



TAY & HELEN WONG

LAW PRACTICE • AMALAN GUAMAN

LAW UPDATE 1/2006

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IMPORTANT

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BANKING/SECURITY/COURT PROCEDURE

FIXED OR FLOATING CHARGE & PROSPECTIVE OVERRULING

In *Re Spectrum Plus Ltd*ⁱ, the House of Lords comprising seven members made two important decisions: one on the nature of a charge over book and other debts of a company and the other on the feature of prospective overruling in the common law system.

In that case, a company opened a current account with a bank, obtained an overdraft facility and executed a debenture as security. The debenture was expressed to include, among others, a fixed charge of all book debts and other debts then and from time to time due or owing to the company. The company was obliged to pay into the company's account with the bank all moneys which it may receive in respect of such debts and shall not without the prior consent in writing of the bank sell factor discount or otherwise charge or assign the same in favour of any other person. However, provided the overdraft limit was not exceeded, the company was free to draw on the account for its business purposes. Both parties proceeded to act in such manner until the company went into voluntary liquidation whereupon the bank applied for a declaration that the debenture had created a fixed charge over the company's debts. Question was posed to the House whether a charge over present and future book debts, where a chargor could not dispose of or charge the uncollected book debts but could deal with its debtors and collect the debts and where the chargor was obliged to place the payments made to it by its debtors in a designated account with the chargee bank but could freely draw on the account for its business purposes provided the overdraft limit was not exceeded, was capable in law of being a fixed charge. The House held that the company's right, pending notice by the

bank terminating the overdraft facility and requiring immediate repayment of the indebtedness, to draw freely on the account had been inconsistent with the charge being a fixed charge. The label placed upon the debenture, although expressed to grant the bank a fixed charge over the company's book debts, had in law granted only a floating charge. On that score, the decision in *Siebe Gorman & Co Ltd v Barclays Bank Ltd*ⁱⁱ, which was made based on terms of debenture similar to *Re Spectrum Plus* case and which has for the past 26 years been followed by bankers when formulating their standard forms of charges on book debts was over-ruled. This has major impact on those debentures currently used as charges similar to those in *Siebe Gorman* or *Re Spectrum Plus*, being regarded as floating charges, would cause the debenture holders to rank after preferential creditors in a winding-up scenario. If however, such charges were regarded as fixed charges as originally contemplated, then the debenture holders will rank first in time.

As to the contention of the bank that the House should overrule *Siebe Gorman* decision only for the future while allowing it to continue to apply to all transactions entered into before the decision in *Re Spectrum Plus Ltd* case including the debenture under consideration (i.e. 'prospective overruling')ⁱⁱⁱ, the House was not prepared to hold that the instant case fell into the exceptional category. Such decision would have the effect of depriving the preferential creditors the rights given to them by statute to rank in priority to the bank if the charge were a floating charge. It is noteworthy that five of the seven Law Lords would not rule out the possibility that in a wholly exceptional case the interests of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively.

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ⁱ [2005] 4 All ER 209

ⁱⁱ [1972] 2 Lloyd's Rep 142

ⁱⁱⁱ The speech of Lord Nicholls of Birkenhead deals extensively with various features of the judicial system relating to the effect of a court decision.

BANKING/LIMITATION/SECURITY

RIGHT OF ACTION FOR SHORTFALL --- REVISITED

In our previous issue, we expressed our reservation on the part of the decision of the Federal Court in *Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd* which held that a civil suit to recover the difference between the amount due under a housing loan and the amount realized from the sale of the land charged as security ("the shortfall") should only be filed after the amount realized from the sale is ascertained. The Federal Court appeared to hold the view that a civil suit to recover the debt brought against the chargor personally (an action in *personam*) prior to the completion of the charge action is premature.

In England, however, the recent House of Lords' decision appeared to have differed from such view. In *West Bromwich Building Society v Wilkinson & Anor*ⁱⁱ, it was held that where the cause of action when it arose was a claim to a debt secured on a mortgage, S.20 of the Limitation Act 1980ⁱⁱⁱ did not cease to apply when the security was subsequently realized. In that case, the mortgage money outstanding became due and payable one month after the mortgagors defaulted in paying a monthly instalment, which was in 1989. The lender sold the mortgaged house in November 1990 but only filed the claim for shortfall of the outstanding sum in November 2002. The House of Lords held that for the purpose of the cause of action to recover a principal sum secured by a mortgage under the said

S.20, time had begun to run when the event of default occurred in 1989 and accordingly the lender's claim for shortfall was statute-barred.

S.20(1) of the Limitation Act 1980 in England is similar to S.21(1) of our Limitation Act 1953. We do not think the fact that the case was a mortgage action makes any difference to the principle propounded therein with regard to a charge action. That being the case, the cause of action to recover the debt against the chargor personally by way of a civil suit accrues upon the occurrence of an event of default whereupon limitation period of twelve years under S.21 of the Limitation Act 1953 starts to run. The time continues to run regardless of whether the lender exercises the power of sale and whether the action is for shortfall or otherwise. In this respect, it appears to be at odds with the Federal Court's decision in *Tan Kong Min* case which held that a claim for balance after sale being a claim for money secured by a charge on a land subject to the limitation period of 12 years under S.21 of the Limitation Act 1953, the cause of action accrues and the limitation period begins after the sale has been conducted and the differential amount (i.e. the shortfall) remaining due to the chargee has been ascertained^{iv}. We advise lenders to nonetheless bear the English decision in mind despite the decision of our apex court as in our opinion, the English decision with its reasoning is to be preferred.

It is also to be noted that a distinction must be drawn between recovery of principal sum of money secured by charge/mortgage and claim for interests. Whilst a chargee/mortgagee has twelve years from the accrual of the cause of action to sue for the principal, it only has six years to sue for interests^v.

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ⁱ [2005] 4 AMR 745

ⁱⁱ [2005] 4 All ER 97

ⁱⁱⁱ S.20(1) reads : "No action shall be brought to recover...any principal sum of money secured by a mortgage or other charge on property (whether real or

personal) ... after the expiration of twelve years from the date on which the right to receive the money accrued."

^{iv} See para [24] on p.753 of the AMR report.

^v Bristol & West plc v Bartlett & Anor [2002] 4 All ER 544

BANK/TORT

BANK, FREEZING ORDER AND DUTY OF CARE

This was what England's Court of Appeal had to consider in the case of *Customs and Excise Commissioners v Barclays Bank plc*ⁱ in ascertaining whether there was a duty of care owed to the claimants by a bank which had been notified of freezing orders relating to current accounts of certain of the bank's customers. The bank had failed to prevent transfers of funds out of those accounts. The claimants sued the bank for negligence.

The Court used three approaches to ascertain whether there was a duty of care at least in an economic loss case. Firstly, the threefold test of (a) foreseeability, (b) proximity and (c) whether it is fair reasonable and just to impose a duty of care (fairness). Secondly, the assumption of responsibility test. Thirdly, the incremental test. Each of the approaches is supposed to lead to the same conclusion if the facts are properly analysed.

On the threefold test, the bank had accepted that the first element of 'foreseeability' existed i.e. if the bank fails to put in operation any mechanism for

preventing their customers from withdrawing money from their account, it is plain (foreseeable) that the claimant may not be able to collect the whole of its claim. As far as 'proximity' is concerned, the Court of Appeal was of the opinion that despite the bank not being a party to the litigation (which was between the claimant and the bank's customer), once a bank is served with notice of a freezing order, the bank cannot but be aware that the claimant has a very active interest in trying to ensure that moneys in the debtor companies' accounts are not transferred and as such the relationship is plainly a proximate one rather than a remote one. As regards 'fairness', it was eminently fair, reasonable and just that the law should require a bank which receives notice of a freezing order to take care not to allow a defendant to flout such an order. More importantly, no policy consideration militated against the existence of such a duty and the imposition of such a duty did not involve any significant extension of the law of negligence.

On the incremental approach, it was evidently contemplated in *Z Ltd v A*ⁱⁱ that banks could and would exercise reasonable care to preserve a defendant's assets and not allow them to be dissipated. It is only a short step to hold that they should be liable to a claimant who suffers loss if such reasonable care is not exercised. Imposition of such a duty of care is not to impose on banks liabilities different in kind from the sort of liabilities to which banks have become used at the hands of their customers and others for many years.

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On assumption of responsibility, the Court of Appeal was of the opinion that whilst an assumption of responsibility may, on occasion, be sufficient for the imposition of a duty of care, it cannot be said that it is always a necessary ingredient. It is rather the case that the law will use the phrase when it decides that there is to be a duty. As such, the law imposes a duty of care by virtue of the fact that the order had been served upon the bank rather than by virtue of the bank having written a letter acknowledging service of the order.

In short, once the bank had been notified of the freezing order, the bank owed a duty to the claimants to take care that funds in the frozen accounts should not be dissipated in breach of that order.

ⁱ [2005] 3 All ER 852

ⁱⁱ [1982] 1 All ER 556

CONTRACT/SECURITY

VARIATION WITHOUT SURETY'S CONSENT

Section 86 of Contracts Act 1950 reads: "Any variance, made without the sureties' consent, in terms of the contract between the principal debtor and the creditors, discharges the surety as to transactions subsequent to the variance". (emphasis ours).

In *Abdul Hamid bin Mahmood & Anor v Oriental Bank Berhad*, the guarantors/sureties had signed the Bank's standard form guarantee which contained a clause that allowed the Bank to vary the credit without their consent. On the construction of the said clause, the High Court held that it was only related to the variation of the credit facility and did not relate to the variation of the security. Thus, the said clause did not permit the Bank to uplift the fixed deposits given as security prematurely without the sureties' consent.

Having so decided, however, the High Court went on to decide that any variation to the principal agreement is permitted only with the sureties' consent as the protection provided by section 86 of the Contracts Act 1950 cannot be contracted out and waived by parties but remains binding. The judge sought to distinguish the case from the Privy Council decision of *Ooi Boon Leong & Ors v Citibank NA*ⁱⁱ (which held that s.86 could be contracted out). Whilst the sureties in *Ooi Boon Leong* case were directors of the principal debtor, the sureties here were the weaker party who needed protection as against the creditor since they were not related to the borrower company and did not enjoy the benefits of the loan but had merely made themselves liable for the debt as sureties. More significantly, the High Court regarded the said Privy Council's decision as peculiar to its own facts and did not set out the general law on contracting out of Part VIII of the law on indemnity and guarantee of the Malaysian Contracts Act. In preferring to adopt the more recent approach of Malaysian courts in interpreting a statute as to whether a person could contract out of a statute, the High Court ruled that sections 86, 92 and 94 of the Contracts Act are intended to protect sureties who did not enjoy benefits of the loan and are not related to the borrower and parties cannot contract out of the statutory

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protection given by those provisions either willingly or unwillingly or knowingly or unknowingly.

This High Court decision represents a stark departure from the long line of cases that have consistently followed the Privy Council decision in *Ooi Boon Leong* case that parties are free to contract out of statutory provisions like sections 86, 92 and 94 of the Contracts Act. It is to be noted that the decision was delivered on 24 April, 2002 although the grounds were reported recently in 2006. Whether this new approach and ruling on the provisions relating to indemnity and guarantee in the Contracts Act will be

affirmed by our appellate courts in due course remains to be seen. Such course will surely affect the banking community which has for years obediently been following the liberal approach propounded by the Privy Council in *Ooi Boon Leong* case.

ⁱ [2006] 1 AMR 59

ⁱⁱ [1984] 1 MLJ 222

CONTRACT/EVIDENCE

ACKNOWLEDGMENT VS. ACCEPTANCE

A had provided Co.B with a written quotation which contained a condition that "This offer is valid only if written confirmation of acceptance of the offer by Co.B." When the words "Terms & Conditions to be discussed" were written just above the signature of an executive director of Co.B who also placed the stamp of Co.B on the written quotation, was there acceptance by Co.B of A's quotation which formed a binding and enforceable agreement or was it merely an acknowledgment?

This was in essence the factual scenario in *CS Bored Pile System Pte Ltd v*

Evan Lim & Co Pte Ltd. Given the wording of the condition stated above, the stamp of Co.B and the written position of the signatory and considering that it is a construction contract where it is not unusual some terms and conditions might have to be worked out subsequently to the formation of the contract but an agreement will still be regarded as formed as long as the nature and structure of the general agreement is clear, the High Court in Singapore held that the signature of the executive director was an acceptance and not an acknowledgment.

ⁱ [2006] 2 SLR 1

CONTRACT

CONTRACT BREAKER NOT TO TAKE ADVANTAGE OF OWN WRONG

In the case of *Poh Geok Sing v HB Enterprise Sdn Bhd*, the defendant had entered into a joint venture agreement with the plaintiff, a developer, to carry out development on the defendant's portion of land. The defendant had also executed a power of attorney in the plaintiff's favour conferring wide powers to deal with the defendant's portion. The development was never completed because part of the

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construction encroached onto a third party's land. Years passed and negotiations could not resolve the impasse. The joint venture agreement was then treated by the defendant as terminated by repudiation. The Court of Appeal affirmed the High Court's finding that it was the plaintiff who was at fault with regard to the encroachment. Having considered the power of attorney, it could not be said that the plaintiff's promise could not be performed, or its performance could not be claimed without the defendant fulfilling his promise within S.55 of the Contracts Act 1950. The plaintiff had sole control over matters pertaining to planning and subdivision and there was nothing further for the defendant to do in respect of these matters. The defendant was on the facts of the case entirely justified in terminating the agreement and holding the plaintiff in breach of contract.

The Court of Appeal however disagreed with the trial judge who directed an assessment of the work that the plaintiff had done and ordered the defendant to pay the assessed value. The Court rejected the proposition that since it was the defendant who terminated the contract, he must restore the plaintiff the benefit he obtained under the contract. The Privy Council

decision in *Muralidhar Chatterjee v International Film Co Ltd*ⁱ was explained in this way:- "A contract breaker must pay damages to the innocent party. However, if he has made any payment under the contract, the contract breaker is entitled to set off that payment against the damages he has to pay. However, he cannot seek to recover any benefit he may have conferred upon the innocent party where he is himself guilty of a breach of contract. Were it otherwise, a contract breaker will be in a position to take advantage of his own wrong. This is against principle and the policy of law." There was no finding by the trial judge that the incomplete structures improved the defendant's land by adding on to its permanent value and thus it was not open to the court to direct an assessment as the benefit element was lacking in this case.

ⁱ [2006] 1 MLJ 617

ⁱⁱ AIR 1943 PC 34

the Valuers, Appraisers and Estate Agent Act 1981 ("the Act") do not apply and the agreement for commission in respect of the sale of land by persons not registered as estate agent under the Act was held to be valid and enforceable in law.

In the above case, the defendant ("TJ") was a co-owner of several pieces of land. He, together with the other co-owners, requested the plaintiff ("TSL") to find a buyer for the lands. An agreement was drawn up authorizing TSL to sell the lands stating the sale price at RM40,000 per acre and that 2% of the total sale price would go as commission to TSL. Further, if TSL was able to sell above RM40,000 per acre, then the additional value shall belong to TSL. TSL managed to obtain a purchaser for the lands

CONTRACT

NON-ESTATE AGENT MAY STILL COLLECT COMMISSION FOR SALE OF LAND

The Court of Appeal decision in *Teh Eng Peng @ Teh Joo v Teh Swee Lian*ⁱ held that in the absence of a system or a course of conduct, it cannot be concluded that a person is practising or carrying on business as estate agent. Therefore, the provisions of

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and this claim was for the commission and the additional sum due to him under the abovesaid Agreement.

TJ contended that the agreement was illegal, null and void and therefore not enforceable in law as TSL was not a registered real estate agent and not authorized under the Act to undertake estate agency practice. TSL however argued that he was not practising or carrying on an estate agency practice and that he never held himself out to the public that he was an estate agent. Therefore, what he did in the circumstances of this case fell outside the provisions of the Act.

The Court of Appeal held that there was not in existence a system or a course of conduct which went to show that TSL was practising or carrying on a business as an estate agent. The transaction was just an isolated transaction and TSL has not been involved in any other similar transactions. Furthermore, no estate agency relationship existed between TJ and TSL. It was simply a case of the landowners requesting TSL to look for a potential buyer for the lands and if

successful, TSL would be paid a commission. At no point did TSL offer any professional advice or other services to TJ as an estate agent.

Therefore, an isolated transaction does not necessarily constitute carrying on a business as an estate agent and evidence of a system or continuous activity is necessary to prove estate agency practice. One has to look at the surrounding circumstances relating to the sale transaction and any similar transactions that the person may have been involved in order to determine whether an estate agency relationship exists.

ⁱ [2006] 2 MLJ 305; [2006] 3 CLJ 249.

CORPORATE LAW/RESTRUCTURING

NO GOOD REASON TO EXTEND RO

In *Metroplex Berhad & 15 Ors v Morgan Stanley Emerging Markets Inc & 3 Ors (RHB Sakura Merchant Bankers Berhad & 10 Ors – Interveners)*^j, the applicant was trying for the fifth time to extend the restraining order (RO) against any action or proceeding which it had obtained pursuant to s176(10A) Companies Act some two years earlier in order to propose a new scheme of arrangement to its creditors.

The Malaysian High Court found no “good reason” to allow the extension as the

applicant did not appear to have a genuine proposed scheme. In fact, less than half of the creditors had agreed to this extension application; and only 21% in value of creditors had given their approval to the scheme itself (whereas the Court construed the relevant provision of the Act to require at least 50% before the RO can be granted). Hence, even if more time was given, the scheme was bound to fail!

It was further ruled that before the RO can be extended, all the provisions of s176(10A) must be met afresh and there must have been reasonable progress made towards achieving the scheme. Since the applicant failed to show all of the above, the RO was not extended.

^j [2005] 6 AMR 509

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CORPORATE LAW/RESTRUCTURING

EXTENSION OF TIME TO SUBMIT SCHEME

The company, Raffles Town Club Pte Ltd, for the third time, had sought for an extension of timeline to put forward a scheme of arrangement to its creditors and the convening of the meeting to discuss the scheme. The Singapore High Courtⁱ dismissed the application not just because of the two extensions having been granted earlier, but because the Company had failed to explain why more time was needed again. In particular, there was no disclosure as to what had been done in the meantime towards the finalisation of the scheme; which components of the scheme were missing; how much more time was needed to complete the outstanding components; and why the delay in making this application when the time for advertising and posting

the scheme was due in a week's time. There was also no explanation given on the source and amount of the proposed funding; or why the earlier fixed timelines could not be met.

In addition, the Court commented that the affidavit in support of this application should have been deposed by persons directly involved in the scheme proposal (namely the directors of the Company, the external financial advisers and the legal advisers) and not, as was in this case, the general manager of the Raffles Town Club owned by the Company.

ⁱ Re Raffles Town Club Pte Ltd [2005] 1 SLR 296

CORPORATE LAW

NO OPPRESSION IF REASONABLE OFFER TO BUY-OUT OPPRESSEE REFUSED

Faced with an oppression of minority suit under Section 216 of the Singapore Companies Actⁱ, the alleged oppressors may well make a reasonable offer to purchase the allegedly oppressed party (alleged oppressee)'s shares in the company in question and if such an offer is spurned by the alleged oppressee, an action for oppression could not be sustained. This is one of the rulings made by the Singapore

High Court in the case of *Lim Swee Khiang & Anor v Borden Co (Pte) Ltd and others*ⁱⁱ. It was also held that an offer was reasonable where: (a) the offer was to purchase the shares at a fair value; (b) if value was not agreed, it would be determined by a competent expert; (c) the offer was to have the value determined by the expert as an expert; (d) the offer provided for an equality of arms between the parties; and (e) the question of costs was considered in the offer.

On the facts of the case, the defendants' offer substantially met the pre-requisites of a reasonable offer to purchase. Despite such offer extended to the alleged oppressee very shortly after the commencement of the action, the alleged oppressee did not act to resolve the situation notwithstanding that they had applied to court to have their shares bought out. The oppressee was thus guilty of an

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abuse of process in continuing with this action and in refusing to respond to the defendants' offer of a buy-out. The oppressee's action was therefore dismissed.

ⁱ S.181 of the Malaysian Companies Act 1965
ⁱⁱ [2005] 4 SLR 141

EMPLOYMENT LAW/CONTRACT

INJUNCTION GRANTED TO RESTRAIN EX-EMPLOYEE FROM WORKING FOR RIVAL

The High Court of Singapore recently allowed an employer to enjoin its former employees from working for a rival companyⁱ. The contract of employment provided the employees with the right to terminate the employment on three months' notice. However, the right accrued only after the employees had served 2 years employment. Notices of resignation [sent at various dates between 17 June 2005 and 14 July 2005] was duly given to the employer who in turn did not accept the resignations and contended that the employees were in breach of the contract of employment. The employer subsequently instituted suits against the employees and filed an application for interlocutory injunctions in both suits. The rival firm was later joined as an intervener. Half way through, the employees commenced employment with the rival firm on 25 July 2005.

The High Court held that although an employer cannot compel an employee to

continue working for him, an employer is entitled to restrain an employee from working for somebody else. Parties to a legally binding contract must adhere to the agreed terms and it would be dishonourable not to do so. The Court did not see this case as a dispute over a restraint of trade contract although it has the semblance of such contract. The Court was merely enforcing a straightforward term of the contract as to when an employee should be allowed to tender his resignation. In cases of this nature, where an injunctive relief was still possible, it should be granted unless there were good reasons why it should not. The plaintiffs in this case had a legitimate interest to protect which was their interest in the contract of employment. Thus, the Court allowed the plaintiffs' application for interlocutory injunctions. The court held that the period of three months shall commence from July 19 2005 (the date the application was first heard before the judge) and that the period of purported employment by the intervener from 25 July 2005 to date will be subjected to the calculation of damages (if any) after trial.

ⁱ Tullet Prebon (Singapore) Ltd and another v Chua Leong Chuan Simon and Ors and another suit [2005] 4 SLR 344

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EMPLOYMENT LAW

CONDONATION OF MISCONDUCT

A company must act swiftly on any misconduct of its employees to avoid any finding of condonation against it. In *Network Foods Industries Sdn Bhd v Thandapani Tirugnanasambandam*ⁱ, the Industrial Court found that the claimant (employee) had actually informed the general manager of the company of his interest in private business whereof the latter took no action against the claimant. The Court held that the consent was implied and it overrode whatever clauses in the claimant's letter of appointment which prohibited him from engaging in any private business outside the

employment with the company. There was therefore no misconduct. However, even if there was, the company had condoned the act of the claimant's misconduct by allowing him to continue in his employment after having knowledge thereof and the company had thus waived its right to punish the claimant.

ⁱ [2006] 1 ILR 281

EMPLOYMENT LAW

TRANSFERRING EMPLOYEE

The recent High Court decision of *Chong Lee Fah v The New Straits Times Press (M) Bhd*ⁱ reaffirms the principle that the right to transfer an employee from one department to another and from one post of an establishment to another or from one branch to another or from one company to another within the organization is the prerogative of the management. However, it is not without restriction. A transfer must not entail a change to the detrimental of an employee in regard to the terms of employment and that the management must act in *bona fide*.

In this case, the applicant commenced her employment with the first respondent, The New Straits Times Press (M) Sdn Bhd in 1977 and was subsequently transferred to the Share Registration Section ('SRS') with effect from April 1994. In November 1997, the applicant was informed

that she would be transferred to a subsidiary known as AMAL as a result of the closure of the SRS. In 1998, the applicant made her claims in the Industrial Court for constructive dismissal which was rejected and hence, this application for judicial review by the applicant.

The High Court held that the transfer was not merely a transfer within the group in view of the issuance of fresh letter of employment with new terms and conditions to the applicant and utilization of her outstanding leave. Upon making a cursory comparison of the basic terms such as salary, retirement benefits, medical benefits, hospitalization, working hours and annual leave, it was held that the applicant was transferred on less favorable terms of employment and the drastic change amounted to a fundamental breach of contract on the part of the first respondent and the applicant was right to consider herself constructively dismissed.

Another point which was taken into consideration by the learned judge was that the transfer was necessitated by the closure of the SRS. His Lordship said that had the applicant continued to remain in the employment of the first respondent, the first

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respondent would have been left with no choice but to retrench her from the service and termination benefits would be payable to the applicant. Reasonable inference was thus drawn from the conduct of the first respondent that the transfer was an attempt to avoid paying termination benefits to the applicant following the closure of SRS.

Arising from this decision, caution must be exercised when a company decides to transfer its employee(s) from a department/subsidiary to another department/subsidiary due to the closure of former department/subsidiary as the court may deem such transfer as a disguise to

avoid paying termination benefits to the affected employee(s) and strikes down such transfer as not *bona fide*.

ⁱ [2006] 1 MLJ 289

EMPLOYMENT LAW

PRIMA FACIE CASE APPROACH --- REVISITED

In our previous 2/2005 issue, we drew your attention to the *prima facie* case approach propounded by the Malaysian High Court to be used by Industrial Court in deciding on a wrongful dismissal claim when there was a domestic inquiry conducted prior to the dismissal. This approach was expanded by the Industrial Court when it ruled that upon the court holding that the domestic inquiry was valid, the inquiry notes were accurate and the company had established a *prima facie* case against the claimant, the burden then shifted to the claimant to rebut the *prima facie* caseⁱ.

However, the *prima facie* case approach was shunned upon in *CSM Trading Sdn Bhd v Tan Chai Kai*ⁱⁱ. In that case, the Industrial Court Chairman cited two High Court decisions to support his decision to depart from this approach. In

essence, his reasoning is that the approach would usurp the function of the Industrial Court Chairman and render the charge of misconduct against a workman be decided by the domestic tribunal instead. Thus, he held that the Industrial Court should not be concerned with the domestic inquiry held by the employer particularly as regards its procedural fairness. However, he opined that the inquiry record relating to the substantive grounds may be used by either party to support or rebut the case in the Industrial Court and this is particularly useful when the witness is no longer available.

Which view will prevail remains to be seen and awaits determination at the Court of Appeal in the pending appeal against *Bumiputra Commerce Bank Berhad* caseⁱⁱⁱ which is the case that re-ignited the *prima facie* case approach.

ⁱ *Merck v Electronic Chemicals Sdn Bhd* [2006] 1 ILR 473.

ⁱⁱ [2006] 1 ILR 495.

ⁱⁱⁱ [2004] 7 CLJ 77

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INSOLVENCY

NO UNDUE INFLUENCE NOR VOLUNTARY SETTLEMENT

Some five years before a developer company was wound up, it had entered into several sale and purchase agreements with some of its creditors. The liquidator of the developer company had disputed the validity of these sale and purchase agreements on the ground that they were entered into to purportedly set off debts allegedly due from the developer company to the creditors concerned when no proof had been presented to substantiate the debts and having regard to s293 Companies Act (Undue Preference) and s52 Bankruptcy Act (Avoidance of Voluntary Settlement)

In deciding *Korakyat Plantations Sdn Bhd v Tan Siew Ee & Co*ⁱ, the Court of Appeal reinforced the rule that the burden rests with the liquidator to prove that these purchasers did not act in good faith and that the transactions were entered into without valuable consideration. This the liquidator had failed to prove as the Court found that there was nothing to show that the purchasers had not acted in good faith as each sale and purchase agreement was

properly stamped, witnessed and attested to by solicitors; there were also receipts issued by the developer company evidencing payment by the purchasers of the 10% deposit upon execution of the agreements. In addition, the developer company had issued undertaking letters to these purchasers stating that it would transfer /assign those units of property free from encumbrance or claim whatsoever as a total set off against the loans taken from the purchasers. This was tantamount to an admission by the developer company that it had received valuable consideration from the purchasers concerned. The sale and purchase agreements were thus upheld and excluded from the scheme of arrangement which otherwise would entail the transfer of the units in respect the disputed sale and purchase agreement to the bridging financier.

ⁱ [2006] 1 MLJ 274

PROBATE/CONTRACT

IMPORTANCE OF LETTER OF ADMINISTRATION

The importance of the letters of administration in order to deal validly with a deceased's estate was underscored in the Court of Appeal's decision of *Harinder Singh & 8 Ors v Futuristic Builders Sdn Bhd*. The 2nd and 6th appellants duly authorized by the other beneficiaries to the estate of the deceased entered into a joint venture

agreement with the respondent for the development of two pieces of land which formed part of the estate. At that time, the letters of administration had not been issued. It was held that in law, a person's interest in land upon his death, devolves to and becomes vested in his estate and for so long as the estate remains unadministered, and despite the grant of letters of administration, the beneficiary of the estate has no title or interest in the property and cannot then pass on the title and interest to another. In this case, at the date of execution of the agreement, the appellants would not have had any title or interest in the said lands which remained vested in the deceased's estate as the letters of administration had yet to be granted. There

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was therefore no interest in the said lands passed to the respondent and the agreement was invalid and unenforceable. It is to be noted that the Court of Appeal extended the principle of law that a beneficiary of an estate can only validly deal with the personal estate of a deceased person when the administration of the estate is complete and distribution made accordingly to cases which involve the estate of a testate deceasedⁱⁱ.

ⁱ [2006] 2 CLJ 272; [2006] 2 AMR 698

ⁱⁱ at para [17] at page 711.

REMEDY

DAMAGES FOR DIMINUTION IN VALUE OF CLUB MEMBERSHIP

Club members who are promised of a premier club may sue for damages for failure of the club owners to provide it. The Singapore Court of Appeal had earlier held that the defendant (the proprietary club owner) had a contractual obligation to provide the plaintiffs (the founder members of the club) a premier club and maintain it as such in the light of representations made in the promotional material and that the club had failed to do soⁱ. The current caseⁱⁱ was an appeal against the assessment of damages pursuant to the earlier case.

The club members contended that the club owner should have only admitted between 5,000 to 7,000 members to remain a premier club. Instead 19,000 members were admitted. To estimate the loss suffered by the club members, the court compared the worth of a premier social club and the run-of-the-mill-club at the date of the breach. Although it may be difficult to measure the true value of memberships of clubs, the transacted price paid for

membership would be the best evidence available. The decline in the price between the date the plaintiffs paid for their membership and the price at the date of the breach was to be determined, taking into account how much of that decline was due to the general weakened market condition or demand for club membership over the same period. Once that was established, the difference represented the decline due to the breach. In the current case, the court recognized that there were several possible methods to determine the diminution in value due to the breach and there was no one correct way to work out the probable loss. There was simply no one indisputable formula in a clearly inexact issue such as this. The court opted for the method of using the decline in price of the club membership from the date the plaintiffs paid for the membership to the date of the breach together with the "eight-club index". The "eight-club index" was created based on the evidence of an economic analyst who made a study on eight comparable social clubs based on the sales data to show the average market depreciation of the eight clubs over a certain period. The average decline in clubs was 50% compared to 61.4% of the defendant. The difference between the average decline and the actual decline of the defendant in the corresponding period was regarded to be attributable to the breach, namely there were just too many members in the club. The enhanced decline would work out the

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amount of damages. Hence the damages awarded to the plaintiffs were as follows:-

SGD\$28,000.00ⁱⁱⁱ - SGD\$10,800.00^{iv} = SGD\$17,200 or 61.4%

Average decline of clubs= 50%

61.4%- 50%= 11.4%

11.4% x SGD\$28,000.00= SGD\$3,192.00^v

The court however declined to award damages to the plaintiffs for loss of amenities, accessibility and enjoyment to avoid double compensation.

It is to be noted that the Singapore courts refused to let the lack of definite figures as to the value of premier club and value of non-premier club as at the date of breach to bar the claim for diminution in

value and to impede the assessment of damages.

ⁱ [2003] 3 SLR 307

ⁱⁱ Raffles Town Club Pte Ltd v Tan Chin Seng & Ors [2005] 4 SLR 351

ⁱⁱⁱ Price paid by the plaintiffs for the club membership in December 1996, which was regarded as the likely market value of the club membership then.

^{iv} The transacted price of club membership as at date of the breach, March 2001

^v The court rounded up the amount to SGD\$3,000.00 for each plaintiff.

TAX/EMPLOYMENT LAW

CONTRACTUAL SHARE OF PROFITS & BONUS

In *Steruda Sdn.Bhd. v Ketua Pengarah Hasil Dalam Negeri*ⁱ, a consultant obstetrician and gynaecologist was entitled to a contractual fixed payment of RM3,000 per month as well as 25% of the employer's yearly net profits. The issue was whether this contractual payment of 25% profits was a bonus and hence, subject to certain restrictions regulating its deduction under the Income Tax Act 1967; but if it was not a bonus, then the entire amount would be deductible.

The Malaysian High Court held that whether or not a payment is a bonus is dependant on the facts of each case and the

relationship between the company, the tax payer and its employees. In this case, it was held that the 25% profits payment was not a bonus but formed part of his total remuneration package as the RM3,000 payment per month per se would not commensurate with the fact that the consultant was a senior obstetrician and gynaecologist. In addition, this 25% profits payment was not discretionary and not subject to review and did not apply to other staff.

In other words, the contractual payment which was not a fixed sum is nonetheless part of the salary of the consultant and the fact that it is not ascertainable until after profits are computed does not change its character.

ⁱ [2006] 1 AMR 87

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TAX

REVIEW AND REPLACEMENT OF ASSESSMENT FROM RPGT TO ITA

The Inland Revenue Department (IRD) had earlier raised assessment to real property gains tax under the Real Property Gains Tax Act 1976 (RPGT) against a company carrying on the business of a property developer in respect of the gains made on the disposal of certain lands. The company paid the tax. About a year later, the IRD informed the company that the transaction in question should be subjected to income tax and not real property gains tax and accordingly an assessment of income tax was raised under the Income Tax Act 1967 (ITA) to replace the real property gains tax's assessment. The Company objected to such action by IRD. On such facts, the High Court held in *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negerii* that the IRD was not precluded from raising an assessment under the ITA after reviewing the earlier assessment made under the RPGT and this included power to vacate an

assessment on the ground that no real property gains tax was payable on the gains. Thus, the assessment to income tax by the IRD was lawful. The Court also looked at various factors, like intention, method of finance, alteration to the property, treatment to the account, location, period of retention, subject matter of transaction and circumstances of realization, in arriving at the conclusion that the company was in actual fact a property developer and a dealer in land, the subject lands formed part of its stock in trade and their disposal was the company's normal business (trading) activity and not merely an investment (realization of capital asset) exercise.

ⁱ [2005] 6 MLJ 518

TENANCY

RECOVERY OF POSSESSION WITHOUT COURT ORDER

A landlord ought not to take the law into his own hands and forcibly evict its tenant from the rented premises without obtaining a court orderⁱ. The court held that the provision of s.7(2) of the Specific Relief Act 1950 was clear and the usage of the word "shall" imposes a pre-condition on all landlords to obtain a court order before the

landlord can recover possession of the property. The act of the landlord locking out the tenant amounts to tort and the equitable remedy of self-help is no longer good law. Even though in cases where the remedy of self-help i.e re-entry may be allowed by the tenancy agreement, any such act of dispossessing a tenant will be deemed tortious and in contravention of s.7(2) of the Specific Relief Act 1950 and the tenant will have the right to re-possession of the said property and damages, if any.

ⁱ *SME Aerospace Sdn Bhd v Steyr Mannlicher (M) Sdn Bhd* [2006] 5 CLJ 121

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TENANCY

ACCEPTANCE OF RENTAL ON “WITHOUT PREJUDICE”

The use of the label “without prejudice” came under scrutiny in the Singapore High Court decision of *Leivest International Pte Ltd v Top Ten Entertainment Pte Ltd*. Pursuant to a settlement to a previous dispute (“the settlement”), a lease of certain premises was executed between the landlord and the tenant provided certain conditions were fulfilled (“the lease”). The tenant was subsequently late in paying the agreed legal costs pursuant to the settlement and the landlord claimed that the lease was thus repudiated. However, evidence show that when payment was tendered after the due date to the landlord’s solicitors, the payment was accepted on “without prejudice to the landlord’s rights”. On the next month, the landlord issued a rent invoice for the month in question to the tenant which was paid to and accepted by the landlord with the wordings “we are holding your payment without prejudice to all our rights at law.” together with a receipt marked “Without Prejudice”.

The Court held that the fact that the landlord accepted the payments without prejudice to its rights did nothing to change the fact of acceptance. The acceptance constituted a waiver of the breach. The effect of “without prejudice” receipts as considered in a 1877 Privy Council decision was cited with approval that “where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.” The landlord’s claim for declaration that the lease was repudiated and delivery of vacant possession was thus dismissed.

The above case serves as a reminder that one must be careful with the use of the label “without prejudice” for it may not have the intended effect in certain instances.

ⁱ [2006] 1 SLR 888

TORT/CONTRACT/REVENUE

DUTY OF CARE OF TAX AGENT

In *United Project Consultants Pte Ltd v Leong Kwok Oon (trading as Leong Kwok Oon & Co)*ⁱ, the tax agent attended to the filling of the appellant’s tax returns and also all of the appellant’s managing director’s personal income tax returns. The appellant was found to have failed to make

proper tax returns in respect of declared fees payable to its directors as a result of which the appellant was required to pay the Inland Revenue Authority a penalty sum. The appellant sued the tax agent for negligence and/or breach of contract in the discharge of the latter’s duties as the appellant’s tax agent.

The Singapore Court of Appeal found that the tax agent as a result of having received and filed the additional income tax returns for the managing director had acquired the actual knowledge that some, if not all, of the appellant’s directors were under-reporting their director’s fees to the authority. The irresistible conclusion was that the tax agent should have foreseen the

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loss that the appellant would eventually suffer. More significantly, it was held that while it had to be conceded that a professional would, in the course of his engagement, have to rely upon the accuracy of the information provided, it could not be right to treat a professional tax agent as a mere form filler. Where some form of mistake had been brought to his attention, he could not remain strongly silent and seek to exculpate himself by saying that the company was the one responsible for providing him with accurate information. The tax agent was under a duty to warn of inaccuracies in the filling of tax returns and, having acquired the necessary knowledge in 1993, was in breach of his duties as a professional tax agent.

With regard to the loss, while it may be countenanced that any loss flowing from the conduct of the appellant prior to when the tax agent acquired the necessary knowledge was the result of its own failings, the cause of the loss thereafter was due to the imposition of and subsequent failure in the tax agent's duty.

With regard to the illegality defence (*ex turpi causa non oritur actio*)ⁱⁱ, the Court

refused to regard the appellant as having connived to cheat the authority by evading tax or as having engaged in an act that was so culpable as to attract the application of the defence. The Court even went so far to hold that even if the illegality defence was applicable, the defence had to fail since the loss suffered by the appellant was precisely the loss that the tax agent had been engaged to avoid. To allow the tax agent to rely upon a consequence that was directly caused by his own failings to absolve him from liability, would be to reward the wrongdoer and punish the innocent party.

ⁱ [2005] 4 SLR 214

ⁱⁱ meaning: an action does not arise from an immoral consideration, or as the Court cited from an old English decision, "no court will lend its aid to a man who founds his cause of action upon an immoral act or an illegal act".

TORT

HOSPITAL NOT VICARIOUSLY LIABLE FOR DOCTOR'S NEGLIGENCE

The relationship between a hospital and a medical doctor operating a clinic at the hospital in a claim for medical negligence was brought into focus in the case of *Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor*ⁱ. In that case, the plaintiffs (husband and wife) brought an action in medical negligence against the doctor as the 1st defendant and the hospital as the 2nd defendant for failure in treating,

managing and caring for the wife who had fractured her tibia and femur. One of the issues was whether the hospital was vicariously liable for the alleged wrongdoing of the doctor. To resolve this issue, three requirements must be satisfied. First, there must be a wrongful, or tortious action. Second, there must exist a special relationship that is recognized by law between the person alleged to be vicariously liable and the tortfeasor. Third, whether the tort is committed within the course of employment.

The hospital's principal defence centered on the second requirement, namely the lack of special relationship between the doctor and the hospital to constitute any vicarious liability. In this context, various tests have been devised to

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ascertain the existence of such a relationship. Firstly, the control test laid down in *Short v J & W Henderson Ltd* which contains criteria such as the power of selection of the employer, the power in determining salary or other remuneration and the power or right of the employer to control the method in which the work was done and the power and right of the employer to terminate the employee's services. Secondly, there is the organizational test laid down in *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* which examines the wrongdoer's work in relation to organization set up by the party who is alleged to be vicariously liable for his action. Thirdly, there is the multiple test adopted by the courts as shown in *Ready Mixed (South East) Ltd v Minister of Pensions and National Insurance* which is said to be based on the common sense approach. All in all, what is necessary for the wife to establish in this case against the hospital is that whether the hospital has control over the doctor to create a form of special relationship that can cause the hospital to be vicariously liable for the wrongdoing of the doctor, if proven.

On the facts, the 1st defendant was a consultant with clients of his own. Though he was attached to the 2nd defendant, it was only an arrangement to use the 2nd defendant's facilities such as running his clinic there, and using its operating facilities in respect of which the 1st defendant had to pay based on a percentage of the 1st defendant's charges to his clients. The clients were exclusively that of the 1st defendant who had a full control in the form of treatment, management and care to be administered upon them as well as the amount of fees to be charged. Although when the 2nd plaintiff was first admitted to the 2nd defendant's hospital for treatment and the 2nd defendant had proposed the 1st defendant, this does not mean that the 2nd defendant had control over the 1st defendant. This was only a recommendation

by the 2nd defendant to the 2nd plaintiff which could be rejected or refused by either 2nd plaintiff or 1st defendant. When both the 2nd plaintiff and the 1st defendant agreed to accept each other, they entered into an independent contract with each other. The 2nd defendant had absolutely no control over the terms and conditions of this contract. Further, the 1st defendant was not in control over the affairs of the 2nd defendant. He only practiced medicine by using the premises of the 2nd defendant for which he paid for it. The 1st defendant was an independent contractor. The court therefore found no such special relationship existed to attribute vicarious liability to the 2nd defendant (the hospital).

The other issue was whether the hospital was independently liable to the wife. From the evidence adduced in this case, the court found no ground to support the wife's claim that the hospital was independently negligent as the doctor was at all material time an independent contractor and has his own set up in the treatment, management and care of the wife. The hospital only provided the premises and operating facilities for which the doctor paid for its use. The hospital had no control over the course or form of treatment, management and care administered by the 1st defendant on the 2nd plaintiff. If the 2nd plaintiff was not satisfied with the services of the 1st defendant, she could change to another doctor or specialist. She had a free choice.

The upshot was that although the court found the doctor was negligent in treating, managing and caring for the wife and is therefore liable to pay her damages, the wife's claim against the hospital was dismissed.

ⁱ [2006] 1 MLJ 57; [2006] 5 CLJ 175

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ARBITRATION

NEW ARBITRATION REGIME

Finally, the new arbitration legislation arrived in Malaysia with the passing of the Arbitration Act 2005ⁱ ("the New Act") which received the Royal Assent on 30.12.2005 and was published in the Gazette on 31.12.2005. The commencement has been fixed on 15.3.2005. In gist, the old legislation, the Arbitration Act 1952, is still relevant and applicable to arbitrations which have already commenced prior to that day whilst the New Act will apply to all other arbitrations which commenced thereafter. To have a general

overview on the differences between the two legislations and the impact of the New Act on arbitrations in Malaysia, you may read the article appearing in the Law Review 2006 Part 1ⁱⁱ.

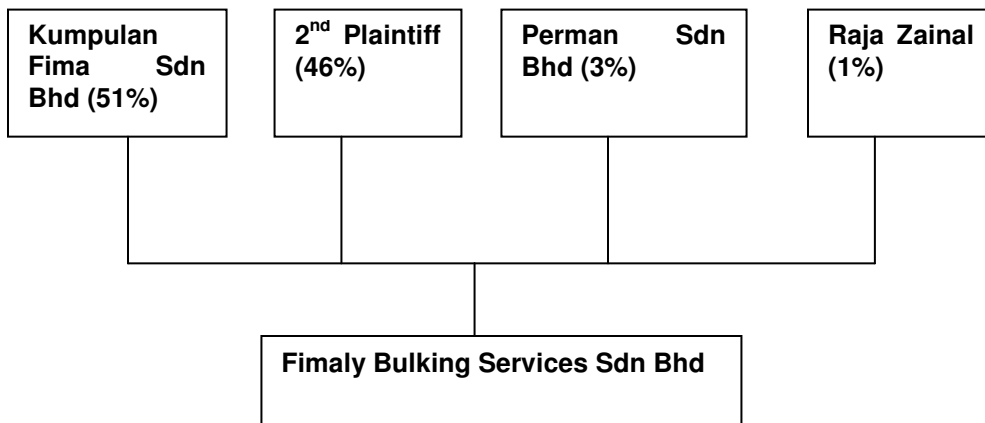
ⁱ Act 646

ⁱⁱ WSW Davidson and Sundra Rajoo, Arbitration Act 2005: Malaysia Joins the Model Law Arbitration Community [2006] LR 1.

TRUST

EXPRESSED TRUST ON PURCHASED SHARES

The case of *Perman Sdn Bhd & 6 Ors v European Commodities Sdn Bhd* epitomes a classic situation where someone lends money to another to subscribe for shares or to purchase shares of a company and eventually, the shares would be transferred to the lender as a settlement of the loan granted to the borrower.



ⁱ [2006] 1 AMR 115

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Fimaly Bulking Services Sdn Bhd ("Fimaly") was a joint venture company incorporated pursuant to a joint venture agreement entered into between 3 parties: the 1st defendant/appellant i.e. Perman Sdn Bhd ("Perman"), the 2nd Plaintiff and lastly, the 9th defendant/appellant i.e. Kumpulan Fima Sdn Bhd ("Fima"). The shareholders of Fimaly are as shown in the chart above, with Fima holding 51%, 2nd Plaintiff holding 46% and Perman holding 3%. The remainder 1% was held by Raja Zainal ("RZ").

The plaintiffs/respondents, i.e. European Commodities Sdn Bhd and another, were controlled by Mohamed Aly Rangoonwala ("MAR"). RZ who was a close business associate with MAR did not have the resources to purchase the Fimaly shares. MAR had through the plaintiffs/respondents provided RZ with the money amounting to RM150,000 to purchase the Fimaly shares. RZ paid this money into Perman's account and then Perman paid for the shares thus becoming registered shareholder of 149,999 Fimaly shares. The remaining 1 share was held by RZ himself.

A memorandum was subsequently executed which gave RZ the option of buying the Fimaly shares at par value within 24 months thereof and if not, the plaintiffs/respondents would have control of the Fimaly shares and RZ does not have to pay any amount whatsoever. RZ and his wife passed away. The 2nd to 4th defendants were appointed personal representatives of RZ's estate. The 5th to 7th defendants were appointed personal representatives of RZ's wife's estate. The 3rd and 4th defendants had prior to their appointment as personal representatives executed a declaration of trust over the Fimaly shares, delivering executed proxy forms and blank share transfers to MAR. The Fimaly shares were subsequently sold for a considerable sum of money.

The plaintiffs/respondents brought a case against the defendants/appellants

arguing that the Shares were held by RZ either under express or constructive trust. By providing money to RZ to purchase the shares, the plaintiffs/respondents contended that there was a constructive trust. The defendants/appellants countered by arguing that there was no trust but a debt. The High Court found in favour of the plaintiffs on the basis of an express trust or alternatively an implied trust. The defendants/appellant appealed to the Court of Appeal.

The Court of Appeal held that the plaintiffs/respondents' claim that RZ held the Shares under constructive trust were misconceived as constructive trust is imposed only by operation of law. The Court of Appeal further held that only Perman could declare itself trustee of the Fimaly shares as only the owner of the property may declare himself as trustee of the same. There was no express trust either as the memorandum executed by RZ did not mention that he was a trustee and only confirms the fact that the money paid for the shares was an advance from the plaintiffs/respondents.

The arrangement above is not uncommon. Loans were given to purchase shares and as collateral, the shares would be pledged as security. In this case, if the borrower does not purchase the shares, the shares would belong to the lender. The decision that there was no trust but merely a debt is a sound one. If the parties had intended that the borrower to purchase the shares on behalf of the lender, an express trust would have been created. On the facts of the case, it was clear that there was no such intention and the shares were merely used as collateral for the loan. Therefore, should a party intend to use another person to hold shares on its behalf in particular where money was given to that other person to purchase shares on the party's behalf, a trust deed should be prepared and executed, declaring that the shares purchased are held on trust for and on behalf of the party that provided the money.

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EPILOGUE

Recovery of Islamic Loan

The case that we featured in our Issue 2/2005 under the heading of “Recovery of Islamic Loan” has now been widely reported in local law reports as *Affin Bank Bhd v Zulkifli Abdullah*ⁱ and readers are advised to refer to the grounds of judgment in order to appreciate the reasoning by the judge and to evaluate the soundness of the decision in the context of syariah transactions. Suffice to state that the decision has been subjected to critical criticism by some quarters in the Islamic banking industry.

Certificate of Indebtedness

Our sole featured case of *Cempaka Finance Berhad v Ho Lai Ying & Anor* (Federal Court) back in our Issue 1/2005 in April 2005 was recently reported in local law reportsⁱⁱ. We trust this decision has immense impact on the banking community as well as loan consumers and we would urge readers who may be affected to read it.

ⁱ [2006] 1 CLJ 438 ; [2006] 3 MLJ 67

ⁱⁱ [2006] 2 MLJ 685

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