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LAW PRACTICE • AMALAN GUAMAN

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BANKING LAW

STRICT COMPLIANCE WITH ORDER 83 RULE 3 IN ENFORCING CHARGE

In the recent decision of *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd*ⁱ the Federal Court ruled that the provisions of Order 83 r 3 (3) of the Rules of the High Court, 1980 ("RHC") i.e. that the amount of interest in arrears as at the date of the originating summons and the amount of daily interest, applied to an application for an order for sale. In a gist, this case related to the appellant chargee who sought to enforce two charges over the respondent chargor's land. The chargee obtained an order for sale in the absence of the respondent or its solicitors. The respondent's solicitors only appeared when the appellant's application for a new auction date was heard. The respondent thereafter applied to set aside the order for sale some five years after the order for sale was made. On appeal the Federal Court (by majority) found that it was incumbent for the chargee to provide particulars in consonance with Order 83 r 3 (3) of RHC and the procedural requirements therein must be complied with strictly for the purpose of seeking enforcement of a charge registered under the National Land Code by way of an order for sale, regardless of the reliefs sought.

This case is important for two reasons. Firstly, it clears the uncertainty regarding the ambit of Order 83 r 3 of RHC as to whether it covers an application for an order for sale. Under Order 83 r 1 of the RHC, a distinction is made between the reliefs of delivery of possession, payment of moneys secured by the charge, sale of the charged property and foreclosure, among others. Whilst Order 83 r 3 of the RHC requires the affidavit in support of the application in a charge action which claims for the relief of delivery of possession or payment of moneys secured by the charge or

both to provide particulars in compliance with O.83 r 3 (3), it does not mention application for the relief for an order for sale. In arriving at its decision, the Federal Court invoked the modern purposive approach to statutory interpretation by reading words into O.83 r 3(1) and (3) in order to give effect to the true intention of the legislature.

Secondly, it held that the oft-cited Federal Court decision of *Low Lee Lian v Ban Hin Lee Bank Berhad*ⁱⁱ had defined the phrase "cause to the contrary"ⁱⁱⁱ somewhat too narrowly. The Federal Court instead held in no uncertain terms that the procedural requirements of O 83 r 3(1), (3), (6) and (7) of the RHC must be complied with strictly for the purpose of seeking enforcement of a charge registered under the National Land Code by way of an order for sale, regardless of the reliefs sought.

The Federal Court went on further to rule that the respondent chargor's long lapse of time was not a bar to an application to set aside an order for sale that was so fundamentally flawed. This was underlined by the fact that in the instant case, the charged property had yet to be sold by way of public auction and as such no third party had suffered prejudice by reason of the respondent chargor's delay in applying to set aside the order for sale.

ⁱ [2006] 5 MLJ 21

ⁱⁱ [1997] 1 MLJ 77

ⁱⁱⁱ These words appear in s 256(3) of the National Land Code 1965. An application for an order for sale can be opposed by showing the existence of a cause to the contrary.

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DEBT & RECOVERY

WRITE-OFF NOT A DEFENCE DESPITE MERGER

The defendants in the High Court of Singapore's case of *Oversea-Chinese Banking Corp Ltd v Moey Keng Weng and another and another application*ⁱ advanced, in our view, an ingenious argument in their attempt to escape liability of debts incurred pursuant to an overdraft facilities taken out from a bank which subsequently underwent merger. Their attempt was however futile.

In a nutshell, the defendants mortgaged their properties to Tat Lee Bank Limited ("Tat Lee Bank") in exchange for overdraft facilities. Tat Lee Bank subsequently ceased to exist upon merging with Keppel Bank, which was renamed Keppel TatLee Bank. Keppel Tat Lee Bank later merged with the plaintiff who became the successor-in-title to Tat Lee Bank. The plaintiff then sought delivery of the mortgaged properties and repayment of the principal amounts of the overdraft facilities. The defendants resisted the plaintiff's claims, alleging that their debt had been written off by Tat Lee Bank prior to the merger with Keppel Bank and therefore, Keppel TatLee Bank would not have obtained any right from Tat Lee Bank. Consequently, the plaintiff would not have obtained any right from Keppel TatLee Bank, to maintain the action against the defendants.

Interpreting paragraph 2(2) of the Second Schedule of the Banking Act (Cap 19, 2003 Rev Ed), the High Court was of the opinion that the plaintiff having produced a certificate of approval for the merger between Tat Lee Bank and Keppel Bank, the

undertakings of Tat Lee Bank should without further assurance be transferred to and vest in Keppel TatLee Bank. Further, all contracts, agreements and other instruments or undertakings entered into by or made with or addressed to Tat Lee Bank or to which Tat Lee Bank was a party should be binding in favour of Keppel TatLee Bank as fully and effectual as if Keppel TatLee Bank had been a party thereto or entitled to the benefit thereof. Similarly, any accounts between Tat Lee Bank and its customers should be transferred to Keppel TatLee Bank as well as any securities held by Tat Lee Bank as security for the payment of debts or liabilities should be transferred or deemed to be transferred to Keppel TatLee Bank.

As the defendants did not take issue with the subsequent transfer of the debt from Keppel TatLee Bank to the plaintiff, coupled with the absence of estoppel or documentary proof of the alleged write-off by the bank, their contention was rejected.

The High Court further remarked that even if the defendants were right about the alleged write-off, that would not have afforded them a defence to the plaintiff's claim as a write-off of a debt in the account books of a creditor did not amount to an agreement to release the debtor from the debt. Even if a creditor had a written-off a debt, he could still pursue his legal remedies against the debtor subject to the law on limitation of actions by time bar.



ⁱ [2006] 3 SLR 538

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EMPLOYMENT LAW

IS AN EMPLOYEE DUTY-BOUND TO OBEY SUPERIOR'S ORDER ALTHOUGH THE ORDER IS MANIFESTLY WRONG ?

In *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd*, the respondent as vendor entered into two sale and purchase agreements. The appellant as its general manager signed the agreements on behalf of the respondent, confirming receipt of the 10% deposit although he was aware at that time that such deposit had not actually been received. He did so on the assurance given by his superior that such deposits would be collected. Thereafter, the appellant signed two deeds of assignment on behalf of the respondent confirming the entire purchase price had been fully paid when in actual fact it was not the case. The appellant was charged with gross negligence and was consequently dismissed. The appellant admitted to the acts of negligence but put up a defence that he was merely acting on the lawful order of his superior who had assured him that everything was in order and that the superior would accept full responsibility for the monies due to the respondent.

The Industrial Court ruled in the appellant's favour and held that he was acting on his superior's representations and that he did not know that the two deeds contained misrepresentations. The High Court and the Court of Appeal however overturned the decision. They found that the appellant himself knew of the true position (that the two deeds contained misrepresentations) when he endorsed the deeds on his superior's assurance. By virtue of such knowledge, both the courts held that the appellant could not rely on the defence that he was merely carrying out superior's order which he knew to be illegal or wrongful. On appeal, the Federal Court found that both the High Court and the Court of Appeal had made erroneous findings of facts by confusing the state of the appellant's mind at the time of signing the sale and purchase agreements with that when he endorsed the deeds. Whilst he knew of the misrepresentation in the agreements, he was not aware that the purchase price had not

been paid in full at the time he endorsed the deeds and thus, he could not have known that he was doing wrong by confirming the endorsement. As the charges against the appellant related to the two deeds, the appellant could not be held to be guilty of gross negligence relating to misrepresentations in the deeds.

In arriving at its decision, the Federal Court stated that:

"In this case, it must be established that the guilty knowledge must be present not at the time when the sale and purchase agreements were executed but at the time when the deeds were endorsed as the charges against the appellant relate to the two deeds."

The Federal Court's approach in probing into the state of mind of the appellant at the relevant time appeared to be applying the test adopted by the High Court and Court of Appeal. By doing so, the Federal Court could still arrive at the same decision by overturning the findings of facts of both the courts and at the same time, upholding the principle that merely carrying out a superior's order was not a defence if the order carried out was to do something which the employee was conscious as manifestly wrong.

However, the Federal Court proceeded further to answer the question of law posed. The Federal Court went through case law and ruled that the duty of obedience was confined to compliance with the lawful and reasonable orders of an employer falling within the scope of his employment and as such the concept of a superior's order being manifestly wrong had no part in the doctrine of superior orders in the context of employment law in Malaysia. The Federal Court held the Court of Appeal erred in ruling that an employee was entitled to disobey his superior's orders if he was aware that such orders were manifestly wrong.

It is our view that the Federal Court laid much emphasis on the need for the management to maintain discipline and industrial peace so that an employee should not be permitted to disobey any order which he thought was not legal. This is apparent from

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the remarks it made towards the end of the judgmentⁱ. The Federal Court stated that if the employee was in doubt whether the order was legal or not, the employee ought to obey the order first and to challenge its legality later in separate proceedings. The employee should not take it upon himself to disobey any order he thinks was not lawful and not reasonable. However, if he wished to do so, then he could point out his difficulties to his superior and if the latter still insisted on the order being carried out, he could do the work and take the matter further in proceedings against his employer. He could also elect to disobey such order but he must then take the risk that if the court found the order to be lawful and reasonable, he would be guilty of misconduct.

Nonetheless, what if the employee is fully aware that his superior's order is manifestly wrong? Can he still comply with such order and subsequently, faced with disciplinary action, raise the defence that he

was merely complying with his superior's order? It would appear, in our view, on the authority of the Federal Court's decision, that the defence is still open to him, although this will give rise to the two concerns addressed by the Court of Appealⁱⁱⁱ.

ⁱ [2006] 5 MLJ 113; [2006] 5 AMR 619

ⁱⁱ These remarks were stated in an earlier Federal Court case of *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27.

ⁱⁱⁱ [2004] 1 MLJ 513 at para 22 and 23 at page 521

justified in dismissing the claimant with just cause and excuse.

2. Illegally obtained evidence inadmissible in Industrial Court

The common law generally treats illegally obtained evidence as admissible as long as it is relevant and reliableⁱⁱ. However, the Industrial Court in *Japan Travel Bureau (M) Sdn Bhd v Wong Siew Ngow*ⁱⁱⁱ decided that this rule should not be applied in full rigour in Industrial Court. In the learned Chairman's view, a master-servant relationship with its peculiarities called for different considerations and the industrial jurisprudence had long recognized the need to treat employment contracts different from other contracts.

To say that the Industrial Court could in good conscience ignore or condone the fact that a servant had wrongfully obtained the employers' property would be tantamount to saying that on the one hand the court could and should look beyond the employment contract to ascertain the existence or otherwise of just cause or excuse but on the other hand it could not look beyond the evidence to ascertain how the employee obtained the evidence.

EMPLOYMENT LAW

DIGEST

1. Avoid racist remark

Uttering a racial slur or showing a vulgar sign which is likely to provoke an argument and possibly a brawl is a serious misconduct which may warrant a dismissal. This was the effect of the decision in *Affin Bank Bhd v Loh Poh Hoong*ⁱ. In that case, the claimant and one of the fellow workers did not have a cordial working relationship. Although the other worker was the one calling the claimant name, the Industrial Court held that the claimant started scolding that worker first and later used highly offensive, insulting and derogatory words on the other worker.

The court went on to state that a clear message must be sent out to all employees that racial slurs must be avoided at all costs for the maintenance of industrial harmony. Racially insensitive and uncivil conduct would not be tolerated. The company was held to be

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That also meant that the employee could insist on the employers' compliance with the strict requirements applicable for terminating an employment contract whilst at the same time get away with the violation of trust placed in him by the very same employment contract. The court rejected such convoluted position and held that the industrial jurisprudence position on illegally obtained evidence had to be the antithesis of the common law position. Thus, the court ruled that the documents which the claimant had taken out of the company's possession (by keeping a copy of those documents 'for her own protection') were inadmissible.

3. Don't prejudge your employee based on suspicion

In *Airod Sdn Bhd v Muzaf Abdullah*^{iv}, the claimant was taken into police custody from 24 June 2001 until 20 March 2002 on suspicion of murder. The company issued him termination letter dated 8 August 2001 on the basis of frustration of contract, terminating his employment with effect from 26 June 2001. The claimant was released by the Magistrate Court on 20 March 2002 on the basis of discharge not amounting to an acquittal.

On the claimant's claim of wrongful dismissal, the Industrial Court held that the company's decision to dismiss the claimant while he was still in police custody though taken in good faith was nevertheless reached too hastily which was pre-emptive, premature and unfair labour practice. The court distinguished those cases where the employee had already been convicted or detained under emergency ordinance for a specific period of time whereas in the instant case, the claimant was only detained in police custody on mere suspicion of involvement in a criminal offence and facing a tentative charge in the court. The company ought not to act with preconceived mind as to the reasons for his detention without holding any inquiry. The claimant's dismissal under misconduct was held to be without just cause or excuse.

4. Act only if conviction

The above case is to be contrasted with another decision in *Celcom (M) Bhd v*

Afandi Mohamed Murky^v in which the claimant was actually convicted of assault or use of criminal force with an intent to outrage modesty of one of his fellow workers under s.354 of the Penal Code. The claimant kept the company ignorant of the conviction for some time until the company received Keputusan Penyiasatan Kes from the police. By then, the company had already two years before that accepted the claimant's explanation after the incident had first come to light and issued him with a final warning. The Chairman of the Industrial Court however did not regard the company as being precluded from taking action to terminate his employment. In her judgment, the company's earlier action was based on their knowledge of the allegations against him whilst their action to terminate his employment was based on his conviction of a criminal offence under the Penal Code.

5. Performance covers attendance

The word "performance" was held to be wide enough to encompass both actual work performance as well as attendance--- *Radicare (M) Sdn Bhd v Fadzlina Tokman*^{vi}. In looking at the reasons advanced to justify the claimant's dismissal, the court will be looking at not just the issue of poor performance but also the claimant's frequent absences due to the number of medical and annual leave taken by her. In that case, although the company failed to prove on a balance of probabilities that the claimant was guilty of poor work performance, the court held that 'evaluation of your performance' referred to the claimant's work performance as a whole which included the issue about 20 days of medical leave taken by her during the probation period of six months. It is interesting to note that the court held that the fact that the company had accepted her medical chits and allowed her to go on annual leave did not mean that the issue of the claimant taking such large number of days of medical leave during her probationary period could not be an important factor in determining whether she was fit for permanent employment with the company.

Towards the end of her probation period, the company would be entitled to question whether the claimant was fit-medically fit- for permanent employment as an employee who was not medically fit would be detrimental

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to the interests of the company. Thus, the company had basis in concluding that the claimant could not be confirmed and the non-confirmation was with just cause or excuse.

ⁱ [2006] 2 ILR 1171

ⁱⁱ As the court observed in the case under focus here, the most frequently quoted authority was the 1861 decision of *R v Leatham* 8 COX CC 498 where Crompton J said "it

matters not how you get it, if you steal even, it would be admissible in evidence."

ⁱⁱⁱ [2006] 2 ILR 1176

^{iv} [2006] 2 ILR 1289

^v [2006] 3 ILR 1649

^{vi} [2006] 2 ILR 1327

EQUITY / TORT / DEBT & RECOVERY

THE EVER EXPANDING CATEGORY OF FIDUCIARY

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."^{vi}

Based on the above passage, the learned judge in the Singapore High Court case of *SM Trading Services (a firm) v Intersanctuary Ltd (Kek Kim Hok, third party)*ⁱⁱ held the 3rd Party who was not an employee, a director nor the lawyer of the defendant and who had no formal position in relation to the defendant was in a fiduciary relationship with the defendant on the facts of the case.

The facts in brief:- The 3rd Party held majority interests in a company involved in developing a site into a columbarium. The

company then sold the columbarium to the defendant. The 3rd Party continued to be active in the day-to-day running of the columbarium and was found to act as adviser to the management of the columbarium. The plaintiff was set up specifically to do business with the columbarium by supplying various goods. Various contracts for supply of goods were concluded but the defendant having made some payment refused to take delivery of further goods. The plaintiff claimed the cost of goods sold and damages. The defendant put up the defence that the sale transaction had resulted from a conspiracy between the plaintiff and the 3rd Party to supply goods to the defendant at vastly inflated prices.

The court found that the 3rd Party's continued participation in the business of the columbarium and rendering of advice on its management, the defendant's reliance on the 3rd Party for advice, guidance and recommendation when concluding contracts with the plaintiff and the 3rd Party's vested interest in the columbarium's business pointed to the existence of fiduciary relationship that entitled the defendant to the 3rd Party's loyalty and to expect that the 3rd Party would act in good faith.

The court went on to hold that the defendant proved the conspiracy between the plaintiff and the 3rd Party. There was evidence of agreement between them for the purpose of injuring the defendant. The plaintiff was set up by its sole proprietor (who had no experience at all in dealing with goods necessary for the columbarium business) assisted by the 3rd Party just after the agreement by the defendant to purchase the columbarium was finalized. The court found that the plaintiff was established for the purpose of carrying on business with the defendant and no one else.

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The plaintiff and the 3rd Party must have intended that they would make a big profit from the defendant and that the defendant would pay more for the goods and services supplied than it would have if it had dealt with a genuine third-party supplier on an arm's length basis. Such acts done in execution of the agreement were unlawful as they breached the fiduciary duties the 3rd party owed to the defendant.

The court dismissed the plaintiff's claim, entered judgment for the defendant on the counter-claim and made an order for

damages to be assessed in favour of the defendant against the 3rd Party.

ⁱ Bristol and West Building Society v Mothew [1998] Ch 1, at 18.

ⁱⁱ [2006] 3 SLR 397

INSURANCE / EVIDENCE

INSURANCE POLICY NOT COVERING BANK'S INTERESTS AS MORTGAGEE

In *Standard Chartered Bank v KTS Sdn Bhd*, the appellant bank lent monies to L Co. against fixed and floating charges on all the assets of L Co. by way of a debenture as security. Both the bank and L Co. insured with HL Assurance, through a joint insurance policy, assets and properties covered by the debenture against loss or damage by fire.

L Co. was in the business of buying and selling sawn timbers at a sawmill owned by another company known as FSF. The respondent claimed that it had entered into various contracts with L Co. to purchase sawn timber to the value of close to RM600,000.00 which had been paid to L Co. However before L Co. could make the delivery, a fire broke out and completely destroyed all the sawn timber purchased by the respondent.

The appellant and L Co. settled with HL Assurance and received their respective proportion of insurance money. The respondent sued L Co. and FSF but only managed to recover about 10% of the contractual value from L Co. which was subsequently wound-up, as was FSF. The respondent sought to trace the balance sum due from L Co. to the insurance money that was in the hands of the appellant on the basis

that the appellant held it on trust for the respondent.

The Federal Court upheld the Court of Appeal's finding which inferred an oral agreement between the respondent and L Co. based on contemporary documents. Such finding did not run foul of s 92 of the Evidence Act 1950 which prohibits evidence of any oral agreement or statement as between parties to any written instrument to contradict, vary, add to or subtract from the terms of such written instrument. The oral agreement was between the respondent and L Co. while the written contract was between the respondent and FSF, essentially two separate independent agreements between different contracting parties. Interestingly, the Federal Court remarked that the respondent was free to enter into as many contracts as it wished with any party who was prepared to contract with it.

The Federal Court went on to hold that a fire insurance policy being strictly indemnity in nature was meant to compensate the owner of goods covered by that policy that had been destroyed by the fire even though he was not a party to that policy. The joint policy executed by the appellant and L Co. identified the property insured to those described in the schedule. The phrase "held in trust" in the schedule coupled with the contract price clause was held to include third party's goods, namely the respondent's sawn timber. The appellant's reliance on the mortgagee clause was rejected because the bank's interest as a mortgagee was not stated in the schedule and the mortgagee clause was not specified in the schedule and hence, not part of the policy. The Federal Court further held that the mortgagee clause spelled out certain rights and warranties which the mortgagee had over the mortgage

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and had nothing to do with the coverage. As to the appellant's argument that the Court of Appeal's finding on the appellant holding the insurance money in trust for the respondent was erroneous since three certainties required for the creation of a trust were absentⁱ, the Federal Court held that a trust of the goods and insurance money in the context of a contract of insurance under consideration was not to be equated with a trust in the strict technical sense as understood in courts of equity. Ordinary meaning must be given so that the appellant must hold the insurance money on trust for the respondent who as the owner of the goods covered under the policy

and destroyed by the fire was entitled to be indemnified of its loss.

ⁱ [2006] 4 AMR 677

ⁱⁱ The three certainties are the intention to create trust, certainty of the subject matter and identity of the beneficiary.

LAND LAW / REMEDY

DON'T TAKE THE LAW INTO YOUR OWN HANDS

Imagine a resident of a condominium unit owes to the management corporation of the condominium maintenance and water charges. The management corporation then issues a general notice to all the residents of the condominium that all charges (maintenance charges, water bills, refurbishment charges and others) owing to the management corporation must be paid by certain date failing which the corporation may disconnect water supply and deny entry to vehicles of the defaulting residents. The resident does not comply with the notice, upon which the management corporation proceeds to prevent the resident's car from entry into the condominium complex car park and parking at his parking bay and to clamp the water meter, thereby stop the water supply to the resident's unit. The management corporation's act has beendone in order to recover monies purportedly due by the resident. Is the management corporation entitled to take such drastic action?

The answer is "No". This was the effect of the decision in *John Denis De Silva v Crescent Court Management Corporation*ⁱ. The High Court emphasized on the obligation on

the part of the management corporation to comply with the Strata Titles Act 1985 (the Act) in particular ss 52, 53, 53A and 75 in seeking to recover the monies due to it. This was because the strata titles for the condominium complex had been issued and a management corporation having been incorporated, the management corporation was bound by the procedures set out in the Act to recover the monies due to it. In a nutshell, the debt could be recovered by way of an action in court and before such court action, the management corporation might serve on the defaulting resident two written notices to pay up within a period of not less than 2 weeks respectively. Alternatively, the management corporation could also recover the debt by way of attachment of the movable property of the defaulting resident. But, nowhere did it provide that the management corporation was entitled to take the law into its own hands by issuing purported final notice and thereafter, stopping vehicle's entry and water supply !

The court granted an injunction to restrain the defendant (the management corporation) in the above case from carrying out the act of preventing the plaintiff (a resident of a unit in the condominium in question) from entering the condominium in his vehicle or parking his vehicle at his car park bay and from disrupting the plaintiff's water supply, The defendant did argue that the grant of injunction would set a dangerous precedent for it might open the floodgates of residents not paying the maintenance charges or not complying with the house rules but continue to enjoy all the common benefits of the common area within the condominium.

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It would also be unfair to other law abiding residents. However, the court was quite resolute in its stand that the management corporation must comply strictly with the provisions of the Act. The management corporation also could not act unilaterally on the basis of the house rules because the house rules were *ultra vires* the Act. In other words, once a management corporation is formed, the relationship between the management corporation and the residents are

strictly regulated by the Act and one is advised not to depart from the provisions of the Act.

ⁱ [2006] 4 AMR 618

The plaintiffs applied for interlocutory injunctions.

The 1st defendant contended that if the court were to order removal of the concrete slab, the 1st defendant would need to divert its manpower and resources thereby leading to a delay in the completion of the housing project which in turn would expose the 1st defendant to huge financial losses for having to pay liquidated damages to the house purchasers for late completion. The High Court rejected such contention and upheld the sanctity of the plaintiffs' right as landowner. The concrete slab and piles constituted a serious violation of the proprietary rights of the plaintiffs as landowners by adversely affecting the enjoyment of their lands.

The court would not sanction the continuance of an acknowledged trespass and gross violation of the plaintiffs' proprietary rights, even if there was a danger that removal of the slab might cause the retaining wall to become unstable leading to its collapse, flooding of the plaintiffs' land and collapsing of the houses on the housing project. The court held that the 1st defendant only had itself to blame for being exposed to claims resulting from the actions ordered to be taken.

On the 1st defendant's argument on public interest, the court held that the 1st defendant was not performing any public

functions or duties in developing its own private lands into a housing project. The number of house purchasers forms a very

REMEDY

HOUSING PROJECT DEVELOPMENT NOT NECESSARILY PUBLIC INTEREST

In *Lim Kek Ping & Anor v Thai Wah Construction & Development Sdn Bhd & 3 Ors*ⁱ, the plaintiffs' land shared a common boundary with the defendants' land. The 1st defendant was developing the defendants' land into a housing and commercial estate (housing project). The plaintiffs complained that in the course of carrying out their works, the 1st defendant had committed various acts of trespass and nuisance as follows:

- (a) raising level of the defendants' land which caused parts of the plaintiffs' land to be flooded and water-locked;
- (b) constructing a huge concrete slab on the plaintiffs' land;
- (c) building a retaining wall on the concrete slab;
- (d) leaving the concrete slab and piles where they laid despite being informed of the encroachment.



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small section of the general population of Sarawak (in which state the lands were situated) and this was to be distinguished from the case of *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd*ⁱ which would have occasioned a disruption of electricity supply in Peninsular Malaysia if Tenaga Nasional had been ordered to remove the pylons it had constructed illegally on private lands and which pylons formed part of the national grid for the conveyance of electricity. There was absolutely no public interest involved in the instant case.

Two other features that were noteworthy in this case are that:

- (a) the court, while recognizing that the interlocutory injunctions granted would virtually give to the plaintiffs the relief they sought in the action without affording the defendants a right to be heard in a full trial on the matter, still proceeded to do so as the court was satisfied with the degree of probability that the plaintiffs would ultimately succeed at the trial. The court found that the plaintiffs had an unusually

- strong case that entitled them to a mandatory interlocutory injunction.
- (b) the court dispensed with the usual undertaking in damages that the plaintiffs would usually be ordered to give to compensate the defendants for damages suffered if the court were to find eventually that an injunction was wrongly granted. It was a case of manifest injustice to the plaintiffs and despite the 1st defendant's contention that the plaintiffs' ability to meet an undertaking in damages was doubtful, the court made the orders for various injunctive reliefs without any undertaking as to damages

ⁱ [2006] 5 AMR 68

ⁱⁱ [2000] 1 AMR 1187

REMEDY / TORT

ABANDONMENT OF THE RUBBISH WITHOUT ABANDONING THE RIGHTS

The Singapore High Court's decision in *Vestwin Trading Pte Ltd v Obegi Melissa*ⁱ drove home the point that putting rubbish out for collection by refuse collection personnel was not an abandonment of the documents in the rubbish and the person throwing the rubbish was still entitled to assert property rights in the documents. The basis was that there was no intent to relinquish the goods absolutely but only conditionally for the purpose of such collection.

This issue arose in the said case because the 9th and 10th defendants from time to time retrieved the plaintiffs' trash bags when the plaintiffs' cleaner threw such trash bags in the common rubbish dump in the bin center at

the ground floor of a multi-storey office building. Both these defendants then passed on the documents to the 1st to 8th defendants who used them to the detriment of the plaintiffs. The plaintiffs argued that the circumstances in which the 9th and 10th defendants obtained the documents and in which the 1st to 8th defendants received the documents imposed on them an obligation under the law of confidence not to use or disclose the same. The plaintiffs thus prayed for injunctive reliefs against the defendants.

The court found that all the three elements to establish a case of breach of confidence in non-contract cases were met. The documents in question contained information relating to the financial affairs, management procedures and trading practices of the plaintiffs which were clearly confidential in nature although they were not marked as confidential. As to the second element that the information had to have been communicated in circumstances importing an obligation of confidence, the law would import such an obligation where the confidential information had been obtained by illegal means and thus, there was no need to find an intentional communication of the confidential information

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by the plaintiffs to the defendants. In this case, the 9th and 10th defendants did obtain the information illegally and surreptitiously by criminal means (theft) and unlawful means (conversion). Thirdly, there was clearly an unauthorized use of the information. The court left open the question in law whether this third element required that the unauthorized use must have been to the detriment to the plaintiffs, although on the facts, the court found that the plaintiffs had suffered detriment.

As a result, a permanent injunction was granted to restrain each of the defendants from using or disclosing the documents and to compel them to deliver up the documents to

the plaintiffs and an inquiry to ascertain the quantum of damages for the conversion of the plaintiffs' property was ordered to be held.

ⁱ [2006] 3 SLR 573

REVENUE

PUBLIC RULING ON TAX TREATMENT OF LEGAL AND PROFESSIONAL EXPENSES

The Inland Revenue Board issued Public Ruling No.6/2006 (Ruling) on 6 July 2006 on the deductibility and non-deductibility of legal and professional expenses under s 33(1) and 39(1) of the Income Tax Act 1967. The Ruling spelt out the specific situations when and how legal and professional expenses may be or may not be deducted as an expense from the gross income of a person from a source in ascertaining the adjusted income of the person from that source.

Readers are advised to refer to the Ruling for the complete list of items canvassed therein. Here, we merely highlight certain items that do not qualify for deduction:

- Legal and other expenses incurred in the collection of non-trade debts and loans of capital nature
- For renewal of loan:- legal expenses incurred by a trading or commercial company; legal expenses on renewal of a mortgage on premises; costs of raising additional capital whether by means of a loan or otherwise

- Annual corporate fillings and meeting expenses:- secretarial fees; annual general meeting expenses (but ordinary expenses of keeping books and preparing financial records and accounts including charges for accountancy work and statutory audit fees expenditure are deductible)
- Cost of filling income tax returns and tax computations; cost of appeal against income tax assessment to the courts and special commissioners of taxation
- Cost of defending criminal prosecution or in connection with unlawful acts in operation of a business
- Legal expenses incurred in connection with:- the formation, renewal, variation or dissolution of a partnership; the acquisition of capital assets or the sale or transfer of capital assets; obtaining trading licence; increasing or reducing share capital or altering M&A of a company; flotation, registration, winding-up or liquidation of a company; obtaining new leases, mortgages, loan or credit facilities; valuation charges relating to probate, company reconstruction and change of ownership; income tax appeals; pursuing a claim for unlawful or unjust dismissal by an employee

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- Legal and professional fees incurred by a property developer for obtaining bank overdraft, term loan and bridging finance and for revaluation of land.

The Ruling is effective for the year of assessment 2006 and subsequent years of assessment.

TORT

LIFTING 'CORPORATE VEIL' TO PRESERVE RIGHT TO LODGE COMPLAINT TO PROFESSIONAL BODY

The defendants were owners of lands subject of government acquisition. They appointed C Co. to be their consultant to assist them to seek compensation from the government. The plaintiff was a registered valuer with the Board of Valuers ("Board"). He was a director with C Co. He was appointed by C Co. to provide valuation services and to assist C Co. to prepare valuation reports for each of the defendants. The relationship became strained which led to complaints being made by the defendants to the Board against the plaintiff. The plaintiff upon obtaining information from the Board on the numerous complaints lodged by the defendants sued the defendants for defamationⁱ.

The defendants moved to strike out the plaintiff's claim on the ground of qualified privilege. The plaintiff side-stepped this issue by raising the argument that the defendants had no right to complaint against the plaintiff as valuer as the defendants appointed C Co. and not the plaintiff directly and that the plaintiff should be distinguished from C Co.

The High Court however rejected such argument. The court refused to allow a registered valuer as in the case of the plaintiff

to clothe himself in the guise of a company to protect himself from the laws that govern his professional conduct. The plaintiff was appointed by a company of which he was a director and which could not be expected to lodge a complaint against its own director. The defendants were the very people directly affected by the plaintiff's act and were merely exercising their rights given by the law to lodge complaints against a registered valuer in the manner provided by the law. To stop the defendants from exercising their right went against the very grain of instilling good ethics amongst professionals. To allow a defamation suit of this nature to continue would defeat the whole purpose of the complaint process set up by law and must be discouraged. Claims of this nature would cause floodgates open to defamation suits whenever disciplinary bodies received complaints from the public against their members. The public should be free to lodge complaints as a recourse against what they perceived to be wrong or unprofessional conduct so long as they did so within the confines of the law. They must be allowed to do so without having to fear the possibility of legal action. The defendants therefore succeeded to strike out the plaintiff's claim.

ⁱ Ernest Cheong Yong Yin (suing in the name and style Ernest Cheong PTL Chartered Surveyors) v Low Kim Yap & Ors [2006] 5 MLJ 780

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TENANCY

CENT WISE RINGGIT FOOLISH!!

Little would the 1st defendant know, in the case of *Billion Origin Sdn. Bhd. v Newbridge Networks Sdn. Bhd. & Anor; Yap Burgess Rawson International Sdn. Bhd. (Third Party)*ⁱ, what damage could occur by leaving the fan switched on to cool the server for a continuous period of six days. What discouraged the 1st defendant from utilizing the air condition system was cost.

It was to the plaintiff's shock and disbelief when they returned to their office premises situated one floor below the 1st defendant rented premises after six-day holiday break only to find their premises flooded with water seeped from the floor above. It was evidenced that the fan placed to cool the server on the 1st defendant's premises above had purportedly burnt out causing a fire that triggered the water sprinkler system. In consequence of the failure to turn off the butterfly valve to stop the sprinkler from discharging water, the plaintiff's premises was flooded with water seeped from the 1st defendant's premises above.

Given the facts, we note that although the 1st defendant was the original wrongdoer who triggered off the incident, it was the subsequent events which actually caused damage to the plaintiff thereby raising claims against the 2nd defendant and the 3rd party. The 2nd defendant was the landlord of the building of the premises concerned while the 3rd party was the building manager engaged by the 2nd defendant to run and operate the said building.

The High Court ruled that such flooding incident constituted a contractual as well as a tortious claim against the landlord as the 2nd defendant. Insofar as the contractual claim is concerned, the learned judge held that such flooding incident constituted a breach of the condition, under the tenancy agreement, relating to the tenant's entitlement to a quiet and peaceful enjoyment without interruption and disturbance. Although the 2nd defendant sought to rely on the clause exempting them from liability, the learned judge rejected such

defence as the exemption clause only applied if there was *no* wilful default or breach of the tenancy agreement on the 2nd defendant's part. However, in this case, 2nd defendant had breached a term of the tenancy agreement by failing to provide quiet and peaceful enjoyment to the plaintiff, hence the exemption clause was not applicable.

Further, negligence on the part of the security guard for not preventing foreseeable damage to the Plaintiff rendered the 2nd defendant vicariously liable. The security guard being an employee of the 2nd defendant failed to conduct his rounds diligently and failed to detect the large amount of water flowing down each floor. He also failed to ascertain whether water was flowing from the sprinkler before turning of the flow switch.

Nevertheless, the attempt to lay certain blame on the 3rd party as the building manager appointed by the 2nd defendant was successful on the ground that physical presence of another technician from the 3rd party was necessary to turn off the butterfly valve in order to stop the sprinkler from discharging water. The security guard could not perform the task to turn off the butterfly valve. For this, the letter of appointment of the 3rd party indeed allowed the 2nd defendant to seek indemnity from the 3rd party for the negligence of the 3rd party or its employee. Negligence on the technician's part was therefore attributed to the 3rd party vicariously.

The above did not absolve the 1st defendant's liability, being the originator of the event, as there was no break in the chain of causation. The insurers, who brought this action by way of subrogation were successful in proving its case against both the 1st and 2nd defendants. The 1st defendant ended up having to pay the plaintiff close to RM260,000.00 together with interests; the 2nd defendant to contribute 50% to the 1st defendant; and 3rd party to indemnify the 2nd defendant 25% of the amount.

ⁱ Adapted from the adage 'penny wise pound foolish'.

ⁱⁱ [2006] 4 CLJ 113

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TENANCY / EMPLOYMENT

DRAFTING WITHOUT COMPASS

What lies behind contractual documents that reflect the actual bargain and intention of parties is the immense value of the skill of DRAFTING. Yes, if scant attention is paid to good drafting – you may be the next victim of an unintended binding covenant!

In the case of *PGC Golf Management Sdn. Bhd. v Sarawak Stadium Corporation*ⁱ, the High Court had the occasion to examine the scope of the tenancy agreement executed between the plaintiff and the defendant. It emphasized the position that the courts would look at the words used within the four corners of the agreement to construe the intention of the parties and must interpret the clause in the context of the whole agreement.

The plaintiff was the tenant of a piece of land of which the defendant was the landlord. The plaintiff constructed, operated and maintained a nine-hole public golf course which included a multiple-lane golf driving range and club-house on the land. After about three years, the plaintiff defaulted in its payment of rental for a number of months. As a result, the defendant issued a letter informing the plaintiff that it was in arrears of four months rental and gave the plaintiff a three-month written notice to deliver vacant possession of the said land to the defendant pursuant to clause 5 of the tenancy agreement. Consequently, the plaintiff ceased operations and vacated the land before the expiration of the notice given by the defendant.

One of the issues that arose was whether there was an implied term in the tenancy agreement that entitled the plaintiff to remove the trade fixtures and whether compensation was payable to the plaintiff upon such termination by the defendant.

The plaintiff's case was simply, despite the fact that the tenancy agreement was terminated pursuant to clause 5, it still had the right to remove the trade fixtures notwithstanding that there was no specific provision in the tenancy agreement conferring

a right for the plaintiff to do so. However, the learned judge disagreed with the plaintiff's contention. The court came to its conclusion in the following manner:

In interpreting the tenancy agreement, the court would look at the words used within the four corners of the agreement to ascertain the intention of the parties. Indeed, the parties here had contemplated the inequity of a situation if the tenancy agreement was terminated prior to its expiry of the seven-year period in view of the heavy investmentⁱⁱ by the plaintiff on the land. Thus, if the defendant (landlord) should exercise its right to terminate the tenancy prior to its expiry without any default on the part of the plaintiff (tenant), clause 7 of the tenancy agreement required the defendant to compensate the plaintiff for the capital expenditure and outlay in respect of the said golf course. In contrast, where the tenant was in default of rentals, no such provision was included under clause 5 so as to make compensation payable to the plaintiff upon termination of the tenancy. It merely conferred the landlord the right to terminate the agreement after three-month notice, in which event the tenant should forthwith return the land. No compensation was therefore payable to the plaintiff simply because it was in default. The court also refused to look at the surrounding circumstances to imply a term to allow the plaintiff to remove the trade fixtures.

Although this case does not establish any new principle of law, it is noteworthy in that, it highlights the importance of proper drafting. Had there been proper drafting in the case of the plaintiff to include the compensation provision in clause 5 as was done for clause 7 of the tenancy agreement, the plaintiff could have been saved from such dire consequences. It also serves as a reminder that the intention of the parties to a contract must be recorded clearly in writing, failing which the court will generally not admit extrinsic evidence in proving such intention.

In another unrelated case, *Tan Meng Yung @ Tan Ming Yaw v Telekom Malaysia Berhad*ⁱⁱⁱ, unclear language in the defendant's employee share option scheme (ESOS 3) documents resulted in the defendant having to recognize the plaintiff's entitlement under the scheme. The defendant's intention was that the offer of ESOS 3 was only given to the defendant's employees who were still in its full

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permanent employment as at 1 August 2002 . The defendant contended that since the plaintiff had already compulsorily retired on 27 June 2002, the plaintiff was not entitled to be offered the shares despite the facts that the plaintiff was re-employed on 1 August 2002 as a contract staff for one year and that the plaintiff was issued with the letter of offer of ESOS 3 on 1 August 2002.

However, upon construing the wordings used in the relevant provisions of the ESOS 3 scheme documents, the High Court came to the finding that neither the ESOS By-Laws nor the offer required that the plaintiff must be a full permanent employment of the defendant in order to be eligible. These two documents only required that the plaintiff was employed full-timeⁱ, which the plaintiff was although not on a permanent basis. Thus, the plaintiff satisfied the criteria of full- time employment.

If one were to read the clauses as reproduced in full in the judgment, one will not fail to notice that if only the relevant clause in

the ESOS 3 scheme documents were to use the words “*is employed full-time and on permanent basis by*” instead of the present wordings in clause 4 “*is employed full-time by*”, the defendant would have succeeded in warding off the plaintiff’s claim.

‘If language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone.’

Confucius
(551-479 BC)

ⁱ [2006] 7 CLJ 195

ⁱⁱ construction of 9 greens and tee boxes on the land and also a driving range.

ⁱⁱⁱ [2006] 4 AMR 61

^{iv} There are other conditions that are not relevant to the focus here, hence they are not commented upon here.

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