



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

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**LAW UPDATE 3/2008 (JUL – SEP)**

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## BANKING LAW

### LOAN AGREEMENT UNAFFECTED BY ILLEGALITY OF PURCHASE IT FINANCED

In *Chang Yun Tai & Ors v Dataran Mantin Sdn Bhd & Ors*<sup>i</sup>, all the 178 plaintiffs were purchasers of apartments to be built by a developer called Dataran Mantin Sdn Bhd and had obtained end-financing from various financial institutions including defendant no.14, 17 and 18 vide the respective loan agreements cum assignments.

The plaintiffs had sued the developer and directors of certain companies connected to the developer on conspiracy to defraud the plaintiffs through a scheme aimed to induce them to purchase apartments. It was the case of the plaintiffs that the sale and purchase agreements being the instrument were void for having contravened certain statutes<sup>ii</sup> and therefore, the end-financing agreements with the financial institutions ought to be held null and void as well.

The banking sector will be glad to know that the High Court struck out the plaintiffs' claim against the defendant no.14, 17 and 18 on the ground that the plaintiffs have no reasonable cause of action against the banks. The plaintiffs' cause of action against the banks was premised not on any impropriety on the part of the banks in granting the loan but on the assertion that the banks were expected to know of the alleged contraventions by the local authority (as owner of the land) and the developer.

The relationship between the plaintiffs and the banks was however purely commercial in nature strictly on a *quid pro quo*<sup>iii</sup> basis that the monies were lent to be repaid in accordance with the terms of the loan

agreements using the apartments as security for the loans.

The banks had nothing to do with the plaintiffs' purchase of the apartments and as provider of the loans, should not be concerned with the propriety or legality of any contracts entered into by the local authority, the developer or any other persons leading to the acquisition and development of the land on which the apartments were built.

The sale and purchase of the apartments had been completed. The loan sums had been disbursed. No court would lend its hand in equity to a party to declare the bank estopped from exercising its right under a loan agreement where it was plain and obvious that to do so would result in the former unjustly benefiting from not having to repay the loan.

The plaintiffs' action against the banks was purely pre-emptive calculated to forestall any action by the banks to recover the loan from the plaintiffs at least for the period that the question of illegality concerning the development of the apartments remained unresolved. This was an abuse of the process of the court and the High Court was not hesitant to strike out the plaintiffs' action.

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<sup>i</sup> [2008] 8 CLJ 762; [2008] 5 MLJ 295

<sup>ii</sup> the Power of Attorney Act 1949, the Local Government Act 1976 and the Companies Act 1965

<sup>iii</sup> something for something, consideration.

#### **IMPORTANT**

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## COMPANY LAW

### SHAREHOLDER'S FUNDAMENTAL RIGHT TO SPEAK AND VOTE

The unalienable and absolute right of a member of a company to attend, to speak and to vote at a general meeting of the company was reaffirmed in the High Court case of *Koperasi Nesa Pelbagai Bhd v Maika Holdings Bhd & Anor Case*<sup>i</sup>. In that case, the plaintiffs were minority shareholders of the defendant. Among the resolutions passed at the annual general meeting (AGM) of the defendant was the resolution to dispose of the defendant's equity interest in Oriental Capital Assurance Berhad (OCAB) to Salcon Berhad. The plaintiffs complained that they were assaulted, beaten up and generally intimidated at the AGM by thugs wearing the defendant's lanyards and tags. The plaintiffs thus sought reliefs, among others, to restrain the defendant from acting on, implementing or giving effect to the resolutions purportedly passed at the AGM.

Citing an earlier High Court decision<sup>ii</sup>, the learned judge held that under s 148 of the Companies Act 1965 (the Act), as shareholder of the defendant, the plaintiffs have an unalienable and absolute right to attend, to speak and to vote at a general meeting convened for the purpose of seeking the approval of members of the defendant to sell the OCAB shares which must be obtained under s 132C of the Act. Without deciding

whether the facts as alleged were true, there was a serious question to be tried on the legality of the meeting. The defendant's argument that even if the plaintiffs had been denied of their voting rights as they claimed, the resolution would still have been carried by sheer force of majority (the plaintiffs owned not more than 0.5% of the paid-up capital of the company) was rejected by the learned judge. A debate on the pros and cons as to whether the OCAB shares should be sold would afford the dissenting member no matter how insignificant his holding was to put forth his view and to enter into open discussion on the merits and demerits of the proposed sale. A denial of the right of the plaintiffs to speak and vote if proven under the circumstances constituted a breach so fundamental that overrode all other considerations that the defendant might be able to advance in favour of discharging the injunction.

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<sup>i</sup>[2008] 4 AMR 344, [2008] 8 CLJ 354

<sup>ii</sup>*Lim Hean Ping v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10

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## CONTRACT

### REMEDY TO HOUSE PURCHASER OF AN ABANDONED PROJECT

The plaintiffs in *Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd*<sup>i</sup> bought a condominium from the defendant (developer). The sale and purchase agreement (SPA) was in the format of the prescribed Schedule 'H' of the Housing Developers (Control and Licensing) Regulations 1989 (the HDA). Under the terms of the SPA, the defendant should deliver vacant possession by 14.10.1998, but

this did not happen and the project was abandoned. The plaintiffs, having paid RM57,000, gave two-month notice to the defendant to complete construction of the property and to hand over vacant possession by 8.5.2004, failing which the SPA shall be deemed as terminated. The deadline was not met.

The plaintiffs filed a suit to claim against the defendant for a refund of the purchase price which had been paid thus far and liquidated ascertained damages (LAD) up to the date of termination of the SPA. The High Court ruled in favour of the plaintiffs. Whilst the defendant conceded that the plaintiffs were entitled to the full refund of purchase price paid thus far, it was contended that there should not be any award of LAD because the SPA had been terminated, the property had not been completed and LAD was only payable to house

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buyers who had paid full purchase price. All these contentions were rejected. It was held that on the proper construction of the terms in the SPA, the plaintiffs were entitled to claim for LAD immediately after the expiry of the contractual deadline for the defendant to hand over vacant possession of the property and did not need to wait for the actual completion.<sup>ii</sup> The plaintiffs' claim for LAD was not affected by the termination of the SPA.

To hold that developers who delayed the completion of housing projects were not liable to pay LAD would in fact be against public policy because house buyers would then had no protection against unscrupulous or recalcitrant developers! Thus, the plaintiffs recovered in full the purchase price paid and

also LAD for the delay in handing over vacant possession of the property as well as for the delay in completing the common facilities.

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<sup>i</sup> [2008] 3 MLJ 411

<sup>ii</sup> See also *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188.

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*Corporation Berhad v Harta Kumpulan Sdn Bhd*<sup>ii</sup>.

#### COURT PROCEDURE

#### DIRECTOR JAILED FOR FLAGRANT BREACH OF INJUNCTION

In our earlier issue of Law Update 3/2007, we featured the unusual case of a recalcitrant party (the said defendant) who kept on harassing a public listed company (the said PLC) to settle a disputed outstanding invoice arising from a joint development agreement (JDA), to the extent of sending pestering letters almost every other day. As readers may recall, a permanent injunction was granted to restrain the said defendant from continuing with its nuisance acts.<sup>i</sup>

Unfortunately, the injunction still failed to stop the said defendant in its track. Instead of writing directly to the said PLC, the said defendant subsequent to the court injunctive order wrote numerous letters to the managing director of the said PLC, Dato' Tan, setting out repeatedly matters in dispute between the said PLC and the said defendant, which amounted to serious breaches of the injunctive order.

The PLC was thus left with no choice but to file for contempt of court against the directors of the said defendant, which resulted in the recently reported case of *IJM*

In resisting the PLC's application for a committal order against the said defendant's directors, it was contended, among others, that the letters were written to Dato' Tan in his personal capacity and not in his capacity as the plaintiff's managing director and that the injunctive order only restrained the said defendant from writing to the PLC, not the PLC's agents, officers or employees.

On the first ground, the learned High Court Judge found that all the offending letters were only related to matters in dispute between the PLC and the said defendant arising out of the JDA. The said defendant's act of writing to Dato' Tan in his personal capacity was merely an attempt to circumvent the injunction using those words as a caveat when the writer of the letters was not a personal acquaintance of Dato' Tan and the contents of the letters had nothing to do with him in his personal capacity. The writer had deliberately perpetuated the very nuisance prohibited from inflicting on the PLC.

On the second ground, the wordings of the injunctive order prohibited the said defendant either by itself or by its employees or agents or any other person from contacting the plaintiff (namely the PLC) either through letters and/or whatever announcement and/or any publication regarding any matter related to the JDA that may constitute a nuisance on the plaintiff. The learned High Court Judge

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however regarded the scope of the injunctive order to be clear and by necessity included communicating with any agent, officer or employee of the plaintiff given that the plaintiff was an artificial legal entity and any communication with the plaintiff could only be through the medium of the plaintiff's agents, officers or employees.

The learned Judge rejected the said defendant's attempt to draw a synthetic distinction that resulted in a technical or literal observance of the words of the order while violating the very spirit of the order. On the converse, the said defendant was censured for trying to be 'clever' by using crafty label such as 'personal capacity' and hiding behind the curtain of technicality to escape consequences of its action.

The High Court went on to find the said defendant as openly defiant of the court's authority and must be punished with a custodial sentence on its directors. While one of the two directors had admitted to be the writer of the infringing letters and attempted to absolve his fellow director (a sleeping director)

from the said defendant's contempt, the court nevertheless found the sleeping director guilty of contempt of court as well, since there was no evidence to show that she was unaware of the injunction or that she had taken steps to ensure that the injunction was obeyed. She was however spared of a jail sentence and was slapped with a fine of RM20,000 while the director/writer was sentenced to imprisonment for a period of 14 days.

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<sup>i</sup> See the write-up entitled "Harassing & Pestered Letters are Nuisance" on *IJM Corporation Berhad v Harta Kumpulan Sdn Bhd* [2007] 4 AMR 317, [2007] 8 CLJ 291.  
<sup>ii</sup> [2008] 4 AMR 638

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## DIGEST

### 1. EMPLOYER'S RIGHT TO CANCEL LEAVE

The Industrial Court decision in *Associated Pan Malaysian Cement Sdn Bhd lwn Muhammad Nor Hakim Rahmat*<sup>i</sup> put in focus the right of employer to rearrange leave or even to cancel leave already granted to its employees if exigencies of work demands it. In that case, the claimant originally applied for leave (to take his family to Australia for holiday) in May 2000 which was granted. However, before the time arrived, the company asked him to cancel the leave because his services were needed to complete a project and promised him that upon completion of the project, he could take leave. The claimant agreed. In June 2000, the claimant applied for leave in August 2000 for a holiday trip in Bangkok with his family which was granted. However, 2 days before the leave commenced,

the company asked the claimant to cancel the leave as his services were needed to do up the budget. The company adduced evidence to show that it was genuinely in need of the claimant's services and the situation was brought upon due to unforeseen circumstances and there was no mala fide. The claimant's claim for constructive dismissal (he having resigned and claimed the company to have breached a fundamental term of the employment contract) was rejected. Much emphasis was put on a clause in the scheme of services which entitled the company to rearrange leave, recall the employee who was on leave or defer his leave if exigencies of work demanded it.

### 2. LOWER RANK BUT BETTER BENEFITS MAY STILL AMOUNT TO CONSTRUCTIVE DISMISSAL

One would have thought that if a company were to change the job function of an employee and transfer him to a lower post (from secretary to receptionist) but offer him additional remuneration, he would have no cause to complain of constructive dismissal. The Industrial Court in *Tamil Selvi Seeralan v*

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*Danfoss Industries Sdn Bhd*<sup>ii</sup> decided otherwise. Transferring a employee to a lower post was a fundamental breach of the contract of employment, regardless of whether the terms and conditions of service remained the same. Such act entitled the employee to walk out of his employment and claim constructive dismissal.

### **3. PROLONGED SUSPENSION AMOUNTING TO CONSTRUCTIVE DISMISSAL**

The claimant in *EON Bank Berhad v Lee Seng Onn*<sup>iii</sup> was suspended to facilitate investigations into allegations of misconduct against him (abuse of his position through instructions given to his subordinates). The period of suspension was inordinately long, totaling 91 days. The company's justification was that the allegations were of a complex nature which required the verification of voluminous documents and interviews with individuals inside and outside the company. The Industrial Court, however, upon looking at the totality of the evidence adduced, held that the suspension without any charges being framed against the claimant was unacceptably long and could be seen to have been calculated to drive him out of his employment. Coupled with the company's lack of a timely response to the claimant's letter which clearly stated his intention to walk out on constructive dismissal if matters were not rectified by a particular date, the company was found to have evinced an intention not to be bound by the contract of employment. The continued payment of the claimant's salary and the keeping of an office for him after he had claimed constructive dismissal did not aid the company's defence.

### **4. ILLNESS THAT FRUSTRATED CONTRACT OF EMPLOYMENT**

Some time in 2000, the claimant in *Kempas Edible Oil Sendirian Berhad v Abu Bakar Talib*<sup>iv</sup> was diagnosed with sleep/anxiety disorder. His illness was found to be chronic and would require long-term treatment. Despite treatment, his condition continued to deteriorate. The company applied twice to have him medically boarded out under the company's group insurance scheme but the

insurer rejected. The claimant was unable to come to work and was constantly on medical leave, for 87 days in 2002 and for the entire year of 2003 till his termination. The company issued a show cause letter and he cited his medical condition. The company viewed his inability to work due to his medical condition had frustrated his contract of employment and thus terminated his employment on 11.11.2003. The Industrial Court held that the company had done its best to help the claimant to be medically boarded out but was unfortunately unsuccessful. It is trite law that if an employee is unable to perform his duties any longer because he is sick, this would amount to frustration, but if there is some chance of recovery, then it would not amount to frustration. On evidence available, the company was right to have concluded that there had been no prospect of the claimant fully recovering from the illness. The company was justified to treat the contract of employment as frustrated and was entitled to terminate it.

### **5. RIGHT TO INTRODUCE NEW TERM ON RETIREMENT AGE**

The original employment contract contained no clause on retirement age. Years later, the company sought to introduce a clause on compulsory age of retirement in their new employment handbook, setting 55 for male employees and 50 for female employees. The claimants disputed their termination based on retirement age as set out in the handbook as no retirement age had been stipulated in their contracts of employment.

This was the scenario in the Industrial Court decision in *Gan Soh Eng & Ors v Guppy Plastic Industries Sdn Bhd*<sup>v</sup>. It was held that although an employment contract had omitted to stipulate a compulsory retirement age, it did not mean that the employer could not bring the employee's service to an end by retiring him.

The company had had a right to introduce the retirement policy even after the claimants had been employed but the retirement age to be imposed must be reasonable and fair. In order to impose different retirement age on the different employees holding the same position, it had to be fair and based on reasonable expectations

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of the employees concerned and if the company wanted to discriminate between male and female employees in the same group, it had to show special reasons for doing so.

There was a lack of evidence that the female claimants had been incapable of carrying on with their duties beyond the age of 50 years. Thus, the company was not justified to impose different retirement age for the female employees in the same group.

Evidence also showed that it had been a norm for workers in the company to work beyond 50 years and the claimants had had a reasonable expectation to retire beyond 50. The court ruled that the fixing of the retirement age by the company at 55 for male employees was fair and reasonable but at 50 for the female employees was an unfair labour practice and was struck down.

## 6. DIFFERENCE BETWEEN SECONDMENT & TRANSFER

There is a material difference between a 'secondment' and a 'transfer' in employment law, so held in *A Majid Maidin v Malaysia International Shipping Corporation Berhad*<sup>vi</sup>. An employee can only be transferred within the same organization or company but he cannot be transferred to another organization or company without his consent.

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## INTELLECTUAL PROPERTY

### NO MONOPOLY OF FOREIGN SOUNDING NAMES

Are you aware that Lewre, Cavenzi, Bonia, D'Urban, John Master, Orlando, Carlo Rino and Emmer Zecna are all actually local brands?

This was highlighted by the High Court (IP court) Judge in the recent case of *Consitex SA v TCL Marketing Sdn Bhd*<sup>i</sup>.

The Judge remarked that in view of the common knowledge that Malaysians preferred

When the services of an employee are lent by his employer to another organization or company, he is said to have been seconded to that organization or company, but it must be done with his consent, a position laid down by the Court of Appeal in *Rosneli Kundor v Kelantan State Economic Development Corporation*<sup>vii</sup>. In a secondment case, the salary of the employee may either be paid by his employer or by the organization or company to which his services are lent, but the right of dismissal still lies with his employer.

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<sup>i</sup> [2008] 2 ILR 549

<sup>ii</sup> [2008] 2 ILR 635

<sup>iii</sup> [2008] 3 ILR 170

<sup>iv</sup> [2008] 3 ILR 11

<sup>v</sup> [2008] 3 ILR 414

<sup>vi</sup> [2008] 3 ILR 297

<sup>vii</sup> [2004] 4 CLJ 492

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foreign sounding brands, businesses chose foreign sounding names to penetrate the market quickly and to boost sales. That was perhaps the reason the defendant in that case, a manufacturer of menswear, opted to use "Emmer Zecna" for their products and in respect of its outlets in Malaysia, without realizing that it would put them in trouble when they were sued by the registered proprietor of the trade marks "Zegna" and "Ermenegildo Zegna" for trade marks infringement, passing off in respect of goods and passing off in respect of the business. Fortunately for the defendant, all well ended well when the Judge dismissed the plaintiff's claim on all counts.

There was no infringement of the plaintiff's trade mark because the plaintiff's and the defendant's marks were not identical or so nearly resembling each other: They differed visually and aurally to a great extent that there was no likelihood of confusion or deception in

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the course of trade in relation to the products concerned. Applying the look and sound test, the first word in the defendant's mark has 5 letters whilst the plaintiff's has 11; the plaintiff's mark has the letter "G" in both words, whereas the defendant's does not; "negildo" is not present in the defendant's mark.

Aurally, the plaintiff's mark has 7 syllables, whereas the defendant's has 4; the pronunciation for both marks is totally different; while there is one common syllable in the suffix of both marks, the marks sound very different in overall.

In any event, oral confusion was not relevant since both parties' customers did not purchase their goods over the telephone nor ask for the goods orally from sales assistant. Both parties focused their business on different markets and targeted different segments of the public and thus, their respective goods would not be mistakenly bought on the basis of oral confusion.

Manner of use of the marks in the market place (the plaintiff only uses the "Ermenegildo Zegna" mark as combined words in its signage, advertisements, product labels and packaging and not "Zecna" alone whilst the defendant's "Emmer Zecna" mark is substantially and significantly different), different channels of distribution (the plaintiff's products are at exclusive malls noted for high-priced items whilst the defendant's products are at island counters in departmental stores, supermarkets and boutique outlets in shopping malls), different customer targets (the plaintiff aims for upper class segment who can afford designer wear and brands whilst the defendant targets the average middle-class consumers), characteristics of an average consumer (consumers in Malaysia are demanding, discerning and observant and reasonably well-informed)---all these factors were taken into account as surrounding circumstances. All point to the conclusion that there was no likelihood of deception or confusion.

The lack of evidence of any confusion among the public in Malaysia in the five-year period that the defendant traded was also of no help to the plaintiff's cause. The results of

market survey were regarded as highly doubtful of its accuracy and authenticity and as of little weight as it had been improperly conducted.

On passing off, the Judge found that the plaintiff's mark has limited goodwill confined to the upper class segment of the public, there has been no misrepresentation to the public by the defendant and there was no proof of tarnishment or diversion of the plaintiff's goodwill.

Most interestingly, the plaintiff's argument that "Emmer Zecna" would be confused for the second tier brand<sup>ii</sup> of the plaintiff was also rejected by the court. In the eyes of the court, consumers in Malaysia were educated, discerning and trade-mark-conscious and would not simply assume that the defendant's mark was the second tier brand of the plaintiff's or was associated to the plaintiff's business.

The marks were significantly different and the plaintiff's contentions were baseless and speculative.

This decision once again<sup>iii</sup> demonstrates the difficulty of stopping others from using mark which nearly resembles another established mark on the ground of likely deception or confusion, and the upshot of it is that many brands/trade marks will have to learn to peacefully co-exist in Malaysia !

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<sup>i</sup> [2008] 5 AMR250

<sup>ii</sup> Some instances cited by the court were "DKNY" was the second tier brand of Donna Karan, "Armani Exchange" for "Armani", "Versus" for "Versace".

<sup>iii</sup> Past instances like "Mister" and "Sister", "Panasonic" and "Pensonic", "addax" and "Daks".

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## LOCAL AUTHORITIES

### ONE-OFF FEE FOR LATE PAYMENT OF RATES

In a landmark ruling, the Federal Court in *Generation Products Sdn Bhd v Majlis Perbandaran Klang*<sup>i</sup> held that the law permits local authorities to impose fees for late payment of assessment rates only once (and not from time to time) and such fees being towards the cost of collection of the arrears of rates are not to be treated as penalty and must be a fixed sum and not based on percentage.

By way of background, the appellant through an auction purchased two properties which were located within the local authority of the respondent. The assessment rates for the two properties had not been paid for the past ten years since 1985. The appellant received a notice from the respondent to pay up the arrears together with “fees” of 2% for every amount unpaid on a half-yearly basis which were subsequently increased to 10% in 1992.

The provisions upon which the respondent relied to impose the “fees” were sections 147 (1) and (2) of the Local Government Act 1976 (the Act) which read as follows:-

(1) If any sum payable in respect of any rate remains unpaid at the end of February or August, as the case may be, the owner or owners shall be liable to pay the same together with such fee as the local authority may fix from time to time.

(2) If any such sum or any part thereof remains due and unpaid by the end of February or by the end of August in each year, as the case may be, it shall be deemed to be an arrear and may be recovered as provided in section 148.

The question before the Federal Court was :-

“Whether the words ‘from time to time’ in section 147(1) of the Local Government Act

1976 refers to **the fee that may be charged from time to time** in an individual case for so long as the rates remained unpaid or **a fixed rate** applicable to all rate payers who have not paid the rates thereby making the **fee chargeable only once** or to both.” (emphasis added)

Upon careful consideration of all the relevant provisions in the Act and taking into account the status of the Act as a consolidating statute, the Bahasa Malaysia and the English text of the Act, established principles of interpretation and the fact that rates chargeable by the local authority are a form of tax, the Federal Court held that:-

1. The words ‘from time to time’ in section 147(1) of the Act qualify the words ‘such fee as the local authority may fix’, which means that the local authority is allowed to alter the amount of the fee from time to time.

2. In respect of a particular rate that is not paid in time, the fee can be imposed only once. In other words, a rate that is due and not paid in February is subject to a fee but if in August the same rate remains in arrear then the authority cannot impose a second fee on the rate that was due in February.

3. The fee under section 147 of the Act must be intended to address the cost incurred for issuing reminders and for collection of rates in arrears due to delayed payment. Such sum will inevitably increase with inflation and can therefore be increased or otherwise varied from time to time. However, such cost must be a fixed sum and not based on percentage.

The appeal was thus allowed and the relevant notices of assessment were declared null and void and the respondent was allowed to issue fresh notices of assessment, correctly computed as regards the fee.

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<sup>i</sup> Federal Court, Putrajaya, Civil Appeal No: 02-15-2007(B)

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## REMEDIES / CONTRACT

### RM50 MILLION DAMAGES FOR BREACH OF JV AGREEMENT

The decision in *Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim*<sup>i</sup> shows yet again the serious consequences that could arise from a breach of agreement, especially a contract for a definite and specific purpose which is known to both parties. In this case, the contract was for the development of the multi-million residential, tourism and recreational project known as 'Desa Tasek'.

The High Court awarded the plaintiff a staggering RM52.9 million as damages for breach of a development joint venture agreement (the JVA) between the plaintiff and the defendant. Under the JVA, the plaintiff was to carry out the said residential, tourism and recreational development project on the development land. The defendant, a state government, was to cause to be alienated to the plaintiff certain portions of the development land.

About six years later, the defendant terminated the JVA (as it decided to conserve the development land) and offered as compensation a 5.5 acre freehold land. However, four years later, the defendant revised the offer to a 5.5 acre leasehold land, which was refused by the plaintiff who subsequently sued the defendant for damages to be assessed on account of the termination of the JVA.

At the trial, the defendant admitted liability. At the assessment of damages, the plaintiff was awarded RM3.9 million for expenditure incurred and RM48.9 million for loss of profits. The former was on the basis that such expenditure was something that occurred directly from the defendant's breach. The latter was on the basis that it was the natural and probable result of the breach of the JVA by the defendant and was within the contemplation of the parties to the JVA.

The formula adopted by both parties to compute loss of profits was similar: total

revenue minus total development costs. The difference however lies in the components of the market price for different types of properties, the number of luxury apartment to be sold to bumiputra buyers and the fair amount for financing costs.

It is beyond the scope of this write-up to discuss in details how the assessment was arrived at and upheld. Suffice to point out two interesting features.

Firstly, whilst the defendant had factored a discounted price of 15% in respect of 40% of the luxury apartments reserved for bumiputra buyers, the court accepted the evidence of the plaintiff that the take-up rate for the bumiputra units would be about 12% only. Thus, it was against commercial reality for the defendant to assume that all the units reserved for bumiputras would be sold. The court accepted the provision of 12% for bumiputra purchasers in the plaintiff's computation of the loss of profits, as a result of which the plaintiff's computation of the loss of profits became much higher.

Secondly, the court arrived at the award notwithstanding the amount of the plaintiff's projected profits was stated as RM16.9 million in the appendix to the JVA. No solid reason was advanced for refusing to take into account the projected profits, apart from holding that the decision<sup>ii</sup> relied upon by the defendant to limit the damages on this basis was not relevant.

It remains to be seen whether the Court of Appeal will interfere with such stunning award of damages when the plaintiff ended up with compensation of almost three-fold of its projected profits, without having to carry out any construction work.

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<sup>i</sup> [2008] 9 CLJ 46

<sup>ii</sup> *Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495

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## REMEDIES / COURT PROCEDURE

### ENFORCING JUDGMENT AGAINST GOVERNMENT

Has it ever occurred to you that the government may not make payment of judgment sum as required under a judgment obtained against the government? What is the remedy available to the aggrieved party? That essentially was the issue faced by the Federal Court in the case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*<sup>i</sup>.

The respondent in that case had obtained a monetary judgment at the High Court against the state government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s 33(1) of the Government Proceedings Act 1956 (the GPA).

Despite such certificate, the state government of Sabah still failed to honour its statutory duty<sup>ii</sup> to make payment, as a result of which the respondent filed an application for judicial review for an order of mandamus against the Minister of Finance, Government of Sabah, to compel payment of the judgment sum in accordance with the said certificate. An order of mandamus is a command issued by the court to an authority to perform a public duty placed upon it by law.

The respondent has to resort to such remedy as the GPA and the Rules of the High Court expressly prohibit ordinary execution or attachment or process in the nature of attachment to be issued for enforcing payment

by the government of any judgment sum or costs.

The Federal Court relied upon the provisions in the Courts of Judicature Act 1964<sup>iii</sup> to hold that mandamus may be issued against the Minister of Finance, Government of Sabah whose failure to pay the judgment sum had deprived the respondent of his property, contrary to the law. Based on the facts, the Federal Court found no excuse for the appellant not to comply with the certificate issued under s 33(3) of the GPA and consequently, issued an order of mandamus against the appellant.

The decision is a welcome one, so as to send a strong message to the government that our courts would not simply allow the government to flout the law and that government ought to act with honour and responsibility, unlike the instant case, where the state government concerned clearly demonstrated its indifferent attitude and lack of respect for the certificate, which in ordinary case would have been sufficient to obtain payment from the government.

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<sup>i</sup> [2008] 4 MLJ 641, [2008] 5 AMR 1

<sup>ii</sup> as imposed by s 33(3) of the GPA.

<sup>iii</sup> s 25 read with paragraph 1 of the Schedule to the Courts of Judicature Act 1964.

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### TRUST

#### FAMILY FEUD OVER PROPERTIES

In yet another family feud, a son's claim for two properties which were registered under his deceased mother's name was dismissed by both the High Court and Court of Appeal.

In *Choong Kwee Sang v Choong Kwee Keong (sebagai wasi bagi harta pesaka Chan Fook Lin, si mati)*<sup>i</sup>, two properties in Johor Bharu in Jalan Balau and Jalan Serigala were purchased in the late 1970s for RM74,000.00 and RM84,000 respectively.

The appellant (the son) claimed that he had paid for the properties and his deceased mother held them on resulting trust for him as the beneficial and equitable owner. He claimed that his savings enabled him to purchase a house on Jalan Gelam in 1972 for RM38,000 and when the Jalan Gelam house was sold in 1978 for RM61,000, he was able to

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utilize the proceeds for the purchase of the two properties.

However, evidence adduced did not support the appellant's case. It was found that based on his income tax assessment of 1969-1972, his total net earning for that period was RM9,274.91. He could not have purchased the Jalan Gelam house for RM38,000 in 1972.

For year 1973-1978, his income tax returns indicated total net earning of RM88,023.42. Taking into account his financial commitments like deduction for personal and family expenses, car loans and statutory contributions, even if there were savings, it would be a Herculean task for the appellant to have come up with the purchase price for the two properties.

On the contrary, there was evidence that the appellant's father had purchased the properties, paid for the same during his lifetime and after he died, the appellant's mother continued to pay for them.

Quite apart from his failure to establish he had the means to purchase the two properties, the appellant had also failed to show the plausibility of a resulting trust in his favour when the two properties were registered in the name of his deceased mother.

To succeed in his claim on resulting trust, he must prove that not only he paid for the two properties (which was held against him) with his own money, the properties were registered in the deceased's name not as a gift

per se to her but as his trustee on a resulting trust<sup>i</sup>.

The existence of a resulting trust is thus premised on the presumed intention of the parties to a particular type of transaction at the time of the transaction. In the instant case, at the time of the purchase, there was not an implied, let alone an express certainty that it was upon the appellant that the beneficial interest lie.

The only clear evidence was that the purchases were made by the appellant's father which evidence had not been rebutted.

There is a valuable lesson to be learnt from this decision --- document your trust properly in writing to avoid legal entanglement in future !

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<sup>i</sup> [2008] 5 AMR 394

<sup>ii</sup> For the benefit of our readers, a resulting trust arises when one person (the settlor) confers title to property on another person but the settlor retains the beneficial ownership of the property, in whole or in part. The legal interest vests in the title holder (the trustee) whereas the beneficial interest results to the settlor.

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Singapore High Court decision in *Re Reliance National Asia Re Pte Ltd* . Recently, this decision on appeal was over-ruled by the Court of Appeal in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd*<sup>iii</sup>.

In a rather lengthy judgment, the Court resolved the question of the court's jurisdiction to extend time to a scheme creditor to file its proof of debt after the court had sanctioned the scheme of arrangement pursuant to S.210 of the Singapore Companies Act (Cap 50, 2006 Rev Ed)<sup>iii</sup> after giving due consideration to the established principles relating to and the nature of schemes of arrangement, to the legislative history and purpose of the said provision and cases in Australia and United

## EPILOGUE

### 1. OVER-RULING OF DECISION ON AMENDMENT TO SCHEME OF ARRANGEMENT

In issue 1 of 2008, under the heading "Ambit of Restraining Order and Amendments to a Scheme of Arrangement", we featured the

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Kingdom on the respective provisions which were substantially similar.

The Court preferred the Australian approach as compared to the English approach which appeared to be unnecessarily strict and mechanical. The wordings in the relevant provisions envisaged that the courts ought to be allowed a more active participatory role in respect of schemes of arrangement. Adopting the Australian approach did not necessarily mean that clarity, certainty and finality would be sacrificed.

The English approach would invariably mean that once the court had approved a scheme of arrangement, it no longer had jurisdiction to grant an extension of time for a creditor to file its proof of debts regardless of the circumstances, save in cases of obvious mistakes in the document which set out the scheme or fraud.

This seemed intuitively restrictive as it was not difficult to envisage a situation where the failure to file a claim in time was not in any way attributable to the fault of the creditor and where allowing the creditor an extension of time did not prejudice any of the parties.

Further, the Court doubted whether an extension of time to file a proof of debt should be treated, as the High Court did, as a material alteration or amendment of the substance of a court-approved scheme. The Court treated such extension of time simply as a matter of procedure. Thus, the grant of an extension of time would not be detracting from the established principle that a court-approved scheme should not be altered in substance and an application for an extension of time after the court had approved a scheme would not be viewed as raising a late objection to the scheme that would jeopardize the certainty of the scheme's validity.

In considering whether to grant an extension of a deadline contained in a court-approved scheme, the overriding consideration was the prejudice---prejudice to the subject company, the other parties to the scheme as well as the party who sought the extension of time.

On the facts, no prejudice would be caused to the subject company or other

scheme creditors if the applicant's application was allowed, given that the scheme was a solvent one, the company had sufficient assets to pay all the scheme creditors including the applicant in full, the applicant was a creditor known to the company and the applicant was only two months late in filing its proof of debt.

On the other hand, the applicant would be left with virtually nothing if the extension was not granted. In the Court's view, although the applicant was certainly not blameless for its failure to file its proof of debt in time, this case was not one of patent oversight but rather an inadvertent oversight which ought to have been viewed with a measure of leniency. The Court thus allowed the extension of time pursuant to O 3 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

Readers are advised to bear this latest decision in mind when reading our earlier write-up (in issue 1 of 2008) on the High Court decision which is no longer the law.

## 2. A LESS COSTLY LESSON TO BANK

In issue 2 of 2006, we featured, under the heading "A Costly Lesson to Bank", the High Court decision in *Top-A Plastic Sdn Bhd & Ors v Bumiputra Commerce Bank Berhad*<sup>v</sup> in which the bank concerned was penalized heavily (to the tune of RM2.9 million) for wrongfully freezing its customer's account for seven banking days and dishonouring 14 cheques with remarks 'Frozen Accounts' and 'Refer to Drawer' upon being served with garnishee orders on the customer's account.

On appeal<sup>v</sup>, the Court of Appeal whilst affirming the finding of liability on breach of contract and torts, allowed the appeal partly with regard to quantum of damages.

There was no indication of the bank having acted with malicious intent. It merely acted lackadaisically and hastily and took the easy way of handling the matter when it relied, on its belief albeit mistakenly, that the garnishee orders were unlimited which justified freezing of all accounts.

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This was not sufficient for an award of exemplary damages as there was no evidence that the bank's act was calculated to make a profit for itself, one of the three categories of cases in which such damages may arise. The award of special damages was also struck down for lack of proof.

The court reduced the general damages to RM500,000.00, which represents

a saving of RM2.4 million to the bank --- undoubtedly a huge reprieve to the bank !

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

<sup>ii</sup> [2008] 3 SLR 121

<sup>iii</sup> The equivalent of S.176 of the Malaysian Companies Act 1965

<sup>iv</sup> [2006] 3 CLJ 460

<sup>v</sup> *Bumiputra-Commerce Bank Berhad v Top-A Plastic Sdn Bhd* [2008] 5 AMR 225

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