



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

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**LAW UPDATE 1/2008 (JAN – MAR)**

**TABLE OF CONTENTS**

<b>BANKING LAW</b>	
<i>CONTINUING SAGA ON ISLAMIC BANKING</i>	2
<b>BANKING LAW / LAND LAW</b>	
<i>STRICT COMPLIANCE WITH O 83 R 3(3) OF THE RULES OF THE HIGH COURT</i>	2
<i>1980 IN CHARGE ACTION</i>	
<b>BANKRUPTCY</b>	
<i>CHARGING OF INTERESTS AGAINST A BANKRUPT'S DEBT</i>	3
<b>COMPANY LAW</b>	
<i>AMBIT OF RESTRAINING ORDER &amp; AMENDMENTS TO A SCHEME OF</i>	4
<i>ARRANGEMENT</i>	
<b>CONTRACT LAW / COURT PROCEDURE</b>	
<i>NO AUTOMATIC CONTRACTUAL EXCLUSION OF JURISDICTION</i>	5
<b>CONTRACT LAW / SUCCESSION</b>	
<i>LOCUS TO CONTRACT BEFORE ISSUANCE OF LETTER OF ADMINISTRATION</i>	6
<b>DIGEST</b>	
<i>EMPLOYMENT LAW CASES</i>	7
<b>INSOLVENCY / DEBTS &amp; RECOVERY</b>	
<i>NO INJUNCTION ONCE WINDING-UP PETITION FILED</i>	7
<b>TORT</b>	
<i>COMPANY &amp; DIRECTOR AS CO-CONSPIRATORS</i>	10
<b>EPILOGUE</b>	
<i>STRICT INTERPRETATION OF S180(3) OF THE COMPANIES ACT</i>	11

## BANKING LAW

### CONTINUING SAGA ON ISLAMIC BANKING

The enforcement of Islamic banking product continues to hog the limelight, the latest being the decision in *Bank Kerjasama Rakyat Malaysia Bhd v PSC Naval Dockyard Sdn Bhd*. In this case, the product in question is the Islamic banking facility of *Bai Al Inah*. By this facility, the bank purchased certain quoted shares from the defendant for a cash consideration of RM15 million and sold the same to the defendant for a sale price of RM23,437,500, which was to be repaid by 60 instalments. The defendant defaulted in repayment which resulted in the termination of the facility. The bank commenced legal action to claim for the whole sum due and applied for summary judgment.

The High Court allowed the application. Although the defendant relied on the decision in *Affin Bank Bhd v Zulkifli Abdullah*<sup>i</sup> to contend that the bank ought not to be allowed to recover unearned profit, the learned judge distinguished the instant case on the fact that the facility had already reached its maturity and thus no issue of unearned profit could arise. The bank could therefore base its claim on the full sale price.



What is of interest is the remark made by the learned judge on the judgment in *Affin Bank Bhd* case. In that case, Affin Bank claimed for RM958,997.94 but the High Court granted judgment for RM582,626.80 with daily profit of RM98.54. It was the view of the learned judge (in *PSC Naval Dockyard Sdn Bhd* case) that such a judgment sum would run to a limitless figure which might eventually exceed the total sale price of RM958,997.94 stated in the agreement. In other words, subject to the defendant therein realizing the amount quickly, the lesser sum awarded could exceed the amount claimed by the bank.

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<sup>i</sup> [2008] 1 CLJ 784

<sup>ii</sup> [2006] 1 CLJ 438

## BANKING LAW / LAND LAW

### STRICT COMPLIANCE WITH O 83 R 3(3) OF THE RULES OF THE HIGH COURT 1980 IN CHARGE ACTION

Banks and legal practitioners in banking litigation ought to take note of the recent Court of Appeal's decision in *Sathunavakey @ Kanagaratnam Sivajothy v Oriental Bank Berhad*. This decision emphasizes the need to strictly comply with the requirements in O 83 r 3(3) of the Rules of the High Court 1980 (RHC) in applying for an order

of sale of a chargor's land under s 256 of the National Land Code to recover the sum due and owing under a charge. The statutory particulars laid down therein must be provided before an order of sale is properly granted.

O 83 r 3(3) of RHC requires the plaintiff who claims for payment of money secured by a charge [O 83 r 3(6)] to show the state of account between the chargor and

chargee with particulars of (a) the amount of the advance; (b) the amount of the repayments; (c) the amount of any interest or

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installments in arrears at the date of issue of the originating summons and at the date of the affidavit; and (d) the amount remaining due under the charge.

In *Sathunavakey @ Kanagaratnam Sivajothy* case, the originating summons was issued on 2.10.1997. The supporting affidavit was affirmed on 1.10.1997. However, the amounts of interest in arrears and amounts due and owing under the charges were calculated only up to 30.6.1997. The supplementary affidavits filed by the chargor thereafter also failed to cure the defect in the

aforesaid non-compliance. Thus, the Court of Appeal set aside the order of sale granted by the High Court.

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<sup>i</sup> [2008] 1 MLJ 461

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The Defendant defaulted in the overdraft facility.

30.9.2002                      The Plaintiff filed an originating summons for an order for sale of the Defendant's land.

17.5.2004                      The High Court granted the order for sale of the said land.

The Official Assignee (for the bankrupt Defendant) argued that the Plaintiff was only entitled to the principal sum of RM20,000.00 but not the interests by virtue of S.8(2A). Although the High Court upheld such argument, the Court of Appeal allowed the Plaintiff's appeal and ruled that S.8(2A) had no retrospective effect.

It appears from the grounds of judgment that the material time to consider whether the said S.8(2A) applies is the date the plaintiff had acquired a right as a secured creditor to realize its security which was held to be when the land was charged to the plaintiff on 29.12.1986. The law applicable to the Plaintiff in this case was the law as at 29.12.1986, on which date the said S.8(2A) had not been enacted. The amending Act does not clearly or specifically provide that the said subsection which deals with a substantive right has any retrospective effect.

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<sup>i</sup> [2008] 2 AMR 434

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#### **BANKRUPTCY**

#### **CHARGING OF INTERESTS AGAINST A BANKRUPT'S DEBT**

In the Bankruptcy Act 1967, there is a provision which disentitles a secured creditor from claiming for any interest in respect of his debt after the making of a receiving order against his debtor (or in common parlance, after his debtor has been adjudged a bankrupt) if he does not realize his security within six months from the date of the receiving order---S.8(2A). Can a bankrupt debtor purely rely on this provision, regardless of any other facts, to deny his creditor's claim for interest?

The following pertinent facts emerged in the Court of Appeal decision in *RHB Bank Berhad v Ya'acob bin Mohd Khalib @ Abdul Ghani bin Muhammad*:

24.11.1986	Defendant was declared a bankrupt
29.12.1986	Charge was registered over the Defendant's land as security over an overdraft facility granted to the Defendant.
17.7.1992	S.8(2A) came into force.

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## COMPANY LAW

### AMBIT OF RESTRAINING ORDER & AMENDMENTS TO A SCHEME OF ARRANGEMENT

In this brief write-up, we will focus on two decisions from courts in Malaysia and Singapore respectively concerning the provision pertaining to statutory compromises and schemes of arrangement as contained in S.176 of the Malaysian Companies Act 1965 and S.210 of the Singapore Companies Act (Cap 50, 2006 Rev Ed) respectively.

First, on the interpretation of the words “action” and “proceeding” in S.176(1) of the Malaysian Companies Act 1965 (the Malaysian Act). The issue which arose in the case of *CHG Industries Bhd & Ors v Bursa Malaysia Securities Bhd* was whether the words “action” and “proceeding” in S.176(10) were limited to suits in court or court-related processes but did not include the enforcement of the Practice Note on listing requirements (PN4 listing requirements) issued by the respondent (Bursa Securities) and the proceeding to de-list the first applicant, the jurisdiction of both of which falls under the Securities Industries Act 1983.

The first applicant, a company listed on the main board of the Bursa Securities had obtained a restraining order under S.176(10) of the Malaysian Act which granted it a 90-day moratorium against actions or proceedings pending a proposed restructuring.

Bursa Securities subsequently de-listed the first applicant on the ground that it had not complied with its PN4 listing requirements.

The High Court judge adopted a purposive approach to the construction of S.176(10) of the Malaysian Act and held that the words “action” and “proceeding” in S.176(10) were not limited to suits in creditor court actions or creditor court proceedings.

The PN4 listing requirements containing the enforcement provisions must be read in conjunction and in consonance with the protection accorded to a company under S.176(10).

On account of the importance of preservation of listed status to the success of the scheme of arrangement in relation to its restructuring and public interest to allow the companies in distress breathing space to restructure their debts, the court held that on proper interpretation of S.176(10) of the Malaysian Act, the court could restrain Bursa Securities from proceeding to de-list the first applicant.

Secondly, in the Singapore High Court case of *Re Reliance National Asia Re Pte Ltd*<sup>i</sup>, the issue was whether scheme of arrangement under S.210 of the Singapore Companies Act (the Singapore Act) operated as an order of court or as a statutory contract.

The subject company put into effect a scheme of arrangement which was approved by the requisite majority and sanctioned by the court. Despite numerous reminders to submit its proof of debt before a certain date in order to receive payment under the scheme, a creditor failed to do so. It then applied for a three-week extension of time to submit its proof of debt. The court held that it had no jurisdiction to grant such an extension of time.

We wish to share several principles laid down by the court which we trust are also of relevance to similar provision in our Malaysian Act. After a scheme is sanctioned, the court would necessarily be slow to hear further objections or to make any amendments to the scheme, which could and should have been raised at an earlier stage as the overriding principle was one of clarity, certainty and finality.

The Singapore courts also preferred the English position to the Australian position and regarded a scheme of arrangement under S.210 of the Singapore Act as a statutory contract and not an order of court. The court

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would be reluctant to substitute its own commercial judgment for that of the members and/or creditors. So, once a scheme had been sanctioned, it could only be amended in very limited circumstances such as where consent had been obtained by fraud or where there were obvious mistakes in the scheme.

The general principle was that the court could not alter the substance of the scheme and impose upon creditors an arrangement to which they had not agreed. An amendment to time limits set out in a scheme constituted a 'material alteration' and an

'amendment of substance'. In other words, where the amendments sought are material or substantial, the court has no jurisdiction to grant such amendments.

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<sup>i</sup>[2007] 6 CLJ 710

<sup>ii</sup>[2008] 1 SLR 569

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#### CONTRACT LAW / COURT PROCEDURE

#### NO AUTOMATIC CONTRACTUAL EXCLUSION OF JURISDICTION

It is not uncommon to find contracting parties stipulate in their contract that the governing law in respect of any dispute between them pertaining to the contract is the law of certain country and that any dispute between them should be referred to a court of competent jurisdiction in that country.

However, does such clause automatically mean that courts of another country have no jurisdiction to try the dispute between the parties if the arising cause of action is otherwise capable to be tried in such other country by virtue of the law of such other country?

Well, the answer is "No". That is essentially the decision of the High Court in *ISC Technology Sdn Bhd v Premium Systems Technology Pte Ltd*<sup>i</sup>. In this case, the plaintiff is a company incorporated in Malaysia while the defendant is a company registered in the Republic of Singapore. They entered into a distributorship agreement.

The plaintiff sued the defendant in the High Court in Malaysia for wrongful termination of the agreement. Their agreement however

contained a clause which provided that the governing law is the laws of Singapore and any dispute shall be referred to a court of competent jurisdiction in Singapore. It was the contention of the defendant that by virtue of this clause, Malaysian courts have no jurisdiction to try the dispute between the parties.

The High Court held that such clause by itself did not automatically take away the dispute between the parties from the jurisdiction of the Malaysian courts. The issue of jurisdiction must be determined by examining the contents of the statement of claim and testing it against the provisions of S 23(1) of the Courts of Judicature Act 1964. Having ruled that, however, the court proceeded to state that the defendant ought to have applied for a stay of proceedings, rather than applying to set aside the writ of summons in the instant case.

The court would normally give effect to what the parties had agreed upon in the agreement and grant a stay. The court reiterated principles which have been laid down to guide the courts when dealing with an agreement containing such a clause and as to how the courts should exercise their discretion.

They are : (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of a trial as between the Malaysia and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in

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any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would---(i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time bar not applicable in

Malaysia, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

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<sup>i</sup> [2008] 2 AMR 461

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between the estate and the Appellant. The Federal Court found that the wife and son were not competent to enter into the agreement on behalf of the estate even though the beneficiaries had earlier consented to their signing of the agreement on their behalf. This was because nobody had the authority to act on behalf of the estate until the grant of letter of administration is made. On this basis, the Federal Court held that the agreement was invalid and unenforceable.

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#### CONTRACT LAW / SUCCESSION

#### LOCUS TO CONTRACT BEFORE ISSUANCE OF LETTER OF ADMINISTRATION

Is an agreement executed on behalf of an estate before the issuance of the letter of administration but with the full consent of all the beneficiaries valid and enforceable and binding on the beneficiaries?

This question arose in the Federal Court case of *Futuristic Builders Sdn Bhd v Harinder Singh & Ors*<sup>i</sup>. In that case, the Appellant had entered into a joint venture agreement for the development of some lands with an "Estate of Ujagar Singh s/o Bhagat Singh". The wife and son of the deceased had signed the agreement purportedly on behalf of the estate. At the time of signing the agreement, however, no letter of administration of the estate had been issued.

The Federal Court questioned the capacity in which the wife and son had signed the agreement: it could not be in their capacity as administrators since no letter of administration had been issued then; and neither could it be in their personal capacity because the agreement was stated to be



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<sup>i</sup> [2008] 2 MLJ 273

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## DIGEST --- EMPLOYMENT LAW CASES

### 1. Limit of Backwages & Award of Future Earnings

The Court of Appeal in the recent decision in *Telekom Malaysia Bhd v Ramli Akim*<sup>i</sup> has emphasized the importance of adhering to the general practice of limiting the award of backwages in a wrongful dismissal case to twenty-four months in accordance with the Practice Note No.1 of 1987. There must be good reasons and justifiable circumstances to depart from the Practice Note.

On the facts, although there was a delay of 10 months occasioned by the appellant's request for an adjournment, there was considerable delay in the Minister's referral of the case to the Industrial Court and in the completion of the hearing in the Industrial Court itself. Factors like the respondent's failure in business after his alleged dismissal and the fact that the respondent had been out of touch with his previous position for a long time that he would not likely be employed in a similar position elsewhere were irrelevant to the issue of backwages. Thus, the Court reduced the award of 53 months of backwages to 24 months.

On the Industrial Court's award of compensation for loss of future earnings (which was in addition to the compensation *in lieu* of reinstatement and backwages), the Court of Appeal regarded such an award as propounded in the Federal Court case of *P Rama Chandran*<sup>ii</sup> as exceptional. It was not intended to be of general application in all Industrial Court cases.

In fact, the Court cited subsequent Federal Court decision in *Dr James Alfred (Sabah)*<sup>iii</sup> for the proposition that in industrial law cases involving compensation for wrongful dismissal, there were only two types of compensation, which were backwages and compensation *in lieu* of reinstatement. The award of 57 months of wages as compensation for loss of future earnings was similarly set aside.

### 2. Retirement benefits as a head of compensation in wrongful dismissal claim?

In view of the above decision, it remains to be seen whether the Industrial Court decision in *HLG Securities Sdn Bhd v Adam Iskandar Choong Abdullah*<sup>iv</sup> regarding the award of retirement benefits to the claimant can be sustained. In this case which was featured in our Law Update issue 4 of 2007, the claimant's dismissal was held to be without just cause and excuse. In addition to the award of backwages of 24 months and compensation *in lieu* of reinstatement of one month's salary for every year of completed service, the court also awarded him his retirement benefits on the ground that he should not lose this entitlement since he did not leave the company voluntarily and would have received the said amount of RM65,000.00 only 8 years from the date of his dismissal.

### 3. Implied term on right to transfer

Although there was no express transfer clause in the contract of employment, the Industrial Court in *Jurunilai Bersekutu & Anor v Mastura Mohd Yunus*<sup>v</sup> held that where an employer had several branches in several cities, the employer's right to transfer was implied. Thus, the decision of the employer to transfer the employee from the Seremban office to the head office in Kuala Lumpur was held to be valid.

### 4. Demotion not dependent on remuneration package *per se*

The mere fact that an employee's salary and terms and conditions of employment have remained unchanged does not mean that there has not been a demotion when a reorganization was carried out. In *Natseven TV Sdn Bhd v Chan Siew Wah*<sup>vi</sup>, the claimant joined the company as Managing Editor (English) (ME). Pursuant to a reorganization, he was asked to temporarily carry out the functions of English News Editor but he was subsequently re-designated to the position of News Editor (English) (NE). The claimant regarded this as a demotion and claimed for constructive dismissal although the company maintained that the transfer was a lateral transfer.

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The Industrial Court found that in his new position, the claimant's subordinates had become his peers, he did not have any staff under him, he had lost his authority vested in him as ME to decide on what news would be broadcast and that as NE, he had been confined to only editing and re-writing Broadcast Journalists' news scripts and translating news scripts. Thus, although he continued to be in the same class, the prevailing conditions which he had been subjected to resulting from his transfer had in actual fact been a demotion.

#### 5. Disciplinary action whilst serving out notice period

Whilst the claimant had tendered his resignation by giving two months notice and was serving the notice period, the company commenced disciplinary proceedings against him on five allegations of charge relating to misconduct and poor performance. At the conclusion of the inquiry, the claimant was found guilty and his employment was terminated. The claimant lodged a complaint of wrongful dismissal which was allowed by the Industrial Court.

It is interesting to note one of the remarks made in the grounds of judgment that an employee who had tendered his resignation and whose resignation had been accepted by the employer could not be dismissed for whatever reason whilst he was serving out his notice period. Should the employer wish to take disciplinary action for the employee's misconduct on poor performance, it would only be fair for the employer to reject the letter of resignation and notify the employee of the impending disciplinary action before any disciplinary action is taken against the employee.

We state that this principle may not be of general application and it is prudent to confine it to the facts of the case, where the court held that the company wanted the claimant to leave the company with a bad reputation of having dismissed and not to allow him to leave on voluntary resignation. The action of the company having been actuated by *mala fide*, the court rejected the company's plea of nominal damages.

#### 6. Duty to investigate contents of e-mail meant as a joke

The employer has a duty to investigate the validity of the contents of e-mail before taking any action against the employee concerned. This is essentially the message sought to be driven home by the Industrial Court in the case of *Overseas Courier Services (M) Sdn Bhd v Yeak Sing Meow*<sup>ii</sup>. In the instant case, the claimant sent out an e-mail to his colleagues and suppliers/customers of the company which was meant as a joke but the employer took it as his resignation and told him to leave within an hour.

The claimant's claim for wrongful dismissal was allowed. The court acknowledged that in the current advanced information technology age, there were too many materials posted on the internet where a user could easily download and re-send out the many e-mails containing jokes and other information or received from various quarters. It was only wise that an employer who was attempting to take any action against an employee based on the contents of e-mail material should scrutinize the e-mail with extreme care before jumping to any conclusion that was adverse to the employee concerned.

There would also be a reciprocal duty on the company to take reasonable steps to investigate and enquire the background facts of the e-mail and its contents to determine whether the claimant had been the author or had merely received it from others or downloaded it from internet and forwarded it to his friends as a joke before taking any action against him, especially so in view of the fact that the said e-mail had not been directed to the company.



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At the same time, the court also rebuked the employee for not vigilant and sensitive in the handling of information received. He should refrain from forwarding an e-mail if there was a possibility of creating misunderstanding. In addition, the attachment to the said e-mail had been a picture of obscenity and the claimant as a person holding a high ranking position should have refrained from sending out material of such a nature which could have jeopardized the reputation of the company. The claimant was thus held to have contributed towards his dismissal and 50% was ordered to be deducted from the award of backwages and compensation *in lieu* of reinstatement.

## 7. Part-timers could be workmen

The claimants in *Aminah Zaiton Amir Dastan & Anor v Star RFM Sdn Bhd*<sup>viii</sup> were engaged as part-time producers/presenters for the task of producing and presenting a radio show. One of the issues arose was whether the claimants were 'workmen' within the meaning of s 2 of the Industrial Relations Act 1967. The court adopted the approach laid down by established authorities in determining whether the contract if one of services (workman) or one for services (independent contractor).

This in turn depended on the degree and extent of control exercised over the person, although this is not the sole criterion. On the facts, the terms of the contract had been more consistent with it being contract of service rather than contract for service notwithstanding the specific provision therein that the claimant had been part-timers.

The nature of their duties and obligations and the manner in which they had been carried out, the fact that they had been subject to the company's control to a sufficient degree to make the company their master and the fact that they had been employed, as the nature of their work had indicated, as part of the company's overall business of radio broadcasting all pointed to the conclusion that

they were not independent contractors but workmen within the ambit of the Act.

## 8. How does one determine retirement age in the absence of contractual provision?

The employment letter in the case of *Pernas International Holding Bhd v Wan Abu Bakar Wan Ja'afar*<sup>ix</sup> did not contain any provision on the age for retirement. The company contended that the retirement age of 55 years old was implied and an established practice of the company. The claimant asserted his wish to remain in the company as long as he was fit and able to discharge his duties.

The Industrial Court decided to adopt the approach taken in *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong*<sup>x</sup>, ie. what was the reasonable expectation or understanding of the employees holding that position at the relevant time on the matter?

On the facts and evidence, it was found that the claimant had been aware of his impending retirement at 55 and had acknowledged this retirement age twice in his correspondences to the company. Thus, it was held that the reasonable expectation of the claimant and those in his category of personnel was that they would retire at 55 with a possible extension of employment by a separate contract subject to the company's discretion.

<sup>i</sup> [2008] 1 CLJ 440, [2008] 1 ILR 288

<sup>ii</sup> [1997] 1 MLJ 145

<sup>iii</sup> [2001] 3 CLJ 541

<sup>iv</sup> [2007] 4 ILR 178

<sup>v</sup> [2007] 4 ILR 294

<sup>vi</sup> [2008] 1 ILR 62

<sup>vii</sup> [2007] 4 ILR 621

<sup>viii</sup> [2008] 1 ILR 562

<sup>ix</sup> [2008] 1 ILR 582

<sup>x</sup> [2001] 3 CLJ 9

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## INSOLVENCY / DEBTS & RECOVERY

### NO INJUNCTION ONCE WINDING-UP PETITION FILED

The Court of Appeal's decision in *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd*<sup>i</sup> brought out a very important procedural point. A winding-up petition was filed by the creditor against the debtor company.

The debtor company applied for an injunction to restrain the creditor from taking any further proceeding upon the petition by advertising the same. The Court of Appeal affirmed an earlier High Court decision in *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd*<sup>ii</sup> that once a winding up petition was filed, the court was precluded from granting an injunction against advertisement or gazettal of the petition.

The reason was that the court was not empowered to make any order to restrain a petitioner from carrying out his statutory

obligation to comply with rule 24 of the Companies (Winding Up) Rules 1972 which prescribes a requirement of advertisement of petition upon it being filed.

In view of this legal position, readers are advised that, particularly in a case where a creditor has not obtained a judgment for a disputed debt but seeks to file winding-up petition against a debtor company, immediate action must be taken to prevent the creditor from filing a winding-up petition and an injunction must be applied for and obtained before such petition is filed.

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<sup>i</sup> [2008] 1 MLJ 453

<sup>ii</sup> [2002] 4 MLJ 390

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## TORT

### COMPANY & DIRECTOR AS CO-CONSPIRATORS

A conspiracy would normally involve at least two persons, with separate minds and separate bodies, agreeing to do certain things. But is it possible for a conspiracy to exist between a company and its director?

Generally, where the company is a mere mouthpiece of its directors, it has been doubted that the company can be regarded as having a separate mind from the directors; but where circumstances are appropriate, the courts have been willing to recognise that the company can be regarded as a co-conspirator with its directors. In principle, the Court said

that it would seem invidious that a company could not be liable for conspiracy where its assets had been augmented as a result of an alleged conspiracy, as that would permit the company to lift its corporate veil as and when it suited the company.

In the Singapore High Court case of *Nagase Singapore Pte Ltd v Ching Kai Huat*<sup>i</sup>, the Court held that there was indeed a conspiracy between one "D Company" and its controlling director, Mr. D; notwithstanding that Mr. D was the moving spirit of the company. And even if Mr. D might have been the one who always gave the orders, the courts said he was not the company's only officer. As a co-conspirator, Mr. D was held to be as liable as D Company for the wrongful act in question.

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<sup>i</sup> [2008] 1 SLR 80

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## EPILOGUE

### STRICT INTERPRETATION OF s180(3) OF THE COMPANIES ACT

In our Law Update Issue 4 of 2007, we reported under the heading of “Compulsory Acquisition of Remaining 10% Shares” the Court of Appeal decision in *Shanta Holdings Sdn Bhd v Golden Uni-Consortium Sdn Bhd*. Recently, the Federal Court over-ruled the said decision and adopted a strict interpretation of s 180(3) of the Companies Act 1965 (“the Act”).

In *Shanta Holdings Sdn Bhd v Golden Uni-Consortium Sdn Bhd*, the Respondent, who held 90.1% of the shares in Aumkar Plantations Sdn. Bhd., had served a notice on the Appellant pursuant to s 180(3) of the Act to acquire the remaining 9.99% shares in the said company held by the Appellant. Four days later, the Respondent filed a suit in the High Court for a declaration order that it was entitled to acquire the Appellant's shares. Although both the High Court and Court of Appeal held in favour of the Respondent, the Federal Court disagreed on the ground that the plain

wordings of s 180(3) had not been complied with by the Respondent. Accordingly, after the issuance of the Respondent's notice, it was up to the Appellant to decide whether or not to require the Respondent to acquire its shares. If yes, the Appellant would have issued a notice under s 180(3)(b) requiring the Respondent to do so. Then, and only then, would the Respondent be entitled and bound to acquire the Appellant's shares.

On the facts, no such notice was ever given by the Appellant. As such, the Respondent had no right to acquire the Appellant's shares. Further, the Federal Court held that because no such notice was given, the Respondent did not even have the right to make the application to the Court in terms of s 180(3) and hence, whatever order made by the Court pursuant to the said application was null and void and ought to be set aside.

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<sup>i</sup> [2007] 7 MLJ 513

<sup>ii</sup> [2008] 2 AMR 279

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