



TAY & HELEN WONG
LAW PRACTICE • AMALAN GUAMAN

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IMPORTANT

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ARBITRATION / COURT PROCEDURE

JURISDICTION TO GRANT INJUNCTION WHERE ARBITRATION OUTSIDE MALAYSIA

In one of the few cases decided under the relatively new Arbitration Act 2005 (the Malaysian Act)ⁱ, the High Court of Malaya in *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors*ⁱⁱ decided to depart from an earlier decision by another High Court in *Innotec Asia Pacific Sdn Bhd v Innotech GMBH*ⁱⁱⁱ and held that the High Court has no jurisdiction to grant injunctive relief in respect of matters where the seat of arbitration was outside Malaysia.

In *Aras Jalinan* case, the plaintiff filed an application for an injunction that pending determination of arbitration between the plaintiff and the defendants pursuant to clause 25 of a settlement agreement between them, the defendants be restrained from preventing the plaintiff from obtaining 50% shares in the 3rd defendant and the defendants be restrained from appointing new directors for the 3rd defendant through any manner whatsoever. The defendants raised a preliminary objection on jurisdiction and contended that as the seat of arbitration was in Singapore, the plaintiff must seek relief from the Singapore courts and the Malaysian courts have no jurisdiction in the matter.

Despite clause 25.6 of the settlement agreement which provided that the said arbitration clause did not preclude the making of an application to any courts for injunctive or other interim reliefs, the learned Judicial Commissioner held that neither the Malaysian Act nor any federal law had expressly provided the High Court with any jurisdiction to grant the relief sought by the plaintiff. S.8 of the Malaysian Act indeed excludes any other form of court intervention *unless otherwise provided* by the Malaysian Act. In the learned Judicial Commissioner's view, by virtue of such provision, any assistance or supervision of the courts must be expressly provided, either under the Act or other relevant statute, which meant power of intervention by courts might not be inferred, either from the invocation of inherent or residual common law powers, or by an inference that what was not expressly

forbidden was permissible. Also, whilst our Parliament had adopted an arbitral regime based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law), unlike the Arbitration Act of New Zealand 1996 which had adopted the relevant article [art. 1(2)] in the Model Law as s.7 therein to confer express jurisdiction to its courts where the seat of arbitration was foreign, the Malaysian Act had not adopted such relevant article which gave rise to the inescapable conclusion that our Parliament did not intend to confer such jurisdiction. Our position was more akin to the position in Singapore and Canada where their courts had taken the view that they had no inherent or residual power to grant interlocutory injunction. Further, such jurisdiction could not be conferred by the agreement of the parties, whether as a specific clause in an arbitration agreement or as an article under the Model Law incorporated into the aforesaid agreement.

The plaintiff however could resort to the Singapore courts where the seat of arbitration was situated, as the Singapore courts have jurisdiction under s.12(7) read with s.12(1) of the Singapore International Arbitration Act 1994. As parties had already agreed to have the matter arbitrated in Singapore, the Singapore courts would be the more effective forum. Recourse to courts of the chosen forum would also reinforce the intention of the parties to submit their disputes to a forum that was neutral to them.

ⁱ which came into force on 15 March 2006 replacing the Arbitration Act 1952.

ⁱⁱ [2008] 5 CLJ 654

ⁱⁱⁱ [2007] 8 CLJ 304

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BANKING LAW

DISBURSEMENT OF LOAN BY BANK TO DEVELOPER AGAINST CUSTOMER'S INSTRUCTION

The plaintiff in *Alex Ting Kuang Kuo v Credit Corporation (Malaysia) Bhd*ⁱ purchased a property from the developer and took a loan from the defendant to finance the purchase. On 20.11.1986, nine days before the developer was obliged to deliver vacant possession of the property to the plaintiff (the due delivery date), the developer issued a notice to the defendant (being the purchaser's financier) requesting payment of RM73,250 being the first drawdown of the housing loan for item (c) of the Schedule of Payments under the sale and purchase agreement (S&P) viz. on commencement of reinforced concrete framework of the property, which indicated the stage of completion of works of the property to be between 25% and 40%.

A day before the due delivery date, the plaintiff telexed the defendant to withhold the release of any payment to the developer as the developer had delayed the completion of the property. The defendant nevertheless proceeded to make payment on 19.12.1986. The housing project was subsequently abandoned in June 1987. The defendant demanded repayment of the loan sums and the plaintiff refused to pay and filed a suit for, among others, a declaration that no monies were due and owing by the plaintiff to the defendant on the ground that the defendant's release of the progress payment of RM73,250 was in breach of express and implied terms of the loan agreement.

The defendant sought to defend its position in a conflicting duties situation --- its duty to the developer to make payment on the receipt of notice of payment, notwithstanding any dispute between the plaintiff and the developer; and a duty to the plaintiff, its customer who had requested that payment be withheld. It invoked the phrase in Clause 1.2 of the Housing Loan Agreement that the lender(defendant) shall release the housing loan at such amounts and times as the lender may reasonably deem fit. The said Clause 1.2 in full reads:

"The lender shall release the housing Loan to the borrower(s) or to the vendor at such amounts and times as the lender may reasonably deem fit. Notwithstanding that there is a dispute between the borrower(s) and the vendor for the purpose of this clause the borrower(s) hereby give(s) his/her/their express consent to the Lender to release the housing loan to the vendor in the manner and at the times specified in the sale agreement."

Upon full trial, the High Court ruled that the defendant's duty to make payment to the developer was not absolute in that every demand from the developer must be complied with, but rather conditional on the demand being made "...in the amount and at the times specified in the sale agreement." Thus, the defendant's release of the progress payment of RM73,250 was in breach of the express term of the loan agreement when the defendant at that time was made aware that it was after the expiry of the due delivery date and there was clear documentary evidence that the developer was in breach of the S&P. Further, a bank in transferring funds to a third party on the instructions of his customer was bound to comply with the instructions of its customer.

The defendant was acting in the capacity of agent of the plaintiff and was clearly under an obligation to act in accordance with the plaintiff's instructions. When the defendant made the payment to the developer contrary to the written instructions (telex) of the plaintiff, the payment was made without mandate. There was therefore no obligation on the plaintiff to repay the sums paid out without his mandate.

ⁱ [2008] 6 CLJ 512

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**FRAUDSTERS POUNCING ON EAGERNESS
TO PROMOTE TOURISM**

The Singapore High Court case of *Singapore Tourism Board v Children's Media Ltd* provided an apt illustration how a nation's anxiousness to promote its tourism was capitalized and exploited by unscrupulous parties. The plaintiff in this case was a statutory body aimed to promote Singapore as a travel and tourist destination. The 3rd defendant who claimed to have extensive experience in organizing musical events on an immense international scale solely owned the 2nd defendant which in turn wholly owned the 1st defendant.

The 3rd defendant was also the director and chief executive officer of both the 1st and 2nd defendants. The 3rd defendant had used the 1st defendant to enter into an agreement with the plaintiff to stage a musical event in Singapore known as ListenLive ("the 1st Agreement") which was intended to comprise a series of activities involving well-known dignitaries, heads of state, members of royalty and film and music artistes to be broadcast worldwide in order to raise funds for the world's most disadvantaged children ("the Event").

Under the 1st Agreement, the plaintiff was obliged to provide sponsorship sum (which the plaintiff did to the tune of S\$6.1m) and the 1st defendant in return was to procure the necessary artistes, broadcasters and financing ("Core Finance") to stage the Event. The 1st defendant failed to meet the deadline to raise the Core Finance 180 days prior to the staging of the Event but the plaintiff accepted the 1st defendant's explanations (which cited diversion of attention brought by external events beyond its control eg. tsunami at end of 2004) and agreed to a variation of the contract that resulted in the 2nd Agreement. Under the 2nd Agreement, the right to terminate was now available to both parties instead of only being available to the 1st defendant.

On the last day of the new deadline, the 1st defendant purported to give confirmation that the Core Finance had been raised. Although suspicious, the plaintiff acknowledged, without prejudice to its rights, that the 1st defendant had confirmed Core

Finance so as to enable the Event to proceed. The Event however still failed to be staged by the new timeline and external events (eg. competing event called Live 8 and terrorists bombings in London and Cairo) were cited again for its failure.

The 3rd defendant then represented to the plaintiff that the Event could still be staged if the plaintiff agreed to a postponement but insisted that the plaintiff removed a refund provision which was termed as a 'deal-breaker'. The plaintiff could have terminated the 2nd Agreement and sued for the return of the sponsorship sum but in reliance of such representations, agreed to further postponement of the Event and to the removal of the refund provision leading to the 3rd Agreement. A side letter was also signed between the plaintiff and the 1st defendant whereby all prior agreements between the parties were deemed terminated, neither party had further obligations arising from the prior agreements and both parties waived their right to claims arising from the prior agreements.

Some months later, the 3rd defendant claimed the 1st defendant was unable to confirm the Core Finance under the 3rd Agreement by the deadline set and purported to terminate the same on this basis. The defendants also rejected suggestions by the plaintiff to further postpone the Event. The plaintiff filed a suit to rescind the 3rd Agreement and sought refund of the sponsorship sums as well as damages based on a multitude of causes: repudiatory breach of contract, fraudulent misrepresentations, total failure of consideration and breach of trust.

Evidence adduced showed that the 1st defendant was merely the conduit to receive the sponsorship sums. It was made to bear all the expenses and liabilities of the 2nd defendant and those of third parties but it obtained none of the benefits for being the organizer of the Event. Where liabilities were to be incurred, the contract was entered into by the 1st defendant but where income was to be received, the contract was entered into by the 2nd defendant. Between the defendants, their bank accounts were commingled and there was no internal procedure for the control of movement of funds. Control of the 1st defendant's bank account rested in the 3rd defendant who used it to make payments to

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himself, the 2nd defendant, his friends and third parties without any measure of checks and balances. The 3rd defendant was the controlling mind and sole beneficiary of the profits of the 2nd defendant who had the sole control of how funds in the 2nd defendant were to be used.

The trial judge pierced the corporate veil of the 1st defendant which acted as a façade and/or sham to allow the 3rd defendant to evade his legal obligations and which was used as an instrument to siphon off the sponsorship sums to the 2nd and 3rd defendants. Consequently, all three defendants were jointly and severally liable to the plaintiff on its claim.

With regard to the 3rd Agreement and the side letter (which was held to be a collateral contract to the 3rd Agreement), they were rescinded because they were entered into on the basis of the defendants' fraudulent misrepresentations. The defendants took advantage of the plaintiff's anxiety in having the Event staged in Singapore and deceived the plaintiff into entering into the 3rd Agreement and the side letter.

At the negotiations leading up to the 3rd Agreement, the defendants wilfully chose not to disclose that the Core Finance had been used up and could no longer be applied to the staging of the Event. Evidence also revealed that the 3rd defendant at that time had transferred the entire balance of the sponsorship sums from the 1st defendant's account to that of the 2nd defendant's and instructions had already been given to stop work for the Event whilst arrangements had been secretly made to stage the Event in New York instead.

Clearly, evidence of such non-disclosure and devious conduct fulfilled all the elements of fraudulent representation on the part of the defendants to induce the plaintiff to

enter into the 3rd Agreement and the side letter (as a prelude to getting out of their responsibilities and liabilities under the 2nd Agreement). The court further held that it was no defence that the plaintiff acted incautiously and failed to take those steps to verify the truth of the representations which a prudent man would have takenⁱ.

The plaintiff also argued that a *Quitclose* trust arose on the facts of the case. The "*Quitclose* trust" is in reference to the trust found in *Barclays Bank Ltd v Quitclose Investments Ltd*ⁱⁱⁱ which established the proposition that where money was advanced by A to B, with the mutual intention that it should be used exclusively for a specific purpose, the law would imply (in the absence of any contrary intention) that if the purpose failed, the money would be repaid to A, and the arrangement would give rise to a relationship of a fiduciary character, or trust. So long as moneys went into a special account (as in this case) and it was meant for a specific purpose that subsequently failed, the sum should be returned to the plaintiff.

Concurrent with the finding that the 3rd Agreement was rescinded, the trial judge held the position of the parties to revert to and their rights were governed by the 2nd Agreement with damages to be assessed.

ⁱ [2008] 3 SLR 981

ⁱⁱ As to this, see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405.

ⁱⁱⁱ [1970] AC 567

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COMPANY LAW

FITNESS CENTERS, URN COMPARTMENTS & BURIAL GROUNDS --- WHAT DO THEY HAVE IN COMMON?

Well ... in a way, they are all related to your health. Exercise and live longer or healthier. Don't exercise and you die earlier? Not necessary so. Some people die earlier even though they exercise all the time!

On a serious note, the common factor that they all could possibly have is "interest" as defined under s. 84(1) of the Companies Act 1965 ("Act"). What is this "interest" then? How is it relevant to fitness centers, urn compartments and burial grounds? "Interest" as defined in s. 84(1) of the Act means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent:

- (a) in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere;
- (b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party;
- (c) in any time-sharing scheme;
- (d) in any investment contract,

whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include:

- (e) any share any share in or debenture of a corporation;
- (f) any interest in or arising out of a policy of life insurance;
- (g) any interest in a partnership agreement unless the agreement -
 - (i) relates to an undertaking, scheme, enterprise or investment contract

promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is a party to the agreement; or

- (ii) is an agreement, or is within a class of agreements, prescribed by regulations for the purposes of this paragraph; or
- (h) any participatory interest in a unit trust scheme as defined in section 2 of the Securities Industry Act 1983.

If it is an "interest" within the ambit of s. 84(1) of the Act, then Section 91 of the Act provides that a person shall not issue or offer to the public for subscription or purchase or invite the public to subscribe any interest unless, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

In short and in layman terms, if it is an "interest", you will need the approval of the Companies Commission of Malaysia ("CCM") (s. 86 of the Act) and a trust deed before offering the "interest" to the public.

In fitness centers, most of you all are aware of the plans, schemes, packages etc. that a fitness center may offer, in particular lifetime memberships, annual subscription plans, 3-years subscription plans, etc. Ever wondered what happens when you go to the fitness center one day and find out that the company operating the center has ceased business? Recently, some fitness buffs found out about this the hard way when the fitness center closed down due to financial difficulties. What happens to all the deposits and payments accepted by the operator? What happens to their membership? Is there anything out there regulating these fitness centers particularly when it comes to taking of deposits and subscription payments?

In reaction, the CCM announced that fitness clubs that offered more than 12-month subscription memberships must obtain prior approval from the CCM as such type of membership was deemed to be an "interest"

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under s. 84(1) of the Act. The CCM went on to say that the member has an interest in the form of an “investment contract” with the respective fitness club by virtue of making payments in exchange of a right to use the club facilities at the club for a period of over 12 months. In our view, the CCM has a valid point. After all, aren’t these fitness centers similar to golf club memberships which fall within the ambit of s. 84(1) of the Act?

But, what about urns compartments and burial plots? Who would have thought these are “interests” as well? Obviously, the CCM thought that they were “interests” within the ambit of s. 84(1) of the Act and the CCM brought an action against NV Multi Corporation Bhd (“NV”) and others for failing to comply with s. 86 and s. 91 of the Act. NV carries on a business which basically involves around the acquisition of lands which will be developed into memorial parks that provide, *inter alia*, urn compartments and burial plots. NV will then advertise and offer for sale these urn compartments and burial plots to the public.

In the Court of Appeal case of *CCM v NV Multi Corporation Bhd & Ors*ⁱ, the CCM appealed to the Court of Appeal on the interpretation of “interests” as the High Court had earlier declared that NV’s business in relation to the urn compartments and burial plots did not fall within the meaning of “interest” under s. 84(1) of the Act and as such, an approved deed as stated under Part IV Division 5 of the CA 1965 was not required, hence the respondents (NV & ors) were not in breach of s. 91 of the Act.

The Court of Appeal held in favour of CCM and over-ruled the High Court. The Court of Appeal adopted a wider approach in interpreting “interest” as compared to the restrictive interpretation adopted by the High Court. It is important to note that the Court of Appeal pointed out that “it is not necessary for the purchasers (of the urn compartments or burial plots) to show that the respondent’s business attracted any profit in which they may participate”. The Court of Appeal went on to explain that profit and participating was only one of the limbs of the ingredients (of s. 84(1) of the Act) and the ingredients were to be read disjunctively (see s. 84(1)(a) where the word “or” appears after the words “in any profits assets” and before the word “realization”).

Therefore, a scheme or business undertaking that requires the approval of the CCM pursuant to s. 86 of the Act may or may not be for economic purposes. “Interest in the assets” (read disjunctively i.e. no longer read as “interest in the profits ...”) under s. 84(1)(a) of the Act must not only be determined based on financial gains but also in terms of benefits, advantages and gains obtained by the purchasers and here, the Court of Appeal was of the view that the benefit or advantage accruing to the purchasers was their legitimate expectation to be given the urn compartments or burial plots and usage of the common areas and facilities in the memorial parks.

On the argument presented by the respondents that the purchasers of the urn compartments were mere licensees and acquired no right or benefit from the use of the urn compartments, the Court of Appeal was of the view that what was necessary was to show the nexus of the relationship between the purchasers and the respondents and this relationship created a right for the purchasers to participate in the common enterprise in which the purchasers were led to expect some interest from the efforts of the respondents as promoters of the scheme. On the argument that there could not be a common enterprise because there was no commercial venture, the Court of Appeal held that it was not necessary that there be a joint participation in all the elements and activities of the enterprise. It was sufficient if the two parties were bonded by a “continuing involvement intended for both parties”.

In conclusion, NV’s business of selling urn compartments and burial plots are “interests” under s. 84(1) of the Act. Who would have thought of that? Whether or not NV has appealed to the Federal Court and whether the apex court would affirm the Court of Appeal’s interpretation remains to be seen. In the meantime, take heed that a scheme or business undertaking need not to have any element of profits to be caught under s. 84(1) of the Act. If in doubt, seek advice of the lawyers or the authorities !

ⁱ [2008] 5 CLJ 450

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MANDATORY ADVERTISEMENT OF WINDING-UP PETITION

The recent Federal Court decision in *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* made it crystal clear that once a winding-up petition has been filed, all the relevant provisions of the Companies Act 1965 (the Act) and the Companies (Winding-up) Rules 1972 (WUR) must be observed, including advertisement of such petition, although the debt forming the subject matter of the petition may have been fully paid in the interim period between the date of the presentation of the petition up to the date when the petition is scheduled to be heard.

On the facts, the petitioner had filed a petition to wind up the respondent in respect of a debt. The scheduled hearing date was on September 3, 1999. The respondent tendered to the appellant a cheque for the said debt which was cleared on May 11, 1999. The petition was however published in the local daily on May 12, 1999. The respondent sued the appellant for libel on account of the petition being advertised after the debt had been fully settled and contended malicious intention on the part of the appellant. The appellant raised the defence of absolute privilege in that under the scheme of the Act and WUR, the advertisement of the fact of the petition was mandatory and thus the petitioner would not be excused from advertising the fact of the petition after the debt had been fully paid which rendered such advertisement absolutely privileged.

The Federal Court agreed with the appellant's contention. The petition was grounded on the presumed insolvency under s 218(1)(e) read with s 218(2) of the Act arising from the respondent's failure to pay the said debt within 3 weeks from the service of statutory demand. Notwithstanding the payment of the said debt, the winding-up proceeding had already commenced which set in motion the relevant provisions of the Act and WUR vis-à-vis the respondentⁱ. Winding-up is a class right or class remedy as opposed to a writ action, which means it seeks to provide

protection to all creditors upon presentation of the petition. Advertisement of the petition is essential so as to give notice to all creditors. Therefore, advertisement of the petition was mandatory and could not be dispensed with. The answer to the question of law posed to the Federal Court --- 'Where a winding-up petition on grounds of presumed insolvency under s 218(1)(e) read together with s 218(2)(a) of the Act has been filed and served on a respondent and the respondent pays the sum stated in the petition to the petitioner, whether under the legislative scheme of winding-up of companies, a petitioner is excused from advertising the fact of the petition and surreptitiously keep the money for himself to the exclusion of the creditors at large of the respondent and subsequently withdrawing the petition that is unadvertised' --- was in the negative.

There are a couple of points made by the court which business community at large is advised to bear in mind when handling their debts. Firstly, the court regarded the payment of the said debt by the respondent as disposition of the property of the respondent after commencement of winding-up within s 223 of the Act and was void unless the court otherwise orders.

The respondent could not claim exclusive right to the money paid. Secondly, the appellant's agreement to discontinue legal proceedings after the cheque had been cleared could not be binding and would be invalid as it was against the express provisions of the rule on the mandatory requirement of advertising the petition. We therefore advise that if you do not wish to suffer the commercial repercussions and draconian consequences entailed from an advertisement of a winding-up petition against your company, you should ensure settlement of your debts before your creditor embarked upon such a petition.

ⁱ [2008] 6 AMR 269

ⁱⁱ eg. s 222, 223 and 224 of the Act

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CONTRACT / BANKING LAW

NEGLIGENT SWIFT WIRE TRANSFER

The Court of Appeal's decision in *Bank Utama (Malaysia) Berhad v Insan Budi Sdn Bhd*¹ reminds bankers to exercise care when issuing a letter of credit in respect of an international trade facility. Any improper issuance may cause termination of a contract (that it seeks to finance) and result in its customer suffering losses which are claimable from the bank.

In that case, a local company, Gula Padang Terap Berhad ordered 100,000 metric tons of raw sugar from the plaintiff which in turn obtained credit facilities (comprising letter of credit, trust receipts and exchange forward line) from the defendant bank to purchase and import 100,000 metric tons of raw sugar from an overseas supplier. The defendant prepared a SWIFT wire transfer message to the supplier's bank according to the terms of the credit facilities but the message was sent by fax only and not through the actual SWIFT itself. The defendant bank re-sent the SWIFT wire transfer, but the supplier informed the plaintiff that the SWIFT was 'not coded or keyed for clearance' and the supplier's bank informed the defendant that it was unable to process the SWIFT 'as it is an unauthenticated message'. Subsequently, a lengthy process of correspondence ensued among the parties at the end of which the supplier terminated the contract with the plaintiff. The plaintiff claimed against the defendant for breach of contract and negligence by the defendant as banker to fulfil their contractual obligation and duty of care to the plaintiff as their customer which

resulted in the supply of raw sugar being aborted and cancellation of the sale to Gula Padang Terap Berhad.

The court upheld the trial court's finding that the supplier's bank could not process the SWIFT wire transfer for payment of the shipment of raw sugar because it was sent by a wrong procedure. This resulted in non-delivery of the sugar and caused loss to the plaintiff. The SWIFT transmission was the *causa causans* of the supplier's termination of contract. The court also affirmed the trial judge's decision that liabilities in tort and contract could exist concurrently or alternatively. It also held that the defendant had a duty to advise the plaintiff as its customer that SWIFT messages were not and could not be sent by facsimile. The defendant ought not to expect a customer to understand the detail working of a SWIFT wire transfer and should advise the plaintiff accordingly.

The defendant bank was therefore liable to pay the loss of profit suffered by the plaintiff.

¹ [2008] 6 AMR 81

CONTRACT LAW/ COMMERCIAL TRANSACTIONS

'TAKE OR PAY' CLAUSE MAYBE A PENALTY

The claimant in *M & J Polymers Ltd v Imerys Minerals Ltd*¹ had been supplying dispersants, chemicals used in the breakdown of clay and other materials, to the defendant since 1991. In the most recent supply

agreement, it was provided that during the term of the agreement the defendant would order certain minimum quantities of products. There was a 'take or pay' clause in Article 5.5 which stated that the defendant would pay for the minimum quantities of products as indicated in the article even if the defendant had not ordered the indicated quantities during the relevant monthly period. In May 2006, the defendant purported to terminate the supply agreement by a notice which was treated as an unlawful repudiation of the contract by the claimant and accepted by the claimant which then filed a suit against the defendant. One of the issues arose was whether the sums due to be paid by the defendant to the claimant in

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respect of the Article 5 commitments for the period prior to the repudiatory breach were recoverable in debt or by way of damages. The contention of the defendant was that the said clause amounted to a penalty whereas the claimant answered that the action was in debt for the price and thus, the law on penalties was not relevant.

The High Court in UK observed that it was strange to find no previous authority as to whether a 'take or pay' clause amounted to or could amount to a penalty when such clause was a familiar provision in commercial contracts. The rule against penalties would be invoked where a sum was specified that was found not to be a genuine pre-estimate of damage, or a sum was stipulated '*in terrorem*' of the offending party (i.e. to deter a party from breaking the contract). As a matter of principle, the rule against penalties might apply to a 'take or pay' clause. However, Article 5.5 in the instant case was not a penalty clause. It was *commercially justifiable*, did not amount to *oppression* and had been negotiated and freely entered between *parties of comparable bargaining power* and did not have the *predominant purpose of deterring a breach of*

contract nor amount to a provision '*in terrorem*'.

On the evidence, the negotiations had taken place between extremely well qualified, able and savvy commercial men against a very significant commercial background, including a background of previous dealings. It followed that the 'take or pay' clause in the instant case did not offend against the rule against penalties and the claimant was entitled to recover the price of the shortfall pursuant to Article 5.5.

ⁱ [2008] 1 All ER (Comm)

had either received the particulars of it from the claimant directly or indirectly, or from any of the firms of estate agents with which the claimant had regular contact or through agents or individuals whom the defendant had instructed the claimant to negotiate with on the defendant's behalf.

CONTRACT LAW

WATCH OUT WHAT YOU SIGNED !

The English Court of Appeal's decision in *The County Homesearch Co (Thames & Chilterns) Ltd v Cowham*ⁱ concerned a real estate agent's commission. In that case, the defendant engaged the claimant to work with him to find a suitable property for him to purchase. The contract provided for the payment to the claimant by the defendant of a substantial registration fee and commission of 1.5% of the purchase price of any property introduced by the claimant which the defendant exchanged contracts to purchase within a specified period. It also provided, very oddly (in the words of the judge before whom the trial was held), that the claimant was deemed to have introduced a property if the defendant

The defendant within the specified period did exchange contracts "privately" for the purchase of a property which the claimant had mentioned in a telephone conversation and had included in a list delivered to the defendant, but in relation to which the defendant had taken no other steps apart from issuing a single reminder to the defendant about it. The claimant nonetheless claimed commission under the contract. The defendant disputed the claim as he had been introduced to the property by his own planning consultant and asserted that the claimant was not the effective cause of the transaction. The trial judge indeed found that the reference previously made by the claimant to the property had not made any impression on the defendant's mind when the defendant agreed to the said consultant checking out the property.

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Both the court of the first instance and the Court of Appeal recognized that unless the contract indicated otherwise, a term would be implied into a home buyer's agency contract (as in the case of selling agency contract) that the agent would not be entitled to commission on a transaction to be brought about unless his services were the effective cause of the transaction being brought about. However, in that case, implication of such a term would be inconsistent with the express terms of the contract, which imposed an obligation to work with the client (defendant) to find a property without requiring that the agent should be an effective cause of the transaction. Further, the concept of 'a deemed introduction' contemplated the possibility of commission

falling due when there had been no true introduction by the claimant. In the circumstances, the claimant was entitled to the commission claimed.

ⁱ [2008] 1 WLR 909

CONVEYANCING

LENDER'S LETTER OF UNDERTAKING PURSUANT TO A SALE & PURCHASE AGREEMENT

It is common in conveyancing practice to come across phrases such as "*Purchaser's Financier's Undertaking shall be deemed payment*" in a sale and purchase agreement. The Vendor should take note that if he has agreed to such deeming provision, as soon as the Purchaser pays the Differential Sum and the Purchaser's Financier provides a conditional undertaking to the Vendor to release the Purchaser's Loan, the Purchaser would have fulfilled his obligation to pay the balance purchase price to the Vendor.

This was the outcome of the Court of Appeal's decision in *Luwasa (Malaysia) Sdn. Bhd. v Ong Siew Oi & Anor*¹. In that case, Clause 5 of the sale and purchase agreement between the Appellant (the Vendor) and Respondent (the Purchaser) ("SPA") read:-

"If the purchaser shall have obtained a loan from a licensed finance company or bank (hereinafter referred to as "the Lender") and the differential sum between the balance purchase price

and the loan having been deposited with the Vendor's Solicitors and the Lender or its solicitors have extended an undertaking to the Vendor or Vendor's solicitors on or before the completion date to pay the balance purchase price stated in Clause 3 above shall be deemed to have complied with and satisfied the requirements of Clause 3 above."

The Respondent complied with his obligations pursuant to the said Clause 5 wherein he paid the differential sum and the Respondent's financier issued its conditional letter of undertaking to release the Respondent's loan to the Appellant subject to 4 conditions set out in paragraphs (a) to (d) of the letter. The Appellant was however not prepared to comply with the undertaking requested in paragraph (b) i.e. the refund of the loan sum by the Appellant in the event the deed of assignment or transfer in favour of the Respondent cannot be perfected for any reason. The Appellant rejected the said Respondent's financier's undertaking and took the stand that the said Clause 5 had not been complied with, proceeded to terminate the SPA and forfeit the deposit.

The Respondent instituted proceedings against the Appellant for an order of specific performance of the SPA.

In upholding the High Court's decision, the Court of Appeal held that:-

1. it was clear from the said Clause 5 of the SPA that the Appellant had agreed

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- that the Lender's letter of undertaking coupled with the payment of differential sum should be deemed full payment of the balance purchase price as opposed to actually receiving the balance purchase price;
2. in accordance with banking and conveyancing practice, the Lender was entitled to impose conditions which they did to protect their interest; the trial judge's interpretation of the said Clause 5 was correct since the said clause did not state that the lender was to provide an unconditional undertaking but a lender's undertaking. Thus, the Appellant could not read into the said Clause 5 of the SPA an "unconditional undertaking"; a conditional undertaking was sufficient and the said Clause 5 of the SPA had been complied with; and

3. the fact that the Lender would be issuing an undertaking instead of issuing the full loan sum directly, implied that there were conditions that have to be met before the loan sum could be released.

The Respondent's application for an order of specific performance of the SPA was granted.

ⁱ [2008] 6 AMR 309

immediately upon demand unconditionally pay to the lender the guaranteed moneys which have not been so paid' (emphasis ours).

The above were the brief facts in the English case of *IIG Capital LLC v Van Der Merwe and Anor*ⁱ. The learned Judge recognized that outside the banking contextⁱⁱ, there was a strong presumption against giving the words "on demand" the effect of creating an independent primary obligationⁱⁱⁱ. The issue was thus whether there were sufficient indications in the wordings of the guarantee to displace that presumption. The learned judge took into account the definition of 'Guaranteed Moneys' in the document described as a guarantee signed by both defendants which included not only those moneys which the company actually owed the claimant but also moneys 'expressed to be due, owing or payable' by the company to the claimant. These words pointed towards the conclusion that the guaranteed moneys might extend beyond what was actually owing by the company to the claimant and hence, that the liability of the defendants was not necessarily co-extensive with that of the claimant.

Further, the terms in clause 2.1 were not cast in the language of a typical contract of suretyship. First, the obligation thereunder was to pay the guaranteed moneys and was cast in the form of a primary obligation. Secondly, it was limited to payment of the guaranteed

CREDIT & SECURITY

INDEPENDENT PRIMARY OBLIGATION ON GUARANTOR

The defendants were directors of a company which took a loan from the claimant. One of the securities was a purported guarantee signed by the defendants. The claimant subsequently demanded moneys from the company said to be due under the loan agreement. The company did not pay the amount demanded and the claimant wrote to the defendants reciting the failure of the company to pay and certifying the amount due and payable by the defendants under the guarantee. Proceedings ensued and one of the issues raised was whether the defendants were entitled to rely on defences which could have been raised by the company in resisting a demand made against it for repayment under the loan agreement.

Under clause 2.1 if the guarantee, the defendants guaranteed 'as principal obligor and not merely as surety', among others, that 'if at any time...any of the guaranteed moneys are not paid in full on their due date... it will

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moneys; it did not extend to the performance by the company of any of its other obligations under the loan agreement. Thirdly, the promise to pay was introduced by the words “as principal obligor and not merely as surety”. There was also a clause (2.2) which provided that the defendants “shall indemnify the lender (claimant) and keep the lender indemnified against any loss...incurred by the lender as a result of a failure by the borrower (company) to make due and punctual payment of any of the guaranteed moneys...”. This clause was a contract of indemnity which imposed a primary liability.

Last but not least, there was clause 4.2 which provided a certificate in writing signed by a duly authorized officer(s) of the lender stating the amount...due and payable by the guarantor under the guarantee shall, save for manifest error, be conclusive and binding on the guarantor for the purposes thereof (emphasis ours). In the learned Judge’s view, the certificate was not expressed to certify what was due under the loan agreement from the company to the claimant, but certified what was due under the guarantee. The question whether the company was actually liable to the claimant was irrelevant to the certificate.

In short, the terms of the guarantee, taken together, were sufficient to displace the presumption on which the defendants sought to rely. The label attached to the document (i.e.

guarantee) was shoved aside, as it was the overall effect of the document that counted.

To quote the learned Judge, ‘One pointer towards a particular conclusion, not decisive itself, may in combination with other pointers lead ineluctably towards a particular conclusion.’ The decision that the terms of guarantee prevented both defendants from relying on the defences that could have been raised by the company in resisting a demand made against it and that once the claimant had certified what was due under the guarantee, both defendants were contractually bound to pay the amount certified was affirmed.

ⁱ [2008] 1 All ER (Comm) 435

ⁱⁱ Or in other words, ‘outside the field of first demand instruments or performance bonds or performance guarantees or on demand guarantees issued by banks.

ⁱⁱⁱ It connotes that liability under it is not conditional upon the existence of liability on the part of the principal debtor in connection with the underlying transaction.

CRIMINAL LAW

SUSCEPTIBILITY OF POLICE TO CIVIL CLAIMS FOR FAILURE TO RESPOND TO PLEA TO PREVENT THREATENED ATTACK

If the police are alerted to a threat that D may kill or inflict violence on V, and the police take no action to prevent that occurrence, and D does kill or inflict violence on V, may V or his relatives obtain civil redress

against the police, and if so, how and in what circumstances? This is in gist the common underlying issue in the two appeals heard together by the UK House of Lords in *Van Colle v Chief Constable of the Hertfordshire Police*ⁱ. The two appeals arose on different facts and are differently grounded. The first claim (*Van Colle*) was brought under the Human Rights Act 1998 and European Convention of Human Rights, whilst the second claim (*Smith*) was made under the common law. We will focus on the decision of the second case, which is more relevant to our jurisdiction.

The facts in brief: The claimant reported to the police that he had received persistent and threatening telephone, text and internet messages from his former partner

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following the break up of their relationship, including threats to kill him. The police was provided with details of his former partner's previous history of violence, his home address and the contents of the messages. The officers declined to look at or record the messages, took no statement from the claimant and complete no crime form. They however took steps to trace the calls and informed the claimant of the progress of the investigation. Shortly thereafter, he was attacked by his former partner and sustained severe injuries. He sued the defendant chief constable claiming damages for negligence in respect of the officers' failure to protect him from the attack. The judge struck out the claim as disclosing no cause of action. The Court of Appeal however reinstated the case.

On appeal, the House of Lords held that the judge had been correct to strike out the claimant's action. The sole issue, at that stage, was whether the chief constable owed to the claimant a duty to take reasonable care (e.g. to take reasonable steps) to prevent threats from being carried out. The House of Lords (by a majority of 4 to 1) upheld the core principle of public policyⁱⁱ that, in the absence of special circumstances, the police owed no common law duty of care to protect individuals from harm caused by criminals. Such duty would encourage defensive policingⁱⁱⁱ and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interests of the community as a whole^{iv}.

The dissenting judge formulated what has been conveniently called as "the liability principle"---that if a member of the public (A) has furnished a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts were known presented a specific and eminent threat to his life or physical safety, B owed A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed. The other judges however did

not agree to adopt such principle which in their view would lead to uncertainty in its application and detrimental effect for law enforcement.

However, it must be noted that there is the possibility of exceptional cases, for instance, the police has assumed specific responsibility for a threatened person's safety by assuring him that he should leave the matter entirely to them and so could cease taking protective measures himself, that a duty of care would arise. Further, the public policy issue as described above is not applicable to the situation where the police is exercising its civil function of performing civil operational tasks concerned with human safety on the public roads. Thus, operational decisions taken by the police can give rise to civil liability without compromising the public interest in the investigation and suppression of crime.

ⁱ [2008] 3 WLR 593

ⁱⁱ as set out in the earlier cases of *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 and *Brooks v Comr of Police of the Metropolis* [2005] 2 All ER 489

ⁱⁱⁱ The police would act to protect themselves from claims and focus on preventing or at least minimizing the risk of civil claims in negligence.

^{iv} Police work elsewhere may be impeded if the police were required to treat every report of threatened violence from a member of the public as giving rise to a duty of care to take reasonable steps to prevent the alleged threat from being executed.

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CRIMINAL LAW

TAXI DRIVER'S MISAPPROPRIATION

We have heard of stories of taxi drivers returning items inadvertently left behind in their cars by passengers and their honesty received praises and accolades. What would happen if a taxi driver, instead of returning the misplaced items to his forgetful passenger or depositing the items with the police, kept some of the items for himself and discarded the rest? He would have committed an offence punishable with imprisonment and that was the fate suffered by the accused in the Singapore case of *Public Prosecutor v Neo Boon Seng*ⁱ. There, the victim (passenger) reported the incident that he left some items in the taxi he took from the airport to his house to the police. Investigations led the police to arrest the taxi driver (the accused) and the recovery of some of the items. The items which were not recovered had an approximate total value of \$4,000, for which the accused did not make restitution. The accused pleaded guilty to one charge of criminal misappropriation. However, the district court only imposed a high fine (\$6,000) as it held the view that the victim had already recovered a significant number of items lost, hence the severity of the sentence ought to be somewhat tempered.

On appeal by the prosecution on the sentence, the High Court held that the sentence was manifestly inadequate. Although the offence of criminal misappropriation was considered as one of the less serious property offences because it did not require a positive act of taking as contrasted with a negative act of keeping something that belonged to another,

this consideration was inapplicable to a taxi driver due to the special position of a taxi driver vis-à-vis his passenger. Taxi drivers could be perceived to perform a public service and the performance of a public service necessarily demanded that it be done with a high level of honesty and care for the customers. Policy considerations would indicate a need to deter taxi drivers from committing property offences against passengers. Therefore, the benchmark for a property offence committed by a taxi driver against a passenger should be a custodial sentence, unless there were countervailing mitigating factors (such as the nature and insignificant value of the property) that would make a fine an appropriate sentence.

Taking the high value of the items misappropriated and all other relevant factors into account, the accused was sentenced to three week's imprisonment. To all taxi drivers out there, you must resist the temptation to unlawfully take the property of passengers which are inadvertently left behind in your taxis!

ⁱ [2008] 4 SLR 216

DIGEST

1. JOINDER OF DIRECTOR

The Industrial Court's decision in *Quek Suan Tsun v Tuanku Jaafar Golf & Country Resort*ⁱ has posed a question pertinent to the management of a corporation---whether directors of a company could be joined as

parties to the suit of wrongful dismissal brought by an employee. The claimant in the instant case applied under s.29 of the Industrial Relations Act 1967 to join a director of the employer company as a party to the proceedings. It is an accepted principle of law that if the employer named in a reference does not fully represent the interests of the employer, other persons who are interested in the undertaking of the employer may be joined. The test is always whether the addition of the parties is necessary to make the adjudication itself effective and enforceable. The Industrial Court Chairman cited two earlier decisions, namely *Yu Hung (88) Sdn Bhd & Ors v. Ago Ak Dinggai & Ors*ⁱⁱ and *Restoran Cheow Yang*

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(PJ) Sdn Bhd v. Lim Choo Leeⁱⁱⁱ as precedents that directors could be joined as parties to the suit. However, our check up on these two cases show that whilst the court in both cases made the order to join the employer's director as parties to the proceeding, it does not appear that substantive arguments were put forth or that the decision on joinder was made on merits after a contested application. Therefore, in our view, this aspect of decision in *Quek Suan Tsun* must be read with care.

2. VERBAL SEXUAL HARASSMENT

Sexual harassment does not necessarily mean unwelcome physical sexual advancement which has the effect of offending, humiliating or intimidating the targeted person. This is the lesson learnt by the claimant in the Industrial Court case of *Malaysia Airline System Berhad v Wan Sa'adi Wan Mustafa*^{iv}. In that case, the claimant was a Leading Steward with the respondent company. He was alleged to have committed a sexual misconduct against a new flight stewardess which resulted in investigation and domestic enquiry, at the conclusion of which he was found guilty and dismissed with immediate effect. Without going into details (for which readers may refer to the report of the case), the claimant made several lewd, vulgar and sexually suggestive remarks to the victim and physically harassed her by caressing her palms. The court in coming to its decision cited the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace for the definition of sexual harassment :-

"Any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment or that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being, but has no direct link to her/his employment."

Quoting from a leading textbook, sexual harassment within the context of employment is any unwelcome behaviour

comprising but not limited to kissing, poking, touching, fondling, making lewd or suggestive gestures or remarks, watching or besetting a person, posting offensive messages or photographs, initiating unwelcome telephone communications or any other form of behaviour calculated, or otherwise, that makes another employee feel uncomfortable or intimidated. Although the claimant has an unblemished service record for 17 years, the court upheld the decision of the respondent company in terminating his employment on the ground of gross misconduct.

3. NO APPRAISAL, WARNING OR GUIDANCE TO PROBATIONER

In *Mohd Baki Saarani v Full Force Security Services Sdn Bhd*^v, the claimant was still under probation when his services were terminated upon seven days notice on the ground of unsatisfactory performance. There had been no warning or appraisal conducted on his performance and no due process or procedure to determine the suitability or unsuitability of a probationer^{vi} was carried out. However, the company sought to rely on the case authorities of *Wong Yuen Hock*^{vii} and *the Dreamland Corporation*^{viii} in which the apex courts had held that defects in natural justice in not holding a domestic inquiry could be cured by the due inquiry before the Industrial Court. The Industrial Court Chairman in the instant case however rejected such submission and held that these authorities did not extend to cover cases where no appraisal was conducted and no warning, advice, guidance, correction or counseling etc. was given to a probationer which an employer ought to have done in determining the suitability of the probationer in employment. He went on to rule that since there had been absolutely no evidence to indicate how the claimant had performed during his tenure, the basis for the claimant's dismissal vide the letter of termination that his quality of service had failed to attain the expectation of the company had not been proven.

4. BACKWAGES FOR UNEXPIRED PERIOD OF FIXED TERM CONTRACT

In the High Court case of *Ranhill Worley Sdn Bhd (formerly known as Jacobs Construction Management (M) Sdn Bhd) v*

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Franz Jozef Marie Schefman & Anor^x, the 1st respondent (the claimant) on 11 May 2001 received a 4-month notice of termination that he would be demobilized from work on the ground that there was a lack of work and reduction in workload. At the time of his termination, the 1st respondent was under a five-year fixed term contract (commencing 1 August 1999) which still had 34 months remaining on his contract. However, the 1st respondent who was an expatriate had only a valid work permit until 26 September 2001. The Industrial Court ruled that the applicant company had failed to prove on a balance of probabilities that the 1st respondent was redundant and that his termination was without just cause and excuse. Backwages of 34 months from 11 May 2001 to 31 July 2004 were awarded. By way of judicial review, the applicant sought an order for certiorari to quash the award. The High Court however dismissed the application. On the quantum of compensation, the applicant contended that the 1st respondent was only entitled to be paid backwages from the termination of his contract till the expiry of his work permit. It was argued that the Industrial Court Chairman had erred in excess of jurisdiction when he failed to take into account the provisions in the Employment (Restriction) Act 1968 which stated that a non-citizen could only be employed to work in Malaysia if he was in possession of a valid work permit and the fact that the 1st respondent's work permit had expired on 26 September 2001 and there was no evidence that the validity of his work permit would have been extended from 26 September 2001 to 31 July 2004. The High Court did not find such argument sustainable. Instead, the High Court agreed with the 1st respondent's submission that there was a consistent trend of cases which decided that an expatriate who had been unfairly dismissed was awarded backwages for the unexpired period of his fixed term contract. The issue as to whether the 1st respondent had a valid work permit or not was irrelevant to the award of remedy of reinstatement or compensation *in lieu* thereof, citing the Federal Court decision in *Dr A Dutt*^x in support. The compensation sum of RM534,665.30 free of tax in favour of the 1st respondent was therefore affirmed.

5. USE OF INTERNET & DUAL ROLE OF PROSECUTOR

The Industrial Court's decision in *Dynacraft Industries Sdn Bhd v Chua Kim Yock*^{xi} laid down a couple of noteworthy points. Firstly, on the charges that the claimant had sourced and made purchases via the internet and surfed non-work related sites, there was no evidence of any rules or regulations or policy of the company disallowing employees from making purchases via the internet at the material time. Even if it had been a practice not to surf non-work related matters, it was not a misconduct which justified disciplinary action as the employees had not been specifically forbidden or forewarned in writing not to do it. Following from this decision (albeit it is not binding at all since it originated from Industrial Court), it is advisable to put in writing the dos and don'ts of the use of the internet at your office. Secondly, the complainant (who was also the chief operating officer of the company) of the alleged misconduct of the claimant had not only attended the domestic inquiry (D.I.) as a witness but had also acted as a prosecutor. He had remained in the D.I. throughout the whole proceedings and had given his own evidence as and when he had deemed necessary. The dual role of the witness had given rise to existence of the risk or likelihood of prejudice against the claimant and in the circumstances, the D.I. was held to be invalid for breach of the rules of natural justice. Thus, it is advisable to have different persons assuming different roles in the conduct of domestic inquiry.

ⁱ [2008] 3 ILR 585

ⁱⁱ [1998] 1 ILR 143

ⁱⁱⁱ [2006] 2 LNS 1056

^{iv} [2008] 4 ILR 72

^v [2008] 4 ILR 199

^{vi} as in the case of *Inter Pacific Development* [1995] 2 ILR 85 and *Post Office v Mughal* [1997] ICR 763

^{vii} [1995] 3 CLJ 344

^{viii} [1988] 1 CLJ 1

^{ix} [2008] 6 MLJ 823

^x [1981] 1 MLJ 115

^{xi} [2008] 4 ILR 371

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INTELLECTUAL PROPERTY

McCURRY PASSING-OFF AS McDONALD

In a case which will surely interest fast-food-lovers, the High Court in Kuala Lumpur upheld the claim by McDonald's Corporation (the operator of the famed McDonald's chain of restaurants, food and beverage business) that the defendant's use of the trade name 'McCurry' as the name of its restaurant constituted passing-off¹.

The plaintiff established the prefix "Mc" as its source, trade identifier and registered trade mark. This prefix has been used in conjunction with other words, names and suffixes to form its other connected trade identifiers like "McChicken", "McMuffin", "McRendang", "McValue Meals", "McNuggets", "McCrispy". Thus, the prefix "Mc" is distinctive of the plaintiff in Malaysia and worldwide in connection with food, beverage and restaurant business. The plaintiff claimed that the defendant's use of the plaintiff's identifier "Mc" in conjunction with the word "Curry" would inevitably misrepresent, deceive and confuse the public into false belief that the defendant was associated or connected with the plaintiff's food, beverage and restaurant business. It was contended that the defendant's misuse and abuse of the plaintiff's distinctive "Mc" prefix would damage the plaintiff's goodwill and commercial advantage acquired by the plaintiff in its trade.

In reply, the defendant denied the plaintiff's monopoly over the use of the defendant's whole mark or name "McCurry" or exclusive right to the prefix "Mc". The defendant's business and range of food and drinks are typical Malaysian or Indian, ie. fish head curry, nasi briyani, roti canai, nasi lemak, the tarik etc. and are totally distinct from those available at the plaintiff's restaurants. The defendant's trade mark "McCurry" was created based on the abbreviation of "Malaysian Chicken Curry" which was distinctly a Malaysian concept. The use of "McCurry" therefore did not and was unlikely to cause deception and confusion.

After a lengthy trial, the High Court ruled in favour of the plaintiff. In a passing-off suit, the property sought to be protected was the goodwill of the business. The trade mark or

get-up was the badge that indicated and identified the goodwill and the business. The plaintiff owned the goodwill and reputation developed out of the usage of the prefix "Mc" on its own or in conjunction with the goods and services sold and offered for sale by the plaintiff. The prefix "Mc" and the colours red and white with its signage had been extensively and constantly used by the plaintiff in identifying and promoting its products throughout the world.

There was false representation (express or implied) on the part of the defendant which caused damage to the goodwill and reputation of the plaintiff through an unlawful association created between the defendant and the plaintiff. Evidence showed that consumer witnesses thought that McCurry was somehow associated to McDonald's where the signage combination was very similar to each other, public perception in associating certain common element (in this case Mc) in both plaintiff's and defendant's business and the first impression in the minds of the public when they saw the red and white coloured McCurry signage was to associate it with McDonald's---all these were sufficient to prove misrepresentation by the defendant in attempting to create an association with McDonald's in order to obtain and derive an unfair benefit detrimental to the rights of McDonald's. The learned trial judge opined that it was not a coincidence that the defendant would have picked the font and colour scheme on its signage without referring to the signage and repute of the plaintiff and this showed that the defendant sought to obtain an unfair advantage from the usage of the prefix.

Damage to the plaintiff could be inferred. There was the possibility of misappropriation of the goodwill and commercial advantage enjoyed by the plaintiff in relation to the products bearing the trade mark with the prefix "Mc" and if products of the defendant did not meet up to the quality associated with the plaintiff's products, the public would associate such lack of quality to the plaintiff. The loss to the plaintiff was the loss of exclusivity, distinctiveness and singularity attached to the prefix "Mc".

As to extended form of passing-off, the plaintiff had also succeeded in proving unlawful appropriation of their trade mark resulting in

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loss and damage. The defendant's use of "Mc" in conjunction with an item of food and of the colour scheme (red and white) which the defendant knew normally associated with the plaintiff had appropriated the plaintiff's goodwill. BY employing "Mc" in McCurry, the defendant would erode the exclusivity of McDonald's over "Mc". If the defendant was allowed to continue with their acts, it would diminish the ability of "Mc" to function as a trade mark.

In the circumstances, the plaintiff's claims for an injunction to restrain the defendant from using the prefix "Mc" or any other confusingly or deceptively similar prefix in the course of trade and for an order

requiring the defendant to change its name were allowed.

ⁱ *McDonald's Corporation v McCurry Restaurant (KL) Sdn Bhd* [2008] 9 CLJ 254

parties claimed against each other for passing off.

Although the High Court's finding was that P1 was a long user of the Meidi-ya trademark and trade name together with the distinctive logo in the form of Kanji characters in Japan and other parts of the world, he did not make any specific finding on the usage of the trademark and trade name in Malaysia on or before 1986 (the material date). Since there was no finding of first user of the trademark and trade name by P1 in Malaysia on or before the material date, the plaintiffs had not made out their case that P1 was first to use the trademark in Malaysia on the standard of proof required. The fact that the trademark and trade name were used in Japan and in other parts of the world was immaterial since 'trademark law is very territorial in many aspects'. Further, P2 was just an importer of the goods of P1 thereby depriving it of the right per se to claim ownership of the trademark and trade name in issue. It is trite law that the manufacturer of goods is entitled to be registered as the owner of any mark he attaches to identify his goods, not the person who imports these goods into the country. P2 was thus not the proper party to make the application. D1 was held to be the lawful claimant entitled to the trademark and trade name 'Meidi-ya FRESH BAKERY' together with the logo as described.

On the P1 and P2's claim for passing off which is 'the civil wrong of attempting to mislead the public into thinking that the defendant's product is in fact a product of the plaintiff', it is essential that the plaintiff's product enjoys a goodwill that the defendant

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INTELLECTUAL PROPERTY

1ST USER PRINCIPLE IN TRADEMARK DISPUTE

In *Meidi (M) Sdn Bhd v Meidi-Ya Co Ltd, Japan & Anor*ⁱ, P1 was a company established in Japan since 1885 and was involved in, among others, the manufacturing and sale of food products such as biscuits, cakes and pastries. P2 was the subsidiary of P1 and incorporated in Malaysia on 23.11.1987. D1 was a company established in Kuala Lumpur and engaged in, among others, the manufacture, sale and distribution of bread, cakes and other confectionaries since 1986. D1 used the trademark 'Meidi-ya FRESH BAKERY' together with the logo of stalks of wheat being blown in the wind on its goods and on 8.12.1986, filed an application with the Registrar of Trade Marks Malaysia for the registration under class of a trademark and trade name 'Meidi-ya FRESH BAKERY' together with the logo as described. On 24.11.1987 and 11.12.1987, D2 filed several applications under different classes with the Registrar for the registration as its own a trademark 'MEIDI-YA', but without the stalks of wheat, in romanised alphabets as well as in Kanji characters. In terms of time, D1's application ranked first. On directions by the Registrar, an action was filed in the High Court for the determination of competing rights. Both

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may benefit from the passing off. However, P1 and P2 could not establish even the first element of passing off since they were not the first user of the trademark and trade name at the material time. P1 and P2 also failed to show goodwill of their business product in Malaysia. Goodwill acquired internationally by a product need not necessarily contribute to its goodwill in a particular territory where the claim of passing off is made. P1 and P2 also could not show 'distinctiveness' ---which in relation to a name or mark denotes the goods of the plaintiffs to the exclusion of other traders--- of its goods in Malaysia. There could be no distinctiveness without business and there was no evidence adduced that at the material date, P1 was doing business in Malaysia using the trademark or trade name in issue. The court went further to hold that the term used by D1 should be read as a whole and if that was done, the likelihood of confusion and deception

would not arise. Thus, P1 and P2 failed to establish the first element of goodwill and business or reputation as well as the second element of misrepresentation and their claim for passing off was dismissed.

ⁱ [2008] 6 MLJ 433

LAND / CONTRACT LAW

PROPERTY SALE TO FOREIGNER WITHOUT STATE APPROVAL

Statutory requirement must not be taken lightly. That was the expensive lesson learnt by the developer in the case of *Palmerston Holdings Sdn Bhd v New Kwong On Ltd*ⁱ. The developer sold a property to the defendant which was a company that was not incorporated in Malaysia but having an address in Hong Kong. The defendant had made progressive payments amounting to RM188,100 but defaulted thereafter whereupon the plaintiff sued them for specific performance of the sale and purchase agreement and payment due for the sum of RM280,979.30.

It was nowhere stated in the agreement that it was conditional ie. subject to the approval of the state authority, whereas s 433B(1)(b) of the National Land Code requires

prior approval of the state authority to be obtained before a non-citizen or a foreign company can deal with land. The High Court agreed with the submission of the defendant that the agreement is null and void by reason of its contravention of s 433B read with s 24 of the Contracts Act 1950.

It must be pointed out that there are exceptions to the requirement to obtain the approval of the state authority first in order to validly deal with alienated land. Further, such requirement is different from the oft-stated FIC (Foreign Investment Committee) approval for a foreigner to acquire property. If you wish to enquire more on this aspect, you are most welcomed to contact our conveyancing solicitor.

ⁱ [2008] 5 MLJ 740

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SOCIETY

IMMOVABLE PROPERTY IN SOCIETY'S NAME

In a short but no less important judgment, the High Court in *Cheng Tua Ba @ Chuan Choo Ping & 2 Ors*ⁱ held that the immovable property of a registered society could be registered in the name of the society. In this case, the properties belonging to Jawatankuasa Pengurusan Rumah Berhala Hong Teng (Tua Pek Kong) Pontian, Johor (the Society) were originally registered in the names of three trustees.

The applicants were the new trustees appointed to replace two of the three trustees who had passed away. At the subsequent annual general meeting of the Society, it was resolved that the properties be vested in the name of the Society only. Application was thus made to the court for an order to that effect but was opposed by the Attorney General on the ground that immovable property of a society could not be registered in the society's name.

The High Court allowed the application. S.9(b) of the Societies Act 1966 (the Act) clearly allowed the immovable property of a society to be registered in the name of the society. The constitution of the Society in the instant case expressly made it

mandatory for all immovable property to be registered in the Society's name. The Senior Federal Counsel's reliance on an old English decision was misplaced because the case was not decided under the Act which contained clear and express wordings on the issue at hand.

The other Supreme Court case of *Vengadasalam v Khor Soon Weng & Ors*ⁱⁱ cited was concerning the capacity of a registered society (or rather the lack of it) to hold a tenancy and it did not concern holding of land. Indeed, the learned Judge observed that the Supreme Court in that case said that s.9(b) of the Act enabled immovable property to be registered in the name of a society if not registered in the names of trustees.

ⁱ [2008] 5 AMR 676

ⁱⁱ [1985] 2 MLJ 449

until determination of this Agreement. However, value of the Demised Premises shall be determined by the valuation report of an independent valuer appointed by both parties."(the Option Clause)

TENANCY / CONTRACT LAW

OPTION TO PURCHASE TENANTED PREMISES

The defendant granted a tenancy of the premises to the plaintiff for a term of three years commencing 1 October 2002 followed by a second option to renew for a further terms of three years with an option to purchase which read as follows:-

"The Landlord hereby grants to the tenant an option to purchase the said Demised Premises upon the expiry the third year of this Agreement. Such option shall be exercisable in writing by the tenant thereof

By a letter dated 7 December 2004 the plaintiff wrote to the defendant informing that it would like to exercise the option. It also set out the name of four valuers for the defendant to choose with a view to determine the value of the demised premises as per the Option Clause. The plaintiff contended that the defendant through its representative had agreed to the appointment of Regroup Associate as the valuer which had stated the market value as RM1.8 million. This was disputed by the defendant which enclosed a valuation report by its valuer, KGV Associates as RM2.5 million.

There was exchange of correspondences culminating in the plaintiff

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forwarding a draft sale and purchase agreement whilst parties were still unable to compromise on the price of the demised premises. The plaintiff then sued the defendant for an order declaring that the option to purchase had been validly exercised and had given rise to a contract for the sale of the demised premises which was to be specifically performed.

On the set of facts briefly stated above, the High Court in *United Overseas Bank (M) Bhd v Ocean Avenue Sdn Bhd*ⁱ ruled in favour of the plaintiff. The defendant's argument that the option was void for uncertainty since the purchase price could not be ascertained and there was no terms and conditions set for the sale and purchase of the demised premises was rejected by the learned Judicial Commissioner. By the defendant's own refusal or non-cooperation to the appointment of an independent valuer when requested to do so by the plaintiff, the defendant had breached the option to do all things necessary to give effect to the agreement and offended against the common law rule of self-induced frustration. In order to give effect to the agreement, the laws will, acting out of necessity or for the purpose of lending it business efficacy, imply terms into the contract of sale to make it work. An implied covenant was thus made on the part of the defendant/vendor to do all things necessary to give effect to the agreement and the court did so to give effect to the legitimate expectation on the part of the plaintiff. The defendant's

further argument that the option could only be exercised after the expiry of the third year of the tenancy ie after 1 October 2005 was also struck down by the learned Judicial Commissioner. On proper construction, the Option Clause allowed the plaintiff to exercise the option at any time during and up to the date of the determination of the agreement, which meant that the option might only be exercisable by the plaintiff during the subsistence of the first term of three years ie not later than 30 September 2005 being the date of the expiry of the term under the tenancy agreement. The plaintiff did just that vide their letter dated 7 December 2004.

The Court granted an order of specific performance and ordered that for the ascertainment of the purchase price of the demised premises, an independent valuer be appointed by the court to ascertain the value of the demised premises.

ⁱ [2008] 5 MLJ 500

EPILOGUE

NOVEL DECISION ON ISLAMIC FINANCING

We wish to inform our readers that the principal decision featured in our Special Issue 2 of 2008 (Sept) [Arab-Malaysian Finance Berhad v Taman Ihsan Jaya Sdn Bhd & 2 Ors] on the legality of Islamic financing facility based upon Al-Bai' Bithaman Ajil concept as practiced in Malaysia has now been reported in [2008] 5 MLJ 631.

In the light of the importance of the decision (and 11 other cases which also affect contracts based on Istinaa', Al-Inah, Al-Murabahah and Al-Wujuh concepts) to Islamic banking and finance in Malaysia, the Bar Council Islamic Finance Committee and Association of Islamic Banking Institutions Malaysia (AIBIM) will be holding the National Symposium on Islamic Banking & Finance (Northern Region) on 12 January 2009 in Penang. For those who are keen to find out more, you may contact Ms Mazni/En Mohd Faizal at 03-20313003 ext. 101/185.

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