



TAY & HELEN WONG
LAW PRACTICE • AMALAN GUAMAN

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POWERS OF ATTORNEY TO BE CONSTRUED STRICTLY

Banking industry must read with care the recent High Court decision of *Standard Chartered Bank Malaysia Berhad v Hew Hai Woon*ⁱ which construed very strictly powers of attorney granted to financial institutions by borrowers.

In that case, the Defendant purchased an apartment unit which was charged to the Plaintiff bank ("SCB") as security in respect of a loan granted. The said apartment unit did not have a strata title at the time of the granting of the loan. For the purpose of securing the loan, SCB entered into a loan agreement cum assignment ("LACA") with the Defendant which assigned the Defendant's rights in the property to SCB.

In 2002, the strata title in respect of the apartment unit was issued by the Land Office and the property was registered in the Defendant's name on 4 December 2002. By that time, the Defendant had already defaulted in the repayment of the loan. Following the issuance of the strata title, SCB registered a charge in respect of the property so as to secure the loan granted. SCB took the position that a manager of their bank, Nor Maziah ("NM"), executed the charge as an attorney of the Defendant pursuant to the power of attorney granted by the Defendant to SCB under the LACA. The Defendant on the other hand contended that SCB, having registered the charge, did not provide him with a copy of the said charge and annexure.

The High Court observed that the capacity in which NM signed the charge was not clear. If she had the authority pursuant to the power of attorney to sign the charge as an attorney of the Defendant and had proceeded to sign as such, then these facts should clearly be stated below her signature and name, including giving particulars of the registration of the power of attorney. As it turned out, NM had signed the charge as the attorney of SCB and this fact was confirmed by attestation clause.

The Court held that the charge was fatally defective as it was not signed by the chargor but by NM.

In addition, according to clause 21 of the LACA, the power of attorney was not granted to any person by name but only to "*the manager of the Bank for the time being in Kuala Lumpur*". In other words, the power of attorney was granted to a person by virtue of his office. This meant that the person who signed the charge, at the time of signing, must be a manager attached to a Kuala Lumpur office of SCB. On the facts, NM never signed the charge as a manager of a Kuala Lumpur office of SCB. The word "manager" appeared nowhere near the name nor the signature of NM. Further, there was no evidence to show that, at the material time, NM was a manager attached to a Kuala Lumpur office but only evidence that she was a manager in SCB. Thus, it follows that the requirement of clause 21 of the LACA was not satisfied resulting in the charge being defective.

It was also held by the High Court that a copy of the charge, as a matter of law, must be given to the chargor by the chargee bank after the charge has been duly registered with the Land Office. The right of the chargor to be supplied with a copy of the charge is implied in the National Land Code. SCB did not provide any answer as to why the Defendant was never supplied with a copy of the charge. It was true the power of attorney under the LACA gave SCB the authority to execute the charge but that did not affect the Defendant's right to be supplied with a copy of the charge. Therefore, SCB's deliberate withholding of the Defendant's copy of the charge without lawful excuse rendered the charge unenforceable as against the Defendant.

The Plaintiff bank's application for an order of sale of the property pursuant to the defective charge was dismissed with costs.

ⁱ [2007] 2 MLJ 387, [2007] 2 AMR 140, [2007] 7 CLJ 454

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CONTRACT

ACTUAL MEDICAL EXPENSES EXCEEDING BILL ESTIMATE--- ARE YOU LIABLE ?

In *Parkway Hospitals Singapore Pte Ltd (Trading as Mount Elizabeth Hospital) & Anor v Sandar Aung*ⁱ, when the Defendant admitted her mother to hospital for angioplasty, she signed an Agreement with the hospital agreeing to be liable for all expenses incurred by her mother in the course of her stay in the hospital.

The hospital had then anticipated that her mother would be in the hospital for only two days and estimated the charges to be about S\$15,000. A document called the "Estimate of Hospital Charges" (the Estimate) to that effect was furnished to the Defendant. However, things went wrong during and after the angioplasty procedure and the Defendant's mother had to stay in the hospital far longer than expected due to various complications and for further treatment; for which the Defendant was billed over half a million dollars.

In defending the suit filed by the hospital, the Defendant argued that the hospital was not entitled to recover more than the earlier estimated figure but only an amount that was in the region of the Estimate. It was argued that the wordings in the "all charges" clause in the Agreement were ambiguous as to whether complications were within its ambit and applying *contra proferentum* rule, any ambiguity should be interpreted against the interests of the hospital which drafted the Agreement and Estimate.

The Singapore High Court however found that there was no ambiguity in the documents and that the Defendant was bound to pay **all the hospital charges** incurred by her mother; whether it arose from the procedure originally contemplated or the subsequent complications. The Court further

held that the Agreement alone was the contract between them; whereas the estimated charges stated in the Estimate were "at best" estimates only; and could not be used to modify the Defendant's liability under the Agreement.

Further, no warranty was given by the hospital that the actual charges payable would be different from the estimated sum. The High Court refused to follow an earlier decision in which the defendant in that case was ordered to pay the plaintiff the hospitalization and other charges of the patient connected with the original treatment contemplated and taking into account the estimated hospital charges given by the plaintiff to the defendant.

However, the court ruled in favour of the Defendant with regard to **the fees charged by** the various consultant practitioners (**doctors**) who attended to her mother during her stay in the hospital. The words "*all charges, expenses and liabilities incurred by and on behalf of the patient*" in the Agreement were for amount incurred in respect of the hospital only.

The doctors were not employed by the hospital and they were not provided as part of its medical services. The hospital did not itself incur any liability to any of the doctors by reason of their attendance on the Defendant's mother. The hospital was merely acting as the doctors' collecting agent and therefore had no legal basis on which to recover the doctors' fees from the Defendant. The hospital's claim in this respect was thus not allowed.

ⁱ [2007] 1 SLR 227

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CONTRACT / EMPLOYMENT

EMPLOYEE LIABLE TO PAY DAMAGES TO EMPLOYER FOR CONTRACTUAL BREACHES

In *Malayan Banking Berhad v Basarudin bin Ahmad Khan*ⁱ, the Defendant was an employee of the Plaintiff bank who was dismissed after he was found guilty of several breaches of his contractual duties. The Plaintiff bank sued the Defendant for breaches of duty, incompetence and negligence which had resulted in the Plaintiff suffering loss. In the service agreement entered between the Plaintiff and the Defendant, there was an indemnity clause in which the Defendant agreed to make good to the Plaintiff all loss and damage which might be sustained by the Plaintiff by or through the non-fulfillment of any of the obligations or any act, neglect or default done or permitted by the Defendant while he was in the employment of the Plaintiff.

At the High Court and Court of Appeal, it was held that the parties' right were governed by the service agreement and as such the Plaintiff was only entitled to claim for indemnity and not for damages for breach of contract. Since during the trial which (by consent) proceeded on the issue of liability alone (but subject to assessment of damages) the Plaintiff had not proved its losses, the

DAMAGES / CONTRACT

ASSESSMENT OF LOSS OF CHANCE

The recent reported decision of *Justlogin Pte Ltd & Anor v Oversea-Chinese Banking Corp Ltd & Anor*^j was illustrative of how the court in Singapore carried out assessment of damages in a case in which the defendants' breach of contractual obligations had caused loss of chance of transaction.

The Defendants in that case were earlierⁱⁱ held to have breached its obligations under an agreement with the 1st Plaintiff to

Plaintiff had not proved its case in indemnity. The Plaintiff thus lost in both courts.

The Federal Court ruled otherwise. It held that the right to sue for damages for breach of contract was a distinct cause of action to that of the right to sue for indemnity provided that the agreement entered into was one of a contractual relationship and not a contract of indemnity. As a matter of construction, the service agreement in the instant case was not a contract of indemnity per se, but a contract of employment with an indemnity clause added as an alternative remedy. In the absence of any express or implied term in the service agreement excluding the right of action for damages for breach of contract, the Plaintiff was entitled to a claim for damages for breach of contract. The fact that the statement of claim referred to the service agreement which contained an indemnity clause did not convert the claim into a claim in indemnity. The Plaintiff's appeal was thus allowed and the case was remitted to the High Court for assessment of damages.

ⁱ [2007] 1 MLJ 613, [2007] 1 AMR 217

procure the execution of an Assets Sale Agreement, which was to enable the 1st Plaintiff to acquire all of business and assets of a company known as iPropertyNet Pte Ltd (iProp). Apart from the Assets Sale Agreement, there were other consequential transactions that the parties had to enter into which did not materialize due to the non-execution of the Assets Sale Agreement.

In allowing the appeal, the High Court treated the loss suffered by the 1st Plaintiff as a loss in the value of the company (ie. 1st Plaintiff) without the benefit of the injection of iProp's business and assets, bearing in mind the object of the Assets Sale Agreement. The lost chance of having the Assets Sale Agreement concluded could be measured by the 1st Plaintiff's enhanced value had the injection of iProp's business and assets been accomplished. The Court accepted the 1st

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Plaintiff's expert's valuation of the enlarged 1st Plaintiff on the basis of net tangible assets (NTA) method, but also took into account all the ancillary obligations that would have come into play had the terms of the Assets Sale Agreement been fulfilled.

It is interesting to note that the court also cut down 20% from the 1st Plaintiff's enhanced value. To award the loss of chance at 100% was to hold that the chance was an absolute certainty. The court factored in the chance of litigation taking place and of the success of iProp's minority shareholders in stopping the execution of the Assets Sale Agreement or any other factor hindering the agreement as not more than 20% which left the 1st Plaintiff with 80% real chance of concluding the Assets Sale Agreement. The court further held that mitigation was not an issue because this was not a claim for loss of a chance to make profits but a loss in the value of the 1st Plaintiff without the benefit of the injection of iProp's business and assets.

It must be noted that not all or any chances lost are recoverable. Earlier cases cited in the same case have held that firstly, the defendant's breach must have caused the

plaintiff to lose a chance to acquire an asset or a benefit and secondly the chance lost must be a real or substantial one, not speculative but at the same time need not be on the balance of probabilities (being rated at over 50%). Once these two ingredients are satisfied, the evaluation of the chance is then part of the assessment of the quantum of damage, the range lying somewhere between something that justifies as real or substantial on one hand and near certainty on the other but there is no fixed percentage of the lower and upper ends of the bracket.

It remains to be seen whether and to what extent any Malaysian court will adopt this approach or apply this principle.

ⁱ [2007] 1 SLR 425

ⁱⁱ [2004] 2 SLR 675

would sustain the losses within the period of 2 years. However, it failed to survive as the closure had continued beyond the 2 year period. The business was closed.

The purpose of the road closure was due to the relocation of unlicensed hawkers from the same Jalan Haji Hussein. The First Defendant, UDA Holdings Sdn Bhd and the Second Defendant, Dewan Bandaraya Kuala Lumpur had made an application to the Third Defendant, the Land Administrator for Wilayah Persekutuan Kuala Lumpur for a temporary occupation license (TOL) at Lorong Haji Hussein 3 which was granted. Once that part of Lorong Haji Hussein 3 was converted into TOL, the Second Defendant closed the road to all traffic and the First Defendant constructed stalls with a view to relocate the said hawkers.

The Plaintiff had filed an action in 1997 against the First Defendant, the Second Defendant and the Third Defendant for damages for the loss suffered by its business as a result of the closure of Lorong Haji Hussein 3.

TORT

WHAT A NUISANCE !

The High Court decision in *Koperasi Pasaraya Malaysia Bhd v UDA Holdings Sdn. Bhd. & 2 Ors*ⁱ is a welcome relief for the public who had suffered at the hands of statutory and governmental bodies arising from their arrogant behaviour and unlawful acts which constitute nuisance.

On 28th October 1996, Lorong Haji Hussein 3 was closed to public supposedly for a period of 2 years. Due to the road closure, the supermarket business belonging to the Plaintiff, Koperasi Pasaraya Malaysia Berhad which was situated adjacent to Lorong Haji Hussein 3 suffered tremendous loss. It had to resort to the selling of the building and renting it back from the purchaser in the hope that it

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The High Court held that this was certainly a case of great nuisance to the public including the Plaintiff. While it was true that the Third Defendant has the power to issue TOL on any land, it could not do so without reasonable justification. The court took into consideration the purpose for which it was issued and on what type of land. TOL is usually issued on government land where it is not occupied and unlawfully occupied by someone. On the facts, however, the TOL was issued on a public road heavily used by public as well as occupants of buildings along the public road and was for the relocation of a handful of unlawful hawkers. The purpose of the TOL on a public road certainly could not override the daily usage of the road by thousands of members of the public. There was therefore no legitimate justification and the high-handed action of the three defendants was held to have caused great nuisance to the public including the Plaintiff and was not lawful.

Further, the Defendants as statutory bodies and government department should have made enquiries as to how the business of the affected people including the Plaintiff would be affected by the closure of the road. It was of no excuse for the Defendants to say that they were not aware of the consequences of the acts of the Plaintiff in its supermarket business. Vehicles were no longer possible to stop at the entrance for the purposes of loading and unloading goods and the parking bays had also been removed. Without easy access and parking of vehicles, it would cause great inconvenience to the customers of the Plaintiff's supermarket who previously were so used to such convenience. Since there was no such enquiry, the High Court held that the road was unlawfully closed and the stalls were invalidly constructed.

TORT

NO PASSING OFF IN NO-FRILLS HAIRCUT SALONS

The popularity of 'no-frills' haircut or 'express' haircut salons where one can get a quick haircut in very short duration of time at a

The Defendants had jointly acted unreasonably causing public nuisance especially to the Plaintiff, the occupier along the affected public road. They also failed to consider the hardship of the public road users and occupiers along the public road in favour of a few unlawful traders. The High Court therefore allowed the Plaintiff's claims for losses amounting to RM23,743,157 with interest.

The Second Defendant in reliance upon the Federal Court case of *Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & 81 Ors*ⁱ attempted to persuade the court not to order damages against them for fear of going bust. The learned Judge however took cognizance of the cause of action in the instance case which was not negligence but nuisance that originated from the direct wrongful action of the Second Defendant acting in concert with the First and Third Defendants. If they were left unpunished, it would result in total chaos in the administration of the local authority. There was no reason for the court to sympathize the Second Defendant having regard to the high handed unlawful acts that had cause substantial damage to the Plaintiff's business which the Second Defendant in fact had a moral duty to protect !

ⁱ [2007] 1 AMR 743

ⁱⁱ [2006] 2 AMR 563, [2006] 2 MLJ 389

low cost saw the business arrangement between the originator of such salons and its franchisee turned sour and developed into a legal battle in which the former sued the latter and numerous other related parties for inverse passing-off, breach of confidence and conspiracy to injure the former's interests. What we are featuring here is the claim for inverse passing-off.

Passing-off concerns the protection of goodwill or reputation associated with business. In the Singapore case of *QB Net Co*

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*Ltd v Earnson Management (S) Pte Ltd and others*ⁱ, QB Net Co Ltd (“Plaintiff”) which was a Japanese company owned and operated 10-minute haircut salons trading *inter-alia* under the name of “QB House”. A company (“QBHPL”) was incorporated to operate “QB House” outlets in Singapore and by two licence agreements entered into between the Plaintiff and QBHPL in 2001 and 2004 respectively, licence was granted by the Plaintiff to QBHPL to operate 10-minute haircut salons in consideration of payment of royalties and licence fees. The Second Defendant in the case, Koki Matsuda had acted for QBHPL in negotiating both the licence agreements and it was known that Koki Matsuda was the *de factor* mind and will of QBHPL at all material times.

In 2005, Earnson Management (S) Pte Ltd, the First Defendant was incorporated by the Third Defendant and entered into a sale and purchase agreement with QBHPL whereby the First Defendant acquired the business assets of QBHPL and the employment of the employees. The sale and purchase agreement was backdated to 1 October 2004. The Third Defendant was appointed as the First Defendant’s sole non-executive director and Koki Matsuda, the Second Defendant was appointed as consultant to the First Defendant. The First Defendant commenced operating 10-minute haircut salons under the name of “EC House” from 1 January 2005.

The Plaintiff commenced action against the Defendants amongst which was an action for inverse passing-off. Inverse passing-off is not only passing-off to misrepresent that one’s goods or services were those of another, but it is also passing-off to misrepresent the inverse: that another person’s goods or services are one’s ownⁱⁱ. The High Court of Singapore dismissed the Plaintiff’s claim in this respect.

In order for inverse passing-off action to succeed, a plaintiff has to prove that there was goodwillⁱⁱⁱ attached to their goods or services; that the defendants misrepresented themselves as the commercial source of the goods or services in question; and that the plaintiff’s goodwill was damaged as a result of the passing-off. The Plaintiff claimed the existence of goodwill in respect of its QB House System^{iv}, QB House get-up^v and

services. It is true that goodwill may accrue in respect of the get-up of business premises and items used in trade but given the high threshold of establishing goodwill in this respect, the plaintiff has to also show the presence of particular features in its goods or services which were “capricious” (ie. not common to the trade) but which had come to be associated with the plaintiff’s goods. Here, the Plaintiff could not show that its QB House get-up was a crucial point of reference for customers who wanted its services or that the QB House get-up was so closely associated with the Plaintiff’s services that it was distinctive of the Plaintiff alone. Thus, the Plaintiff could not show the existence of goodwill in respect of its QB House system, get-up and services.

The Plaintiff had also failed to that the goodwill had accrued solely to it. In determining whether a licensee had acquired goodwill in the licensor’s business, regard to be given to the evidence adduced by both parties on the facts. On the facts of the case, as QBHPL had played a significant role in promoting QB House trade name and its haircut services in Singapore, it had acquired a shared ownership in the goodwill of the Plaintiff’s business.

Even though the Plaintiff was successful in showing that the First Defendant was guilty of misrepresenting the Plaintiff’s goods and services as its own and the misrepresentation had caused or was likely to cause damage (which would be inferred given both the Plaintiff and the First Defendant were competitors in the same industry and offering express haircut services at the same price and for the same duration), the Plaintiff’s claim for inverse passing-off had to fail since it had failed to show the existence of goodwill in respect of its QB House system, get-up and services.

ⁱ [2007] 1 SLR 1

ⁱⁱ *Tessensohn t/a Clea Professional Image Consultants v John Robert Powers School Inc* [1994] 3 SLR 308

ⁱⁱⁱ The classic definition is “the benefit and advantage of the good name, reputation, and

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connection of a business and the attractive force which brings in custom” as propounded in *The Commissioners of Inland Revenue v Muller & Co’s Margarine, Ltd* [1901] AC 217

^{iv} The particulars pleaded included no cash register, no reservation system, use of electronic sensors and no frills.

^v The prominent features were use of a ticket-vending machine, air wash system, use of

working cabinets which minimize the movement of hair-dressers whilst at work and the ten-minute service offered.

bearing a defamatory meaning because it connoted a solicitation of a bribe and hence dishonesty. Readers are therefore advised to exercise care in using term or words which may carry similar connotation as the term “tea money”, eg. “*duit kopi*” (coffee money), “under-counter money”, “under-table money”.

TORT

“TEA MONEY” IS DEFAMATORY

In Malaysia, the colloquial term “tea money” is usually used to denote bribe. What happen if a statement is made that a person has asked for “tea money” to do carry out certain act? Can the person sue the maker of the statement for defamation?

The answer is an emphatic “yes”. The Court of Appeal in *Tan Kah Khiam v Liew Chin Chuan & Anor*ⁱ held that the said term in the Malaysian context was indeed capable of

ⁱ [2007] 2 MLJ 445

The Court held that the company had discharged its burden of proving that the claimant had ignored the customer by attending to the request of a co-worker and had failed to give priority to the customer, thus being guilty of the misconduct charge. However, the Court also found that the company had failed to recognize the claimant’s co-worker’s participatory and contributory conduct in the claimant’s misconduct and that the claimant was a first time offender.

EMPLOYMENT LAW

DIGEST

1. UNDULY HARSH PUNISHMENT MAY IMPAIR AN OTHERWISE JUST DISMISSAL

Severity of offence must be considered in meting out punishment. This is basically the message sent out in the Industrial Court decision of *Resort World Berhad v Normah Yakub*ⁱ. In that case, the claimant/employee was found guilty of the charge of being rude to a customer whilst on duty at a counter of the theme park. She was dismissed.

The company’s punishment of dismissal was held to be too harsh and inappropriate and thus without just cause and excuse. The Court awarded backwages for 24 months and compensation in lieu of reinstatement for 3 months but reduced it by 50% due to the claimant’s own contribution to her dismissal.

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2. GOSSIPING WITHOUT FEAR ?

If you were to use derogatory and vulgar language against your senior officers but without naming them in your e-mails to your friends, and the e-mails were found by your employer, would you be held guilty of misconduct? Well, from the ruling in the Industrial Court of *Malaysia National Insurance Berhad v Ratnawati Mohamed Nawawi*ⁱⁱ, you may be able to get away scot-free.

In that case, the Court on the evidence presented to the Court held that the claimant's e-mail correspondence which contained vulgar and derogatory words against her seniors were not used directly in the face of the seniors. They were not meant to undermine the authority of senior officials of the company but were merely tea-room gossip and only meant to be within knowledge of four friends. The Court accepted the claimant's evidence that they were to release her work pressure and unhappiness with the situation in the company. In the Court's view, even if the misconduct had been committed by the claimant, the punishment meted out was too severe.

The Court thus ruled in favour of the claimant and ordered backwages for 24 months but scaled down to 60% due to the claimant's act in using e-mails to gossip and using derogatory language against her seniors. In our view, the decision must be read with care and should be confined to the facts of the case and not as a general principle that one can use vulgar words against one's superiors behind their backs and yet escape any punishment.

3. WORDS MAY NOT MEAN WHAT THEY SAY

The High Court decision in *Smart Glove Corporation Sdn Bhd v Industrial Court, Malaysia & Anor*ⁱⁱⁱ serves as a reminder to employers not to rely on the wordings of the clause on termination with notice in contract of employment *per se* without seeking legal advice. In that case, the employer pursuant to a clause in the letter of appointment gave the claimant 2 weeks notice to terminate his employment and argued that their case was a termination simpliciter in accordance with the contract of employment between the parties.

The High Court upheld the Industrial Court ruling that termination based on mere contractual notice must still be grounded on just cause or excuse for it to be justified. What is considered to be lawful according to the law of contract and the principle of freedom of contract can never be deemed as a justified dismissal according to industrial jurisprudence. In other words, in all cases of dismissal of employees, the employer must be able to justify it on just cause or excuse for doing so and not on the contractual provision *per se* that allowed the employer to give due notice to the employee concerned.

ⁱ [2007] 1 ILR 505

ⁱⁱ [2007] 1 ILR 189

ⁱⁱⁱ [2007] 1 AMR 515

EPILOGUE

Landmark case in Medical Negligence

The landmark case of *Foo Fio Na v Dr Soo Fook Mun & Anor* featured in our Law Update Issue 5/2006 has been widely reported in local law reports and readers, particularly practitioners in medical fraternity, are advised to read the full grounds of judgment. It can be found in [2007] 1 AMR 621, [2007] 1 CLJ 227 and [2007] 1 MLJ 593.

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