



TAY & HELEN WONG
LAW PRACTICE • AMALAN GUAMAN

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IMPORTANT

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BANKING

RECOVERY OF ISLAMIC LOAN

The recent newspaper reportⁱ on the decision of the High Court in Kuala Lumpur in not allowing a bank from recovering in full the amount of a Islamic financing facility is an eye-opener to the banking community. In the case, the borrower took out a loan of RM346,000.00 under the Al-Bai Bithaman Ajil facility in December 1997 and he was to repay the loan by 216 instalments over 18 years. His house was charged to the bank as security. He defaulted in repayment of the loan in June 2001 after making several payments totalling RM33,454.00. The bank claimed for RM958,909.21 in applying for an order for sale to auction off the house.

In granting the order for sale, the learned Judge however reduced the bank's claim to RM582,000.00 together with daily profit of RM98.54 until full settlement of the loan. The learned Judge remarked that the bank should not be allowed to claim for "unearned profit" which is the profit margin that continues to be charged on the unexpired part of the tenure of the facility. The learned Judge made a comparison between a conventional loan facility and the Islamic loan facility when a default occurred before the end of the loan tenure. In the former, the amount to be paid over and above the principal sum---namely the interest and late payment interests--- was limited to the period from the release of the loan until the full settlement and not for the full original tenure of the loan, but in the latter, the lender bank would seek to recover the profit margin for the full

unexpired tenure of the facility. The learned Judge held that such profit was not actual profit and it contradicted the principle of Al-Bai Bithaman Ajil as to the profit margin that the provider of the facility is entitled to.

The landmark decision is timely. It promotes the *muqassah* principle under the Al-Bai Bithaman Ajil facility whereby a customer who prepays the facility does not pay the profit margin for the full unexpired tenure but is given a rebate. Having said that, another High Court quite recently in a different case appeared to have held the view that the right to such rebate dissipated with the default of the facilityⁱⁱ. It was then said that any rebate if given where the borrower has defaulted would absolutely be based on pure sympathy and indulgence. This has also been the prevailing approach adopted by most banks which provide for rebate on discretionary basis. It is not clear at print time whether the learned Judge in the landmark case arrived at his decision based on *muqassah* principleⁱⁱⁱ. Be that as it may, this latest decision serves as a wake-up call to the banks seeking to recover a defaulting loan under Al-Bai Bithaman Ajil facility to grant appropriate rebate to the defaulting borrower so as to avoid running foul of the essence of an Islamic financing facility.

ⁱ The New Straits Times, Friday, December 30, 2005 at page 2.

ⁱⁱ Arab-Malaysian Merchant Bank Bhd v Silver-Concept Sdn Bhd [2005] 5 MLJ 210; [2005] AMR 381.

ⁱⁱⁱ The full text of his judgment will probably be reported in the coming issue of law report in Malaysia.

Infocommcentre Pte Ltd, the Singapore High Court cited the decision of the English Court of Appeal in *Lloyds Bank plc v Lampert*ⁱⁱ that it was in no way inconsistent for a bank, or any other lender, to grant a facility which it and the borrower both envisaged would last for some time, but with the caveat that the lender retained the right to call for repayment at any time on demand. The High Court went on to state that there could be an overdraft facility for a fixed period which was a hybrid

BANKING

OVERDRAFT FACILITY FOR A FIXED PERIOD

In the Singapore case of *Oversea-Chinese Banking Corp Ltd v*

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creature bearing characteristics of both a term and overdraft facility, but in such a case, a bank had to exercise prudence in unequivocally spelling out its contractual rights. Banks' reliance on a standard printed term conferring a general "on demand" discretionary right of recall may not be sufficient and may be viewed as inconsistent with or repugnant to the express purpose and/or duration of that facility. In the final analysis, it boils down to an issue of interpretation whereby factual matrix of each case must be probed.

It is noteworthy that in *Infocommcentre Pte Ltd's* case, the defence relied upon the unreported decision in *Titford Property Co Ltd v Canon Street Acceptances Ltd*ⁱⁱⁱ ("Titford") to assert that the plaintiff was precluded from exercising its rights to recall the facility until the purpose of the facility was fulfilled. The learned Judge however remarked that the *Titford* case must be understood and interpreted as decisions engendered on their own special facts. Similarly, the learned Judge held that the decision in Malaysian cases of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd*^v and *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v Chnederling Development Sdn Bhd*^{vi} which

relied heavily on the *Titford* case should be confined to the facts of the case.

It is also pertinent to point out that the line of argument in *Titford* case (which found favour in the said Malaysian cases) in fact did not prevail in the subsequent English cases of *Williams and Glyn's Bank Ltd v Barnes*^{vi} and *Lloyds Bank plc v Lamperts*, none of which was cited in the two Malaysian cases. Whether the Federal Court or the Court of Appeal in Malaysia will in due course depart from these two Malaysian cases remains to be seen.

ⁱ [2005] 4 SLR 30

ⁱⁱ [1999] 1 All ER (Comm) 161

ⁱⁱⁱ Chancery Division, 22 May 1975.

^{iv} [1993] 2 MLJ 76, Supreme Court

^v [2004] 1 MLJ 657

^{vi} [1981] Com LR 205

BANKING/LIMITATION/ SECURITY

RIGHT OF ACTION FOR SHORTFALL

In *Tan Kong Ming v Malaysian Nasional Insurance Sdn Bhd*, the respondent granted a housing loan to the appellant which was secured by a legal charge over the appellant's land. Upon the appellant's default, the respondent commenced foreclosure proceedings and the land was sold via public auction on 16.3.1992. The sale proceeds were insufficient to satisfy the loan. The respondent in reliance of clause 7 of the annexure to the charge entitled "Personal Liability of Chargor"ⁱⁱⁱ demanded the

shortfall by letters of demand dated 18.8.1994 and 11.11.1994. The appellant did not pay the amount demanded resulting in the commencement of a suit by the respondent on 17.1.1995 against the appellant. The appellant contended that the respondent's claim was time-barred as it was founded on contract which was subject to the limitation period of 6 years under S.6(1) of the Limitation Act 1953 ("the Act").

The Federal Court held that S.6 of the Act was inapplicable in view of the express exclusion of "any action to recover money secured by any mortgage of or charge on land" in S.6(5) of the Act. The applicable provision was S.21(1) of the Act which specifically referred to an action to recover moneys secured by the charge and provided for 12 years from the date when the rights to receive the money accrued. As to when the limitation period of 12 years started to run, the court held that since the

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shortfall was only ascertainable after the sale of the said land, the period began to run on the date the property was sold by auction, which was 16.3.1992.ⁱⁱⁱ Therefore, the respondent's action filed on 17.1.1995 was well within the time prescribed in S.21(1) of the Act i.e. 12 years.

The Federal Court's interpretation of S.21(1) of the Act has extended the time period to recover shortfall arising from inadequate sales proceeds since the limitation period only starts to run after the date the charged property was sold by auction.

There is however the other part of the Federal Court decision which has a far-reaching consequence to the loan recovery process of the banking community. Citing two High Court decisions, the Federal Court went on to reiterate that:

"...the personal liability of the appellant as chargor is in respect of the difference between the amount due under the housing loan and the amount realized from the sale of the said land only and the cause of action against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck-off as being premature."^{iv}

...where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before realizing the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if

there arises any difference to the amount due after deducting the amount realized from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance."^v

It is our view that this holding is correct if the charge annexure (or the loan agreement) in *Tan Kong Min's* case does not contain any concurrent remedies clause that entitles the chargee to concurrently recover the outstanding loan by a civil suit against the chargor personally (an action *in personam*) and a charge action to enforce the charge of the property (an action *in rem*). In cases where such clause exist, the legal position in our view should be that the chargee is entitled to institute an action for recovery of the debt and also to assert the power of sale on the charged property^{vi}. Therefore, this part of the Federal Court decision must be applied with caution and upon full understanding of the factual matrix of the case concerned.

ⁱ [2005] 4 AMR 745

ⁱⁱ The said Clause 7 reads: "If the amount realized by the Lender on a sale of the Said Land under the provisions of the national land Code after deduction and payment from the proceeds of such sale of all fees, dues, costs, rents, rates, taxes and other outgoings on the Said Land is less than the amount due to the Lender and whether at such sale the Lender is the purchaser or otherwise the chargor(s) shall pay to the Lender the difference between the amount due and the amount so realized and until such payment will also pay interest on such balance at the Prescribed Rate as aforesaid with monthly rests."

ⁱⁱⁱ See paragraph 24 to 26 on page 753.

^{iv} See paragraph 35 on page 754.

^v See paragraph 41 on page 755.

^{vi} See *Bank Bumiputra Malaysia Berhad v Esah binto Abdul Ghani* [1986] 1 MLJ 16; *Co-Operative Central Bank Bhd v Belaka Suria Sdn Bhd* [1991] 3 MLJ 43.

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BANKING

NON-TRIABLE ISSUES IN LOAN RECOVERY

Two recent High Court decisionsⁱ reiterate the following principles:-

1. Whether bank is entitled to vary the margin of interest and base lending rate for facilities

Pursuant to an expressed term in the letter of offer which conferred a right on the bank to vary base lending rate and/or margin from time to time, the bank has a discretion to do so but its discretion must be subject to reasonableness of the increase based on commercial banking practice, a term which must necessarily be implied into the contract. A contention that such term was void for uncertainty under *Section 30 of the Contracts Act, 1950* was rejected.

2. Charging of compound interest

As long as any sum is due and not paid including interest by the specified date, interest at the prescribed overdue rate is payable and this includes interest upon interest. The bank is therefore

entitled to charge this interest upon interest or compound interest even in the absence of express provision on "compound interest"ⁱⁱ.

3. Whether failure of borrower to dispute the amount due before filing of suit amounts to an estoppel

As the borrower never raised any objection to the monthly statements

issued by the bank and had been making payments towards the amounts due, the non-query of the said accounts in the statements created an estoppel against the Borrower.

4. Whether the bank had breached its promise to grant deferment of installments

Should a borrower fail to sign and return the bank's offer to defer installments in time, it would be entirely up to the bank to accept the said offer (which the bank chose not to) should it be returned after the offer had lapsed. As such, there would be no need to notify the borrower that it was rejected because the offer had lapsed.

5. Whether bank entitled to review and recall facilities

As the facilities granted by the Bank to the borrower were not for a fixed term, and the borrower had breached the terms of the facilities, the bank is therefore entitled to review it and even recall it. Such a decision to recall the facilities is purely a commercial one which the bank is entitled to invoke what more with the defaults by the borrower in servicing interest and making installments.

6. Demand larger than actual amount due

It is good sense that a party should know the amount which he has to payⁱⁱⁱ. However, the fact that a notice demanded a slightly larger amount to be paid could not in any way prejudice the borrower when the borrower did not pay anything at all^{iv}. It should be noted that there is no general rule that unless the precise amount owing is correctly stated in a notice, the notice will be invalidated as it would be unjust if, just because a notice demanded more than the amount the court after trial found to be due, the Borrower is relieved from paying the whole amount due and owing^v.

ⁱ *OCBC Bank (M) Bhd v Belton Springs Industries Sdn Bhd & Anor* [2005] 7 MLJ 289; *Sabah Credit Corp v Wilayah Fabrication Sdn Bhd* [2005] 7 MLJ 529.

ⁱⁱ See *Amsteel Securities (M) Sdn Bhd v Datuk Hwang You Chuaang & James Wong* [2001] MLJU 334 and *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 at pg 20.

ⁱⁱⁱ *Sungei Way Leasing Sdn Bhd v Goh Nai Khoo* [1997] 2 CLJ Supp 541.

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^{iv} *Sabah Credit Corp v Wilayah Fabrication Sdn Bhd* [2005] 7 MLJ 529.

^v *Chung Khiaw Bank Malaysia Berhad v Raju Jayaraman Kerpayu* [1995] 1 LNS 51

six year period, his action would be barred by limitation, arrears of interest included.^{iv}

BANKRUPTCY/LIMITATION

LIMITATION TO FILE BANKRUPTCY ACTION

In *Tham Kok Oon v Perwira Habib Bank Malaysia*ⁱ, the summary judgment was obtained against the appellant, a Singaporean, on 23.9.1988. The respondent applied for leave to execute the judgment since more than 6 years had elapsed. The leave was granted on 23.5.1996. The appellant applied to set aside the leave to execute. It was contended that the order dated 23.5.1996 was invalid and unenforceable as it allowed the respondent to enforce the full judgment. The argument was that on the authority of the Federal Court decision in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin*ⁱⁱ, the respondent ought not to be permitted to enforce the full judgment under S.6(3) of the Limitation Act 1953 ("the Act")ⁱⁱⁱ.

To recap, in *Ernest Cheong's* case, it was held, among others, that:

(i) S.6(3) of the Act applied to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years from the date of the judgment (albeit with leave of the court), arrears of interest may only be claimed for a period of six years from the date of the judgment;

(ii) a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date would only be entitled to that amount and nothing more. If he filed it on the first day after the

The Court of Appeal in *Tham Kok Oon's* held that:

(a) S.6(3) of the Act had no application to the facts of the case as the order dated 23.5.1996 was merely an order granting leave to issue writ of execution to enforce judgment made under O.46 r.2(1)(a) of the Rules of the High Court 1980. It was not an act of recovery or execution. Only at the execution stage will S.6(3) of the Act apply and it will then become incumbent upon the judgment creditor to state how much is being executed and to ensure that the amount does not include arrears of interest of more than six years calculated from the date of judgment or any future interest;

(b) Leave to issue execution to enforce a judgment may be granted for as long as the judgment is capable of being enforced provided that the execution or recovery should be limited to that part of the judgment which is not time barred.

It would appear that the part of the

Court of Appeal's decision in (b) above is not in tangent with the part of the Federal Court decision in *Ernest Cheong's* case as stated in (ii) above. In *Ernest Cheong's* case, although the amount of interest claimed was only six years from the judgment date, the

bankruptcy notice had been filed on 24.1.1996 which was long after the limitation period of six years that expired on 14.10.1993 and the bankruptcy notice was rendered invalid. Thus, if one were to follow *Ernest Cheong's* case, the respondent in *Tham Kok Oon's* case would certainly be barred from enforcing the judgment since the judgment had been more than six years after the judgment.



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However, we wish to point out that the part of the *Ernest Cheong's* decision as in (ii) above has been departed from in a subsequent case decided by the Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee*.^v

The facts in *Lim Ah Hee's* case briefly are as follows: The judgment creditor (JC) obtained judgment against the judgment debtor (JD) on 23.10.1987. In 28.3.1996, the JC filed a bankruptcy notice (BN) against the JD which included claim for interest until 28.3.1996. The JD then disputed the BN as incorrect and excessive. The Senior Assistant Registrar dismissed the JD's notice to dispute. At the appeal before the High Court Judge, the JD raised an objection that the BN was wrong as it included a statute-barred debt. The High Court Judge dismissed the JD's objection. On appeal, the Court of Appeal allowed the appeal. The JC then applied for leave to appeal to the Federal Court.

Following the decision in *Ernest Cheong's* case, the Federal Court in *Lim Ah Hee's* case held that the date of interest became due was the date of the judgment and not the earlier date stated in the judgment itself as the date the interest was to be calculated. However, contrary to *Ernest Cheong's* case, the bankruptcy notice which was filed on 28.3.1996, eight years and five months from the date of judgment, was not out of time since it was within the 12 year period^{vi}.

The present state of law therefore is that S.6(3) of the Act allows a bankruptcy notice to be filed within a period of 12 years from the date of the judgment but the arrears of interest may only be claimed for

a period of six years from the date of judgment^{vii}.

The decision in *Lim Ah Hee's* case is a welcome relief as it may take years for a suit to exhaust the avenues of appeal before a judgment creditor could safely enforce the judgment. This is more so if the judgment needs to be enforced in a foreign country^{viii} whose laws contain a provision that does not allow registration of a foreign judgment which is pending appeal, as what happened in *Tham Kok Oon's* case.^{ix} An appeal may take years to complete its entire course and by the time the apex court decides the matter, it could well be more than six years after the judgment and the judgment creditor would be time-barred from enforcing the judgment. Thus, the decision in *Lim Ah Hee's* case is not only sound as a matter of construction of the relevant provision but also just and sensible.

ⁱ [2005] 3 MLJ 338.

ⁱⁱ [2002] 2 MLJ 385.

ⁱⁱⁱ S.6(3) of the Limitation Act 1953 reads: An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

^{iv} [2002] 2 MLJ 385, 397F.

^v [2004] 3 MLJ 253.

^{vi} See para 62 and 66 at page 267 and 268.

^{vii} On the facts of *Lim Ah Hee's* case, since the arrears of interest claimed contained arrears of interest outside the six-year period (ie two years and five months more than allowed), the BN was invalid.

^{viii} An example is Singapore.

^{ix} At para 3 in page 341.

CORPORATE LAW

MESDAQ MARKET OF THE BURSA MALAYSIA SECURITIES BERHAD

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After months of speculation and news of amendments to be made to the Listing Requirements of Bursa Malaysia Securities Berhad for the MESDAQ Market, the Securities Commission has finally released its Guidelines on Initial Public Offerings and Listings on the MESDAQ Market of Bursa Malaysia Securities Berhad ("MESDAQ IPO Guidelines"). With effect from 29 November 2005, the MESDAQ IPO Guidelines replaces the admission requirements stated in the

Listing Requirements of Bursa Malaysia Securities Berhad for the MESDAQ Market. It is noted that the MESDAQ IPO Guidelines merely replaces the admission requirements and not the entire Listing Requirements of Bursa Malaysia Securities Berhad for the MESDAQ Market.

The MESDAQ IPO Guidelines have enhanced entry requirements in areas such as:

- (i) enhancing qualitative criteria to promote higher quality companies;
- (ii) enhancing price-discovery process and method of distribution of securities;
- (iii) enhancing level of corporate governance, reporting and accountability; and
- (iv) enhancing role of advisers as "quality controllers".

In a nutshell, companies which are technology based are required to demonstrate some degree of commercialization of the technology and

research and development capabilities and commitments. Companies which are termed as high-growth are required to have at least three years audited operating revenue in addition to having the relevant qualitative aspects. Profit and cash flow forecasts now must be reviewed by the reporting accountants. Issuers will also have to report on the progress of implementation of the business development plan, utilization of proceeds and achievements of forecasts in the form of a "Follow-Up Questionnaires" which can be found in the Guidance Notes to the MESDAQ IPO Guidelines. Last but not least, Principal advisers are now required to act as lead underwriter and placement agent and provide opinion on the adequacy of the potential issuer's procedures, systems and controls as well as the management's competency. This capacity as "quality controller" is in addition to the role as sponsor as previously required under the admission requirements.

CORPORATE LAW

THE CONCEPT OF INTEREST UNDER PART IV DIVISION 5 OF THE COMPANIES ACT 1965

The meaning and concept of "interest" in Part IV Division 5 of the Companies Act 1965 ("the Act") was extensively dealt with by the High Court in the case of *NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia*ⁱ. Under S.91 of the Act, before a person can issue or offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest, there must be in force, in relation to the interest, an approved deed. "Interest" has been defined in S.84 of the Act as any right to participate or interest, whether enforceable or not and whether actual prospective or contingent:

-
- (a) in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere;
 - (b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party;
 - (c) in any time-sharing scheme; or (d) in any investment contract; whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset.

In possibly the first ever reported case on this area of law in Malaysia and Singaporeⁱⁱ, the plaintiffs whose business is in 'cemetery development' purchased lands to be developed as 'burial plots' and 'memorial park'. They then offered to the public the purchase of the burial plots and urn compartment and other infrastructure. Standard form agreements were entered into with such purchasers who were allowed to use burial plots and urn compartments subject to terms. The purchasers did not however receive any

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profit, reward, interest, rent or monetary gain from the plaintiffs.

Drawing guidance from Australian cases, the learned Judge proceeded to consider each and every limb (a) to (d) of S.84 and came to the conclusion that the plaintiffs' business was not an "interest" within the meaning of any of the four limbs and therefore the plaintiffs were not obliged

to comply with all the relevant requirements under Part IV Division 5 of the Act.

ⁱ [2005] 6 MLJ 65

ⁱⁱ See paragraph 20 of the judgment.

CORPORATE LAW/ RESTRUCTURING

COURT REFUSED SANCTION OF S.176 SCHEME

The High Court's judgment in *Re Sateras Resources (Malaysia) Berhad*ⁱ is possibly the first ever reported case in Malaysia in which the High Court refused to grant sanction to a scheme of arrangement and compromise between a company and its shareholders and creditors pursuant to S.176(3) and (4) of the Companies Act 1965 ("the Act") despite overwhelming approval of the proposed scheme by its shareholders and scheme creditors of the company in a meeting held earlier. Prior to this case, the common view is that once the requisite vote of the shareholders and scheme creditors in favour of the scheme has been obtained, it is almost certain that the court will grant the sanction under S.176(3). The prevalent view is that the court is generally slow to differ from the decision of such majority as businessmen are much better judges of what is to their commercial advantage than the court could be.

The learned High Court Judge in *Re Sateras* however reminded us that the court should not act as a mere rubber stamp to endorse a scheme. He proceeded to scrutinize the facts and circumstances of the case to satisfy himself various criteria

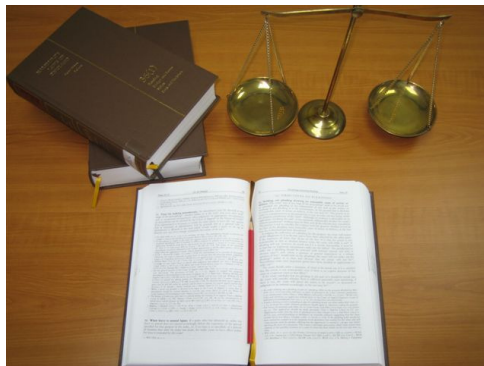
have been met. Among the factors considered by the learned Judge were whether the scheme had been properly tabled and voted on at the creditors and shareholders' meeting; whether the meeting was properly convened in accordance with the relevant laws; whether the proposed scheme is so fair and reasonable that an intelligent and honest person, who is a member of the class of the creditors bound by the arrangement acting alone in respect of his interest, as such creditor may approve it; whether the relevant provisions of the Companies Act 1965 have been complied with; whether the class of creditors was fairly represented by those who attended the meeting; whether the majority were acting *bona fide* and were not coercing the minority in order to

promote interests adverse to the class that they purport to represent; whether there was proper *corum* and proxies attending the meeting; whether all material information relating to the assets and liabilities of the company is communicated to the creditors in the

form of explanatory statement to be properly served.

In the same case, the learned Judge also drove home the importance of proper classification of creditors. This is in reiteration of the principle that a scheme of arrangement and compromise will be rejected if the promoter of the scheme has not correctly identified the separate classes.

ⁱ [2005] 4 AMR 246



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Employment Law

PRIMA FACIE CASE APPROACH

The High Court decision in *Bumiputra Commerce Bank Bhd v Mahkamah Perusahaan Malaysia & Anor*ⁱ on the duty of Industrial Court in a wrongful dismissal claim where a domestic inquiry has been held demonstrates the benefits of holding such an inquiry prior to dismissing an employee. Where such a domestic inquiry has been held, the court's duty is limited to considering whether there was a *prima facie* case established against the claimant. This will entail, in the first instance, a perusal of the inquiry notes to ascertain whether the inquiry was validly conducted in that the correct procedure had been followed and the rules of natural justice adhered to. In other words, the Industrial Court should have first considered whether the domestic inquiry was valid and whether the inquiry notes were accurate. The Industrial Court should

not proceed to hear the matter *de novo*ⁱⁱ without any regard to the notes of inquiry.

This judicial approach, which actually emanated from the decision in *Metroplex Administration Sdn Bhd v Mohamed Elias*ⁱⁱⁱ back in 1998, appeared to have been adopted and applied by Industrial Court^{iv}. The case is nonetheless pending appeal at the Court of Appeal.

ⁱ [2004] 7 CLJ 77

ⁱⁱ anew, again.

ⁱⁱⁱ [1998] 5 CLJ 467

^{iv} *Pamol Plantations Sdn Bhd v Rajandran Ramalingam* [2005] 2 ILR 900; *Muhammad Muthaiah Abdullah v Indah Water Konsortium Sdn Bhd* [2005] 2 ILR 920; *Hasan Mohamad v New Straits Times Press (M) Bhd* [2005] 3 ILR 192; *Metrod (Malaysia) Bhd v Suradi Md Rusdi* [2005] 3 ILR 176; *Subramaniam Ramasamy & Ors v Sitt Tatt Industrial Gases Sdn Bhd* [2005] 3 ILR 220.

EMPLOYMENT LAW

CONTINUING UNCERTAINTY IN AWARD OF BACKWAGES & AWARD OF LOSS OF FUTURE EARNINGS

The Industrial Court continues to be besieged by inconsistent awards of backwagesⁱ. Some Chairmen took the stand that Practice Note No.1 of 1987ⁱⁱ which limits the award of backwages to a maximum of 24 months of the last drawn salary of the unjustly dismissed claimant employee should be observed and should only be departed from in very exceptional circumstances. Some others did not consider the practice directive as providing any guidance and have been awarding backwages of exceeding 24 months. The article in Industrial Law Report titled "Assessment of Backwages in Dismissal

Without Just Cause or Excuse: Its Inconsistency" ⁱⁱⁱ contains an illuminating analysis of the "chaotic" situation currently prevailing in the Industrial Court. In a nutshell, there is no uniformity, consistency nor certainty in the assessment of an award. The different approaches adopted by different Chairmen have made it difficult if not impossible for the general public to be fairly advised on wrongful dismissal claims.

In the recently reported case of *Telekom Malaysia Bhd v Ramli Akim*^{iv}, the High Court in Kota Kinabalu in dismissing the application for judicial review filed by the employer refused to limit the number of months of backwages that could be awarded. The learned Judge upheld the award of 53 months. To the argument that the delay in the hearing was of no fault of the employer, he stated that the employee should also not be made to suffer the delay. It was the employer who started it all and should be made to shoulder the delay as being in consequent of the wrongful dismissal which the employer was guilty of. It will be worthwhile to bear in mind the learned Judge's remarks that employers

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should ponder very carefully before they embark on the action of dismissing the employees and they must take into account that the hearing can be protracted that may result in a higher amount of backwages.

The learned Judge went a step further by affirming the award of future loss of earnings to the claimant. This part of award covered the period from the date of hearing (on which date the backwages stopped) to the date of the claimant's compulsory retirement age of 55 years which amounted to another 57 months. The learned Judge held that this was a different period for which the claimant could not for various valid reasons be expected to secure similar employment nor be reasonably be expected to return to work for the employer. The learned Judge justified his decision on the strength of the

Federal Court decision in *R Rama Chandran v Industrial Court of Malaysia & Anor*^v. Whether award of future loss of earnings will become prevalent remains to be seen.

ⁱ The backwages are awarded to compensate an unjustly dismissed workman for the period that he has been unemployed due to the unjustifiable act of dismissal.

ⁱⁱ The relevant part provides payment of back pay in full from the date of dismissal to the date of conclusion of hearing subject to a maximum of 24 months.

ⁱⁱⁱ [2005] 2 ILR i.

^{iv} [2005] 2 ILR iv

^v [1997] 1 CLJ 147

further investigation revealing that the current registered proprietors had obtained the title to the lands through forged instruments.

LAND LAW

ADORNA PROPERTIES NO LONGER GOOD LAW?

In 2001, the Federal Court decided in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng*ⁱ that S.340 of the National Land Code ("NLC") recognized "immediate indefeasibility" as opposed to "deferred indefeasibility". The effect of this decision is that although a registered proprietor may have possession of his individual land title, a fraudster may use forged documents to obtain duplicates thereof by claiming the original to be lost and then to subsequently effect the transfer of the land to an innocent purchaser. The innocent purchaser on the strength of *Adorna Properties* will immediately acquire good title to the land at the expense of the equally innocent and rightful registered proprietor.

Such state of law has given rise to terrifying consequences. Arising from this decision, there have been cases reported of innocent true owners of lands suddenly discovering that they were no longer the registered proprietors of the lands and

In the recent reported judgment of *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & 7 Ors*ⁱⁱ, the Court of Appeal observed that the Federal Court in *Adorna Properties* had erred in two respects: it did not have regard to the earlier Supreme Court decision in *M&J Frozen Foods* which recognized "deferred indefeasibility" and it did not consider S.5 of the NLC which makes a distinction between the expressions "proprietor" and "purchaser". On these grounds, the Court of Appeal held that *Adorna Properties* was decided *per incuriam*ⁱⁱⁱ and should no longer be applied as good law. The current legal position on S.340 of the NLC appears to be that this section provides for deferred indefeasibility and not immediate indefeasibility.

ⁱ [2001] 1 MLJ 241

ⁱⁱ [2005] 6 MLJ 120; [2005] 5 AMR 292

ⁱⁱⁱ without the court's attention having been drawn to the relevant authorities or statutes.

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RESTRUCTURING/ EMPLOYMENT LAW

“PROCEEDING” EXCLUDES INDUSTRIAL COURT CLAIM FOR PURPOSES OF COURT ORDER UNDER S.176 COMPANIES ACT

S.176 of the Companies Act 1965 (“the Act”) basically provides for schemes of arrangement and compromise to be binding on the relevant creditors and members alike upon obtaining the approval of the requisite majority and confirmation by the court. A court-sanctioned scheme of arrangement will probably have the effect of stopping the relevant creditors and members from continuing with further proceedings in any action or proceeding.

In *Long Huat Group Bhd v Yee Siow Chin*ⁱ, the issue was whether the Industrial Court was prevented from hearing the claimant’s wrongful dismissal claim in the light of the existence of a High Court order made under S.176 of the Act. In that case, the word “proceeding” was used in paragraph 12 of the scheme of arrangement. The Industrial Court

Chairman held, by way of *obiter dicta*, that the word “proceeding” did not include proceedings in the Industrial Court and accordingly the scheme does not refrain the case from being heard in the Industrial Court.

However, in an earlier awardⁱⁱ, another Chairman held that the words “proceeding” also referred to the Industrial Court proceeding.

In the light of conflicting decisions, and until High Court comes out with a ruling, it is advisable that in a scheme of arrangement or a restraining order under S.176(10) of the Act, the word “proceeding” should be defined clearly to include proceeding before the Industrial Court if such is the intention of the company.

ⁱ [2005] 3 ILR 256

ⁱⁱ *Kilang Papan Seribu Daya Bhd v Ruslan Maksyum* [2004] 1 ILR 606.

SECURITY

DANAHARTA HELD LIABLE FOR WILFUL AND GROSS NEGLIGENCE FOR UNDER- VALUED SALE

In *Choo Oh Kim & Ors v Mok Yuen Lok & Ors (Naza Properties Sdn Bhd, Intervener)*ⁱ, the 3rd Plaintiff defaulted in its credit facilities which were secured against a charge over a land and a hotel thereon (“Property”). The loan account was subsequently vested in Pengurusan Danaharta Nasional Berhad (“Danaharta”) which subsequently appointed the 1st and 2nd Defendants as the Special Administrators (“SA”) to administer the 3rd Plaintiff.

The Plaintiffs had sold the shares in the 3rd Plaintiff to a purchaser for RM42 million (“SPA”) prior to the appointment of the SA. The Plaintiffs had also procured three separate valuation reports of the Property which assessed the value at RM42 million, RM43 million and RM43 million respectively. Under the SPA, the purchaser was obliged to furnish a bank guarantee on 11.8.2000 but failed. The Plaintiffs’ application to the SA for extension of time to complete the SPA was rejected. The SA procured valuation report of the property which assessed the Property at RM16.3 million and RM19.8 million. The SA subsequently advertised a sale by tender of the Property and proceeded to accept the highest bid of RM15 million from the Intervener. The Plaintiffs sued Danaharta and SA for damages and losses incurred.

In a very strong-worded judgment, the learned Judge held that on the facts of

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the case, the SA had acted dishonestly and shown total disregard for the Plaintiffs by ignoring the valuation reports procured by the Plaintiffs, withholding consent for the extension of time for the SPA, accepting the tender bid of RM15 million and further securing the payment of fees for estate agents, solicitors and their own services. The SA's cumulative acts and omissions were wilful or otherwise grossly negligent bordering on fraud against the Plaintiffs and Danaharta and SA were liable to the Plaintiffs for all consequential loss.

It is also noteworthy that the learned Judge analyzed at length the different methods of

valuationⁱⁱ used by different valuers before making his finding that the plaintiffs' valuers' method was to be preferred and rejecting the defendants' valuer's method of valuation.

ⁱ [2005] 6 MLJ 49

ⁱⁱ comparison method, depreciated replacement cost method, discounted cash flow method and cost method on a break-up basis.

arrive at RM89,060 and demand for such sum.

The court did not accept the evidence adduced by the respondents on discount generally accorded to the sale of shares in bulk because that would only be relevant in ascertaining "market value", which is different from "market price". The respondents were therefore erroneous in offering only RM80,000 (arrived at by deducting 10% discount as blockage factor from RM89,000) to redeem the said Tan Chong shares and the appellant was justified to refuse their offer.

ⁱ Court of Appeal in Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Poong Lim (M) Sdn Bhd & 2 Ors [2005] 5 AMR 461.

company is then entitled to frank the income tax to be deducted out of the income tax which it has previously suffered on its taxable profits. To implement this imputation system, the company is required to maintain an account known as "s.108 account" which contains entries in the form of credits and debits. The credit total represents tax paid or payable by the company for the current or previous years of assessment. The debit total represents the amounts of tax deducted or deemed deducted from dividends paid for the current years of assessment. At the end of the assessment year, Director General of

SECURITY

MARKET PRICE & MARKET VALUE

There is a distinction between the expression "the market price" and "the market value".ⁱ The former denotes an available ascertained fixed figure whereas the latter connotes use of a certain formula to ascertain value on the open market. Thus, when the relevant clause stipulates that the respondents shall deliver to the appellant a banker's order equivalent to the "market price" of 61,000 Tan Chong Holdings Berhad shares at the time of such delivery in exchange for the return of the said Tan Chong shares, the appellant is entitled to take the price quoted for each Tan Chong share on the relevant day of RM1.46 and multiplying it by 61,000 to

TAX

TIME BAR FOR S.108 REQUISITION UNDER INCOME TAX ACT

Under S.108 of the Income Tax Act 1967 (ITA), every company resident in Malaysia is required to deduct income tax at the prevailing rate (currently 28%) from any dividend paid to the shareholder. The

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Inland Revenue (DGIR) will compare the credit and debit. When the debit exceeds the credit, the amount of excess is a debt due to the government from the company and DGIR will issue a S.108 requisition to call upon the company to pay the amount.

The sums requisitioned under S.108 of ITA are a form of statutory debt and did not constitute taxⁱ. Thus, when the taxpayer submitted the relevant returns to the DGIR in 1990, the court held that the time started to run upon such submission. However, the DGIR only issued the requisition (Form S) to recover the debt

some 8 to 11 years later. Thus, the sums requisitioned by DGIR were held to be time-barred under S.6(1) of the Limitation Act 1953.ⁱⁱ

ⁱ Ketua Pengarah Jabatan Hasil Dalam Negeri v Rheem (far East) Pte. Ltd [1998] 2 CLJ Supp 351.

ⁱⁱ Malayan United Industries Berhad v Ketua Pengarah Hasil Dalam Negeri [2005] 5 AMR 598; [2005] 6 MLJ 259.

TENANCY

ASSIGNMENT OF TENANCY

The vendor of a property sold the property to a purchaser whereby a sale and purchase agreement and a deed of assignment were entered into between the two parties. Prior to the sale and purchase transaction, the vendor had already let to a tenant the property by way of a tenancy agreement. Under the deed of assignment, the vendor as the assignor assigned to the purchaser as the assignee all the vendor's rights, title, interests, benefits and obligations under and in the principal sale and purchase agreement between the developer and the vendor and in respect of the property. Can the purchaser rely upon the deed of assignment to assert that the rights, title, interests, benefits and obligations in the tenancy agreement have been assigned from the vendor (the former owner) to the purchaser and are binding on the tenant?



Court held that the deed of assignment in that case on its true construction only concerned rights, title, interests, benefits and obligations under and in the principal sale and purchase agreement in respect of the property but there was in fact and in law no valid assignment by way of the deed of assignment of the rights, title, interest, benefits and obligations in the tenancy agreement from the former owner (the vendor) to the purchaser. The tenancy agreement was thus not assigned to the purchaser at all.

In view of this decision, it is advisable that a deed of assignment pursuant to a sale and purchase agreement should expressly refer to any tenancy agreement which the parties to the

sale and purchase transaction intend to assign to the purchaser. A general clause on assignment especially one that makes reference to only the principal sale and purchase agreement entered with the

developer/proprietor of the property is not sufficient to cover assignment of a tenancy agreement.

The answer appears to be "no". In *Chung Shan Kwang v Ise Ichi Japanese Restaurant Sdn Bhd & Anor*ⁱ, the High

ⁱ [2005] 3 MLJ 471

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TENANCY

RE-ENTRY BY SERVICE OF WRIT/SUMMONS FOR POSSESSION

The common mode of termination of a tenancy [subject to breach of covenants] is by way of re-entry. A typical clause may allow the landlord to “*re-enter upon the premises or any part thereof in the name of the whole and thereupon this agreement shall absolutely determine but without prejudice to any remedy or right of action of the landlord in respect of any antecedent breach of the terms or stipulations contained herein.*”

However, the right of re-entry, although specifically agreed between the parties, is not advisable, more so in cases where there is animosity between the parties as this will possibly subject the landlord to a claim under s. 8 of the Specific Relief Act 1950 which reads: “*If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.*”

A question then arises as to what the landlord should do if physical re-entry to the premises is not viable.

The Court of Appeal in the case of *HP Projects Sdn Bhd v Investprop (M) Sdn Bhd*ⁱ held that in cases where the mode of termination of a tenancy is by way of re-entry, the proper way to determine the said tenancy is by way of filing a writ/summons for possession of the premises and by serving it on the tenant. Such action is equivalent to a physical re-entry within the meaning of the above typical clause. The court further held that the effective date of termination is the date of service the writ/summons for possession on the tenant. The rationale is that this is the date the tenant is considered to be aware of the intention of the landlord to forfeit the tenancy. It follows that claims for double rental (if any) should commence from this date till the date when actual possession is delivered.

ⁱ [2005] 6 MLJ 393

CONVEYANCING

AMENDMENTS TO SOLICITORS' REMUNERATION ORDER

With effect from 1st January 2006, the Solicitors' Remuneration Order 2006 (“SRO 2006”) will come into operation. Pursuant to this Order, the remuneration of a solicitor in respect of property related transactions such as sale & purchase, tenancies, leases, loans, banking facilities and other non-contentious matters under the Solicitors' Remuneration Order 1991 (“SRO 1991”) has been revised and is now governed by the provisions of SRO 2006.

For sale and purchase transactions, the following is a comparison of the remuneration of a solicitor under SRO 2006 and SRO 1991 :-

| SRO 2006 | | SRO 1991 | |
|---|------------------|---|--------------------|
| Consideration (Purchase/Selling price) | Scale of fees | Consideration (Purchase/Selling price) | Scale of fees |
| For the first | 1.0% (subject to | For the first RM100,000 | 1.0% (subject to a |

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| | | | |
|---|---|--|--|
| RM150,000 | a minimum fee of RM300) | | minimum fee of RM200) |
| For the next RM850,000 | 0.7% | For the next RM4,900,000 | 0.50% |
| For the next RM2,000,000 | 0.6% | For the next RM5,000,000 | 0.25% |
| For the next RM2,000,000 | 0.5% | Where the consideration is in excess of RM10,000,000 | Negotiable on the excess (but shall not exceed 0.25% of such excess) |
| For the next RM2,500,000 | 0.4% | | |
| Where the consideration is in excess of RM7,500,000 | Negotiable on the excess (but shall not exceed 0.4% of such excess) | | |

In cases of charges, debentures and other security or financing documents, the comparison is as follows:-

| SRO 2006 | | SRO 1991 | |
|---|---|--|--|
| Amount secured or financed | Scale of fees | Amount secured or financed | Scale of fees |
| For the first RM150,000 | 1.0% (subject to a minimum fee of RM300) | For the first RM100,000 | 1.0% (subject to a minimum fee of RM200) |
| For the next RM850,000 | 0.7% | For the next RM4,900,000 | 0.50% |
| For the next RM2,000,000 | 0.6% | For the next RM5,000,000 | 0.25% |
| For the next RM2,000,000 | 0.5% | Where the consideration is in excess of RM10,000,000 | Negotiable on the excess (but shall not exceed 0.25% of such excess) |
| For the next RM2,500,000 | 0.4% | | |
| Where the consideration is in excess of RM7,500,000 | Negotiable on the excess (but shall not exceed 0.4% of such excess) | | |

| | | | |
|--|---|--|---|
| For the principal instrument | Full scale fee | For the principal instrument | Full scale fee |
| For each subsidiary instrument within the meaning of subsection 4(3) of the Stamp Act 1949 | 10% of the scale fee (subject to a minimum fee of RM200 and a maximum fee of RM1,000) | For each subsidiary instrument within the meaning of subsection 4(3) of the Stamp Act 1949 | 1/10 scale or RM1,000, whichever is the lower |

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In cases of leases and tenancies, the comparison is as follows :-

| SRO 2006 | | SRO 1991 | |
|--|--|------------------------|--|
| Lease | | | |
| <u>Monthly rent</u> | <u>Scale of fees</u> | <u>Monthly rent</u> | <u>Scale of fees</u> |
| For the first RM10,000 | 50% of the monthly rent (subject to a minimum fee of RM600) | For the first RM10,000 | ½ month's rent (subject to a minimum fee of RM200) |
| For the next RM90,000 | 20% of the monthly rent | Thereafter | 1/5 month's rent |
| Where the rent is in excess of RM100,000 | Negotiable on the excess (but shall not exceed 20% of such excess) | | |
| Tenancy | | | |
| <u>Monthly rent</u> | <u>Scale of fees</u> | <u>Monthly rent</u> | <u>Scale of fees</u> |
| For the first RM10,000 | 25% of the monthly rent (subject to a minimum fee of RM300) | For the first RM10,000 | ¼ month's rent (subject to a minimum fee of RM200) |
| For the next RM90,000 | 10% of the monthly rent | Thereafter | 1/10 month's rent |
| Where the rent is in excess of RM100,000 | Negotiable on the excess (but shall not exceed 10% of such excess) | | |

There are new provisions governing specifically transactions falling under the Housing Development (Control and Licensing) Act 1966 or any subsidiary legislation made thereunder and transactions involving auction sales. If you are desirous of obtaining the full information, you may inquire from us at lawpractice@thw.com.my.

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