



**TAY & HELEN WONG**  
LAW PRACTICE • AMALAN GUAMAN

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**LAW UPDATE 3/2007 (JUL – SEP)**

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**A DIFFERENT APPROACH TO RECOVERY  
OF AL-BAI BITHAMAN AJIL FINANCING**

Readers will note our write-up on the case of *Bank Muamalat Malaysia Bhd v Suhaimi Md Hashim & Satu lagi*<sup>i</sup> featured in Law Update Special Issue 4/2006 which laid down guidelines as to how a claim arising from Islamic Al-Bai Bithaman Ajil Financing facility (BBA) should be computed in an action to enforce the charge for an order of sale in respect of the charged property. Recently, another High Court adopted a different approach. This is in the case of *Malayan Banking Bhd v Ya'kup Oje & Anor*<sup>ii</sup>. Although that case was decided under s 148(2) of the Sarawak Land Code (SLC) which contains provisions different from those in National Land Code (which is governing statute for land in West Malaysia) (NLC), it is noteworthy that the Judicial Commissioner (JC) in that case made extensive references to the earlier two cases decided under NLC, namely *Affin Bank Bhd v Zulkifli Abdullah*<sup>iii</sup> and *Malayan Banking Berhad v Marilyn Ho Siok Lin*<sup>iv</sup>. The JC also remarked that powers to do justice and equity were similarly preserved under s 256 of the NLC as in s 148(2) of the SLC, hence we believe Islamic banking law practitioners and product personnel must not overlook *Ya'kup Oje* case.

To recap, the principal issue in past cases revolved upon whether the bank should be allowed to claim for the full profits when the BBA was terminated much earlier than its full tenure. Both cases of *Zulkifli Abdullah* and *Marilyn Ho Siok Lin* applied the same formula as laid down in the former case, which took into account the profit for the expired tenure of advance (earned profit) in arriving at the sum to be stated in the order of sale. Effectively, the defendant got a rebate. Similar approach has also been used in *Suhaimi Md Hashim* case. However, in *Ya'kup Oje* case, the JC ordered the plaintiff to file additional affidavit stating:-

- (i) that upon recovery of the proceeds of sale they would give a rebate; and

- (ii) the rebate which must not be a nominal rebate. It must be a substantial one taking into account prevailing market force by banks generally and the meaningful decisions in both cases of *Zulkifli Abdullah* and *Marilyn Ho Siok Lin*.

The JC would only make the order of sale if he was satisfied that the proposed rebate was just and equitable.

The JC dealt at length the nature of Islamic commercial transaction and BBA. Extensive references were made to Qur'anic verses and Syariah principles. It is also interesting to note that the JC referred to a landmark decision of the Supreme Court of Pakistan in respect of interest in Syariah Banking which has been hailed as "Historic Judgment on Interest". In that judgment, it was held that Murabahah and BBA transaction (sale by deferred payment) when used as a mode of trade financing was a borderline transaction with interest-bearing loan. The Supreme Court of Pakistan further held that unless basic requirements for its legal validity under Syariah were strictly complied with, it might amount to interest-bearing loan. The court also took the view that the Murabahah and BBA concept were susceptible to misuse and were not an ideal financing system and should only be used where Musharaka and Mudarabah (partnership or equity financing) were inapplicable. Our courts in Malaysia, as the JC rightly observed, have yet to subject Islamic financing instruments employed in Islamic commercial transactions here to close scrutiny as to their Syariah-compliance. Whether and to what extent challenge on the validity of the transactions will be made here remain to be seen.

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<sup>i</sup> [2006] 7 CLJ 321

<sup>ii</sup> [2007] 5 CLJ 311

<sup>iii</sup> [2006] 1 CLJ 438, [2006] 3 MLJ 67. The write-up on this case can be found in our Law Update Issue 2/2005.

<sup>iv</sup> [2006] 3 CLJ 796

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## **BANKING LAW / LIMITATION**

### **TIME STARTS RUNNING FROM 1<sup>ST</sup> ISSUANCE OF DEMAND**

In *Bank of Tokyo-Mitsubishi (M) Bhd (dahulu dikenali sebagai Bank of Tokyo Ltd) lwn Chong Suan Kit dan satu lagi*, there were six third party charges created by the Defendants over two plots of land. Due to defaults by the borrowers, the Plaintiff issued statutory demand in Form 16D on 6.8.1985 (the First Form 16D) which was sent to the Defendants on 14.8.1985. The Plaintiff then in the same year filed an action in court to enforce the charges (First Action). The First Action was however discontinued in 1995. Subsequently, on 13.1.1998, the Plaintiff issued fresh Form 16D to the Defendants (the Second Form 16D). On 27.2.1998, the Plaintiff filed the current action (Second Action). In June 1998, the Defendants made payment of RM1,000.00.

The Defendants raised plea of limitation and contended that the limitation period of 12 years under s 21 of the Limitation Act 1953 started to run from the date of the First Form 16D and ended on 6.8.1997. Thus, the Plaintiff's Second Action was time-barred. The Plaintiff argued that there was acknowledgement of debt on the part of the Defendants by virtue of their payment in June 1998 and contended that the limitation period started to run from the date of such payment.

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## **COMMERCIAL TRANSACTIONS / SALE OF GOODS**

### **REJECTION OF REPAIRED GOODS**

Are you deemed to have accepted the goods (which were found to be defective) that had been duly repaired by the seller at your request? In the recent case of *J& H Ritchie Ltd v Lloyd Ltd*, the House of Lords held that there was no acceptance of the goods and

The High Court held that limitation period started to run from the date the First Form 16D was sent to the Defendants. The payment of debt by the Defendants in June 1998 ought not to be taken into account, on the ground that the Defendants in the instant case were not sued as a principal borrower or guarantor and the fact that they made payment ought not to be regarded as an acknowledgment and reviving (*menghidupkan semula*, the words used in the judgment which is in Bahasa Malaysia) the accrued cause of action. Since the limitation period expired in August 1997, the Second Action filed on 27.2.1998 was time-barred. The Court dismissed the Plaintiff's Second Action.

With due respect, we do not quite agree with this decision. Section 26(1) of the Limitation Act 1953 provides that where there has accrued any right of action to enforce a charge in respect of land and in the case of any such action by a chargee, the person liable for the debt secured by the charge makes any payment in respect thereof, whether principal or interest, the right shall be deemed to have accrued on and not before the date of the last payment. If this provision was brought to the attention of the learned judge, the outcome could have been different.

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<sup>i</sup> [2007] 4 MLJ 387

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hence the Plaintiff had the right to seek for the repayment of the purchase price.

The Plaintiff ordered from the Defendant and paid for an agriculture machine which vibrated when it was used by the Plaintiff. The Plaintiff stopped use of the machine after the 2<sup>nd</sup> day of purchase and was given a replacement machine by the Defendant. The agriculture machine was sent back to the Defendant for inspection and was found that it had a major defect. The agriculture machine was duly repaired by the Defendant and they requested the Plaintiff to collect the same. The Defendant however chose to ignore the Plaintiff's request for the

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details of the repairs and informed the Plaintiff that it was repaired to 'factory gate standard'<sup>ii</sup>.

The Plaintiff discovered, informally, what the problem was and was concerned that operating the machinery when it was defective might have affected it in other ways. The Defendant chose to ignore the Plaintiff's request for an engineers report which led to the filing of the suit by the Plaintiff.

The House of Lords held that the Plaintiff was entitled to reject the machine as he did not have all the necessary information to make an informed choice. The Defendant was under an implied obligation to provide the Plaintiff with the requested information. A seller must accede to requests for details of repairs.

Under the s. 35 (1) of the Sale of Goods Act 1979 (UK)<sup>iii</sup> (SOGA UK) a buyer is deemed to have accepted the goods when he intimated to the seller he had accepted them or when he did any act in relation to them which was inconsistent with the seller's ownership. There is an exception<sup>iv</sup> to s. 35 (1) SOGA UK whereby, a buyer is not deemed to have accepted the goods if he had no reasonable opportunity of examining them for the purpose, *inter alia*, of ascertaining whether they were in conformity with the contract<sup>v</sup>. S. 35 (6) (a) SOGA UK also provides that a buyer is not deemed to have accepted the goods merely because he asked for or agreed to the repair by or under arrangement with the seller.

To succeed in cases involving defective goods sold, a buyer must make known to the seller of any defects and must

request the repair of such defects within a reasonable time. When such repairs are duly made, and the buyer accepts the goods without any objection, it will be deemed that there is acceptance.

Since in Malaysia, we do not have a provision similar to s. 35 (6) (a) of SOGA UK, it may be argued that there has been acceptance of the goods, especially when a buyer requests for repairs, although the repairs may turn out to be unsatisfactory. It may also be argued that by requesting for repairs, it is intimated that the buyer has accepted the goods. To safeguard your interest, when requesting for repairs, it is advisable to state clearly that the goods are not deemed accepted until the defect has been made good and reasonable time must be given for testing the goods after any repairs.

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<sup>i</sup>[2007] 2 All ER 353

<sup>ii</sup> It was as good as it would have been if it had left the factory as a new correctly assembled machine.

<sup>iii</sup> In Malaysia, see s. 42 of the Sale of Goods Act 1957.

<sup>iv</sup> S. 35 (2) SOGA UK.

<sup>v</sup> In Malaysia, see s. 41 of the Sale of Goods Act 1957.

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## COMPANY LAW

### DIRECTORS – DIFFICULT DECISIONS?

The Companies (Amendment) Act 2007 (the Amendment Act)<sup>i</sup> which came into effect on 15 August 2007, *inter alia*, introduced some major changes impacting the duties and

liabilities of officers of a company. Among others, subsections (1) and (2) of section 132 have been replaced and new subsections 132(1A) to (1G) have been introduced. This short write-up highlights how sections 132(1) to (1D) considerably affect the content of duties carried out in the capacity of a director and their decision-making rights. It is noteworthy that sections 132(1) and (1A) are very much akin to sections 180(1) and 181(1) of the Australian Corporations Act 2001. Therefore, reference will be made to relevant Australian case law in connection with the newly enacted provisions.

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### ***Proper purpose and good faith in best interest***

The statutory duties imposed by the new Section 132(1) reflect, and to some extent refine, corresponding obligations of directors under the common law.

On section 132(1), which requires a director of a company to exercise his or her powers and discharge his or her duties **in good faith in the best interests of the corporation, and for a proper purpose**, Malcolm CJ in *Chew v R*<sup>ii</sup> summarized the requirements of the **duty to act in good faith** as including that directors: (1) must exercise their powers in the interests of the company, and must not misuse or abuse their power; (2) must avoid conflict between their personal interests and those of the company; (3) must not take advantage of their position to make secret profits; and (4) must not misappropriate the company's assets for themselves.

It was also held that the words "**in the best interests of the corporation**" emphasized the significance of the relevant constituencies -- in particular, the shareholders as a whole, and the creditors in the case of impending insolvency. This duty was imposed to prevent abuses of directors' powers for their own or collateral purposes and was intended to forbid directors from abusing their position for their own advantage or the company's detriment. A breach of the obligation to act *bona fide* in the interests of the company involved a consciousness that what was being done was not in the interests of the company, and deliberate conduct in disregard of that knowledge.

Whilst the words "**act honestly**" (under the repealed section 132(1)) have not been retained in the new section, the historical origin of the duty may lead the courts to equate "acting honestly" with "acting in good faith in the interest of the company". The absence of good faith appears to require much more than negligence.

### ***Reasonable care, skill and diligence***

The new section 132(1A) requires a director to exercise **reasonable care, skill and diligence** with the knowledge, skill and

experience which may be reasonably expected of a director having the same responsibilities and any additional knowledge, skill and experience which the director in fact has. Thus, in determining whether a director has exercised **reasonable care, skill and diligence**, the circumstances of the particular company concerned and the director himself are relevant to the content and ambit of the duty. These circumstances include the type of company, the provisions of its constitution, the size and nature of the company's business, the composition of the board, the director's position and responsibilities within the company, the particular function the director is performing, the experience or skills of the particular director, the terms on which he or she has undertaken to act as a director, the manner in which responsibility for the business of the company is distributed between its directors and its employees, and the circumstances of the specific case.

The Australian Court in the case of *Australian Securities Commission v Gallagher*<sup>iii</sup> opined that directors are not required to exhibit a greater degree of skill in the performance of their duties than may reasonably be expected for persons of commensurate knowledge and experience. Conversely, a director who honestly believed that he or she has acted with reasonable care, skill and diligence *may* still contravene section 132(1A) if, **judged objectively**, he or she has not exercised with reasonable care, skill and diligence reasonably expected of a director having the same responsibilities.

This is the objective standard which has been set out section 132(1A)(a). However, section 132(1A) goes further than merely subjecting the director to objective standard for subsection (b) of section 132(1A) also takes into account any additional knowledge, skill and experience which the director himself in fact has, which is the subjective standard, that varies from individual to individual.

### ***Business Judgment***

In order to discharge his duties under section 132(1A), the director may have to make a **business judgment**. Section 132(1B) provides presumption for a director making a business judgment to have met requirements

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under section 132(1A) if the director ensures that (a) the decision is made in good faith for a proper purpose; (b) he does not have a material personal interest in the subject matter of the business judgment; (c) he is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and (d) he reasonably believes that the business judgment is in the best interest of the company.

### **Reliance on Others**

Whilst exercising his duties as a director, a director is entitled to rely upon others, provided he believes on reasonable grounds the reliability and competency of such others---Section 132(1C). His reliance is deemed, under section 132(1D), to be on reasonable grounds if it was made in good faith and after making an independent assessment of the information or advice, opinions, reports or statements, having regard to his knowledge of the company and the complexity of the structure and operation of the company.

### **Conclusion**

The enlarged definition of "director" under the Amendment Act includes the chief executive officer, the chief operating officer, the chief financial controller or any other

person primarily responsible for the operations or financial management of a company by whatever name called. The purpose of the expanded definition is to cover officers who have controlling powers and authority over decision making but who may not have been formally appointed to the board.

The Amendment Act introduced significant changes to the functions and powers of the board. Some may see this as an improvement of defining with more clarity the duties and liabilities of the board. Some may perceive it as an inappropriate interference with the board's decision-making rights. Well, the effects may only be known in time to come.

If you wish to know about the amendments brought upon by the Amendment Act, please contact our Corporate and Commercial Division Partner, Mr. Chan Chee Woei.

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<sup>i</sup> Act A1299

<sup>ii</sup> (1991) 4 WAR 21

<sup>iii</sup> (1993) 11 WAR 105

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## **CONTRACT / COMPANY LAW**

### **ILLEGAL TO ASSIST IN PURCHASING BUMIPUTRA SHARES**

The Plaintiff was owned by the C family. The Plaintiff together with certain members of the C family owned substantial but not majority shares in X Co. which was a public listed company. However, the shareholding of the Plaintiff and C family combined with those

of 2 other families, namely S family and Y family, would have control of X Co. S and Y are bumiputra whilst C is a Chinese.

In 1984, X Co. declared special rights issue to be taken solely among bumiputra shareholders. S, the Defendant, would be eligible to take up 3.1 million shares. The Plaintiff then pledged its shares in X Co. to the banks as securities to assist the Defendant to obtain the necessary financing to take up the bumiputra rights issue. In consideration, the Defendant agreed to transfer 500,000 of the 3.1 million bumiputra shares to the Plaintiff. However, since they were bumiputra shares which could not legally be transferred to the Plaintiff, the Defendant agreed to hold the 500,000 shares in trust for the Plaintiff. In late 80s, the securities pledged to the banks were force sold and these included the X Co. shares

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of the Plaintiff that were used to assist the Defendant to purchase the bumiputra special rights issue shares. The Plaintiff claimed from the Defendant for the loss of its X Co. shares.

The above were the finding of facts in *Tuan Syed Azahari bin Noh Shahabudin & Anor v Ming Holdings (M) Sdn Bhd*<sup>i</sup>. The Court of Appeal held that the consideration was unlawful and void and was unenforceable in law. The arrangement was completely against public policy as it obviously defeated the purpose of the government policy to ensure bumiputra participation in the business sector achieve certain ratio. It amounted to cheating the government (in that the 500,000 bumiputra

shares would end up being owned by non-bumiputra) and the public at large and ought to be discouraged.

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<sup>i</sup> [2007] 4 AMR 133

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## CRIMINAL LAW

### NO GRAVE AND SUDDEN PROVOCATION DESPITE DEGRADING OF MANHOOD

It is not in every instance that words derogatory to a man whose wife is having an illicit affair with another person will amount to grave and sudden provocation which constitutes a defence to a charge of murder. That is basically the message meted out in the Federal Court decision of *Che Omar bin Mohd Akhir v PP*<sup>i</sup>.

In that case, the accused was a police lance corporal whose second wife went back to Sarawak with their daughter without his knowledge. The accused went to look for her despite allegedly receiving threatening phone calls warning him not to go to Sarawak and, apparently fearing that he was being followed by two men, bought a knife. After having a few drinks in a bar, he went to his mother-in-law's food stall where he saw his wife in the company of one Awang. He confronted his wife and questioned her why she had not been home and where she had been. She replied allegedly very loudly and roughly that this was not his concern and refused to return home. When asked about Awang, she replied that

Awang was 'her man' and told the accused to go back and not to return. The accused stabbed her to death and was charged with murder. His defence was that there was grave and sudden provocation brought about by what the deceased had said to the accused which made him feel less than a man and caused him to suffer '*dayus*', a term which meant a man allowing his wife to have an illicit affair with another person, the effect of which, constituted an attack upon his credibility as a husband.

The Federal Court held that it was not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden. In the instant case, the only provocation was a suspicion of adultery. The provocation was gradual. However, in the view of the trial judge affirmed subsequently by the Court of Appeal and the Federal Court, there was no such thing as gradual and accumulated provocation. Devoid of its gravity and suddenness, a gradual and accumulated provocation was not sufficient to constitute a defence of grave and sudden provocation under Exception 1 to s 300 of the Penal Code. The court therefore refused to substitute the conviction for culpable homicide not to amounting to murder under s 304 of the Penal Code.

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<sup>i</sup> [2007] 4 MLJ 309.

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## DIGEST

### 1. NO DOUBLE PUNISHMENT OVER SAME INCIDENT

An employee ought not to be punished twice over the same incident. That was basically the message driven home by the Industrial Court decision in *Aoba Technology (M) Sdn Bhd v Tan Kian Wool*<sup>i</sup>. The claimant had disobeyed his superior's directive, picked up the dustbin, smashed it on the table in front of his superior, shouted at his superior and walked away without an explanation. The claimant had been given a final warning and action letter which referred to several verbal warnings issued to him on his poor performance and bad attitude. The company subsequently took the dustbin incident as a serious misconduct and five days later, held a domestic inquiry pursuant to which the claimant was found guilty and dismissed. The Industrial Court held that the company by giving the claimant the warning letter had in effect taken action against him and it was unfair to take another course of action against him by dismissing him over the same dustbin incident. Although the dustbin incident had been serious misconduct to justify dismissal, it was inappropriate of the company to mete out another punishment for it, as it tantamount to punishing the claimant twice over the same incident. The claimant's dismissal was thus ruled to be without just cause and excuse. This case also illustrated the importance of a company handling properly its procedure and proceedings with regards to disciplinary action. If it had not been poor handling of such procedure, the company would have succeeded in establishing its case against the claimant.

### 2. RETRACTION FROM VSS

In *Thilagavathy SR Canasingam v AM Bank (M) Berhad*<sup>ii</sup>, the claimant met with an accident and had just returned to work after 2 ½ months' medical leave when she was given an application form to apply for an early retirement under the Voluntary Separation Scheme (VSS). She decided to opt for it due to her health condition, which application was accepted by the company. However, she had a

change of heart and subsequently wrote to withdraw her application for VSS, which appeal was rejected by the company with no reason given. The claimant contended that she had been dismissed without just cause or excuse. The Industrial Court held for the claimant. In the Court's view, there was sufficient evidence to show that the claimant was still suffering from trauma due to the accident when she reported for work and she was depressed and emotionally affected when the VSS application form was given to her. She was given only seven days to decide whether to accept the VSS. The VSS was held by the Court to contain terms most favourable to the company without consultation with workers. Term 13 therein which disallowed applicant for VSS to retract or cancel the application after it had been submitted was held to be draconian and unfair. The Court resorted to s.30(5) of the Industrial Relations Act 1967 to act according to equity and good conscience and the company was not allowed to insist on its strict contractual legal rights. The Court ruled that the application for VSS was not voluntary and there was no mutual termination. That being the case, the company's letter informing the claimant that her withdrawal from VSS was unacceptable amounted to unilateral termination of the claimant's employment and dismissal without just cause or excuse. In our view, this case should be confined to its facts and ought not to be construed as laying down any general principle that allows a person to willy-nilly retract his acceptance of VSS.

### 3. COMPANY'S PREROGATIVE ON TYPE OF PUNISHMENT

Is a company bound to accept the recommendation of the domestic inquiry (DI) panel set up to hear allegations of misconduct against an employee? The answer is 'no' and this is reiterated in the Industrial Court decision in *Airport Limo (M) Sdn Bhd v Syed Jamal A Nasir Syed Mustafa*<sup>iii</sup>. The company is not obliged to abide by the recommendations of the DI panel. The role and main function of the DI panel is to determine if there is sufficient evidence to prove the allegations of misconduct against an employee and to determine his guilt or otherwise. The management of the company is not bound by recommendation of a course of action to be taken against the employee with regard to the

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punishment to be imposed. It remained the company's prerogative to impose the correct punishment taking into account the necessary criteria. Thus, there had been no irregularity when the respondent in that case had failed to adopt the recommendation of the DI panel to terminate the claimant with notice.

#### **4. IMPORTANCE OF WARNING LETTERS**

With regard to poor or unsatisfactory performance of an employee, it is advisable to issue written warnings to him unless the employee by virtue of his senior position is and must be expected to know the company's expectation of him. This is to prevent the

company in an afterthought from using the lame excuse of an oral warning when no such warning was given in the first instance<sup>iv</sup>.

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<sup>i</sup> [2007] 3 ILR 225

<sup>ii</sup> [2007] 3 ILR 215

<sup>iii</sup> [2007] 3 ILR 350

<sup>iv</sup> See *Ah Yat Abalone Forum Restaurant Sdn Bhd v Chow Gee Cheu & Anor* [2007] 3 ILR267 at 273.

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#### **PUBLIC UTILITIES**

#### **UNDER-BILLED CONSUMPTION**

#### **ELECTRICITY**

If the utilities provider, in this case Tenaga Nasional Berhad (TNB), were to under-bill your electricity consumption, is TNB entitled to claim from you the amount undercharged notwithstanding that the undercharging was due to error or mistake by TNB's servant/agent and that more than six years have passed ?

The answer is "yes" as ruled by the High Court in *Tenaga Nasional Bhd v Teck See Plastic Sdn Bhd*. In that case, a meter was installed by the plaintiff at the defendant's factory in August 1990 and in July 1996 the meter was discovered to be faulty which caused it to record lesser units of electricity consumed at the defendant's factory. The defendant had all this while duly paid the monthly bills raised by the plaintiff.

The plaintiff made an estimate loss calculation of RM2.27 million (based on pro rata calculation method) for the irregularities of the meter for the period of September 1990 to August 1996 and demanded the same from the

defendant who refused to pay, hence the suit filed by the plaintiff on 5 September 1998.

The High Court relied on certain provisions in the Licensee Supply Regulations 1990<sup>ii</sup> and two previous cases to hold that the plaintiff was entitled to claim from the defendant an estimated amount (instead of an actual amount) of electricity consumption although the under-billing was brought about by the wrongful installation of the meter by the plaintiff without any fault or breach on the part of the defendant.

The defendant's plea of negligence as a set-off did not succeed as the defendant had not proven actual damage which was an essential ingredient in the tort of negligence<sup>iii</sup>.

As to the defendant's argument that the plaintiff's claim was time-barred<sup>iv</sup>, the court held that the date the breach occurred was on 12 June 1998 when the defendant's solicitor notified the plaintiff's solicitors that the defendant was denying liability to pay the undercharged sum and not September 1990 which was the date from which the plaintiff claimed for the undercharged sum.

The court also rejected the defendant's contention that the plaintiff had led the defendant to believe that the bills were accurate in reliance upon which the defendant had priced their manufactured products for sale to its customers and it would be inequitable to burden the defendant with the alleged loss.

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We do not quite agree with the decision and it remains to be seen whether the appellate court will affirm it. Having said that, it must be pointed out that the amendment to r 11(2) of the Licensee Supply Regulations 1990 which came into force on 15 December 2002 only allows retrospective adjustment of not more than three (3) months from the date the consumer has been informed about being undercharged or overcharged.

The High Court however held that this amendment did not assist the defendant because it came into force after the cause of action arose and in the learned judge's view,

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#### TENANCY

#### NO SELF-HELP TO EVICT TENANT FOLLOWING TERMINATION OF TENANCY

The case of *Metro Charm Sdn Bhd v Lee Nyan Hon & Brothers Sdn Bhd & Anor*<sup>i</sup> serves as a reminder to landlords that they ought not to resort to self-help if their tenants refuse to move out of their premises after termination/expiration of tenancy. It also cautions drawer of a cheque to be vigilant in monitoring his bank account to ensure there are sufficient funds to meet payment of cheque drawn.

On 28 February 2001, the tenant in *Metro Charm* case presented their cheque to the landlord for the rental of the month of February 2001. The cheque was not presented to the bank for payment until 17 March 2001, by which time there were insufficient funds in the tenant's account to meet the payment resulting in the cheque being dishonoured. The tenant used this as the ground to terminate the tenancy agreement and sealed off the land, and tore down and flattened all the structures on the land. The tenant sued the landlord for breach of contract and trespass.

ought to be construed as a prospective provision and was therefore inapplicable to the case.

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<sup>i</sup> [2007] 5 MLJ 430, [2007] 9 CLJ 161.

<sup>ii</sup> Rule 11(2).

<sup>iii</sup> *Arab Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ong and others* [2003] 1 MLJ 567 (at 578)

<sup>iv</sup> Six (6) years pursuant to s 6 Limitation Act 1953.

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The Ipoh High Court held that when the cheque was dishonoured on 17 March 2001, rental for the month of February 2001 was already outstanding for more than 14 days (from due date 15 February 2001) and thus, under cl 7.1(a) of the tenancy agreement, the landlord was legally entitled to terminate the tenancy agreement. The tenant's contention was that the landlord had intentionally delayed in banking in the tenant's cheque until the funds in the tenant's account were depleted.

Thus, it was argued that the tenant could not be considered as having defaulted in paying the February 2001's rental since when the cheque was tendered on 28 February 2001, the tenant's bank account had sufficient funds to honour it. The learned judge rejected the argument.

It was useless for a drawer of a cheque to claim that he had funds in his bank account at the time when he issued the cheque but not when it was presented for payment. A holder of a cheque has every right to present it for payment within a reasonable time and expected it to be honoured. The landlord has not acted unreasonably in presenting the tenant's cheque 15 days after it was drawn and tendered. Therefore, the landlord had a legitimate contractual right to terminate the tenant's tenancy.

However, the landlord was wrong to enforce his rights to evict the tenant by self-help. Under s 7(2) and (3) of the Specific Relief Act 1950, owner of a property can only seek to

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enforce his right to recover his property from the occupier, even after the tenancy has terminated, by way of court action.

Therefore, although the tenant's claim based on breach of contract failed, the tenant's claim based on trespass on the land by non-compliance of s 7(2) of the Specific Relief Act 1950 succeeded. A sum of RM944,228.84 was awarded to the tenant as damages for trespass.

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## TORT

### RESPONSIBLE JOURNALISM

How does the law strike a balance between the right to freedom of expression and the right of an individual to protect his reputation which is an aspect of the right to privacy? How does the law ensure the promotion of a free and vigorous press to keep the public informed and allowance to journalists latitude in how they presented the material; but at the same time protect an individual's reputation which is an integral and important part of the dignity of the individual? The development in England in the law concerning defamation and defences available to such cause of action has been dynamic and the recently reported decision of its High Court in *Charman v Orion Publishing Group Ltd and others*<sup>i</sup> provides a good insight into the current state of law. However, as it is only a decision at the High Court, it remains to be seen whether some of the principles espoused therein will be upheld by the appellate courts.

In the said case, the claimant was a former police officer whilst the defendants were respectively the publishers and author of a book entitled "Bent Coppers", which was subtitled 'Scotland Yard's Battle Against Police Corruption'. The claimant sued for defamation on account of several passages in the book which contained a detailed narration of the claimant's relationship with another officer and a police informant. The book suggested that the informant had made corrupt payments to the claimant and the officer in return for their protection in relation to a substantial theft. The two officers were said to have denied those

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<sup>i</sup> [2007] 5 AMR 214, [2007] 5 MLJ 272

allegations. The trial was divided into stages, in which at the first stage, the High Court judge ruled that the words complained of bore a defamatory meaning<sup>ii</sup>. The said case was the decision on the second stage which concerned the application of the defence of qualified privilege, particularly the common law privilege based on responsible journalism, which had undergone massive changes in the House of Lords' authority in *Reynolds v Times Newspapers Ltd*<sup>iii</sup>.

Bearing in mind that the author of a book had more time for checking than a journalist who had to meet a deadline and the publication sued on in the said case was a book rather than a newspaper containing the perishable commodity which was news, the High Court summarized the principles relating to privileged based on responsible journalism as follows:-

(i) In order to determine whether the publication was in the public interest, it was first necessary carefully to analyse the information which had been provided to the public and to pose and answer the question whether the public had the right to know, or a legitimate interest in knowing, the facts alleged, even if they could not be shown to be true;

(ii) The question at (ii) had to be answered by reference to the information which was known to the publisher at the time of publication, and not post-publication;

(iii) The touchstone being that of the public interest *and* responsible journalism, it was then necessary to ask whether in the particular circumstances of the case the publisher had demonstrated that he was acting responsibly in communicating the information to the public. The starting point was to consider the ten factors set out by Lord Nicholls in the said

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House of Lords' authority which by no means were exhaustive and which are summarized herein for ease of reference:

- (a) the seriousness of the allegation;
  - (b) the nature of the information and the extent to which the subject matter was a matter of public concern;
  - (c) the source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;
  - (d) the steps taken to verify the information;
  - (e) the status of the information. The allegation might have already been the subject of an investigation which commanded respect;
  - (f) the urgency of the matter;
  - (g) whether comment had been sought from the plaintiff;
  - (h) whether the article contained the gist of the plaintiff's side of the story;
  - (i) the tone of the article. The author could raise queries or call for an investigation. It need not adopt the allegations as statement of fact; and
  - (j) the circumstances of the publication, including the timing;
- (iv) The requirements of responsible journalism would vary according to the circumstances, and factors other than those identified in the said House of Lords authority might come into play. It was necessary always to bear in mind that the publication was defamatory and could not be shown to be true. The standard of conduct by which the responsibility of the journalism had to be

judged had to be applied in a practical, fact-sensitive and elastic manner;

(v) One such circumstance was where publication consisted of "reportage", that was, where the publisher had neutrally and disinterestedly reported in an even-handed way unattributed allegations which were of legitimate and topical interest to the readers of the publication but had not adopted those allegations as being true or otherwise embellished them. In such a situation, the court had held that the public was entitled to be informed of the matter without having to wait for the publisher, following an attempt at verification, to commit himself to one side or another;

(vi) In the case of reportage, there might well be no duty on the publisher to verify the information, provided that the publication did not include background material which was defamatory of the claimant and provided further that any comment by the publisher about the information was confined to honest comments about the information made without malice; and

(vii) A publication did not have to be balanced in order to qualify as responsible journalism. Nor did it matter whether or not the information on which the publication was based was found or could be found in the public domain.

In the circumstances of the instant case, the question that had to be addressed was whether the defendants had acted responsibly in collating and presenting the information in the book which related to the claimant rather than the information in the book generally.

**Where an imputation was conveyed to readers in relation to the claimant that cogent grounds existed for suspecting that in his capacity as a police officer he had been guilty of corruption, a responsible journalist had to evaluate with some care of the material on which that imputation was based and should subject the material to a degree of critical analysis (emphasis ours).** That was particularly so in the case of a book where there was less urgency than in the case of a journalist who had to meet a deadline. The

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passages complained of also did not constitute reportage nor did they contain a balanced account, therefore the requirements of responsible journalism were not to be significantly relaxed. Thus as the defendants had not shown that they had been acting responsibly in communicating the information contained in the book about the claimant to the public, the defence of qualified privilege failed.

The above is a brief write-up of the said case and readers are advised to refer to the report in full for a better understanding and

appreciation of the entire case and the relevant law.

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<sup>i</sup> [2007] 1 All ER 622

<sup>ii</sup> [2005] EWHC 2187 (QB), [2005] All ER (D) 152 (Oct)

<sup>iii</sup> [1999] 4 All ER 609

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### **TORT (MALICIOUS PROSECUTION)**

#### **SUCCUMBING TO PRESSURE TO MALICIOUSLY PROSECUTE INNOCENT**

In the recent case of *A v New South Wales and Another*<sup>i</sup>, the High Court of Australia seized upon the opportunity to determine the requirements of the tort of malicious prosecution in the modern context when actions for malicious prosecution were instituted against public prosecutors as opposed to private prosecutors. Historically, in England and Wales, a private individual was able to institute criminal proceedings which presupposed some personal knowledge of the facts alleged to found a criminal prosecution. Thus, in this case, some pertinent observations were made as to the context and applicability of the principles laid down in older cases. Our focus will however be on those considerations that are relevant to public prosecution which is the prevalent feature of criminal procedure in our country.

Factually, this case arose out of a public prosecution brought against the appellant, A. The second respondent, a police officer was alleged to have committed the tort. The first respondent, the State of New South Wales, was sued on the basis that it was vicariously responsible for his wrongdoing. In March 2001, the appellant was arrested and

charged with two offences of homosexual intercourse with the appellant's stepsons D (then aged eight) and C (then aged nine) contrary to s 78H of the Crimes Act 1900 (NSW). In the course of cross-examination of the proceedings at the Children's Court, C admitted that his evidence-in-chief was false, and that he had told lies to help his brother. The appellant was acquitted on the charge concerning C. Upon the completion of D's evidence and after hearing arguments, the magistrate concluded "that there was no reasonable prospect that a jury could convict the appellant. The appellant was likewise discharged.

The appellant then commenced these proceedings. He sued for malicious prosecution, unlawful arrest, unlawful imprisonment and abuse of process. The trial judge held that only the claim for damages for malicious prosecution was partly successful concerning the charge in relation to C. On appeal, the Court of Appeal dismissed an appeal by the appellant concerning the charge in relation to D but allowed a cross-appeal by the first and second respondents against the decision concerning the charge in relation to C and set aside the judgment of the trial judge.

After much deliberation, the High Court of Australia found that all the elements of the tort were made out on the evidence accepted by the trial judge in respect of the charge based on C's complaint and restored the trial judge's finding on this.

It is trite that for a plaintiff to succeed in an action for damages for malicious

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prosecution the plaintiff must establish four elements of the tort of malicious prosecution:

- (1) that proceedings of the kind to which the tort applies were initiated against the plaintiff;
- (2) that the proceedings terminated in favour of the plaintiff;
- (3) that the defendant, in initiating or maintaining the proceedings, acted maliciously; and
- (4) that the defendant acted without reasonable and probable cause.

The decision mainly focused on element (3) and (4). On the facts, the trial judge made an adverse finding against the respondents about the out-of-court admission by the second respondent to the appellant's lawyer --- "if it was up to me I wouldn't have charged him" --- and the associated statements about succumbing to the pressure upon him to charge the appellant because he worked for the police force. The trial judge was satisfied that the second respondent acted maliciously in laying both charges against the appellant not for the purpose of bringing a wrongdoer to justice. But, in respect of the charge concerning D, the trial judge found that the appellant had failed to satisfy element (4) and failed to demonstrate an absence of reasonable and probable cause on the part of the second respondent in prosecuting the appellant. In respect of the charge concerning C, the trial judge's finding that the second respondent did not believe that the appellant had committed the offence or alternatively that if he did believe it, then such belief was not based upon reasonable grounds was restored by the High Court. The appellant had therefore proved malicious prosecution in respect of the charge concerning C.

There are a few points of general importance which we wish to point for the benefit of our readers:-

1. It is necessary to establish both elements (3) and (4) which are distinct, one positive (malice) and the other negative (absence of reasonable and probable cause).

2. The five conditions laid down in *Mitchell v John Heine & Son Ltd*<sup>ii</sup> which are to be met if one person was to have reasonable and probable cause for prosecuting another for an offence are guidelines more relevant to cases of private prosecution where the defendant prosecutor may be supposed to have personal knowledge of the facts giving rise to the charge and the plaintiff alleges either that the prosecutor did not believe the accused to be guilty, or that the prosecutor's belief in the accused's guilt was based on insufficient grounds. But where the prosecution was based on the basis of statements by third parties (as in the case of public prosecution), there are evident difficulties in applying a test of reasonable and probable cause which would be satisfied by demonstrating only that the subjective state of mind of the prosecutor fell short of positive persuasion of guilt.

3. In the case of public prosecution, initiated by a police officer or a Director of Public Prosecution, a prosecutor has no personal interest in the matter, and no personal knowledge of the parties or the alleged events, and is performing a public duty. In such case, there are three critical points. First, it is the negative proposition that must be established: **more probably than not the defendant acted without reasonable and probable cause.** Second, **that proposition may be established in either or both of two ways: the defendant prosecutor did not "honestly believe" the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief.** The third point is: **what does the plaintiff demonstrate about what the defendant prosecutor made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? That is, when the plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?**

4. Thus, in the case of public prosecution, where a prosecutor has no personal knowledge of the facts underlying the charge, but acts on information received, in order to satisfy the element (4), the plaintiff will need to establish that the prosecutor had not honestly formed the view that there was a proper case for prosecution, or to have formed

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that view on an insufficient basis. The issue is not whether the plaintiff proves that the state of mind of the prosecutor fell short of a positive persuasion of guilt.

5. On element (4), to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an “illegitimate or oblique motive”. The improper purpose must be the sole or dominant purpose actuating the prosecutor.

6. Malice in a case of malicious prosecution may be established if some collateral purpose is shown to have provoked or driven the prosecution. That does not mean that a person bringing a prosecution who dislikes the subject of it should necessarily on that account be adjudged to have brought it maliciously. If the charge is one that should have been laid according to the precept of Dixon J in *Sharp v Biggs*<sup>iii</sup>, the prosecutor’s

distaste for the accused will be an incidental matter only.

We will conclude by citing the remark in the House of Lords’ decision of *Glinski v McIver*<sup>iv</sup> that justice requires that the prosecutor, the person who effectively sets criminal proceedings in motion, accept the form of responsibility, or accountability, imposed by the tort of malicious prosecution.

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<sup>i</sup> [2007] 233 ALR 584

<sup>ii</sup> (1938) 38 SR (NSW) 466

<sup>iii</sup> (1932) 48 CLR 81

<sup>iv</sup> [1962] AC 726; [1962] 1 All ER 696

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debts to avoid a winding-up order being made against it. Absent of such settlement, the court will proceed to wind-up the company.

It is a short-cut route to get your debts paid up without going through the long-winding route to file a civil suit to obtain judgment for the debts and subsequently to enforce such judgment. However, there must not be any substantial dispute over the debts. If any such dispute exists, then the winding-up court will not allow the winding-up petition to proceed. The creditor will have to file its claim in a civil court to have the dispute ordinarily adjudicated upon and to obtain a judgment. A creditor may however abuse the winding-up process to assert improper pressure on the debtor company. Therefore, it is not unusual for a debtor company of a disputed debt to apply for an injunction to restrain its creditor from filling or proceeding with a winding-up petition, so as to avoid the adverse consequences of having the petition advertised on newspaper to the detriment of the debtor company’s reputation and credit standing.

What is unusual in the recently reported case of *IJM Corporation Berhad v Harta Kumpulan Sdn Bhd* is that apart from applying for an injunction to restrain the presentation of a winding-up petition, the

## **TORT (NUISANCE)**

### **HARASSING & PESTERING LETTERS ARE NUISANCE**

A creditor may rely on s 218 of the Companies Act 1965 (the Act) to seek payment of debts (for a sum exceeding RM500.00) due and owing by a debtor which is a company. The creditor will need to issue a demand to require the debtor company to pay the sum due within 3 weeks and if the debtor company neglects to do so or to secure or compound for the sum to the reasonable satisfaction of the creditor, then a presumption that the debtor company is unable to pay its debts will arise. This will entitle the creditor to commence winding-up proceedings against the debtor company pursuant to s 218(1)(e) of the Act on the ground that the debtor company is insolvent. If the debts are not disputed, then the debtor company will have to settle the

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plaintiff also applied for an injunction to restrain the defendant from communicating with the plaintiff in a manner that would constitute a nuisance upon the plaintiff. The plaintiff's complaint stemmed from the fact that the defendant had been incessantly sending letters to the plaintiff to demand an alleged outstanding invoice (which was disputed). The frequency of these letters increased to one letter almost every other day. The plaintiff's cause of action was founded upon nuisance, namely an unlawful interference with the plaintiff's use and enjoyment of its land. The High Court judge relied on cases in which deliberate harassing and pestering telephone calls had been held to constitute an actionable nuisance to rule that the defendant's acts in consistently sending prolix letters that

substantially repeated or dealt with the same issue over and over and which contained constant threats amounted to nuisance. Injunction was granted and damages was ordered to be assessed against the defendant.

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<sup>i</sup> [2007] 4 AMR 317, [2007] 8 CLJ 291.

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## TRUST

### CAN'T HAVE THE CAKE AND EAT IT !

H and W were husband and wife. H bought the property and registered it under W's name. H claimed that W held a one half share in trust for him by alleging that there was a common intention between him and W to this effect. These are the facts in a nutshell in *Lew Pa Leong v Chi Shen Lan*<sup>i</sup>.

In law, there is the presumption of advancement. The parties being husband and wife, the purchase and registration of the subject property by the husband in the wife's name makes the wife the beneficial owner of the subject property by reason of the presumption of advancement operating in her favour. This presumption is rebuttable by evidence that shows a contrary intention, but the rebutting evidence must not be evidence of an improper purpose.

In the above case, H had affirmed to an affidavit to state that he let W to hold half

share of the subject property in trust for him so that in the unfortunate event of his sole-proprietorship business failing, his creditors would not be able to reach it. On this evidence, the Court of Appeal ruled that the true purpose of H registering the subject property in W's name was to show the world at large including his potential creditors that the subject property was not his. But between him and his wife, he would tell her that half of it belonged to him. In the court's view, H could not have it both ways. He could not say that the house was his own and, at one and the same time, say that it was his wife's. As against his wife, he wanted to say that it belonged to him. As against his creditors, that it belonged to his wife. That simply would not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. The presumption was that it was conveyed to her for her own use and he did not rebut that presumption by saying that he only did it to defeat his creditors.

So, to all married men or prospective married men, watch out when you intend to carry out 'scheme' similar to the above case !

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<sup>i</sup> [2007] 4 MLJ 13

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## EPILOGUE

### 1. COSTLY LESSON FOR BREACH OF STATUTORY DUTIES AND NUISANCE

In our Law Update Issue 1/2007, we featured the decision of the High Court in *Koperasi Pasaraya Malaysia Bhd v UDA Holdings Sdn. Bhd. & 2 Ors*<sup>i</sup> under the heading “What a Nuisance!” to drive home the message that statutory and governmental bodies must not act in a high-handed manner or abuse their powers to carry out unlawful acts that affect the public. The decision has recently been affirmed by the Court of Appeal in *UDA Holdings Sdn. Bhd v Koperasi Pasaraya Malaysia Bhd*<sup>ii</sup>. The background facts will not be reproduced here and readers are invited to refer to the said Issue 1/2007. We only wish to highlight a couple of points.

Firstly, to recap, in the High Court, the 2<sup>nd</sup> Defendant (DBKL) attempted to escape liability by relying on majority judgment of the Federal Court in *Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & 81 Ors*<sup>iii</sup> (aka the Highland Tower case) which excluded local authorities (in the instant case, DBKL) from liability in any claim for pure economic loss arising from negligence. The High Court judge distinguished Stephen Phoa’s case since the cause of action in the instant case was nuisance. The Court of Appeal however held that the majority judgment in Stephen Phoa’s case extended to a cause of action for public nuisance. Nonetheless, this did not help DBKL or the 3<sup>rd</sup> Defendant (Government of Malaysia who was vicariously liable for the acts of the Land Administrator which had wrongfully issued temporary occupation licence [TOL]). This is because the Court of Appeal went on to hold that DBKL and the Government of Malaysia were also liable for breach of statutory duty, the former under the Street, Drainage and Building Act 1974 for failing to maintain the road as a public street and to remove the obstruction and for allowing the road to be barricaded to enable UDA to erect 76 stalls; the latter under the National Land Code and Road Transport Act 1987 for issuing the TOL to a public road. The majority judgment in Stephen Phoa’s case did not provide DBKL or the Government of Malaysia

with an insulation or immunization against their liability arising from breaches of statutory duties.

Secondly, whilst the Appellants/Defendants succeeded to convince one of the three judges to reduce the quantum of damages (to RM16,305,608.00), two other judges by majority affirmed the High Court’s award of RM23,743,157.00. It is truly a costly lesson for the three defendants !

### 2. CONTEXT PREVAILS OVER LANGUAGE --- PATIENT NOT LIABLE TO PAY EXPENSES WHICH GREATLY EXCEED ESTIMATE

In one of our earlier updates<sup>iv</sup>, we reported that defendant (Sandar Aung) had admitted her mother for angioplasty which had unexpectedly turned complicated post-surgery where the Singapore High Court held her liable to pay for all the medical charges incurred by her mother despite the sum being far greater than that as estimated by the hospital earlier. This was because of an undertaking she signed agreeing to be liable for “all charges, expenses and liabilities incurred by and on behalf of her mother.”

The Singapore Court of Appeal has since overruled the decision and held<sup>v</sup> that the focus ought not to be the word “all” per se; but rather on the *type* of charges, expenses and liabilities that the parties intended to be covered under the contract. And having regard to the language and the context of the contract in question, the Court of Appeal found that the factual matrix clearly demonstrated that the ambit and scope of the contract was confined to only expenses related to the angioplasty procedure. As such, the Court held that defendant was liable for all charges related only to the angioplasty procedure.

It is interesting to note the approach taken by the Court of Appeal in construing the contract in the *context* in which it had been made and held that even if the plain language of the contract appeared otherwise clear, the construction subsequently placed on the language of the contract should not be inconsistent with the context in which the

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contract was entered into if this context was clear or even obvious, since the context and circumstances in which the contract was made would reflect the parties' intention when they entered into the contract and utilized the contractual language they did. The Court of Appeal applied the common law principle that the court could have recourse to extrinsic material where such material would aid in establishing the factual matrix, which would in turn assist the court in construing the contract in question. Such principle was not inconsistent with the parol evidence rule in Evidence Act since the court was not seeking to utilize such material to add to, vary or contradict the terms of the contract itself.

The Court of Appeal went further to cite with approval the 'more modern view' that the words did not have to be vague, ambiguous or otherwise uncertain before extrinsic evidence would be admitted. The purpose of the inquiry being to ascertain the meaning which the words would convey to a reasonable man against the background of the transaction in question, the court was free

(subject to certain exceptions) to look at all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words which were ambiguous but even to conclude that the parties must, for whatever reasons, have used the wrong words or syntax. Thus, the court was entitled (and, indeed, bound) to enquire beyond the language of the document and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances which the person using them had in view. The court must place itself in the same "factual matrix" as that in which the parties were.

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<sup>i</sup> [2007] 1 AMR 743

<sup>ii</sup> [2007] 5 AMR 36

<sup>iii</sup> [2006] 2 AMR 563, [2006] 2 MLJ 389

<sup>iv</sup> Law Update 1/2007, "Actual Medical Expenses Exceeding Bill Estimate – Are You Liable?"

<sup>v</sup> [2007] 2 SLR 891

## CONTACT US

For further information, explanation or analysis of the subject matter covered in this issue or to provide feedback, please contact us at:

TAY & HELEN WONG  
LAW PRACTICE  
Suite 703 Block F Phileo Damansara I  
No. 9 Jalan 16/11  
46350 Petaling Jaya  
Selangor Darul Ehsan  
Malaysia  
Tel (603) 79601863 Fax (603) 79601873  
email: [lawpractice@thw.com.my](mailto:lawpractice@thw.com.my)

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