



TAY & HELEN WONG
LAW PRACTICE • AMALAN GUAMAN

LAW UPDATE 2/2008 (APR – JUNE)

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IMPORTANT

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BANKING LAW

BE VIGILANT IN DEALING IN CHEQUES AND HANDLING COMPLAINTS

Two recent reported decisions of the High Court of Malaya serve as valuable lessons to banks when carrying out their daily operations. One concerns wrong remark on an irregularly drawn cheque; the other concerns wrongfully furnishing information to financial information system (FIS).

In *Charles Edward Victor v Malayan Banking Bhd*ⁱ, the plaintiff maintained a current account with the defendant. A post-dated cheque issued by the plaintiff to a 3rd party was prematurely presented by the 3rd party to the defendant for payment. Instead of marking the cheque 'post-dated cheque' and debiting the plaintiff's account with RM10 being the penalty for post dated cheque, the defendant returned the cheque with the remark 'refer to drawer' and debiting the account with RM100. Such wrongful debiting subsequently caused another cheque issued by the plaintiff to AIA Co Ltd to be dishonoured (due to insufficient funds brought about by the bank's blunder) and marked as 'refer to drawer'. This resulted in the plaintiff blacklisted in the records with Bank Negara Malaysia and was barred from operating a current account with any bank in Malaysia. In a suit brought by the plaintiff against the defendant for breach of contract and defamation, it was held that the wrongful and unjustified 'refer to drawer' remark on both cheques must have caused embarrassment to the plaintiff and had lowered his standing in the eyes of the 3rd party and AIA Co Ltd. The High Court awarded the plaintiff RM250,000.00 as damages for defamation.

In *Mayban Finance Bhd v Otahulu Industries (M) Sdn Bhd & Ors*ⁱⁱ, the 3rd and 4th defendants notified the plaintiff that their signatures on the guarantee had been forged and they were not guarantors for a loan granted by the plaintiff to the 1st defendant.

The plaintiff however brushed aside their complaints, took no action to investigate and initiated a legal suit against them to recover the said loan. The 3rd and 4th defendants counterclaimed for negligence and conspiracy whilst the 3rd defendant also claimed for defamation. It was an agreed fact that the signatures alleged to be that of the 3rd and 4th defendants were forgeries. It was also agreed that the plaintiff had entered the 3rd defendant's name in the FIS. The court took judicial notice that financial institutions utilized the services of the FIS. It was the practice among financial institutions that before a loan was approved the financial institution in question would check with the FIS in order to know the credit standing of the loan applicant. When a person's name was listed in the FIS, he would be considered prima facie a loan defaulter and unworthy of credit, and financial institutions would decline his loan application. There was a stigma on the person once his name was listed in the FIS. The court held that it was defamatory to the 3rd defendant for the plaintiff to supply third defendant's particulars to the FIS because the financial community regarded such information to mean that the 3rd defendant was prima facie a defaulting borrower, whereas the truth was that the 3rd defendant was neither a borrower nor a guarantor. The 3rd defendant was awarded RM250,000 in respect of the tort of defamation. Damages in the sum of RM150,000 each was awarded to the 3rd and 4th defendants for the tort of conspiracy to injure.

ⁱ [2008] 7 MLJ 609

ⁱⁱ [2008] 7 MLJ 616

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**BANKING LAW / GUARANTEE /
RECOVERY OF DEBT**

**WATCH OUT WHEN ISSUING DEMAND
AND WHEN WITHDRAWING SUIT VIS-À-VIS
GUARANTOR**

The recent Court of Appeal decision in *Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)*¹ has in our view serious ramifications on debt recovery process and enforcement of guarantee.

Briefly, the bank granted a loan to a company (principal borrower) which was secured by a guarantee given by the appellant together with two other individuals (the other two guarantors). The principal borrower defaulted on the loan and the bank took action to recover the outstanding loan. The chronology can be stated as follows:-

23.12.1980	Bank issued 1 st notice of demand (1 st NOD) against the borrower and all three guarantors.
13.3.1981	Bank filed a suit (1 st Suit) against the borrower and all three guarantors.
15.10.1981	Bank obtained summary judgment against the other two guarantors.
25.5.1985	Bank obtained summary judgment against the principal borrower.
4.6.1991	Bank filed application for the 1 st suit to be struck off with liberty, being an action prematurely commenced without a proper or valid notice of demand made on the appellant.
7.11.1991	Order was granted whereby the 1 st Suit was withdrawn with leave of court and struck off as being an action prematurely commenced without a proper or valid notice of demand made on the appellant. Note that the

words “struck off with liberty” was deleted on the application of the bank.

4.5.1992	Bank issued 2 nd notice of demand (2 nd NOD) against the appellant. This demand however stated that the appellant were availed loan facilities.
8.6.1992	3 rd notice of demand (3 rd NOD) was issued to the appellant.
23.11.1992	Fresh action was filed against the appellant (2 nd Suit).

The 2nd Suit proceeded to full trial whereby judgment was given in favour of the Bank. On appeal, the appellant succeeded to overturn the judgment. The Court of Appeal ruled that:-

1. The bank’s cause of action arose from the date of the 1st NOD on 23.12.1980.
2. Even if the cause of action did not accrue on that date, then it certainly did on 13.3.1981 when the 1st Suit was instituted. Thus, the 2nd Suit was barred by limitation.
3. The bank’s action in applying to delete the words “struck off with liberty” was a clear representation by the bank that there would be closure of the matter which resulted in the bank estopped from filling the 2nd Suit.
4. The 2nd NOD was not a valid notice of demand because it failed to identify any guarantee or guarantor and was also factually wrong.
5. The 3rd NOD could not be considered because it was not tendered in court by any witness of the bank. It was only an identification document (ID) in the non-agreed bundle and was never converted to a court exhibit.

It is interesting to observe that despite the bank’s argument that the 1st Suit (by itself) could not constitute a sufficient notice of demand since the appellant resisted it contending that there was no demand made against him which resulted in the withdrawal of

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the 1st Suit, the Court of Appeal stood by the 'principal debtor clause' in the guarantee and held that the issuance of the writ in the 1st Suit was a demand in itself. The bank's cause of action against the appellant had occurred on 13.3.1991 which was more than 11 years before the 2nd Suit was launched. The court also remarked that the bank had entered judgment against the principal borrower and the other two guarantors under the 1st Suit which made it untenable for the bank to suggest that for the appellant alone, the cause of action did not accrue with the 1st NOD but was held in abeyance for about 11 years until it issued the 2nd NOD.

The lesson is to be vigilant when instructing solicitors to issue letter of demand

COMPANY LAW

TIME TO MAKE APPLICATION FOR COURT-CONVENED MEETING UNDER S 176 OF COMPANIES ACT

The High Court decision in *Perbadanan Kemajuan Negeri Selangor v Worldwide Holdings Berhad*ⁱ provides guidance as to whether an application for an order to convene a meeting falls under s 176 of the Companies Act 1965 (the Act) [court-convened meeting] and when such an application ought to be made. In the instant case, the applicant, PKNS, as a majority shareholder of the respondent, WHB which was a public-listed company, had proposed to implement a scheme of arrangement (the scheme) to convert WHB into a private company by transferring PKNS' entire shareholding in WHB to its wholly-owned subsidiary PFFIM and PFFIM acquiring from minority shareholders of WHM all their shares at a named or adjusted price. The PKNS' application was to obtain an order for a court-convened meeting for PFFIM to acquire PKNS' shares and the shares of the minority shareholders in WHB.

or to commence court action against a guarantor for in either case, the time with regard to limitation period can be regarded as starting to run. It is also important to state properly the condition under which a suit is being withdrawn or discontinued lest you be caught by estoppel when you later decide to file afresh action against the same party.

ⁱ [2008] 2 MLJ 773

There are two aspects of the decision which merits attention. Firstly, whilst it was held that PKNS being a member of WHB at the time of the application had locus to make the application for a court-convened meeting, the PKNS' application being in fact by the majority shareholder to obtain a court order for a court-convened meeting for another legal entity (ie. PFFIM) to acquire PKNS' shares and the shares of the minority shareholders in WHB is not a scheme of arrangement envisaged under s 176 of the Act. Secondly, the PKNS' application was made while various other applications for approvals as well as exemptions were outstanding from the administrative bodies. The High Court held that the order of court under s 176 should be sought only after all administrative approvals and exemptions have been obtained and other pre-conditions have been satisfied. Such ruling, in our view, has an impact on the practice by some quarters undertaking a s 176 scheme of arrangement exercise to hold a court-convened meeting first to obtain approval from members (or creditors in relation to a creditors' scheme) but subject such approval to other requisite approvals by regulatory bodies. The ruling means that a court-convened meeting can only be held after all requisite approvals from regulatory and administrative bodies have been obtained.

ⁱ [2008] 3 AMR 241

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LAST MINUTE TENDER FOR SETTLEMENT

The danger of last minute act not being received favourably rears its head againⁱ, this time in the context of resisting winding up order made against a debtor company. In *Anvest Corporation Sdn Bhd v Wong Siew Choong Sdn Bhd*ⁱⁱ, the respondent served a statutory notice pursuant to s 218 of the Companies Act 1965 to require the appellant to pay up certain taxed costs. Having received no response, the respondent presented a winding-up petition against the appellant. No affidavit in opposition was filed by the appellant. Only on the eve of the hearing date of the petition, the appellant gave a notice of appointment of solicitors and stated its willingness to settle the taxed costs (the purported tender) at the Federal Court and High Court but as regards to taxed costs at the Court of Appeal, the appellant sought an adjournment to seek

instruction. The High Court rejected the purported tender and refused adjournment.

On appeal, the Court of Appeal held that the respondent had every right not to accept the purported tender, even assuming that there was indeed a valid tender proffered. The purported tender did not include the debt on taxed costs at the Court of Appeal which rendered it an invalid tender. The court reiterated the importance of filing an affidavit in opposition to the petition which would form the basis for winding-up court to make an appropriate order.

ⁱ See the write-up entitled "Chargor, watch out!" in Issue 2 of 2007.

ⁱⁱ [2008] 2 AMR 653, [2008] 3 CLJ 317

CONTRACT LAW

GIVING EFFECT TO RECEIPT OF SUM

It is common to come across phrases such as "the receipt of which sum the vendor hereby acknowledges" or "the sum of which the party hereby acknowledges receipt" in an agreement. Well, such phrase is not to be ignored and must be given full effect, so ruled the Court of Appeal in *Hock Chnay Sdn Bhd v Bong Kong Min*ⁱ.

In that case, the clause in question in the sale and purchase agreement (SPA) reads:

"A sum of RM15,000 shall be paid upon signing hereof as deposit cum part payment towards the consideration of the said land, the receipt of which sum the vendor hereby acknowledges."

The vendor argued that the deposit of RM15,000 was never paid. However, the purchaser relied on the said clause and also corroboration by the solicitor who witnessed the SPA and to whom the vendor had admitted that he had received the said amount prior to the signing of the SPA. It was held that the word "receipt" as contained in the said clause did not mean documentary receipt. It meant receipt of the sum of RM15,000. The clause literally meant that the vendor had acknowledged receiving the money amounting to RM15,000 as deposit. The fact of whether it was paid on or before the signing of the SPA was immaterial. Thus, the vendor's complaint that the purchaser failed to comply with the said clause was rejected by the court.

ⁱ [2008] 3 AMR 1

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COURT PROCEDURE

HEARING OF APPLICATIONS FOR SUMMARY JUDGMENT & STRIKING OUT PLEADINGS

We wish to bring to the attention of our readers that with effect from 1st July 2008, all applications for summary judgment under O.14 of the Rules of the High Court 1980 (RHC) and to strike out pleadings or indorsements under O.18 r.19 of RHC will have to be heard before

CREDIT & SECURITY

PLEDGE OF SHARES NOT IN BREACH OF MORATORIUM RESTRICTION

It is not uncommon that when a public-listed company acquires an existing business and issues shares in exchange for the business, a moratorium on the trading of the new shares is imposed to ensure that the market price of existing shares is not destabilized by immediate and sudden influx of a large number of shares of that company in the market. The moratorium may also be for the purpose of ensuring the persons to whom the listed company issues new shares will be committed to work for the welfare of the company for a specified period. The principal issue which arose in the Singapore Court of Appeal case of *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and Anor*¹ was the extent of moratorium as intended by parties to the agreement.

In the instant case, the listed company acquired, via an Acquisition Agreement, all the shares in A Co. which were held by P & C, in consideration of which P & C were allotted shares (the Consideration Shares) in the listed company. P & C agreed not to 'sell, assign or dispose' (the Moratorium) the shares for a period of time. P however 'pledged' some of the Consideration Shares (the Pledged Shares) to the appellant as security for the brokerage fee payable by P & C to the appellant in respect of the acquisition by the listed company of A Co, whereby P deposited the share certificates for the Pledged Shares together with duly-signed blank transfers. Upon default by P, the appellant presented the

a High Court Judge personally. The previous practice directions conferring jurisdiction on the Registrars, the Deputy Registrars and the Senior Assistant Registrars to hear and dispose of such applications have been revoked.

transfers of the Pledged Shares to be registered but the listed company declined on the ground that the underlying 'pledge' was in breach of the Moratorium.

The High Court of Singapore held that the 'pledge' was in substance an equitable mortgage and its creation was a breach of the Moratorium. The Court of Appeal, whilst agreeing that the 'pledge' was an equitable mortgage, decided that such equitable mortgage was not a sale, assignment or disposal of the Pledged Shares. The Court regarded the issue as one of construction of the contractual terms containing the words 'sell, assign or dispose'. The approach undertaken by the Court was to first consider the fundamental principle of law applicable to property rights and then the intention of the parties with regard to such rights. Firstly, all property rights were freely transferable unless there was some legal restriction preventing their transfer. In case of such restriction, it was necessary to know why the restriction was imposed and why the shareholder had agreed to it. In other words, the meaning of each of the terms 'sell', 'assign' and 'dispose of' would be coloured by the purpose for which the restriction on the shareholder was imposed.

On the facts, the objective of the Moratorium was to ensure P & C to remain as shareholders of the listed company for at least a year so as to secure their commitment to the company. In the view of the Court, the use of the Consideration Shares as security would not have been inconsistent with the Moratorium's aim of keeping P & C committed. Indeed, in the event of P & C using the Consideration Shares as security, it was in their interest to work even harder for the company to improve its business and thereby to increase the market value of the shares. The Court further held that the express terms of the Moratorium did not extend to

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restricting P & C from using the Consideration Shares as security for loans during the period of the Moratorium provided that the shares were not sold in the market within that period.

In our view, draftsman must be more specific if he wishes to extend the ambit of a moratorium on shares as any ambiguity will likely to be resolved in favour of the shareholder in accordance with the principle that the freedom of a shareholder to deal with

his shares should generally be given a broad, rather than a narrow, interpretation.

ⁱ [2008] 2 SLR 898

DIGEST

1. ENTERTAINMENT EXPENSES

In *Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 17 Ors*ⁱ, question arose as to the extent courts should go in investigating whether an amount claimed to have been incurred as 'entertainment expenses' were reasonably incurred and in the ordinary course of the relevant business. The learned Judicial Commissioner refused to be engaged in this onerous task and instead ruled that it was the duty of the corporations concerned which provided for such expenses to ensure that there were mechanisms or procedures in place as safeguards to verify and approve or disapprove such expenses. Thus, the court would not go into scrutinizing invoices for food and beverage at restaurants, nightclubs and the services for guest relations officers which fell within the broad category of 'entertainment'.

2. DANAHARTA ACT DOES NOT EXCLUDE LIMITATION ACT

The defendants as guarantors owed monies to Bank Bumiputra Malaysia Berhad (BBMB) under a banking facility agreementⁱⁱ. Notice of demand giving 14 days grace period to settle the debts was issued to both defendants on 22.12.1994. The cause of action thus accrued on 5.1.1995. Pursuant to Pengurusan Danaharta Act 1988 (Danaharta Act), the plaintiff was vested with the rights, titles and interests of BBMB on 7.7.1999. The

plaintiff commenced action against the defendants on 20.12.2005. The defendants argued that the limitation has set in on 5.1.2001 and the plaintiff's action was time-barred. The plaintiff contended that the Limitation Act 1953 was not applicable as Danaharta Act (being a specific law and later law) overrode the limitation statute (being a general statute and earlier law). The High Court ruled that the Danaharta Act did not override limitation as a bar to an action. In other words, the issue of limitation period is still relevant in cases of a plaintiff pursuing an action based on debts which have been vested in the plaintiff pursuant to the Danaharta Act.

3. QUALIFIED PRIVILEGE ON STATEMENTS MADE DURING POLICE INVESTIGATION

The defendant in *Henry Ong Keng Sem v Patrick Ong King Kok*ⁱⁱⁱ who was shot three times by an unknown person was alleged to have informed police during investigation that the defendant had hired someone to kill the plaintiff. The plaintiff was detained for investigation but was unconditionally released four days later. The plaintiff sued the defendant for defamation by slander. The High Court held that the statement was made in a privileged occasion and constituted qualified privilege. A grievous crime of attempted murder had been committed upon the defendant. He owed a duty to himself and to the public at large to report a crime and to police as soon as possible in order that the perpetrator could be apprehended. It was his privilege to tell the police the name of any person whom he suspected may have committed the offence and the police officer had a corresponding duty to receive the statement from him. It would be up to the police after due investigation whether to arrest the person mentioned by the

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defendant. The defendant's statement could not therefore form the basis of an action in defamation.

4. TRUST NOT ENFORCEABLE DUE TO BREACH OF PROMISE OF MARRIAGE

In yet another instance of doing equity, the Court of Appeal refused to come to the aid of a married man who sought to enforce a trust against another woman whom he had promised to marry but had subsequently refused to do so. In *Wong Chun Wah v Kok Kam Chee*^{iv}, a property was purchased in the defendant's name who executed a trust deed to hold the property and another RM50,000 in trust for the plaintiff. The plaintiff was a married man who had promised to marry the defendant. Subsequently, their relationship became acrimonious. The plaintiff then filed a suit to enforce the trust while the defendant counter-claimed for damages based on the plaintiff's breach of promise to marry her. Bearing in mind two maxims of equity^v, the Court held that the plaintiff's breach of promise of marriage clearly revealed that he had not

acted rightly and fairly to the defendant and that he had not acted with clean hands. He was thus not entitled to seek equitable remedy to enforce the trust. The defendant was additionally awarded a sum of RM5,000 as damages on account of the plaintiff's breach of promise to marry her.

ⁱ [2008] 2 MLJ 915, [2008] 2 CLJ 620

ⁱⁱ *Danaharta Urus Sdn Bhd v KP Manufacturing Sdn Bhd & 3 Ors* [2008] 3 AMR 318

ⁱⁱⁱ [2008] 7 MLJ 567

^{iv} [2008] 3 CLJ 510, [2008] 3 MLJ 176

^v 'He who seeks equity must do equity' and 'He who comes into equity must come with clean hands'.

EMPLOYMENT LAW

STEALING OF CUSTOMERS' LIST

An ex-employee must not take away his ex-employer's list of customers or use the particulars of that list. Courts will not hesitate to grant an injunction to protect the confidential information pertaining to such customers' list and restrain the ex-employee from continuing to exploit names and details of such list.

This is in essence the decision in *Svenson Hair Centre Sdn Bhd v Irene Chin Zee Ling*ⁱ. In that case, the defendant had executed three employment agreements which contained confidentiality, non-solicitation and non-competition clauses. The confidentiality clause prohibits the use and disclosure of any confidential information whether during or after the termination of the employment agreement without limit in point of time. The non-solicitation and non-competition clauses precluded the defendant from soliciting and/or

competing with the plaintiff within 12 months from her termination of employment. Three months after the defendant left the plaintiff's employment, she started work for a competing business. The plaintiff later discovered that she was contacting several of the plaintiff's customers and asking them to go over to the competing business. It was the plaintiff's case that the defendant had taken possession of some of the plaintiff's customer treatment cards during her employment, although this was disputed by the defendant.

The High Court granted an injunction to restrain the defendant from contacting and/or corresponding with all or any of the present customers of the plaintiff whose names were set out until disposal of the action. In the judgment, several principles were re-stated which are worth mentioning here for the benefit of our readers. Generally, there is no restriction to an ex-employee competing with his ex-employer by canvassing or doing business with the latter's customers. However, an employee will be held to have broken the duty of good faith that he owes to his employer if he makes or copies a list of the customers of the employer for use after his employment or deliberately memorizes such a list. The law

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also does not debar an ex-employee from making any use of or drawing on a fund of knowledge and experience or skills that he had acquired while working for the employer. However, the law does impose an obligation on the employee not to use or disclose trade secrets or to do what he has covenanted not to do. As to 'know-how' which employees may have in the course of their employment learnt (the way in which a skilled man does his job and is an expression of his individual skill and experiences), the court cannot protect this type of information or skills. Information pertaining to the employer's customers lists, names and details are not 'know-how' but confidential information.

The defendant's contention that her livelihood and customer access right would be

affected by such an injunction was rejected as the defendant was only an employee in the competing business. It did not stop her from working with the competing business. It is also pertinent to note that the order did not restrain customers from contacting the defendant (if they so choose).

ⁱ [2008] 3 AMR 334

EVIDENCE

APPLICABILITY OF PRIVILEGE AGAINST SELF-INCRIMINATION IN TRACING ORDER

In a suit for the recovery of monies alleged to have been fraudulently utilized, converted, stole or misappropriated from the plaintiff, an interlocutory injunction is invariably applied for to restrain the alleged wrongdoers (defendants) from dealing with the monies while awaiting for the trial to take place.

To make the order effective, a tracing order is commonly included, which requires the defendants to provide within a certain period a detailed account of to whom and where the monies belonging to the plaintiff were subsequently disbursed to.

The court however will need to consider the privilege against self-incrimination. The rule is that in civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly, to a criminal conviction, the imposition of a penalty or the forfeiture of an estate¹.

In the Court of Appeal decision in *Meridian Asset Management Sdn Bhd v Ong Kheng Hoe & Anor*ⁱⁱ, one of the ancillary orders applied for in the plaintiff's application for Mareva injunction was that all the defendants therein respectively shall by way of an affidavit to be filed and served seven days after the order had been served provide a detailed account of to whom and where the sum of RM27 million which was money belonging to the plaintiff's clients was subsequently disbursed to.

The defendants relied on the privilege against self-incrimination and argued that by disclosing what was requested of them in the tracing order might incriminate them to criminal offence.

The Court of Appeal however applied the proposition that:- if there is evidence that the defendant is already exposed to the risk of criminal proceeding then the demand for disclosure under the tracing order could not materially add to the existing risk faced by the defendant; thus such privilege would not apply. Applying to the facts of the case, the 1st defendant had already been charged for cheating and falsification of documents, apart from having his properties seized on the suspicion that they were secured from monies derived from money laundering.

Thus, what he had to disclose in the civil suit was nothing more than what he had already told the authorities who possibly had used some of the information to frame the

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criminal charge against him or might even used them to support the filing of further charges. The 1st defendant's risk towards the impediment by the disclosure demanded had not materially increased.

On the other hand, there was no information of whether the 2nd, 3rd or 4th defendants were charged for any criminal offence or that their properties seized and information on the movement of their funds divulged to the authorities. Thus, they would risk self-incrimination by the disclosure of the

information demanded and such risk must be safeguarded.

ⁱ Suzanne McNicoll, *Law of Privilege* (1992 Ed.) as cited in *Attorney General of Hong Kong v Zauyah Wan Chik* [1995] 2 MLJ 620 at 631.

ⁱⁱ [2008] 3 MLJ 184

LAND LAW

LIEN CREATED FOR LOAN TO 3RD PARTY IS VALID

It was a landmark decision in *Hong Leong Bank Bhd v Staghorn Sdn Bhd*ⁱ when the Federal Court ruled that ss 281(1) and 330 of the National Land Code (NLC) allows a registered proprietor of land to deposit his issue document of title as security for a loan not only to the said proprietor but also to a third party. Thus, the person with whom the title is deposited may apply for the entry of a lien-holder's caveat and shall be entitled to a lien over the land although the loan is not granted to the said proprietor but to another third party.

The Federal Court also brushed aside the notion that in order for a lien holder's caveat to be valid, the registered proprietor must personally effect the deposit of his issue document of title. It is sufficient, in the Federal

Court's ruling, that the said issue document of title has been deposited by a third party on the instructions or with the authorization or the consent of the registered proprietor. Thus, an order for sale made pursuant to a lien holder's caveat created by the deposit of the issue document of title by a third party with the consent of the registered proprietor is not illegal.

In the same case, the court also ruled that if a registered proprietor of land deposits his issue of document of title as security for a loan to a third party, the judgment that is required to be obtained under s 281(2) of NLC is a judgment against the third-party borrower of the loan (and not against the said registered proprietor).

ⁱ [2008] 2 MLJ 622

TORT (ECONOMIC TORTS)

DISSOLVING UNIFIED THEORY OF ECONOMIC TORTS

The three appeals decided collectively by the House of Lords in *OBG v Allan*ⁱ

presented a rare opportunity to the highest court in the land in the United Kingdom to deliberate on distinct claims in tort for economic loss caused by intentional acts. The Law Lords seized on this opportunity to re-write the law on the general tort of actionable interference with contractual rights and to provide certainty to an area which has been in a convoluted state for years.

In the first appeal---*OBG Ltd v Allan*, the defendants who were receivers purportedly appointed under an invalid debenture took

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control of the claimant company's assets and undertaking. The claimant sued the receivers under, among othersⁱⁱ, the tort of unlawful interference with its contractual relations.

In the second appeal---*Douglas v Hello! Ltd (No.3)*, the magazine *OK!* Contracted for the exclusive right to publish photographs of a celebrity wedding at which all other photography would be forbidden.

The rival magazine *Hello!* Published photographs which it knew to have been surreptitiously taken by an unauthorized photographer under the guise of a waiter or guest. *OK!* sued *Hello!* for, among othersⁱⁱⁱ, causing its loss by unlawful means.

In the third appeal---*Mainstream Properties Ltd v Young*, two employees of a company in breach of their contracts diverted a development opportunity to a joint venture in which they were interested. The defendant, knowing of their duties but wrongly thinking that they would not be in breach, facilitated the acquisition by providing financing. The company sued him for the tort of wrongfully inducing breach of contract.

In a landmark decision, the House of Lords rejected the unified theory of economic torts, which had treated procuring breach of contract as one species of a more general tort of actionable interference with contractual rights.

The tort of causing loss by interference with a trade or business by unlawful means differed from the tort of inducing breach of contract (the *Lumley v Gye* principle) in four respects:

1. Unlawful means was a tort of primary liability, not requiring a wrongful act by anyone else, while *Lumley v Gye* created accessory liability, depending upon the primary wrongful act of the contracting party.
2. Unlawful means required the use of means which were unlawful under some other rule (independently unlawful), whereas liability under *Lumley v Gye* required only the degree of participation in the breach of

contract which satisfied the general requirements of accessory liability for the wrongful act of another person.

3. Liability for unlawful means did not depend upon the existence of contractual relations; under *Lumley v Gye* the breach of contract was essential. If there was no primary liability, there could be no accessory liability.
4. Although both were torts of intention, the results which the defendant had to have intended were different. In unlawful means, the defendant had to have intended to cause damage to the claimant (although usually that would be a means of enhancing his own economic position). Because damage to economic expectations was sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under *Lumley v Gye*, an intention to cause a breach of contract was both necessary and sufficient.

The House went on to discuss the essential elements of the *Lumley v Gye* tort^{iv} and the tort of causing economic loss by unlawful means^v, in particular the types of acts falling to be regarded as unlawful means. Acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which was unlawful against that third party and which was intended to cause loss to the claimant would constitute unlawful means, provided such acts were actionable by that third party or would have been so actionable had that third party suffered loss.

In the first appeal, the House did not find any breach or non-performance of any contract and thus, there was no wrong to which accessory liability could attach. Neither had the receivers employed unlawful means nor intended to cause the claimant any loss. The appeal was thus dismissed.

In the second appeal, although the House held that the magazine *OK!* had not proven the tort of causing loss by unlawful

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means (the magazine *Hello!* had the necessary intention to cause loss but did not use unlawful means), there was a breach of an obligation of confidentiality to itself.

The information in question, namely the photographs, was capable of being protected because it was information of commercial value over which the celebrity couple had sufficient control to enable them to impose an obligation of confidence. The appeal was thus allowed on the ground of breach of confidence.

In the third appeal, the House upheld the findings of fact that the defendant had not intended to cause a breach of contract and the conditions for accessory liability under the *Lumley v Gye* tort were not satisfied. There was also no question of the defendant having

caused loss by unlawful means. The appeal was thereby dismissed.

ⁱ [2007] 4 All ER 545

ⁱⁱ The alternative claim is in conversion.

ⁱⁱⁱ The alternative claim is on breach of its equitable right to confidentiality.

^{iv} Or 'inducement' tort, as termed by Lord Nicholls.

^v Or 'unlawful interference' tort, as termed by Lord Nicholls.

other hand, if penthouse flat were cut back so as to give 53% adequate light to the maisonette, the estimated loss in value would be £175,000.

The trial judge held that the injury to the plaintiff's legal rights was small. It was one which was capable of being estimated in money and could be adequately compensated by a small money payment. It would be oppressive to the defendant to grant an injunction as the loss of value of the penthouse in the cut-back state would be disproportionate to the amount of harm caused to the plaintiffⁱⁱ. Thus, although an actionable nuisance had been committed, the trial judge refused to grant an injunction to stop that part of the development which infringed the plaintiff's right to light and awarded damages instead.

On appeal, the Court of Appeal disagreed with the conclusion of the trial judge. Firstly, in relation to whether the injury to the plaintiff's rights was small, the defendant had to take the natural consequences of their acts in interfering with the right to light; what mattered was not so much the amount of light that was taken as the amount of light that was left due to the infringement. The consequence of the obstruction to the light was that the plaintiff would suffer a substantial interference with the enjoyment of natural light in his living room. Secondly, the loss of value to the maisonette was more than a small amount. £5,500 was smaller than the cost to the

TORT (NUISANCE) / REMEDY

RIGHT TO LIGHT

The right to light is not to be treated lightly. It is not measurable, *simpliciter*, in pure monetary terms. That was the message emitted from the English Court of Appeal's decision in *Regan v Paul Properties Ltd & Ors*ⁱ, which witnessed a contest between a developer who sought to erect a five-storey building and an owner of a maisonette whose right to light in his property was affected.

In that case, only one of the 16 units which was the penthouse flat caused loss of light in the living room of the maisonette. Factually, and statistically, prior to the development, the living room enjoyed adequate light to 65%-67% of its floor area, significantly more than the conventional minimum but after the development, it would enjoy adequate light to an area of 42%-45.2%, which was significantly less than the conventional minimum. It was also the finding of the trial judge that the effect of the infringement on the market price of the maisonette was a maximum of £5,500, less than 2.5% of its pre-development value. On the

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defendant of having to comply with a mandatory injunction (between £12,000 and £35,000) but that was not the correct approach to whether the injury was small. Thirdly, although the effect of an injunction would entail substantial losses to the defendant which would probably exceed the plaintiff's losses, that was not the determinative of the issue of oppressiveness and of the choice of remedy. All the surrounding circumstances of the dispute and the conduct of the parties must be considered. In this respect, the court took into account the fact that despite the plaintiff's protest five months before the development reached the fifth floor level, the defendant took a calculated risk to continue with the construction. The defendant acted on advice which turned out to be wrong and must take the consequences. It was therefore not oppressive to the defendant or unreasonable or inequitable to grant an injunction to protect

the plaintiff's right to light in relation to his property.

ⁱ [2007] 4 All ER 48

ⁱⁱ These are some of the factors of the 'good working rule' laid down more than a century ago in *Shelfer v City of London Electric Lighting Co.* [1891-4] All ER Rep 838, which was regarded as the leading case on the power of the court to award damages instead of an injunction in a nuisance case.

equal distribution of matrimonial assets as in a married couple.

On the above facts, the High Court in *Law Ding Hock v Ng Yoon Lin (p)*ⁱ held that the plaintiff's claim was not sustainable. The court found that the contemporaneous documents supported the defendant's contention that the plaintiff gave the money to the defendant to circumvent his bankruptcy status in order to deceive the Director General of Insolvency. It was an illegal purpose and the plaintiff could not enforce the illegal transaction.

ⁱ [2008] 2 MLJ 539, [2008] 8 CLJ 94

the decision by another High Court judge in *Brett Andrew Macnamara v Kam Lee Kuan*ⁱ. In this case, the plaintiff who was an Australian and the defendant who was a Malaysian were man and wife. The plaintiff purchased a property and had it registered in the name of the defendant but through a trust deed, both parties declared that the whole of the purchase price was paid by the plaintiff and that as consent in writing of the Foreign Investment Committee (FIC) and the state authority of

TRUST / BANKRUPTCY

INVALID TRUST TO CIRCUMVENT BANKRUPTCY

The plaintiff and defendant were not married but stayed together. When the plaintiff inherited about RM2 million from the estate of his deceased grandfather, he was an undischarged bankrupt. He credited half of the inheritance into the defendant's account which was subsequently utilized to purchase three properties. A few years later, the defendant walked out on the plaintiff. The plaintiff filed a suit to claim that the defendant held the properties on a resulting trust for the plaintiff or alternatively, the plaintiff was entitled to at least a half share according to the principles of

TRUST / CONTRACT

VALID TRUST CREATED TO GET ROUND FIC GUIDELINES

The decision as reported in the preceding section ought to be compared with

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Perak was required for a foreigner to own a property in Malaysia, the defendant held the property in trust for the plaintiff until such time consent was obtained to register the same in the plaintiff's name. The trust deed further declared that upon obtaining the consent of the relevant authorities, the defendant would at the request of the plaintiff transfer the property to the plaintiff or deal with the property in such manner as the plaintiff should direct.

The plaintiff and the defendant then divorced. The plaintiff took out an action for an order that the defendant held the property in trust for him and for a further order of vacant possession and that he be allowed to re-enter the house. The High Court held that the trust was not in contravention of the FIC guidelines. The ownership of the property was in the name of the defendant, a Malaysian who was holding it on trust for the plaintiff. The parties were merely facilitating the transfer of the property pending the approval of the authorities. The trust deed was not executed for an oblique purpose and neither was it a colourable device

to deceive the authorities. There was nothing illegal about the trust deed for it was not a device to transfer the ownership of the property to the plaintiff who was a foreigner and prohibited by the guidelines. The trust was therefore lawful and valid.

From the above two decisions, it is opined that determination of validity of a trust is not a simple task. It is thus advisable for readers faced with problems relating to trust to immediately seek legal consultation.

ⁱ [2008] 2 MLJ 450, [2008] 7 CLJ 625

EPILOGUE

In Issue 3 of 2006, we reported the Singapore High Court decision in *Vestwin Trading Pte Ltd v Obegi Melissa*ⁱ under the title “*Abandonment of the Rubbish Without Abandoning the Rights*”. On appeal to the Court of Appeal, however, the High Court decision was over-turned recently in *Obegi Melissa & Ors v Vestwin Trading Pte Ltd & Anor*ⁱⁱ. The Court of Appeal of Singapore held that the suit was not suitable for determination under summary judgment application. It raised novel legal issues and required a full examination of all the relevant facts: the law on abandonment (or the concept of ‘divesting abandonment’ as recognized in Australia, Canada and US) had not been settled in Singapore, nor was there recent English jurisprudence or consensus among comparative common law jurisdictions. Rubbish disposal raised issues of protecting individuals’ and business entities’ privacy; as a matter of public importance, it should not be

decided summarily. There were factual issues like the contractual terms on which the company engaged to collect refuse from Orchard Towers (waste disposal company) provided its services, the relevant arrangements between the respondents and other tenants of Orchard Towers on the one hand and the waste disposal company and managing agent of Orchard Towers on the other hand. The resolution of such issues may be necessary to determine which party had ownership or possession of the document at the time they were retrieved by the ninth appellant and accordingly whether the appellants could be held liable for conversion or theft. As summary judgment was granted without considering these issues, the High Court decision was set aside and the matter was to be tried.

ⁱ [2006] 3 SLR 573

ⁱⁱ [2008] 2 SLR 540

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