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LAW PRACTICE • AMALAN GUAMAN

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CUSTOMER AWARDED FULL VALUE OF WORTHLESS CHEQUES

In *Development & Commercial Bank Bhd v Liew Weng Hang & Ors*ⁱ, the plaintiffs sued the bank for conversion and negligence to recover the value of five cheques which were drawn on the bank's branch in which the plaintiffs maintained their account. The cheques were given by K, an employee of the bank who was also a customer of the bank, as repayment of the debt owed by K to the plaintiffs. When the plaintiffs presented the first cheque, there was insufficient money in K's account but instead of returning the cheque to the plaintiffs indicating that it had been dishonoured, the bank's manager returned it to K. Similar thing happened for the other four cheques. The plaintiffs were not told of the dishonoured cheques and assumed that the cheques were good for payment. K left the plaintiffs' employment and disappeared.

The bank argued that since K had no money in his account, the cheques were worth

nothing and thus, the plaintiffs should receive only nominal damages. Awarding them the full value of the worthless cheques would amount to punishing the bank. The Court of Appeal however rejected this argument. In the strict-liability tort of conversion, under the applicable rule of remoteness of damage of direct consequence, the damage that befell the plaintiffs as a result of the conversion committed by the bank was the value of the cheques being the amount appearing on the face of each of them. In the sphere of law of negligence, the reasonable foreseeability test would also require the bank to compensate the plaintiffs for all loss that was reasonably foreseeable as a consequence of the breach, and that would be the sums that the bank misrepresented to have been credited to the plaintiffs' account by its failure to return the cheques to the plaintiffs and to inform them of the dishonoured cheques.

ⁱ [2007] 6 CLJ 260

COMPANY LAW

COMPULSORY ACQUISITION OF REMAINING 10% SHARES

The Court of Appeal's decision in *Shanta Holdings Sdn Bhd v Golden Uni-Consortium Sdn Bhd*ⁱ put in focus the situation whereby a company (or its nominee) (transferee) holding 90.1% nominal value of shares in another company (subject company) acted pursuant to a provision in the Companies Act 1965 (the Act)ⁱⁱ to acquire the remaining 9.9% shares of the subject company. On the next day after the completion of transfer of the said 90.1% shares from the assenting shareholders of the subject company to the transferee (respondent), the respondent gave

the requisite noticeⁱⁱⁱ to the dissenting minority holder of the remaining shares (the appellant). Four days later, the respondent filed an action in the High Court for a declaration that the respondent was entitled to acquire the appellant's entire shareholding in the subject company at the same price (RM2.05 per share) as accepted by the assenting shareholders or at such other terms as ordered by the court.

On the first issue that the respondent's action was premature as it was filed well before the three months accorded by s 180(3)(b) of the Act expired, the Court of Appeal remarked that the said provision was meant for the minority dissenting shareholder to give a counter-notice during the said three-month period requiring the transferee to acquire its minority shares, in anticipation that the transferee, after acquiring the consenting majority shares, may refuse to acquire those of the dissenting minority. On the facts of the instant case, the respondent transferee was ready and willing to acquire the shares of the appellant in the subject company whilst the

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appellant was also prepared to part with its shares except at a higher price (RM5.50 per share) as reflected in the appellant's counter-notice given subsequent to the respondent's action but before the expiry of the said three-month period. Thus, whether the filling of the respondent's action was before or after the appellant had given counter notice to the respondent was immaterial. The Court viewed the technical objection raised by the appellant that the respondent should have delayed in filling its action as an attempt to extract from the respondent the higher price insisted on by the appellant for its shares. The objection was thus overruled.

On the second issue on pricing, each party traded different views and angles in analyzing their respective share valuation reports to support their cause. The trial judge took the approach that unless there was evidence advanced by the appellant to show that the price offered and accepted by the majority assenting shareholders was totally unjustified or was manifestly lower than the value asked for by the appellant or that the

respondent was acting in bad faith in the sense that its objective was for some sinister purpose obtained by devious means, the price for the appellant's minority shareholding should be that as offered and accepted by the majority assenting shareholders. The Court of Appeal agreed with such approach and held that on the evidence as presented, the price of RM2.05 per share offered by the respondent was a fair price.

ⁱ[2007] 7 MLJ 513

ⁱⁱs 180(3) of the Act.

ⁱⁱⁱ notice of the fact that the respondent had acquired shares representing 90.1% in nominal value of the shares in the subject company.

or the disposal of a substantial portion of the company's undertaking or property.

“substantial value” and “substantial portion”

For the purpose of section 132C, the words “*substantial value*” and “*substantial portion*” have now been defined under the new subsections 132C (1A) and (1B).

In relation to companies where all of its shares are listed for quotation on the Stock Exchange, sub-section (1A) provides that the term “*substantial value*” and “*substantial portion*” shall mean the same value prescribed by the provisions in the Listing Requirements of Bursa Malaysia Securities Berhad (“LR”) which relates to the acquisition or disposals by a company or its subsidiaries to which such provision applies and which would require the approval of shareholders at a general meeting in accordance with the provisions of the LR. Under Paragraph 10.06 Chapter 10 of the LR, a company must obtain the approval of its shareholders in a general meeting where the percentage ratio (as defined in the LR) of the acquisition or disposal exceeds 25%.

COMPANY LAW

THE AMENDED SECTION 132C

Some of the changes impacting the content of the duties and liabilities of directors and their decision-making rights in a company have been highlighted in the article entitled “*Directors – Difficult Decisions?*” that appeared in the previous issue, Law Update 3/2007. In this article, we will examine amendments made to Section 132C under the Companies (Amendment Act) 2007.

Section 132C deals with the approval of company required for acquisition or disposal by directors of company's undertaking or property. Approval of the company must be obtained whenever there is an arrangement or transaction for the acquisition of an undertaking or property of a substantial value

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As for private companies, sub-section (1B) provides that an undertaking or property shall be considered to be of a “*substantial value*” and a portion of the company’s undertaking or property shall be considered to be a “*substantial portion*” if---

(a) its value exceeds 25% of the total assets of the company;

(b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than 25% of the total net profit of the company; or

(c) its value exceeds 25% of the issued share capital of the company,

whichever is the highest.

Removal of “...which would materially and adversely affect the performance or financial position of the company...”

Under the old section 132C, the acquisition and disposal of an undertaking or property of a substantial value or substantial nature per se does not require the shareholders’ approval. Approval is only necessary where it would materially and adversely affect the performance or financial position of the company. Thus, in a case where the directors reasonably believe that an acquisition or disposal will be good for the company or will not materially and adversely affect the performance or financial position of

the company, they do not have to get prior shareholders’ approval. There is an element of subjectivity.

However, with the new amendments which came into force on 15th August 2007 shareholders’ approval is necessary as long as the criteria of “*substantial value*” and “*substantial portion*” as set out in the new subsections 132C (1A) or (1B), as the case may be, are met, regardless of whether such acquisition or disposal affects or enhances the company’s financial position. Put simply, directors may be in breach of his or her fiduciary duties if they had proceeded with the acquisition or disposal of any undertaking or property of a substantial value or substantial portion without the shareholders’ approval.

Conclusion

All companies whether or not listed on the Stock Exchange should be aware that once a transaction satisfies the criteria of “*substantial value*” or “*substantial portion*”, directors would need to seek shareholders’ approval in a general meeting failing which subsection (3) of section 132C provides that the arrangement or transaction is *void* except in favour of a person dealing with the company for valuable consideration and without actual notice of the contravention.

COMPANY / CONTRACT

ADMISSION IN RESOLUTION NOT AMOUNTING TO ADMISSION OF A DEBT

Can we rely alone on statements in the minutes of a board of directors’ meeting which acknowledged certain debts to recover the debts? That was the question put in a nutshell in the case of *Amer Singh @ Mohinder Singh v Kelana Resorts Sdn Bhd*. The answer is “no”.

The High Court drew a difference between a document as evidence of a debt and a document as an admission of a debt. By virtue of s 17 of the Evidence Act 1950, an admission merely suggest or infers a fact. Even if a fact can be inferred from the admission, the admission was not conclusive proof of the fact. The resolution in question was not a contract. It was at most an admission. This admission must be viewed separately from the contract under which the debt was incurred. To treat the resolution as a contract for a debt and an admission of a debt interchangeably was wrong.

On the facts of the case, the contract for which the debt was incurred did not exist.

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The resolution was not a contract. Thus, the resolution even if it amounted to an admission of debt (which the Court ruled otherwise) was not an admission of a legal liability to pay the debt. The plaintiff had not on the facts and evidence furnished any consideration for the defendant to assume certain debt from a third party to the plaintiff. The resolution remained an internal manifestation of intention and it could not form any obligation on the part of the

defendant to pay the plaintiff. The plaintiff's claim was therefore dismissed with costs.

[2007] 8 MLJ 175

CONSTITUTIONAL LAW

LATE APPLICATION FOR CITIZENSHIP MAY NOT BE FATAL

Two children of a Malaysian citizen were born in India. The Malaysian only applied to register the birth of his two children with the Malaysian High Commission in India a few years after their birth. Under article 14(1)(b) of the Federal Constitution read with Part II of the Second Schedule, a person born outside Malaysia whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of Malaysia is a Malaysia citizen by operation of law. The application therefore failed to comply with the one-year period. There was a letter from the High Commission acknowledging the application but there was no further news despite reminder. About nine years later, the children having reached the majority made separate applications for citizenship under article 15(2) of the Constitution which were rejected. The children then applied to the High Court for a declaration that they were citizen under article 14(1)(b).

The above are the facts in a nutshell in the case of *Haja Mohideen MK Abdul Rahman & Ors v Menteri Dalam Negeri & Ors*¹. The children's application was successful. The learned High Court judge held that there was only one primary qualification that an applicant

must satisfy to qualify as a Malaysian citizen, ie. that his father must be a citizen when he was born; and that the other qualification which required the registration of the birth within a year or such longer period as the Federal Government may allow was purely a secondary requirement. In his judgment, whereas due compliance with the primary rule was imperative, a failure to comply with the secondary rule of registration was purely a procedural non-compliance which need not necessarily disqualify a person from being a citizen by operation of law under article 14 of the Constitution. Where the secondary requirement was not met, the Federal Government was obliged to examine the circumstances of the non-compliance on the merit whether a longer period ought to be granted. In this respect, the Minister concerned was not making an administrative decision as in those "if the Minister is satisfied" instances in public law which was subjective and was susceptible to be challenged only on grounds of procedural impropriety. The Minister was in fact making a decision under a social contract between a citizen and the Federal Government.

Therefore, the Minister must consider the reason(s) why the applicant fails to register on time. A refusal may only be justified where the reason proffered was so unreasonable and unacceptable that it outweighed the applicant's right to citizenship. The Minister must not unreasonably refuse a longer period of registration since the infraction is only a secondary rule of procedure. The reasonableness of the Minister's decision may be examined by the court.

On the facts and evidence, the reply of the High Commission which did not make an issue of the lateness or any specific issue relevant to the application had created in the

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mind of the Malaysian citizen a legitimate expectation that sooner or later the outstanding matters would be sorted out and he and his wife and children would be called for the purpose of identification. Further, the omission by the Federal Government for unexplained reasons to follow up from where it left off despite the Malaysian citizen's reminder had caused injustice to the applicants. The learned High Court judge permitted equity to intervene in the form of the maxim, *equity regards that as done which ought to be done* and granted the declaration that the children were citizens of

Malaysia under article 14(1)(b) of the Constitution subject to the verification that they were issues of their father.

ⁱ [2007] 6 CLJ 662

CONTRACT

POSSIBILITY OF GAMBLING DEBTS RECOVERED THROUGH FOREIGN JUDGMENT

In our Law Update issue 2 of 2006, we wrote about the case of *Jupiters Limited (trading as Conrad International Treasury Casino) v Lim Kin Tong*ⁱ ("*Lim Kin Tong*") which refused to uphold a claim based on dishonoured cheques where the underlying transaction was relating to gaming debts. In effect, gambling debts were absolutely unrecoverable in Malaysia. The recent reported case of *Jupiters Limited (trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor*ⁱⁱ ("*Gan Kok Beng*") drove home similar message.

Six cheques issued by the defendant to the plaintiff for the settlement of gambling losses incurred in the plaintiff's casino in Australia were countermanded by the defendant. Since the cause of action (arising solely from the dishonour of the said six cheques issued upon a wagering contract) was sought to be litigated in Malaysia, Malaysian law must apply.

Under Malaysian law, such cheques were given for no consideration by virtue of s 26 of the Civil law Act and s 31 of the Contracts Act 1950. The plaintiff could not found an action on the said six cheques.

What attracts our attention are the remarks of the learned High Court judge on another High Court decision in *The Ritz Hotel Casino Ltd & Anor v Datu Seri Osu Haji Sukarn*ⁱⁱⁱ ("*Ritz Hotel Casino*").

In *Ritz Hotel Casino* case, the plaintiffs applied to register in the Malaysian courts a foreign judgment (which was for a gambling debt in the English High Court) pursuant to the Reciprocal Enforcement of Judgment Act 1958. The plaintiffs' application was dismissed.

However, the learned High Court judge in *Gan Kok Beng* case seemed to be of the view that a foreign judgment legally obtained in England in respect of gambling debts ought to be permitted to be registered in Malaysia. In his opinion, the defendants in *Ritz Hotel Casino* case ought to be precluded from going behind the English judgment because of the public policy which was to accord due recognition to any reciprocal arrangements between our country and another.

To the learned High Court judge, *Ritz Hotel Casino* case was not to enforce a cause of action founded on a gaming contract---in which case the *Lex Fori*^{iv} of the country where the cause of action was brought would have to prevail, namely Malaysian law, which were essentially the factual matrix of the *Gan Kok Beng* case and *Lim Kin Tong* case. Unlike those two cases, *Ritz Hotel Casino* case merely concerned the registration of foreign judgments that had not only been provided for but sanctioned by statute which enjoined our courts to allow registration if papers were in order.

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Going by his reasoning, it seems to us that gambling debts could still be recovered in Malaysia if a judgment is obtained in respect of such debts in a foreign country which has a reciprocal enforcement of judgment arrangement with Malaysia which enables such foreign judgment to be registered here with a view to subsequently enforce it.

ⁱ [2006] 4 AMR 20
ⁱⁱ [2007] 7 MLJ 228

CONTRACT

SPECIFIC PERFORMANCE IN FAVOUR OF HOUSING DEVELOPER ?

In departure from the usual outcome of purchaser succeeding in obtaining specific performance of a sale and purchase agreement of a property against vendor, the developer in *Palmerston Holdings Sdn Bhd v Neo Cheng Soon dan Satu lagi*ⁱ was granted specific performance to compel the defaulting purchaser to complete the purchase of an apartment.

In that case, after having paid 10% of the purchase price, the defendants as purchasers had not made any progress payment. The plaintiff as the housing developer claimed for specific performance. On a construction of the terms of the agreement in question particularly clause 9, the High Court judge held that the vendor had the choice of either determining the agreement and forfeiting the deposit or claiming for

ⁱⁱⁱ [2005] 6 MLJ 760

^{iv} Lex Fori---the law of the country in which the action is brought or sought to be litigated. This is to be contrasted with Lex Loci, being the law of the country in which the wagering or gaming activity is carried out or the transaction where it is performed.

specific performance. The High Court judge also rejected the argument that specific relief if granted would cause hardship to the purchasers on the ground that the sale was on the basis of willing seller and willing buyer.

In another case which involved same housing developer and presumably sale and purchase agreement of similar contents, another High Court judge however came to a different conclusion.

In *Palmerston Holdings Sdn Bhd v Chong Siew Eng*ⁱⁱ, it was held that the plaintiff as the developer was not entitled to the decree of specific performance but was only entitled to forfeit purchase price already paid in accordance with the agreement. The learned judge did not regard provision similar to clause 9 in the agreement in *Neo Cheng Soon* case as conferring any right on the developer to obtain specific relief.

ⁱ[2007] 6 MLJ 281
ⁱⁱ[2007] 7 CLJ 56

DIGEST

1. Arbitrary setting of target is wrong and award where there is no fixed remuneration

In *Sentrafield Sdn Bhd v Kasivisvanathan P Velayutham*ⁱ, the company

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operated a debt collection agency business and the claimant was employed as a recovery officer. Two months after the claimant's employment, the company arbitrarily imposed collection target of RM60,000.00. Although the company contended that the figure applied to all staffs, the observed that it was unfair to impose a blanket target covering all staff regardless of permanent employees or probationers.

The Industrial Court went on to hold that the imposition of the said collection target on the claimant which was extraneous to the letter of appointment was out of malice and smacked of victimization. The dismissal was thus ruled unlawful. One interesting aspect of the award is that although the claimant's did not receive fixed salary and was paid based on collections made (i.e. commission of 2.5% for collections beyond RM12,000.00), the court took into account the ascending collection in the three-month period preceding his termination and awarded him a lump sum figure of RM25,000.00 as compensation in lieu of reinstatement.

2. Award of retirement benefits

More on quantum of award. In *HLG Securities Sdn Bhd v Adam Iskandar Choong Abdullah*ⁱⁱ, the claimant, an administration manager, was retrenched due to reorganization which resulted in redundancy. The Industrial Court held on the facts of the case that although there was justification why the company had to reorganize its business due to losses and the need to merge two departments to become one department, the company was wrong to have chosen to retrench the claimant (who has 23 years experience) as opposed to the HR manager (one year experience).

In awarding compensation, the Industrial Court took into account the fact that but for the retrenchment, the claimant would have continued working in the company (for another eight years) until his retirement age when he would have received a minimum of RM65,000.00 for his services. The court awarded hi full retirement benefits.

3. Disclosure of particulars of employees' salary is gross misconduct

The claimant in *Alam Flora (M) Sdn Bhd v Haryati Jamaluddin*ⁱⁱⁱ was an executive in the Human Resources Department (Payroll Administration). In her course of daily activities, she had unintentionally distributed an e-mail containing highly sensitive private and confidential information on matters pertaining to salary to the unauthorized personnel of the company and outside parties.

Although the company did not suffer any monetary loss, the Industrial Court held that she was negligent. As a payroll executive, she had held a position of trust and confidence and should have handled the information with more care and vigilance. The claimant had breached the terms of her employment to maintain confidentiality of sensitive information which resulted in loss of trust and confidence that necessitated the punishment of dismissal.

4. Copying e-mail responses to other parties may not be wrongful

On the other hand, in certain circumstances, replying to an e-mail with copies to various parties who were also on the original sender's list of recipients by answering accusations levelled against the person and laying down problems and shortcomings of the company may not amount to a gross misconduct. This was the outcome of the case of *Anka Tackle Corporation Sdn Bhd v Ong Seow Cheng*^{iv}.

The claimant's e-mail was in response to an earlier e-mail sent by the chairman of the company. The contents of the claimant's e-mail contained information and material supposedly confidential and sensitive but could actually be found in the company's audited accounts and books of accounts. The e-mail had not been sent to rivals, bankers or suppliers and had not been malicious. It had not been biased, inaccurate, irrelevant or unsolicited and it had been within the scope of the claimant's official duty express her views on the subject matter concerned.

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5. Condonation of employee's criminal record

The company in *Khamis Che Rose v Malaysian Resources Corporation Berhad*^v engaged the claimant as a Security Guard in June 2001. The claimant had criminal record between 1978 and 1982 with past offences unrelated to his employment. The company was aware of such record in November 2001. The company subsequently offered all its employees a voluntary separation scheme which was accepted by the claimant.

The claimant was then offered a 2 year contract job as a Security Guard. About 16 months later, the claimant's services were terminated on the ground of his criminal record with the police. The company's defence was that the status of security guard was upgraded to Auxiliary Police and since the claimant could not be accepted by the Police on account of his criminal record, the company had no alternative but to dismiss him.

The Industrial Court however held that the company had condoned the claimant's past criminal acts or record when they had continuously accepted or retained him and had thereby waived their rights to take disciplinary action against him. The court made the observation that the company could have either included a clause in the letter of appointment of the requirement of the claimant to satisfy the security screening or vetting by the police in the event the company was to apply for the Auxiliary Police status for the security guard and to reserve their rights to determine the claimant's employment failing such requirement or resorted to retrenchment on the ground that there was no more post of Security Guard for the claimant.

The act of the company terminating the claimant's fixed term contract was unlawful and the claimant was awarded compensation for the unexpired period of the fixed term contract.

6. Company registered as foreign company operating in Malaysia is subject to Industrial Court

The decision of the Industrial Court in *Ker Su Chon v PRG-Schultz International Pte.*

Ltd.^{vi} is to be welcomed. Prior to that case, the legal position appears to be settled that the Industrial Court does not have extra-territorial jurisdiction beyond Malaysia and does not govern companies that are not incorporated in Malaysia^{vii}.

The company in *Ker Su Chon's* case was a foreign company registered under s.332(1A) of the Malaysian Companies Act 1965. When the matter came up for hearing, there was still a legal entity within Malaysia to represent the company. The Industrial Court thus was seised with jurisdiction to hear the claim.

7. Social justice to employer too

The Industrial Court in Malaysia more often than not has been generally perceived as tilting towards employees in handing down awards. The Court of Appeal's decision in *Chan Hock Liong v Associated Motor Industries (M) Sdn Bhd*^{viii} to a certain extent serves to taper such perception. In that case, the appellant succeeded in his wrongful dismissal claim against the respondent who was ordered to reinstate the appellant and pay backwages of 24 months, the latter of which the respondent duly did.

However, in carrying out the reinstatement exercise, the respondent required the appellant to produce a written confirmation that he was no longer in the employment of his then employer (new employer). This request was consistent with an express term in the appellant's contract of service that the employee was not to be engaged directly or indirectly in any other business or occupation. The appellant refused and did not report for duty. Instead he treated himself as constructively dismissed and remained as an employee of the new employer.

The appellant filed an application to the Industrial Court for non-compliance with the order for reinstatement which was granted (the impugned award). The respondent then applied for an order of certiorari to quash the impugned award. The High Court granted the order for certiorari and the Court of Appeal affirmed the decision. The Court of Appeal admonished the appellant for his desire to get

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the best of both worlds ie. to be gainfully employed by the new employer and still to be treated as constructively dismissed so as to obtain enormous compensation against the respondent. The respondent's request was held to be in consonance with the contract of service.

The respondent had complied with the order for reinstatement. The impugned award ran counter to fundamental jurisprudence in industrial law which espoused the doctrine of equity, good conscience and substantial merits of the case. In the view of the Industrial Court Chairman, whilst the Industrial Relations Act 1967 is designed to ensure social justice, social justice is not to be administered as a monopoly of the employee to the exclusion of

the employer. Social justice is to be meted out to both employers and employees.

ⁱ [2007] 3 ILR 56

ⁱⁱ [2007] 4 ILR 178

ⁱⁱⁱ [2007] 4 ILR 342

^{iv} [2007] 4 ILR 385

^v [2007] 4 ILR 372

^{vi} [2007] 4 ILR 437

^{vii} See: Nihon Keizai Shimbun, Inc v Peter Kandiah [2003] 3 ILR 1246, Mostek Malaysia Sdn Bhd, Penang v Cik Aniza Yaacob & 763 Ors, Penang [1986] 2 ILR 876, Muscatine Holdings Inc v Chuah Chye Hin [2005] 2 ILR 78.

^{viii} [2007] 6 MLJ 323

LAND LAW

LANDOWNER CANNOT CAVEAT ITS OWN LAND

Land scams on the rise! Owners lost millions in rising number of cheating cases. That was how the headlines in The SUNDAY STAR on 23 December 2007 screamed out. The ironic situation where a landowner can lose his land even though he holds a good title is a direct result of the much-criticized Federal Court's decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit*, which interprets the law as set out in Section 340 of the National Land Code as one of immediate indefeasibility instead of deferred indefeasibility. For brief explanation for the benefit of our readers, we reproduce below parts of the write-up in the said newspaper:

"The term indefeasibility means that something is impossible to be 'defeated' or made void. Where fraud or forgery is involved in the transfer of land titles, legal system around the world adopt either one or two principles – "immediate" or "deferred" indefeasibility. Immediate indefeasibility is a situation where a transferred title is valid, regardless of any element of

fraud or forgery. Countries like Australia or Canada practice this, and their respective governments have in place a fund that compensates victims of such cases. Deferred indefeasibility, on the other hand, only protects a subsequent purchaser to a title that is defeasible. Therefore, if one party obtains a title where fraud or forgery is involved, this title can be defeated. However, if the same party sells it to another purchaser who buys it on good faith, that title is considered to be indefeasible. The indefeasibility therefore "defers" across one transfer of title (the one where fraud or forgery is involved) to the next purchaser who buys it in good faith."

However, for a better understanding of the problem and how unscrupulous fraudsters have made use of the current position of law to carry out their scheme, readers are urged to read up the write-up at page F27 to F29 of the said newspaper. Our previous issues of Law Update have also featured subsequent cases which had refused to follow the decisionⁱ.

Now, with a view of protecting a registered proprietor's land, can a private caveat be lodged by him over his own land, so that no transaction can take place on the land without his knowledge? The current position of the law as it stands does not permit this. This

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was highlighted in the recent Court of Appeal's decision in *Mohamed Ali Abdul Razak v Sim Hock Yong*ⁱⁱ. The relevant provision in the National Land Code (s.323) only permits entry of a private caveat by any person or body claiming title to, among others, any alienated land. A person cannot 'claim' title to something the title to which is already vested in him. Thus, a registered proprietor does not have a caveatable interest. The caveat entered by the

TRUST

PRESUMPTION OF ADVANCEMENT IN FAVOUR OF MISTRESSES

The Court of Appeal has decided that the rules in equity which refuse to extend the presumption of advancement to mistresses was no longer good law. Thus, in *Heng Gek Kiau (p) v Goh Koon Suan*ⁱ, the property was purchased by the plaintiff in the name of the defendant who was the plaintiff's mistress and who have been living in it. The plaintiff later sued to recover the house. While he succeeded in the High Court, the mistress prevailed in the appeal at the Court of Appeal. The Court held that the first question was whether the purchaser had a donative intention which was to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If there was such an intention,

UTILITIES

DISPUTE ON TELEPHONE CHARGES NOT WITHIN CONSUMER PROTECTION ACT 1999

The Consumer Claims Tribunal ("the tribunal") was established under the Consumer Protection Act 1999 ("CPA 1999") to hear claims for any loss suffered on any matter concerning a consumer's interest. Whilst generally the CPA 1999 applies to all goods

appellant against the title of his land was held to be rightly removed.

ⁱ Issue 2 of 2007.

ⁱⁱ[2007] 6 CLJ 337

then that was the end of the matter and there was no room for the operation of the presumption of resulting trust or advancement. It was only where there were not or insufficient facts or evidence from which a fair inference of the true intention might be drawn that a court should turn to presumptions as a last resort to resolve the dispute.

In that case, there were five circumstances which were demonstrative of the plaintiff's real intention to make a gift of the property to the defendant. Even if adopting the approach of the trial judge, there was evidence of a compelling nature to rebut the presumption of resulting trust. The Court went further to reject the ancient rule laid down in the case of *Soar v Foster* decided in 1858 which excludes the equitable presumption of advancement to mistresses.

ⁱ [2007] 6 AMR 178

and services offered or supplied to one or more consumers in trade, does it cover a claim over disputed telephone bills?

The answer appears to be "negative". In *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor*ⁱ, the consumer (the 2nd respondent) disputed two bills rendered by the applicant in relation to international calls purportedly made by the consumer to Papua New Guinea. Factually, the tribunal found in favour the consumer on grounds of wire-tapping from an unidentified person who had made the international calls while the consumer was surfing the internet and that the consumer's computer was hacked.

However, s.2(2)(g) of the CPA 1999 provides that the CPA 1999 does not apply to

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any trade transactions effected by electronic means unless otherwise prescribed by the Minister. There was no submission that the Minister has done so. Having also considered the Communications and Multimedia Act 1998 and the dictionary meaning of the word “telecommunications”, the High Court held that the said sub-section excludes the application of the CPA 1999 to trade transactions effected through the communication of electronically transmitted waves e.g. telephone. Therefore, the consumer had chosen the wrong forum to adjudicate his dispute as it was beyond the jurisdiction of the tribunal. The award made by the tribunal was consequently quashed.

EPILOGUE

MORE ON AUDITORS’ DUTIES

In the article appearing in the previous Law Update issue 2/2007 entitled “*Why Didn’t Auditors Find The Fraud?*”, we featured two decisions of the Singapore High Court, namely *JSI Shipping (S) Pte Ltd (“JSI”) v Teofoongwongcloong^j* and *Gaelic Inns Pte Ltd v Patrick Lee PACⁱⁱ*. Both these cases were recently heard on appeal by the Singapore Court of Appeal and both were partially allowed. Detailed facts of these cases are set out in the previous Law Update issue 2/2007 and the abbreviations used in the following write-up are similar to those used previously.

JSI Shipping (S) Pte Ltd (“JSI”) v Teofoongwongcloongⁱⁱⁱ

At the High Court, the trial judge held that the respondent (or “auditor”) was not negligent and were entitled to rely on the signature of the other director, C, on the draft financial statements as verification of R’s (the appellant’s Asia director) remuneration.

The nub in the controversy of this appeal falls into two broad categories, namely, breach and causation both of which constitute essential of any claim in negligence. Before assessing whether an auditor had breached

In this respect, the consumer ought to have obtained redress (if any) either through a suit in a civil court of law or by lodging a complaint under s.188(1)(a) and (b) and s.190(1)(b) of the Communications and Multimedia Act 1998.

ⁱ [2007] 4 ILR 35

his duty, one will have to determine the standard of care expected of him which would depend on (a) the standard required as a matter of contract and under the relevant statutes or regulations; (b) expert evidence relating to the conduct of the audit; and (c) the relevant accounting standards set by the governing professional body.

In considering the issue of breach on the part of the auditor, the conduct of the auditor must be looked at in the light of the circumstances reasonably known to the auditor at the material time and not *ex post facto*. The standard of reasonable care must be objectively assessed on the basis of knowledge reasonably available to the auditor and all measures that could have been reasonably adopted at the material time.

The Court of Appeal held that the respondent had made crucial omissions in relying on C’s signature, without informing him, that his signature would be relied on for the verification of R’s entitlement to remuneration and failing to draw C’s attention to the importance of verifying R’s entitlement. Also, an auditor exercising the requisite level of skill and judgment could not abdicate his core responsibility of verification by relying on management representations without seeking independent verification. As such, the respondent should not have relied on R’s self-certification of his entitlement to remuneration.

In deciding whether there was a causal link between the breach of the duty and the loss claimed, the test is whether if the appellant had been made aware of the misfeasance, it would have taken steps to secure the benefit of that chance of discovery,

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prevention and recovery. The Court of Appeal held that although proper verification of R's entitlement to remuneration may not have led to a realistic chance of discovery, prevention and recovery, the respondent's failure to verify or seek reasonable assurance was an effective cause of the losses incurred.

The respondent was partially excused from liability under s.391 of the Singapore Companies Act as the three elements of honesty, reasonableness and fairness were present. The fault was attributed equally to both the respondent and the directors of the appellant, as they were just as negligent and had not discharged their responsibilities according to good corporate governance. The appellant was awarded 50% of the losses amounting to \$273,385.65 as damages occasioned by the respondent's failure to verify R's entitlement to remuneration.

PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd^{iv}

In the case of *Gaelic Inns*, the appellant who was the auditor of the respondent was held liable at the first instance for the entire loss of 2004. The appellant appealed to the Court of Appeal and raised issues of negligence, quantum of damages which the respondent was entitled to and the defence of contributory negligence.

It was held that statutory auditors had a duty to be alive to the possible existence of fraud and to discharge their obligations with reasonable care. By failing to recognize that something was amiss from the striking facts before it, the appellant had failed to comply with the standard of care which could reasonably be expected of it in the circumstances.

In considering the defence of contributory negligence, the Court of Appeal held that notwithstanding the change in management that the respondent had undergone, the respondent remained liable to ensure that the handover process was performed seamlessly as possible, without compromising the management's oversight of the company's affairs. In this case, the management failed to comply with even its basic duties in this respect and neglected to

conduct simple checks to ensure that all cash sales were banked in promptly. However, the respondent's conduct, although negligent, did not amount to such deliberate conduct so as to break the chain of causation. Thus, the amount of damages awarded to the respondent was reduced by 50% in light of the finding that the respondent was contributorily negligent.

There are a few remarks by the appellate court (of the same panel) in both cases which provide good guidance to the profession of auditing:

- The essence of an audit is to obtain and provide reasonable assurance that a company's accounts provide a true and fair view of the financial position of the company. This encompasses the duty to verify and to be sensitive to the possibility of fraud.
- Prudence and integrity are hallmarks of the accounting profession and this requires an auditor to obtain sufficient and appropriate audit evidence to draw reasonable conclusions and provide a basis for his opinion on the financial statements. In the event of substantial doubts, the auditor should have qualified the audit report in the light of various scope limitations.
- An auditor would have discharged his duty by exercising the reasonable skill and care of an ordinary skilled person performing the same engagement, which was to minimize audit risk to an acceptable level by obtaining reasonable assurance of the matters which ought to be verified.
- Contributory negligence could arise if the company was found to have failed to look after its own interests even though it had appointed an auditor.
- The insertion of a disclaimer clause may not necessarily exclude or limit an auditor's liability as the terms of engagement do not constitute the sole criterion of the scope of duties undertaken by a statutory auditor. A

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statutory auditor remains under an implied duty to exercise reasonable care and skill in the course of the audit.

- An auditor ought to approach his task with an inquiring mind and remain constantly alert to the fact that a mistake or an oversight could actually be the thin end of a wedge. He would thus be obliged to pursue the matter and make further inquiries where reasonable suspicion would typically have been excited.
- It is however not contemplated that an auditor must detect each and every material misstatement or instance of fraud in the discharge of his duties.

- The fact of insubstantial remuneration cannot detract from the scope of an auditor's duty to ensure client's accounts are free from material misstatements. In other words, an auditor ought not to be allowed to adopt a lower standard simply on the basis that he had not been remunerated sufficiently for his services.

i [2007] 1 SLR 821
ii [2007] 2 SLR 146
iii [2007] 4 SLR 460
iv [2007] 4 SLR 513

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