

THE UPDATE



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BANKING / CONTRACT

IRREGULAR USE OF CUSTOMER'S FACILITY TO TRADE IN SHARES

In *RHB Bank Bhd v Ujang bin Che Daud*, the plaintiff (in whom the relevant account maintained in Rakyat Merchant Bankers Bhd was vested) sued the defendant to recover debts arising from a share financing facility granted to the defendant. Having made some finding of facts based on the evidence adduced at the trial, the trial judge faced the unenviable task to weigh both findings to arrive at a seemingly just decision.

On one hand, in agreeing with the plaintiff, the judge held that the defendant did sign the share financing facility agreement, he did pre-sign draw-down notices (in blank) to authorize an employee of the plaintiff (who was called as a witness) to trade on his behalf using his facility and crossed cheques made out in the defendant's name arising from trading profits had been encashed.

On the other hand, the judge accepted the defendant's evidence that he did not ever give any instruction to any of the plaintiff's employees to trade any shares. The plaintiff could not produce any contract notes or any statement of accounts to corroborate the trades. No account in the name of the defendant was opened in any of the broking houses through which the trades were carried out.

The judge framed the pivotal issue as: whether the defendant by signing the requisite share financing facility agreement, pre-signing the blank draw-down notices and possibly accepting profits arising from the trades, did authorize expressly or implicitly the use of his facility by third parties for the

conduct of those trades? If the answer were affirmative, then the defendant would be liable for the losses arising thereby.

Notwithstanding the judge's remark that the defendant did in fact suspect or was even cognizant that his share financing facility was being utilized by officers of the plaintiff for the purchase and sale of shares, the judge held that on the totality of the evidence, the plaintiff had not proved that defendant did in fact give direct orders to the plaintiff's officers to execute the trades utilizing his facility or that he had given express and precise authorization.

The judge went on to hold that the plaintiff's employees were complicit in utilizing the defendant's share financing facility (through the use of the pre-signed draw-down notices) for the trading of shares with the defendant's reluctant or tacit consent. While the defendant had not proved fraud, the entirety of evidence showed that there were serious irregularities in the conduct of the share financing facility. The singular absence of any concrete evidence to show that the defendant participated or acquiesced fully to the trades that were undertaken by the plaintiff's employees rendered the plaintiff's claim in doubt resulting in the judge having no choice but to dismiss the claim with costs.

ⁱ [2009] 9 MLJ 21

CONTRACT

DEVELOPER'S CONSENT NOT REQUIRED

In a typical financing of purchase of a property whose individual issue document of title has not been issued, P granted a loan to the purchasers to purchase the property which was developed by D. The security for the loan was

assignment by the purchasers of all their rights, title and interest in the sale and purchase agreement of the property (Original SPA) as well as the property to P. A power of attorney in favour of P was also executed by the purchasers. The purchasers subsequently defaulted in their loan repayment. P terminated the loan facility and disposed of the property by public auction. The auction sale was to be completed by assignment of the Original SPA and the property from P to the successful bidder (Successful Bidder). However, D refused the Successful Bidder's request for consent to the assignment on the ground that the service and maintenance charges of the property remained

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outstanding and would only grant the consent if all the outstanding charges were paid.

On the above set of facts, the High Court was called upon to decide on P's claim for various declaratory reliefs in relation to its rights as an assignee and the defendant's counterclaim for the outstanding charges in the case of *Hong Leong Bank Berhad v Sum-Projects (Brothers) Sdn Bhd*.

The High Court pointed out the pertinent facts that the assignment from the purchasers to P was only the full and entire benefit of the SPA together with all their rights, title and interests therein but not the purchasers' liabilities or obligations thereunder; that the defendants' consent to the assignment was unequivocal and without any qualifications; that P proceeded to execute a deed of assignment in favour of the Successful Bidder and that D refused to acknowledge the assignment on the basis that D's consent was required.

In the Original SPA, there was a prohibition against assignment of the SPA without D (the developer)'s consent. The learned Judicial Commissioner however held that the requirement to obtain D's consent was an obligation under clause 9 of the Original SPA. Being an obligation, it had not been assigned to or assumed by P. On this basis, the Court held that D's consent was not required for P to assign to the Successful Bidder all rights, title and interest in the Original SPA and to the property.

The deed of assignment from the purchasers to P was an equitable mortgage. In the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of the rights to land, the court would recognize the contractual rights as determined between the partiesⁱⁱ. Likewise, there was no statutory provision or common law requiring D's consent to realize its security, hence P(a lender) should not be required to obtain D's consent before enforcing P's power of sale under the deed of assignment.

In order for the auction sale to bind D, P must execute a deed of assignment in favour of the Successful Bidder and notice of assignment must be given to D. D would be bound by the assignment as

soon as notice in writing of the assignment is given to D by P.

As stated above, P took the benefits without burdens of the Original SPA. Thus, P was not bound by any liability or obligation arising under the Original SPA, including payment of the outstanding charges. D ought to recover the arrears from the purchasers.

As an equitable mortgagee, P was a 'secured' creditor and enjoyed priority to the proceeds of sale of the property ahead of other creditors and D has no right to make any prior claim to the proceeds of sale of the property. P or the Successful Bidder (being the person taking an assignment from P) would not be liable to pay the charges incurred by the purchasers. Merely because P through its then solicitors had enquired from D concerning the outstanding service charges owed by the purchasers did not alter the legal position; such enquiry did not create any equity where none existed in law before.

The court therefore allowed P's claims and dismissed D's counterclaim with costs.

ⁱ [2009] 6 AMR 568

ⁱⁱ *Phileoallied Bank (M) Bhd v Bupinder Singh* [2002] 2 CLJ 621. See also *Chuah Eng Khong v Malayan Banking Bhd* [1999] 2 CLJ 917



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BANK LOST CREDIT CARD DISPUTE

In what could be regarded as a landmark decision in Malaysia, the High Court in *Diana Chee Yun Hsai v Citibank Berhad*ⁱ had ruled that credit card issuer was not allowed to contract out of the provisions of the Credit Card Guidelinesⁱⁱ issued by Bank Negara Malaysia (the BNM Guidelines). The relevant provision in issue is pertaining to the extent of liability that a credit card holder faces for unauthorized use of the credit card that was lost.

In that case, the applicant upon alert by another credit card issuer discovered that her Citibank credit card was missing and immediately advised the respondent (ie. Citibank) of the theft on the same day and lodged a police report the next day on the loss of both credit cards. The applicant was informed by the respondent that she would have to bear an amount of RM1,859.01 being the charges incurred by the unauthorized use of her Citibank credit card on the day before her discovery. The applicant challenged such deduction and relied on the BNM Guidelines. The relevant clause on liability for lost or stolen credit card read :-

“The cardholder’s maximum liability for unauthorized transactions as a consequence of a lost or stolen credit card shall be confined to a limit specified by the issuer of credit cards, which shall not exceed RM250, provided the cardholder has not acted fraudulently or has not failed to inform the issuer of credit card as soon as reasonably practicable after having found that his credit card is lost or stolen.”

There was no evidence that the applicant had acted fraudulently or had failed to inform the respondent as soon as reasonably practicable. Thus, the applicant contended that her maximum liability was RM250.00.

However, the respondent relied on terms and conditions in the credit card agreement which contained some modifications to the BNM Guidelines. It was contended that under the relevant clause in the credit card agreement, the limit of liability of RM250 was only for transactions effected for a period of one hour prior to the reporting of the lost card and thus, the applicant could still be

charged for any transaction after the credit card had gone missing.ⁱⁱⁱ

The learned High Court judge disagreed with the respondent. He held that the “one hour prior to the reporting of the lost card” clause was not only unreasonable but was contrary to the BNM Guidelines. The guidelines have the force of law. The respondent could not have the discretion, despite having it so written in the agreement, to circumvent the BNM Guidelines, with a view to limiting its liability. The respondent had therefore contravened the law and public policy as enunciated in the Payments Systems Act 2003 read together with the BNM Guidelines.

The applicant succeeded in obtaining a declaration that the terms and conditions of respondent’s credit card relied upon to deduct the said sum of RM1,859.01 from the applicant’s account were contrary to the BNM Guidelines and were hence illegal and void and such wrongfully debited charges be reversed forthwith.

ⁱ [2009] 5 AMR647

ⁱⁱ BNM/RH/GL-014-01 which was issued pursuant to s 70 of the Payment Systems Act 2003 (Act 627).

ⁱⁱⁱ The entire clause was not stated in the grounds of judgment. Based on the terms appearing at the back of the statement of account of Citibank credit cards, the relevant part of the clause concerned reads: “...all charges arising from any transactions effected through the use of your Card whether authorized or otherwise... shall be deemed to have been made by you and you shall be liable for all such charges...until such time you shall have reported any loss, theft or unauthorized use of your Card promptly to us. At our absolute discretion, we may resolve that your liability be limited to RM250 (or such amounts as we may determine from time to time) in respect of only transactions effected through the use of your card for period of one(1) hour prior to you reporting to us the loss or theft or unauthorized use of your Card on proof that you had in good faith exercised reasonable care and diligence to prevent such loss or theft or unauthorized use of your Card to us.”

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CONTRACT

NO WAIVER OF FIC'S APPROVAL

In *Chase Perdana Bhd v Md Afendi bin Hamdan*ⁱ, the appellant by a letter of undertaking agreed to pay RM5m for the respondent's shares in JK Co. (which would allow the appellant to indirectly own a securities broking firm) and paid a deposit of RM1m with the balance RM4m to be paid upon the approval of the transaction by the Ministry of Finance (MOF) and the Foreign Investment Committee (FIC). The MOF and FIC however refused to give approval. On a claim by the appellant for the refund of the deposit, the respondent contended that an oral agreement had been reached between the parties that varied the terms of the letter of undertaking and to waive the conditions set by the FIC and MOF. The respondent's counterclaim for the remaining RM4m was allowed by the High Court and the Court of Appeal.

The Federal Court however over-turned the decision. The apex court held that where a written agreement provides, whether as a requirement of law or policy, that approval of the FIC made under the FIC Guidelines and the approval of the MOF under a legislation/statute such as the then Securities Industry Act 1983 (SIA) or the present Capital Markets Services Act 2007, be obtained for the transfer of shares in a company, parties CANNOT by conduct waive such requirement. Such a waiver is contrary to public policy under s.24 of the Contracts Act 1950 in view of the prohibition of the transfer by the FIC or the overseeing of the shareholding by the MOF in stock broking firms under the then SIA.

CONTRACT

"AS IS WHERE IS"

The phrase 'as is where is' basis was the focus in the High Court's decision in *Hadland Arthur John & Anor v Audra Elaine Gomez*^j. In that case, P entered into a sale and purchase agreement (SPA) to purchase a condominium from D. Clause 11.2 of the SPA specifically provided that the purchase of the property was on an 'as is where is' basis and excluded any warranty as to the state and condition

Whilst the Federal Court upheld the finding of the existence of an oral agreement as contended which was in contravention of the written agreement (ie. the letter of undertaking), the court refused to recognize it as failing within under the exception (b) in s.92 of the Evidence Act 1950 as 'a matter on which the original agreement is silent and which is not inconsistent with the terms.'ⁱⁱ The letter of undertaking required that the relevant authorities' approvals be obtained whilst the so called oral agreement was supposed to have waived this condition. The oral agreement was thus in direct contradiction to the terms appearing in the letter of undertaking and was not a term which the original document was silent. Since the exception (b) was inapplicable, the terms in the letter of undertaking continued to be binding.

The second part of this decision carries the message that once parties have entered into a written agreement, any subsequent variation or change to the terms must be reduced into writing as well and parties must not be contented with a verbal agreement to effect such variation or change.

ⁱ [2009] 6 MLJ 783

ⁱⁱ S.91 and 92 of the Evidence Act 1950 embodies the common law rule that where a contract has been reduced into writing, it is the writing that must be looked at for the entire terms made between the parties subject to the six provisos (exceptions) in s.92(a) to (f) of the Act.

of the property and its fitness for habitation. However, another clause (12) dealt with either party's right to rescind the SPA if before its completion, the property was damaged or destroyed by any cause beyond reasonable control of the parties and became unfit for occupation or use. Pending completion of the SPA, P and D entered into a tenancy agreement of the property. As it turned out, the plaster ceiling in the master bedroom of the property collapsed and hairline cracks appeared in the ceilings of the other bedrooms, all of which resulted in P moving out of the property. P sought to terminate the SPA on the ground that the property was unfit for occupation or use.

Evidence was led that the cracks were not structural cracks but cracks in the cement sand

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plaster as certified by the original civil and structural consultants. The structural integrity of the ceiling slab remained uncompromised and was fit for its intended purpose. The ceilings were eventually rectified with the installation of fibrous plaster ceilings.

The High Court held that the maxim '*caveat emptor*'ⁱⁱ applied for the purchase of a completed house. There was no implied warranty that it was fit for habitation. Any such warranty must be expressly stipulated in the sale and purchase agreement. Clause 12 must be read together with clause 11.2 to arrive at a consistent and harmonious interpretation of the SPA. To achieve a consistent interpretation, clause 12 would apply in the event the property was damaged or destroyed by some external factor or cause and not some defect in the property itself. The latter situation, as in the instant case, would be insufficient to rescind the SPA. Furthermore, the defect in the instant case was only temporary and not sufficiently permanent. The property was certainly unsafe for a certain time but it was subsequently fit for occupation after the plaster ceilings were replaced and the property restored. P was therefore not entitled to rescind the SPA by

virtue of clause 12. D was entitled to forfeit the 10% deposit.

All is not lost for P, however. Though the property was let to P on a 'as is where is' basis, when the property became unsafe for occupation, there was a fundamental breach of the tenancy agreement as P could no longer use the property as tenants, which use was the primary object of the tenancy agreement. P was therefore entitled to vacate the property and claim for alternative accommodation and packing and storage charges.

ⁱ[2009] 8 AMR 580

ⁱⁱIt means 'let the buyer beware'. At common law, when a buyer of goods had required no warranty he took the risk of quality upon himself, and had no remedy if he had chosen to rely on the bare representation of the vendor, unless he could show that representation to have been fraudulent.

actively involved in businesses which may conflict with that of the company would also cover his wife or immediate family members. The claimant offered to have his wife withdraw from the joint-venture company.

The Industrial Court however held that the claimant in his managerial position was guilty of misconduct given the potential or actual mischief that could be caused to the company by being linked to te competitor entity through his wife. It would be far-fetched to believe that he could have been blind to the knowledge of the possibility of such mischief. It was also immaterial whether the company had indeed suffered financial loss, for actual losses need not be proved conclusively in conflict of interest situation but possible detriment or loss to the employer was sufficient. The claimant's dismissal was thus held to be with just cause or excuse.

DIGEST OF EMPLOYMENT LAW CASES

1. CONFLICT OF INTERESTS VIA WIFE'S BUSINESS

The claimant in *Low Ah Heng v Cartrade Sdn Bhd*ⁱ was engaged as the Ipoh branch manager of the company. It was later discovered that he had been indirectly engaged and associated with business activity which was in competition with the nature of business carried on by the company through ownership of his wife in a joint-venture company set up a year after his employment with the company that provided car and air-conditioner repair service mainly for BMW cars. The company was the sole importer of and dealer in BMW motor vehicles and as part of its business had a showroom and a service workshop in Ipoh.

The claimant's defence was that he did not know that the prohibition of an employee from being

2. LIFO NOT MANDATORY

LIFO is last-in-first-out, the principle often misunderstood as mandatory to be followed in undertaking a retrenchment exercise. Well, that misconception was cleared to a certain extent in the Industrial Court case of *Vijjan Paramasivam & Ors v Sun Media Corporation Sdn Bhd*ⁱⁱ.

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In that case, the respondent company published the daily called The Sun. Faced with deteriorating business conditions and huge accumulating losses, the company carried out a reorganization and downsizing exercise. The claimants were rendered redundant and were retrenched. One of the grounds relied upon was that LIFO principle had not been adhered to.

The Industrial Court Chairman however pointed out that the Code of Conduct for Industrial Harmony only stipulated that (a) the need for the efficient operation of the establishment or undertaking and (b) the ability, experience, skill and occupational qualifications of individual workers required by the establishment or undertaking, were objective criteria relevant to the decision of the employer.

The court went on to find that in line with the requirement of the new business model, ie. the no-frills newspaper, the company had conducted its selection of employees to be retrenched with due regard for the 'efficient operation of the establishment or undertaking'. There was thus compliance with the Code. In any event, the company had also looked at functionality and seniority and upon scrutiny of the evidence, it was found that LIFO had in fact been complied with.

3. DON'T UNILATERALLY POTONG GAJI !

The company in *Lim Lee Chang v China Airlines*ⁱⁱⁱ unilaterally deducted from the claimant's salary the amount of overpayment of EPF, SOCSO and Income Tax (statutory contributions) for another employee. The company merely instructed the claimant to with-hold salary cheques for the said employee but did not instruct the claimant (whose responsibilities included processing of staff salaries for the company) not to make the statutory contributions or deductions.

The salary cheques ultimately were not given to the said employee who did not come back to work. Upon finding out from the authorities that the overpayments could not be refunded, the company did the deduction despite protests from the claimant. The Industrial Court ruled in favour of the claimant in her constructive dismissal claim. There was no provision in the contract of employment for a deduction to be made to her salary to reimburse the company for the losses it had incurred.

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Such deduction of the claimant's salary was a breach of the implied term of contract that an employer would not deduct an employee's salary without his consent. The breach was serious and fundamental and destroyed the relationship of trust and confidence between the company and the claimant and the claimant was entitled to claim for constructive dismissal.

4. ABANDONMENT OF DOMESTIC INQUIRY

In *Wong Sie Ping v Bata marketing Sdn Bhd*^v, the company issued two show cause letters to the claimant for allegedly making unwarranted and inappropriate remarks against the company management and on his refusal to abide by the transfer order.

The claimant's responses were not accepted by the company which went on to schedule an internal inquiry to answer charges of misconduct proffered against him. The claimant was also suspended from his duties. However, before the inquiry was conducted, the claimant was dismissed. The court came to the finding that it was the company's own conclusion that the claimant had not been interested in giving himself an opportunity to explain his actions at the inquiry, due to the fact that he had refused to go on suspension.

The suspension and the need to hold as domestic inquiry were not linked to each other and had to be viewed independently. The act of holding the inquiry had reflected fairness on the part of the employer in dealing with the claimant. The company could not deny the claimant's right to natural justice (right to be heard). The court did not view favourably the company's abandonment of the inquiry process and this fact was ruled against the company.

5. NO VERBAL RESIGNATION

The issue in *Dynamic telecommunication v Yap Kem Fung*^v was whether the claimant had verbally resigned on his own accord from the respondent's employment. The respondent asserted that the claimant told the Site Manager (to whom the claimant as Supervisor reported) that he wanted to stop working.

The claimant denied and testified that he told his superior that he would be on leave for a certain period of time due to medical examination

and he was surprised to receive a letter of termination stating that he had verbally resigned. The Industrial Court held that resignation could only be accepted by the appointing authority and not any subordinate authority.

The person to whom an employee is only required to report for duty (in this case, the Site Manager) and who is a subordinate authority has no power to accept resignation. It would have been desirable for the respondent to have gotten a decision of oral resignation expressly recorded in writing. In the circumstances, the irresistible

inference was the claimant had not tendered his resignation.

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- ⁱ [2009] 4 ILR 295
 - ⁱⁱ [2009] 4 ILR 372
 - ⁱⁱⁱ [2009] 4 ILR 461
 - ^{iv} [2009] 4 ILR 485
 - ^v [2009] 4 ILR 629

Huadian, a manufacturer of medium voltage circuit breakers as General Manager and later became its Managing Director. The plaintiffs sued the defendant for breach of fiduciary duties.

EMPLOYMENT LAW

SENIOR EMPLOYEE OWING FIDUCIARY DUTY

An employment relationship could give rise to fiduciary duties. A senior employee was held to owe the same fiduciary duties to his employer as a director of that employer would in the Singapore High Court decision of *ABB Holdings Pte Ltd v Sher Hock Guan Charles*¹.

In that case, the defendant worked for various companies in the ABB Group which was a worldwide group of companies manufacturing, marketing and selling low, medium and high voltage circuit breakers.

The defendant held various management positions, primarily as Director of the 2nd plaintiff and Vice-President of the 3rd plaintiff. While still in the employ of the 2nd and 3rd plaintiffs, the defendant exchanged e-mail correspondence with one Mr.L a former ABB Group employee in relation to enquiries by a Chinese body, Xian High Voltage Apparatus Research Institute (XIHARI) regarding whether Mr.L would act as XIHARI's technical advisor in R&D projects relating to the development of a new generation of medium voltage circuit breakers.

After leaving the 2nd and 3rd plaintiffs, the defendant joined a company in China called

The 2nd and 3rd plaintiffs succeeded in their claim. By virtue of being in the senior management for both companies, the defendant owed fiduciary duties to them. In undertaking a commission from XIHARI to communicate with Mr.L with a view to engaging the latter's services as a consultant for XIHARI, the defendant acted in breach of his fiduciary duties as the purpose of the communications was to assist XIHARI to enlist assistance of an expert in relation to the development of products which posed a potential threat to the plaintiffs' products.

The defendant could not dismiss the competitive intentions of XIHARI as being irrelevant to the 2nd and 3rd plaintiffs. At the least the information was of concern to these entities and should have been passed on to them whether or not they would have been able to take any steps to reduce the potential competition. In failing to inform the 2nd and 3rd plaintiffs of XIHARI's intention to develop and market a new generation of circuit breakers, the defendant was in breach of his fiduciary duty to them and of his duty of fidelity to the 3rd plaintiff.

¹[2009] 4 SLR 111

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EQUITY

EXPECTATION OF INHERITING ESTATE

C & P were cousins. Since 1976, C had been working on P's farm for 30 years without pay. During the eighties, C came to hope that he might inherit the farm (S Farm); his hope became an expectation in 1990 when P handed him a bonus notice on two life insurance policies and said 'that's for my death duties'.

That remark and conduct on P's part strongly encouraged C and caused him to decide to remain and continue his considerable unpaid help at the S Farm rather than move away to pursue one of the other opportunities which were then available to him and which he had been considering. In 1997, P made a will leaving pecuniary legacies of certain amount and the whole of his residuary estate to C.

A year later, P revoked the will. P dies *intestate* in 2005. Between 1990 and 2005 P had sold one of the farm fields and used part of the proceeds to buy more agricultural land. C brought a claim against P's personal representatives on the basis that C had the benefit of a proprietary estoppel, that is to say, by reason of the assurance and reliance, P's estate was estopped from denying that C had acquired the beneficial interest in the S Farm.

The above were the facts in a nutshell in the House of Lord's decision of *Thorne v Major*¹. The trial judge ruled in favour of C, holding that P's handing over of the bonus notice and P's remarks on death duties showed P's intent to indicate to C that C would be P's successor to S Farm upon P's death and that it was reasonable for C to understand to that effect and rely on them. Such and other remarks encouraged the expectation which C had formed that he would be P's successor and encouraged C to continue with helping P. The Court of Appeal disagreed with the trial judge.

On final appeal by C to the House of Lords, two main issues were canvassed, namely the character or quality of the representation or

assurance made to C and whether, if the other elements for proprietary estoppel were established, the claim would fail if the land to which the assurance related had been inadequately identified or undergone a change during the period between the giving of the assurance and its eventual repudiation. The three main elements requisite for a claim based on proprietary estoppel are: 1st, a sufficiently clear and unequivocal representation made or assurance given to the claimant; 2nd, reasonable reliance by the claimant on the representation or assurance; and 3rd, some detriment, sufficiently substantial, incurred by the claimant as a consequence of that reliance.

On the first issue, the assurance had to have been a promise which one might reasonably expect to be relied on by the person to whom it had been made. Proprietary estoppel looked backwards from the moment when the promise fell due to be performed and asked whether, in the circumstances which had actually happened, it would be unconscionable for the promise not to be kept. On the facts, the trial judge had found that P's assurances, objectively assessed, had been intended to be taken seriously and to be relied on, and there was no sufficient reason for the Court of Appeal to reverse that finding.

On the second issue, whilst the assurances given to C (expressly, impliedly, or tacitly by standing-by) should relate to identified property owned or about to be owned by P, both C and P knew that the extent of the S Farm was liable to fluctuate; there was no reason to doubt that their common understanding was that P's assurances related to whatever the farm consisted of at P's death.

The appeal was therefore allowed and the trial judge's order was restored.

¹ [2009] 3 All ER 945

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REMEDIES

LOSS OF RESERVED SEATS ON AIRPLANE --- DAMAGES RECOVERABLE !

The respondents/plaintiffs had bought six return flight tickets of the appellant/defendant for a flight from Malaysia to Melbourne. They specifically reserved seats at the front of the aircraft and paid a premium for such reservation because they were sensitive to the engine noise. However, on the day of the flight, they were allocated seats at the back of the aircraft. Despite protests and complaints, the respondents did not get back their reserved seats. They were indeed shoved around the airport and misled into accepting the boarding passes for the back seats. Their flight turned out to be unpleasant and the ill effects of their bad experience spilled over to their holidays. The respondents therefore claimed for damages for the distress, discomfort and for the spoilt holidays on the ground of breach of contract.

The above were the facts in *Malaysian Airline System Bhd v Tan Chin Siong & Ors*ⁱ. The trial was held in the Sessions Court which ruled in favour of the respondents and awarded them RM15,000. On appeal, the High Court agreed with the Sessions Court's judgment. Whilst it is settled law that normally, no damages will be awarded for injury to the plaintiff's feelings or for his mental distress, anguish, annoyance, loss of reputation or social discredit caused by a breach of contract, there is an exception in the case of the provision of a holiday of the advertised standard or some other form of entertainment or enjoyment. The court

applied such principle and held that the damage suffered by the respondents arose directly from the failure of the appellant to honour their contract to reserve the seats booked by the respondents. The court refused to disturb the Sessions Court's award of RM15,000 for the embarrassment, inconvenience, mental and physical distress, loss of refreshing and memorable holiday with family suffered by the respondents.

Airline operator will be wise to bear in mind the parting words of the judge in the case as follows:-

"...when we buy a plane ticket, that ticket is technically a contract between us and the airline. The airline has an obligation to get us and our luggage in as timely and as safely as possible to our destination. We, as the purchaser, also have certain rights, as for being guaranteed to be given our reserved seats, being protected in the event of a flight delay or cancellation, or in the event of the airline losing our luggage."

ⁱ [2009] 9 CLJ 435

ROAD TRAFFIC

BLACKLISTING FOR OUTSTANDING TRAFFIC SUMMONS

Scenario: Mr.A goes to apply a motor vehicle licence for vehicle X. The Road Transport Department (RTD) refuses to issue the licence because Mr.A purportedly has an outstanding traffic police summons in respect of another vehicle Y. For this reason, Mr.A's name and identity card number appear on the computer systems of RTD as a person with an outstanding summons, hence his name is blacklisted.

The above scenario is familiar to most of us. The question is whether RTD is entitled to do so. The answer appears to be "No" following the High Court decision in *Leonard Lim Yaw Chaing v Director of Jabatan Pengangkutan Jalan Negeri Sarawak & Anor*. In that case the brief facts of which are similar those depicted in the above scenario, it was the finding of the court that the blacklisting was apparently automatic and RTD never conducted an inquiry before blacklisting the applicant (A). The applicant was also not informed of the blacklisting and only learnt about it when he went to apply for renewal of his motor vehicle licence for vehicle (X in the above scenario).

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The provision relied upon by RTD [s.17(1) of the Road Transport Act (RTA)1987] reads:

“A licensed registrar shall not be required to grant any motor vehicle licence for which application is made unless...(d) he is satisfied that the applicant has no outstanding matter or case with the RTD or the Police relating to any contravention of or offence against this Act or the Commercial Vehicles Licensing Board Act 1987.”

The High Court gave a strict and narrow interpretation of the wordings “(a) matter or case with the RTD or the Police relating to any contravention of or offence against this Act or the Commercial Vehicles Licensing Board Act 1987” (the Wordings). A summons being a written complaint that the person has allegedly committed an offence is not a matter or case pending and relating to the contravention of the RTA 1987 or the CVLB Act 1987. The Wordings apply only to a matter or case that has gone to court and which the applicant has failed to appear to answer the charge on the offence; and also (technically) to a matter or case under investigation by RTD or the police and pending the outcome of such investigation.

In the instant case, there is no evidence that the licensed registrar had satisfied himself that A had been charged in a court of law for the offence stated in the summons or whether the offence alleged had been proven in the court of law against A. Neither did the registrar conduct any inquiry to determine the veracity of the summons.

The fact that the Traffic Police Department's computer is linked to the RTD's computer so that the information keyed in on summons issued by police

to traffic offenders will appear on the RTD's computer does not justify the RTD to merely rely upon such information to blacklist an alleged offender without giving him an opportunity to be heard. The RTD's action is tantamount to compelling A to admit to the alleged offence and pay the compound. The submissions of the counsel for RTD that s.17(1)(d) was aimed at ensuring a person issued with a traffic summons pay the summons was rejected by the court as being affront to the basic principle of criminal law that a person was presumed innocent until proven guilty. The RTD's decision was quashed by the court and damages were ordered to be assessed on the basis of renting a vehicle for the period A was deprived of the use of his motor vehicle.

Interestingly, a few scenarios posed by the learned High Court Judge will serve as a good guide to road users. The mere fact that a person has an outstanding traffic summons, without more, does not place him within the ambit of s.17(1)(d) of RTA. If however the offence alleged in the summons has been framed as a charge against the person and it is called up in court and the person does not appear to answer the charge, then the subject matter of the summons can be regarded as a matter or case within the Wordings. On the other hand, if the person turns up and claims trial, it is also not proper to regard it as a matter or case within the Wordings as it has yet to be dealt with by the court.

ⁱ [2009] 4 ILR 250

LEGISLATION UPDATE

RE-IMPOSITION OF REAL PROPERTY GAINS TAX

On 23.10.2009, the Government announced in Budget 2010 Speech that real property gains tax (RPGT) would be re-imposedⁱ from 1.1.2010. RPGT

is imposed on gains made from the disposal of real property or shares in real property companies. The tax rate for chargeable gains was to be a flat rate of 5% on the gains regardless the duration for which the property was held. However, on 23.12.2009, the Prime Minister announced that RPGT would only be payable on properties disposed within five (5) years from the date of purchase. The Treasury has subsequently on their website confirmed that the exemption on chargeable gains from the disposal of properties held for more than 5 years was applicable to all types of real property including shares in real property companies disposed by all categories of

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property owners who were individuals (citizens, permanent residents and non-citizens), companies as well as other property owners.

We wish to highlight several other features of the new provisions introduced via the Finance Bill 2009 and the Real Property Gains Tax (Exemption) Order 2009.

(1) The tax is to be collected by way of withholding of 2% of the purchase consideration (Retention Sum) by the purchaser. The purchaser shall remit the Retention Sum to the Inland Revenue Board (IRB) within 60 days of the disposal (ie. the date of the sale and purchase agreement (SPA) or in the case of conditional agreement, the date the SPA becomes unconditional). This obligation applies irrespective whether there is in fact a gain by the vendor in the transaction.

(2) Failure to retain the Retention Sum renders the purchaser liable for the same as a debt due to IRB, apart from a penalty of 10% on the Retention Sum.

(3) The time period for filling CKHT forms has also been extended to 60 days from the date of disposal.

(4) In the event of any refund of excess Retention Sum, the onus appears to fall on the vendor to seek such refund from IRB.

(5) The level of minimum exemption has been increased from RM5,000 to RM10,000 or 10% of the chargeable gains, whichever is higher.

(6) The amount of interest paid on capital employed to acquire the asset (eg. housing loans) has been excluded as an item in incidental costs. Thus, such amount is no longer deductible from the chargeable gain.

ⁱ For a period of about 2 ½ years from 1.4.2007 to 31.12.2009, the Government has allowed complete exemption of RPGT.

THE UPDATE is a quarterly law bulletin of TAY & HELEN WONG Law Practice which aims to highlight to the firm's clientele, business partners and friends contemporaneous development in law (particularly in principal areas of the firm's law practice) which might have an impact on their business dealings, operations or trade. The bulletin focuses primarily on case law development in the jurisdiction of Malaysia.

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