggregate of [the accrued benefits] up to the level of benefit specified in sub-clause (3) hereof". Take the example just now of a member whose level of benefit is

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RM668,250 and assume that his accrued benefits consist only of employer's contributions in the EPF amounting to RM200,000. The lump sum that will be sufficient to bring the aggregate of the accrued benefits (RM200,000) up to the level of benefit of RM668,250 will be RM468,250.

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That is the lump sum that constitutes the benefit due to the member from the RBF. If he happens to be also a member of the PF – and there are only 57 in this case – and his employer's contributions in the PF amount to RM10,000, the accrued benefits will increase in total to RM210,000, and

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the lump sum sufficient to bring the aggregate of the accrued benefits (RM210,00) up to the level of benefit of RM668,250 will be RM458,250. That is the lump sum that constitutes the benefit due to the member from the RBF. If he has received benefits that fall under paragraph (b), the aggregate of the accrued benefits will increase further and the lump sum

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that constitutes the benefit due to him from the RBF will decrease accordingly.

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A 16. It is obvious, therefore, that the aim of the employers in establishing the RBF was to ensure that at the end of his service an employee will enjoy, or will have enjoyed, retirement benefits from all sources of at least a certain amount. If the benefits from sources other than the RBF – that is the accrued benefits – do not come up to that amount, then the RBF will B come in to make up for the deficiency by supplying it. The target amount is the level of benefit and the supplied deficiency is the benefit due from the RBF. It is a top-up. If there is no deficiency, the target of the RBF is reached and nothing is due from the RBF. Or if the accrued benefits are C more than the level of benefit, as happened in the case of a few plaintiffs, the target has been exceeded, and nothing is due from the RBF. The member will be enjoying, or will have enjoyed, a greater amount of retirement benefits than the target set by the RBF. It is not true, as submitted by Dato' Dr. Cyrus Das on behalf of the plaintiffs, that in such D cases the member will be indebted to the RBF for the excess. Such being the nature of the RBF, there will be no basis on which to make the member become indebted to the RBF for the excess. The member will not have received anything from the RBF.

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17. It is elementary that, arithmetically or accounting-wise, to arrive at the lump sum sufficient to bring the aggregate of the accrued benefits up to the level of benefit specified in sub-clause (3), all that needs to be done is

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A to subtract or deduct the accrued benefits from the level of benefit and arrive at the difference or the top-up, which, if any, will be the lump sum. That is what was done in the calculations of the RBF entitlement of members that have been exhibited in this case. The summary of each calculation begins with the "Opening Balance", which is the level of
B benefit. The deductions come after the word "Less". In all cases there are the EPF deductions. In a few cases there are also the PF deductions. These deductions are respectively described as "Company Contribution on EPF" and "Company Contribution on SSSPF". But the deductions are
C only an arithmetical or accounting way of arriving at the sufficient lump sum. They are not deductions by taking away from the member. The member is not deprived of the deducted EPF and PF contributions. Such deprivation there cannot be, when the whole idea of the RBF is to ensure
D that, with the accrued benefits, and any necessary top-up from the RBF, the member will at least enjoy his level of benefit.

18. Dato' Cyrus cited various instances in which he said the defendants admitted making deductions of employers' EPF and PF contributions and
E instances in which he said that the defendants contradicted themselves by denying making deductions of those contributions. We have examined those instances and we find that where the defendants admitted making deductions they meant deductions in the arithmetical or accounting sense

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A that has been explained, that is deductions for the purpose of determining the lump sum to which the plaintiffs were entitled from the RBF and not deductions from what they were entitled to from the RBF, but where they denied making deductions they meant deprivative deductions in the sense alleged by the plaintiffs, which we will come to in a while.

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19. In our judgment, therefore, the defendants were right in their defence in paragraphs 20 and 22 of the Trustees' statement of defence that has been set out earlier. They were right in their stand that in arriving at

C the lump sum they acted within regulation 5(2) and that, as far as concerned the plaintiffs' grievance as to deductions made, the manner in which they arrived at the lump sum did not involve regulation 7.

D 20. The last sentence of sub-clause (2) of regulation 5 says: "In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7", which sets out the deductions that are to be made, not in calculating the lump sum constituting the benefit due from the RBF, but "in calculating the amount of a Member's benefit". These words

E echo the words in regulation 5(1): "the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8", sub-clause (1) of which says: "When a Member leaves Company

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A Service ... he shall be entitled to be paid the net amount of his benefit calculated in accordance with Regulation 5 ...". The term "net amount" in regulations 5(1) and 8(1) has been the subject of a bit of submission by Dato' Cyrus. It simply means that while the benefit due to a member from the RBF is the sufficient lump sum specified in sub-clause (2) of regulation B 5, what is actually to be paid to him is the net amount after making the deductions authorized by regulation 7, if any. If no deduction falls to be made under that regulation, the net amount is the full lump sum. Of course, in this case, if there had been any deduction to be made under C regulation 7 it would have been made – although we do not recall that in any of the exhibited calculations any amount, besides the EPF and PF amounts that needed to be subtracted to arrive at the sufficient lump sum, was pointed out to us as being a deduction under regulation 7 – but such a D deduction would not have been the subject of the plaintiffs' grievance.

21. The learned judge's understanding of what the lump sum is, is expressed in the following words at page 59 of his judgment:

> "A plain reading of the Regulation 5(2) clearly shows that E the entitlement is a lump sum. This lump sum is an aggregate of the sum in paragraph [*sic*] of (a) and (b) of Regulation 5(2). The determinative factor for the amount of the lump sum is the formula in Regulation 5(3) for the computation of the level of benefit and entitlement. If for a moment we ignore the amount to be deducted under Regulation 7, it would be obvious that the lump sum under Regulation 5(2) would be equal to the amount computed under Regulation 5(3). If not for the deduction under F

> Regulation 7, this lump sum would be payable to the plaintiffs. However if the deductions under Regulation 7 is [*sic*] taken into account the lump sum payable is less the amount deducted. It is this deduction that is being challenged, particularly the deductions under Regulation 7(1)(c). This is one of the reasons that I cannot accept the defendants' submissions that the lump sum is a top up to the retirement benefits payable to the plaintiffs by way of EPF contributions."

22. One thing to be observed in that passage is the judge's view that the aggregate of the amounts in paragraphs (a) and (b) of regulation 5(2) – the "accrued benefits" – is the lump sum and that it "would be equal to the amount computed under Regulation 5(3)", that is the level of benefit. This view is reflected in the formula that the judge produced at page 33 of the judgment. The aggregate of the accrued benefits cannot as a rule be equal to the level of benefit. It could be so only in a rare case and only if, by a fluke or a miracle, the aggregate of accrued benefits and the level of benefit, when they came to be computed, happened to be two amounts that were exactly equal. Dato' Cyrus, while endeavouring to support the judge, improved on that view of the judge's by saying in oral submission that it would have been better if a third figure were added to the formula, the third figure being the top-up. That would be a perfectly correct arithmetical statement in cases , as are all the cases in this case but a few, where the accrued benefits were less than the level of benefit. In such cases, since the top-up would be the sum sufficient to bring the aggregate

A of the accrued benefits up to the level of benefit, of course, arithmetically, the aggregate of the accrued benefits plus the top-up must equal the level of benefit.

23. But the serious error in this case is the judge's view, as may be
B inferred from the passage quoted just now and better seen in the judge's said formula, and Dato' Cyrus's contention, as expressed in his oral submission, and the belief that the plaintiffs held or were led to hold, that the lump sum that constitutes the benefit due from the RBF is the level of
C benefit. The judge's formula, with a commonly accepted amendment, is that the net benefit due from the RBF is (A + B = C) – D, where A and B are the amounts under regulation 5(2) – the "accrued benefits" – C is the level of benefit, and D is an authorized deduction or deductions under
D regulation 7. In his oral submission Dato' Cyrus said, as recorded: "Our submission is that the lump sum is (a + b) plus the 3rd sum if necessary to bring (a + b) to level of benefit. The lump sum is the aggregate sum of (a) + (b) + top-up and not just the top-up". Since, as has been seen, that aggregate must, of arithmetical necessity, be equal to the level of benefit,
E the submission amounted to an assertion that the lump sum must be the level of benefit. That is patently wrong. The error arose from a failure or refusal to appreciate or recognize the true significance of the critical words "sufficient to bring the aggregate of [the accrued benefits] up to the level

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A of benefit specified in sub-clause (3)" that qualify or describe what the lump sum is that constitutes the benefit due to a member from the Fund.

24. It was because they held the notion that the RBF benefit that they were entitled to was the level of benefit, which was a wrong notion, that B the plaintiffs became aggrieved when they discovered upon receiving their RBF benefit that the Trustees had deducted the accrued benefits, particularly the EPF contributions, from their respective levels of benefit. They would not recognize that the deduction was made in the arithmetical C implementation of sub-clause (2) of regulation 5 in order to arrive at the sufficient lump sum, because that would be the legal answer to their grievance that would make it legally baseless. Instead they turned to paragraph (c) of regulation 7(1) and contended that the deduction was D made under that paragraph. From that paragraph their counsel, in this appeal, chose the words "any payments which a Company shall by law ... have been required to make to the Member ... by way of additional remuneration or benefit beyond his ordinary remuneration" and argued that the employer's EPF contributions fitted into those words and then, turning E to the two sections of the EPF Acts, further argued that the amount of the level of benefit which the plaintiffs contended was the benefit due to them under the RBF was "wages or remuneration" and that therefore the employer's EPF contributions had been deducted or recovered from their

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A wages or remuneration in contravention of the two sections. Mr. Robert Ham QC for the defendants countered those arguments on paragraph (c) of regulation 7(1) and the two EPF sections with several tiers of argument, so that in appeal No. 1075 something like half of the argument was devoted to these matters.

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25. In this case there was only one instance of "deduction" of the EPF and PF benefits and that was, as we said, an arithmetical or accounting deduction to arrive at the sufficient lump sum, and not a deprivative

C deduction. There has not been another instance of deduction of those benefits, to be seen as a regulation 7(1)(c) deduction. Since the plaintiffs would not have been driven to construe that regulation in the way that has been done in this appeal and in the High Court had they not held the notion

D that the lump sum was the level of benefit, and since that notion is patently wrong, the defendants' appeal No. 1075 has to be allowed without the necessity of entering upon a deliberation of the arguments concerning regulation 7(1)(c) and the two EPF sections and making a reasoned finding as to the correctness of the High Court's declarations concerning that

E regulation. It would be a purely academic exercise, and one of a very involved nature, that is not required to be carried out in order to dispose of appeal No. 1075. Those declarations were sought solely to entitle the plaintiffs to a restitution of the alleged deductions. There had been no

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A deductions under or by virtue of paragraph (c) of regulation 7(1) and the plaintiffs were not entitled to any restitution or, in other words, to succeed in their action. To order restitution, as the High Court did, would be to compensate them for what they had not lost but were always available for their enjoyment and benefit.

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26. We will, nevertheless, say a few words generally about paragraph (c) of regulation 7(1). That paragraph of course does not mention employer's EPF contributions. It was only by resorting to the

C argumentative faculties and calling in aid various authorities that the plaintiffs sought to establish that "any payments which a Company shall by law ... have been required to make to the Member ... by way of additional remuneration or benefit beyond his ordinary remuneration" would or could

D cover employer's EPF contributions. It is an irresistible reflection that if, before they became aware of the manner in which their RBF entitlement was computed, a suggestion had been made that the employer's EPF contributions might be deducted from their RBF entitlement by virtue of paragraph (c) of regulation 7(1) because the words in question were

E capable of referring to the employer's EPF contributions, the plaintiffs would have come out strongly against such a construal of the words. It could not have been the intention of the Member Companies who established the RBF and the regulations to deduct employer's EPF

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A contributions from the sufficient lump sum that constitutes the benefit payable under the RBF and to resort to paragraph (c) of regulation 7(1) to enable that to be done, and therefore it could not have been their intention that the paragraph be subtly framed using the words in question to achieve that purpose, because to deduct employer's EPF contributions from the B lump sum would not only expose them to accusations of illegal action and fraud on employees but would result in no employee getting any benefit from the RBF and in the RBF becoming a futile exercise, and it is inconceivable that those companies would embark on such an absurd, C pointless and perilous undertaking.

27. We therefore allow the defendants' appeal No. 1075 with costs and set aside the orders made by the High Court in favour of the plaintiffs. We D also order that the deposit be refunded to the defendants. Since the defendants succeed completely in appeal No.1075, it is not necessary to answer the question whether, even if the defendants should fail in their appeal on the O 14A questions, the restitutionary orders ought nevertheless to be set aside or suspended pending the trial of the issue of limitation. E The question arose because the defendants had in their statements of defence raised the defence of limitation which in the appeal the defendants contended had still to be tried, notwithstanding that the O 14A questions

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had been answered in the High Court in favour of the plaintiffs, before the judge could finally decide the action and grant the reliefs sought.

28. Appeal No. 1177 is the plaintiffs' appeal against the High Court's refusal of the prayers concerning unjust enrichment and breach of trust. Since those prayers were sought on the premise that there had been wrongful deductions from the plaintiffs' RBF entitlement, and since in our judgment there were no such deductions, we dismiss appeal No. 1177 with costs and order that the deposit be paid to the defendants to account of taxed costs.

Dated: 23 March 2007

Sgd.
Dato' Abdul Aziz bin Mohamad

DATO' ABDUL AZIZ BIN MOHAMAD
Judge
Federal Court Malaysia

Counsel for the appellants in appeal No. 1075 and the respondents in appeal No. 1177	Robert Ham, Q.C. (Dato' Cecil Abraham, Jimmy Wee and Shanti Mogan with him)
Solicitors for the appellants in appeal No. 1075 and the respondents in appeal No. 1177	Messrs Jimmy H.T. Wee & Co.

A	Counsel for the respondents in appeal No. 1075 and the appellants in appeal No. 1177	Dato' Dr. Cyrus Das (Eric C.S. Khoo, Steven Thiruneelakandan, Gabriel C.H. Kok and David Mathew with him)
	Solicitors for the respondents in appeal No. 1075 and the appellants in appeal No. 1177	Messrs Khoo & Company
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Salinan yang diakui benar

30/3/07

Setiausaha kepada Hakim
Y.A. Dato' Abdul Aziz bin Mohamad
Mahkamah Persekutuan Malaysia
POJ, Putrajaya

D:J-Q0107504(1177)CAV
23.3.2007

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