Lau Suk Lee (trading as Lau Enterprise)
Lau Ing Kwong (trading as Lau Enterprise)

AND

Malayan Banking Berhad

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 13 of 2005)

Cons, P.; Power and Mortimer, JJ.A.
Date of Handing Down Judgment: 6th December, 2006.

Appeal on fact alone. Appeal dismissed.

Mr Daud Ismail (M/S Daud Ismail & Co.) for the Appellants.
Ms Elaiza Merican (M/S Abrahams, Davidson & Co.) for the Respondent.

Cases cited in the Judgment:

Bank of Baroda v Panessar Ors [1986] 3 ALL ER 751
Newsholme Bios v Road Transport and General Insurance Co Ltd [1929] 2 ALL ER 442

Cons, P.:

This is an appeal from the judgment of Leonard, J.C. whereby he awarded the Malayan Banking Berhad ("the Bank") the sum of B$16,641,095.93 against Lau Suk Kee and Lau Ing Kwong, a father and son trading in partnership as Lau Enterprise Co. They were also, at all material times, Directors and majority shareholders in a limited company known as LEC Sdn Bhd ("LEC"). By the same judgment the Judge dismissed the Lau's counterclaim and awarded costs to the Bank.

Between May 1994 and October 1997 LEC successfully tendered, in particular, for four government contracts which related to projects in connection with

1. The Tutong Lumut Coastal Highway;
2. The relocation of the Istana Maintenance Unit and other works;
3. The completion of the Lebuhraya Muara-Tutong highway and other works; and
4. The 3rd Battalion camp in Seria.

The Bank, whose customers the Laus had been since February 1991, made facilities available in relation to these four projects. The relevant details, and the accompanying terms and conditions, are to be found in a letter from the Bank dated 21 February 2000 (Plaintiffs Bundle ("PB") 100). The Laus confirmed their acceptance, on 28 February, by each signing a copy of the letter and applying their partnership chop.

The facilities for each project were operated through separate bank accounts, one for each project. The procedure in essence was simple. Mr Lau Ing Kwong, who was running this aspect of the partnership, would pass a copy of each progress payment certificate received from the government representative to the Bank, who would eventually credit the appropriate account with 80% of the sum certified therein. It is not necessary to set out the accounting arrangements made to secure this end. The partnership could then draw down from that account and the account would be replenished in due course by a payment from the Treasury. The 20% difference would be placed by the Bank on fixed deposit by way of collateral, as it was so used on at least one occasion, to bring an excessively overdrawn account bank to within the agreed limit.

The system appears to have worked well for quite some time, but towards the end of 2000 the Bank started to be a little concerned. Payments from the Treasury were not coming in as they should. Enquiries and investigations were put in hand and eventually the Bank discovered that many of the progress payment certificates that had been passed to the Bank by Mr Lau were not from genuine certificates issued on behalf of the government but were in fact certificates made up by Mr Lau himself in form similar to the genuine. This was naturally not acceptable to the Bank and by letter of 5 June 2002 the Bank terminated the facilities and demanded repayment within seven days of the $16,641,095.53 claimed to be due and owing. The Bank gave as its reasons

1. Failure to operate the accounts in a satisfactory manner and exceeding the limits agreed upon; and
2. The presentation of some 13 false Progress Payment Certificates.

Repayment was not made as demanded. The Bank brought action in the court below.

The explanation for this state of affairs is to be found in the evidence of Mr Lau:

> "In 1997, when my overdraft facility was about to reach the limit and normally the bank had several types of overdraft facility. I discussed with bank because in 1997 there was economic crisis, in order to buy building materials it had to be by cash. Because of needs of project, because my overdraft limit has been exceeded I went to bank to see if it could give me money temporarily in order to tide over the cash flow problem. At the time, the bank had to go through head office and it would cause delay. Because of urgency of project the bank advised me – at the time I still had not utilized the ODPC (overdraft progress claim). Then the 3 bank officers asked me to photocopy the progress claim of the consultant. Then the bank officer advised me to instruct my quantity surveyor to go to site to appraise the amount of progress claim and to be put into the progress claim format that I

> photocopied. The bank advised me to refer to progress claim I got from consultant and to use it for our own progress claim to be forwarded to the bank for the bank internal use. That was the arrangement between my bank and my firm. Therefore I followed that arrangement to deal with the bank.
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> From 1997 until termination that was the format we used."

He gave the names of the 3 Bank officers. The contention became a major issue at the trial and in this appeal.

There were other issues, such as the contention that the same officers orally and expressly agreed, subsequent to the letter of offer, that the partnership would be allowed time to complete the 4 projects and that the Bank would extend more credit. This contention need not detain us here. Although the Judge seems to have thought otherwise, there was in fact no evidence adduced in support, neither in Mr Lau's affidavit nor his evidence in court. It was pleaded in the Amended Defence, but not followed up.

Four other contentions need also not detain us, namely, that Mr Lau Suk Kee, the father, was not individually liable, being a non executive partner as to those projects; that the Bank had incorrectly debited two of the accounts in respect of guarantees given by it on behalf of the partnership; that the Bank's certificate of indebtedness was not conclusive; and that costs should not have been awarded on solicitor and client basis. These contentions have been expressly not pursued in the appeal.

At the outset of his submission Mr Daud Ismail, who has appeared throughout for the Laus, correctly observed

> "The central issue at trial was whether the respondent was entitled to terminate the financial facilities"

The observation is correct because if the termination "was not wrongful and the demand for payment was properly and validly made", as the Judge later expressly found, the Laus would inevitably lose on the claim and their counterclaim would automatically fall away, together with the allied questions of whether they were "financiers" of LEC, whether they were subcontractors to LEC, whether the Bank had pressured Mr Lau to execute false subcontract documents and whether the Bank had known of express loan agreements that the partnership was said to have made with LEC, questions all of which have furnished much argument here and below.

By the same token this appeal must fail unless it can be shown that the Judge was wrong in respect of both of the grounds on which the Bank had relied to terminate.

We turn to the false progress certificates. The document at PB 301 was admitted by Mr Lau to be a "government certificate approved by the consultants." He said that the document at PB 302 "was prepared by my quantity surveyor" and that he, Mr Lau, would take it to the Bank. Apart from the figures, the date, the certifying chop and signature,

and the type face of the references to the project, the two documents are identical. In particular each contains in the top right hand corner the logo of the Jabatan Kerja Raya ("JKR"), the Public Works Department. There can be no doubt that PB 302, on its face, was not in fact what it pretended to be, namely, a government approved certificate. It was clearly orchestrated to deceive. It follows then that when Mr Lau, knowing exactly what it was, used it to obtain an advance from the Bank, he was himself intending to deceive. Equally so with the other 12 Progress Certificates on which the Bank relied. Mr Lau cannot possibly have thought, as counsel now suggests on his behalf, that the Bank officers, acting within their authority and for good commercial reason, had removed the Bank's requirement of government approval in favour of that from his own quantity surveyor. The suggestion that the Bank was prepared to accept Progress Certificates from Mr Lau's own quantity surveyor is completely undermined by the fact that the false Progress Certificates bore the logo of JKR. They were manifestly false and misleading and must have been intended to be so.

It has been strongly urged before us that the Judge was wrong not to draw an adverse inference against the Bank for failing to call as witnesses the three officers with whom Mr Lau had then dealt. They have since been dismissed from the service of the Bank, but the witness who spoke as to that was unable to give the reason. The Judge was invited to draw such an inference, but declined, for reasons he then gave. That is of course, a matter for his discretion and this court will not lightly interfere with a Judge's discretion.

The inference that counsel has in mind is no doubt an inference that the officers in question at least connived at the deceit practiced by Mr Lau. The immediate reaction is that such a course would be so contrary to normal banking prudence, so inimical to the best interest of the Bank itself that one would expect the officers to have had very good, or perhaps bad, reason to take such a course. There is no suggestion whatsoever of bad reason. The good reason suggested – to avoid a bad loss to the Bank – does not seem strong enough for the officers to risk their careers. However, even if the officers did so accommodate Mr Lau, it avails him nothing now. There is ample authority that an employer is liable for the fraud of his employee vis a vis an innocent third party, provided the fraud is committed within the scope of the employee's actual or apparent authority. But a guilty third party cannot take advantage of the employee's fraud against his own employer. That would be seeking to profit from his own wrong. So obvious is this proposition that authority is not easily found. The Judge mentioned *Newsholme Bios v Road Transport and General Insurance Co Ltd* [1929] 2 ALL ER 442. He did not expressly decide upon the involvement or otherwise of the Banks officers, but he did clearly conclude:-

> "My finding of fact on the balance of probabilities is that the second defendant, a shrewd, intelligent and experienced businessman, at a time of financial difficulty, set out to deceive the bank by means of false PCs and succeeded in doing so,"

We have no hesitation in concluding that he was right.

It has also been strongly urged that a conclusion of that kind, even although it only needs to be founded on the balance of probability, should not be made without "cogent evidence". For our part and with the greatest respect we find it difficult to envisage evidence more cogent than that presented to the court below in this respect.

We indicated earlier that such conclusion would be sufficient to dispose of the appeal. However it has been further argued that having regard to the underlying purpose of the facilities, that is to finance the completion of the 4 projects, the Bank was precluded from demanding payment in effect forthwith, but should have allowed time for the partnership to seek alternative finance elsewhere.

Setting aside the futility of giving time in the circumstances as they then stood, we cannot even agree with the principle. No serious challenge was made to the authority of *Bank of Baroda v Panessar Ors* [1986] 3 ALL ER 751 and the breach of faith with the Bank was so gross that it would repudiate the entire relationship, including any implied obligation to give time.

In the course of this appeal we have heard detailed submissions on other issues that were raised before and dealt with by the Judge below. We are indebted to counsel for their help, but our opinion on these issues has now become unnecessary.

For the reasons we have just set out the appeal is dismissed. We make an order nisi that the Bank is to have it costs thereof on a solicitor and client basis. The order will become absolute at 10.30 this morning unless application is made before then to vary.