

THE UPDATE



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BANKING LAW

'BAI BITHAMAN AJIL AND 'BAI INAH CONTRACTS VALID

In our Law Update Special Issue 2 of 2008 (September), we featured the controversial High Court decision of *Arab-Malaysia Finance Berhad v Taman Ihsan Jaya Sdn Bhd & 2 Ors and a Third Party* (heard together with 11 other cases), which ruled that the Islamic financing facility based upon Al-Bai' Bithaman Ajil concept and 'Bai Inah as practiced in Malaysia was not syariah-compliant and illegal. This decision was generally perceived as impeding the growth of syariah-based banking transactions in the country.

We are pleased to bring to the attention of readers that on 31 March 2009, our Court of Appeal in *Bank Islam Malaysia Berhad v Ghazali Shamsuddin & 2 Others* had unanimously overturned the High Court decision and ruled that the Islamic financing contract Al-Bai Bithaman Ajil (BBA) as valid and bindingⁱ.

The Court of Appeal reiterated that a BBA contract was a sale transaction and must not be compared to a loan transaction. With this decision, certaintyⁱⁱⁱ has been restored by our appellate courts and until it is further challenged at the apex court

COMPANY LAW

DIRECTOR'S LIABILITY FOR INTENTION TO DEFRAUD CREDITORS

P Co. purchased machineries from K Co. at a time when P Co. had already ceased operations and become an insolvent company. About eight months later, P Co. sold the machineries to S Co. The selling price was however paid to the defendant who was the managing director of P Co. P Co. subsequently failed to pay the purchase price to K Co. resulting in a judgment entered against P Co. which was later wound up.

(Federal Court), the present legal position is that BBA contracts as generally practiced in Malaysia are valid and enforceable.

On the next day, the same panel ruled that 'Bai Inah contracts were valid in *Bank Kerjasama Rakyat Malaysia Berhad v Fadason Holdings Sdn Bhd*^v.

The court is expected to deliver a written judgment in due course.

ⁱ [2008] 5 MLJ 631

ⁱⁱ The Edge Financial Daily, April 2, 2009; New Straits Times, Biznews section at page B4, April 2, 2009

ⁱⁱⁱ There are contrary views from at least 3 different High Court judges on the issue of the validity of BBA.

^{iv} The Malaysian Reserve, April 7, 2009.

The appointed provisional liquidator then filed an action to claim against the defendant to replace the amount of the selling price on the ground that the defendant had demonstrated an intention to defraud creditors of P Co. within s. 304 of the Companies Act 1965 (the Act) as well as that he had acted in breach of his fiduciary duties imposed by s.132(1) of the Act.

The above were the essential facts of the case of *Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong*ⁱ. The High Court found that P Co. purchased the machineries when it had already ceased operations and the defendant knew that P Co. being insolvent had no funds to pay the outstanding purchase price to K Co. Thus, by later selling the machineries and paying the purchase price to himself, it was obvious that the defendant had the intention to fraudulently defraud K Co. The High Court rejected the defendant's contention that P Co. might discharge its liabilities in any order that it pleased and that when the only allegation was

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the bare fact of preferring one creditor over another, it was impossible to hold that such preference per se constituted fraud.

The case relied upon by the defendant only contained a bare fact of preferring one creditor over another, whereas in the instant case, there was a series of questionable interconnected transactions, namely the purchase of the machineries when P Co. was insolvent, the non-payment of the purchase price to K Co., the sale of machineries to S Co. and the proceeds from that sale being pocketed by the defendant. Further, the purported ratification by the shareholders of P Co. was a mere ploy to deflect the real intention of the whole exercise which was

COMPANY LAW

SHARE SWAPS CONSIDERED AS FINANCIAL ASSISTANCE?

Share swaps are the most common method of paying for an acquisition of a target company or in a merger exercise. But wait, what if a legal advisor now tells you that share swaps can amount to financial assistance?

As some of you may be aware, Section 67 of the Malaysian Companies Act 1965 provides for, *inter alia*, that “no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, **any financial assistance** for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company ...”.

Singapore also has an equivalent provision with regards to financial assistance in Section 76 of the Singapore Companies Act.

In the Singaporean Court of Appeal case of *Wu Yang Construction Group Ltd v Mao Yong Hui and another*ⁱ, a case which involved share swaps as consideration for an acquisition, the legal counsel for the appellant/plaintiff raised (amongst other arguments) an interesting argument, in that the issuance of shares by the acquiring company for the acquisition of the target company amounts to financial assistance! The case involved Wu Yang

calculated to benefit the defendant personally and could not therefore absolve the defendant from the breach. The defendant was held liable to replace the misapplied funds.

ⁱ[2009] 1 MLJ 723

Construction Group Ltd (“Wu Yang”) against several defendants, namely, (1) Zhejiang Jinyi Group Co. Ltd (“ZJL”), (2) Chen Jinyi (“CJY”), (3) Kingsea Limited (“Kingsea”), (4) Mao Yong Hui (“Mao”) and VGO Corporation Limited (“VGO”)”. The relationship between all the parties can be summarized as follows:

- Wu Yang and ZJL had business dealings with each other;
- CJY is the Managing Director and the controlling shareholder of ZJL;
- Chen is also the sole shareholder of Kingsea;
- Kingsea has a wholly owned subsidiary, called Spring Wave Ltd (“Spring Wave”);
- Spring Wave in turn has a few subsidiaries, two (2) of which are in China, HKFC and KSWDLC;
- VGO wanted to diversify into the food and beverage industry;
- Spring Wave through HKFC and KSWDLC was in the food and beverage industry;
- VGO entered into a sale and purchase agreement with Kingsea to acquire Spring Wave (“S&P”);
- The purchase consideration was RMB55m to be satisfied by the allotment to Kingsea of 134,705,882 new VGO shares of S\$0.01 each, credited as fully paid, at an issue price of S\$0.085 per share;

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- Completion was subject to Spring Wave's consolidated net asset value ("NAV") to be confirmed at RMB55m; and
- Mao was an "introducer" who with another individual introduced the deal to VGO.

Things began to get complicated when Kingsea could not fulfill some of its warranties in the S&P and furthermore, as a result of an audit, the NAV of Spring Wave was short of RMB4,404,000 from the original RMB55m. The two (2) warranties which were relevant to the case are as follows:

- (i) "concession warranty" – that an exclusive concession to extract spring water (valued at RMB5m) would be acquired by KSWDLC failing which Kingsea will pay RMB2.513m to HKFC;
- (ii) "debt warranty" – that a long term debt owed by KSWDLC to Agang Group Co Ltd would be forgiven and waived by the creditor failing which Kingsea will pay KSWDLC such sum as is necessary to settle the debt.

Even though the NAV was short and Kingsea could not fulfill the warranties, the parties went ahead and completed the transaction BUT only 123,918,506 new VGO shares were issued ("Issued Consideration Shares") instead of the original 134,705,882 new VGO shares. Out of the Issued Consideration Shares, VGO held back 44,437,379 new VGO shares which were kept in escrow to secure Kingsea's unfulfilled warranties.

Kingsea continued to breach its warranties and as a result, Kingsea further deposited 2 more lots of 9,068,861 and 5,832,998 of the Issued Consideration Shares as additional security. Altogether, the number of shares deposited by Kingsea as escrow shares amounted to 59,339,238 ("Escrow Shares"). When Kingsea continued to be in breach of its warranties, VGO demanded for payment and when Kingsea failed to pay, VGO exercised its power of sale and sold the Escrow Shares to Mao.

Now, while all the above were going on, ZJL borrowed RMB30m from Wu Yang and this was recorded in nine agreements. CJY confirmed then that Kingsea had 31,764,784 shares in VGO which were then pledged to Wu Yang to guarantee the

repayment of the loan. Further to that, the last of the 9 agreements provided that CJY would transfer all his shareholdings in VGO to offset the amounts owed to Wu Yang.

Now, remember that VGO had exercised its power of sale and sold the Escrow Shares? One day after VGO sold the Escrow Shares to Mao, Wu Yang applied to court to restrain CJY and Kingsea from dealing with the Escrow Shares and for those shares to be transferred to Wu Yang.

Amongst the orders granted was a freezing order (Mareva Injunction). VGO and Mao applied to intervene in the action and sought to vary the freezing order on the ground that VGO had sold the Escrow Shares to Mao. Amongst the many arguments raised by the counsel for Wu Yang was that by issuing the Issued Consideration Shares, VGO was providing financial assistance to Kingsea for Kingsea to acquire the Issued Consideration Shares IN VGO.

What Wu Yang did was they characterized the 2 warranties (concession and debt warranties) as non-existent assets of Spring Wave and as such, VGO had issued shares to Kingsea in exchange for non-existent assets! The counsel for Wu Yang further argued that even though the basis of sale was based on the NAV of Spring Wave, the value of the shares allotted by VGO to Kingsea exceeded the NAV of Spring Wave and as such, amounted to VGO providing financial assistance to Kingsea to enable Kingsea to acquire shares in VGO, and was thus in breach of Section 76 of the Singapore Companies Act.



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The Court of Appeal of Singapore rejected the arguments for 2 reasons:-

(1) Based on the facts of the case, the consideration for acquisition was not based solely on the NAV of Spring Wave and,

(2) Even if it was based on NAV, there was no discrepancy between the NAV of Spring Wave and the value of the Issued Consideration Shares.

These were further supported by the fact the VGO acquired Spring Wave as a going concern and by retaining the Escrow Shares as security for the performance of Kingsea's obligations, VGO had ensured that no financial assistance would be given and that its capital would not be diminished. The Court further went on to say that Wu Yang's argument on the financial assistance was completely without merit and commercially impractical !

The Court concluded that the purpose of the equity-business swap in this case was not the giving of financial assistance to Kingsea to enable Kingsea to acquire shares in VGO but rather the acquisition of Spring Wave's food and beverage business by VGO. The transaction did not therefore offend Section 76.

ⁱ [2008] 2 SLR 350

ⁱⁱ Mao & VGO applied to the court to intervene in the action.

liable to pay interest at the default Rate as at the date of expiry of three (3) months from the date of termination of this Agreement, calculated from the date of the expiry of the three (3) months to the date of actual payment including actual and full refund."

CONTRACT LAW

OUTSMARTED ?

In *Dato' Abd Rahim Mohamad v Abdul Farish Rashid*, the plaintiff sold certain shares in a company to the defendant. Several payments were made under the sale and purchase agreement amounting to RM5.4 million. The plaintiff after demanding for the balance commenced an action to recover the sum of RM11,896,000.

The defendant relied on a clause in the agreement to argue that he was entitled to render void the contract by refusing to pay the balance purchase price. The said clause reads:

"In the event that the Purchaser fails to make payment of the balance of the Purchase Price by the Expiry date, this Agreement shall terminate, be rendered null and void and of no effect and the Vendor shall refund to the Purchaser Initial and Second payment or such part thereof that shall have been paid by the Purchaser in accordance with Article 6.11, 6.12 and 6.13 without interest within three (3) months from the date of termination of this Agreement, failing which the Vendor shall be

It was contended that the defendant was not taking advantage of his own wrong because there was no rule of law that a contracting party could not contractually provide for his own act or omission to bring the contract to an end and then rely on that act or omission to justify his refusal to comply with its terms. One would have thought that such contention was valid given the wordings of the above clause which appeared to have envisaged and provided for non-payment of the balance purchase price by the purchaser.

However, the Court of Appeal rejected the contention. In their Lordship view, the presumptive rule of construction that a party was not to be permitted to take advantage of his own wrong held true in the instant case and the said clause did not take the defendant's case outside the rule. Judgment was therefore entered for the plaintiff in the sum claimed.

It is noteworthy that the court in arriving at its decision cited, as the law, the principle from the case of *Alghussein Establishment v Eton College*ⁱⁱ that "...in the absence of clear express provisions in a contract to the contrary it was not to be presumed

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that the parties intended that a party should be entitled to take advantage of his own breach as against the other party...”.

As can be clearly seen, the principle was qualified by the phrase ‘in the absence of clear express provisions in a contract to the contrary’. Is it not clear that the said clause in *Abdul Farish Rashid* case had made explicit provision for the scenario where the purchaser did not make payment of the balance purchase price and yet was entitled to get a full refund? Unfortunately, the Court of Appeal did

not think so and unless the Federal Court on further appeal decides otherwise, the decision is binding and care must be taken when drafting agreement or rendering advice on similar facts.

ⁱ [2009] 1 CLJ 395

ⁱⁱ [1991] 1 All ER 267

CONTRACT LAW

BEWARE OF PROMOTIONAL MATERIALS

The decision of the High Court in *Ameer Ali Bin Mohd Yusoff & Anor v Sunrise Berhad* illustrates to us that one should not be taken in easily by luxuriously produced promotional materials for the contents therein may not have any contractual and binding effect !

The plaintiffs in this case sued the defendant for misrepresentation. According to the plaintiffs, they entered into a sale and purchase agreement with the defendant based on representations alleged to have been made by the agent and staff of the defendant. The plaintiff also alleged that they relied on and were induced by the representations contained in the sales brochures, sales promotional leaflets, catalogues and photographs (promotional materials) which were found in the defendant’s sales office.

In their defence, apart from denying making the representations, the defendant relied upon the endorsement in the promotional materials i.e. that “All illustrations are artist’s impressions only. All items mentioned are subject to variations, modifications and substitutions as recommended by the Company’s Architect and/or Engineer or the

relevant Authorities...” and words at the end of promotional materials, “The Developer shall be entitled at its sole discretion to change any building materials or specifications as mentioned above without prior notification to the Purchaser.”

The court having heard both parties agreed with the defendant’s argument and held that the existence of such words made the representations in the promotional materials qualified and did not provide, on their own, any foundation for an action based upon the promotional materials themselves.

This was because the defendant reserved sole and absolute right to change any building materials or specifications mentioned in the said promotional materials. These qualifying words ought to put any invitee to the promotion to be careful not only to confirm these representations, but also to take measures to incorporate language that the above qualifications did not apply to those specifications and aspects important to him.

It must therefore be noted that not all promotional material are capable of being construed/treated as representations by the developer on their properties. The nature and qualifications in the promotional materials save the day for the developer in this case.

ⁱ [2009] 1 AMR 101

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CONTRACT & COMMERCIAL TRANSACTION

'ROMALPA CLAUSE' NOT PART OF CONTRACT

In, perhaps, one of the few occasions, our courts were asked to adjudicate a dispute on the so-called 'Romalpa clause' in the case of *Interdeals Automation (M) Sdn Bhd v Hong Hong Documents Sdn Bhd*. 'Romalpa clause' is a term in a contract for the sale of goods by which parties to the contract agree that the ownership in the goods would only be transferred from the vendor to the buyer when the latter has met all his obligations contained in the contract. Such clause, which was first recognized and upheld in the case of *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*ⁱ, has the effect of making the buyer a trustee or fiduciary of the goods for the seller thereby entitling the seller to trace them into the hands of third parties to whom the buyer may transfer them. Such tracing remedy is especially useful if the buyer fails to pay for the full price of the goods and has gone into liquidation --- the seller may at least re-take the goods. Based on such clause, the buyer may possibly argue that the seller is not entitled to the price of the goods as the title to the goods is retained by the seller.

Such was the argument advanced by the defendant in *Interdeals Automation (M) Sdn Bhd*. However, the Court of Appeal found that the *Romalpa* stipulation in question appeared only on the invoices. The contract of sale was formed when the defendant accepted the terms set out in the purchase order which did not contain anything that reserved the title of the machine in the plaintiff. It is

settled law that once a contract is already concluded then a stipulation imposed subsequently does not form an integral part of the contract unless the parties accept it by way of variation. Thus, in this case, the invoices came later after the contract had been made and there was no evidence that the parties had varied their original contract to include the *Romalpa* stipulation that was endorsed only on the invoices. Such being the case, the *Romalpa* stipulation did not bind the parties.

It followed that there was no question of affording the plaintiff the right to re-take possession of the machine. Property in the machine had passed from the plaintiff to the defendant who had accepted the machine and used it to its benefit.. There was acceptance of the machine and a refusal to pay for them --- s.55(1) of the Sale of Goods Act 1957 which prescribed the remedy for the unpaid seller applied. The judgment of the High Court that required the return of the machine to the plaintiff was set aside in favour of a judgment for the plaintiff for the balance selling price of the machine.

ⁱ [2009] 2 CLJ 321

ⁱⁱ [1976] 2 All ER 552

COURT PROCEDURE / TORT

NO TORTIOUS CLAIM AGAINST GOVERNMENT WITHOUT SUING THE TORTFEASOR

The Federal Court in *Kerajaan Malaysia & 3 Ors v Lay Kee Tee & 183 Ors*ⁱ held in no uncertain terms that it was fatal to a claim in tort against the government for alleged wrongdoings of relevant government officers if such officers were not identified and named in the claim. The claim in this

case arose from outbreak of the Japanese Encephalitis (JE)/Nipah virus in 1998-1999 in the states of Negeri Sembilan, Perak and Selangor. The claimants either were themselves persons who allegedly had suffered from the virus, or were dependents of persons who died from the virus, or owners of pig farms affected by the virus. The claimants' complaint was that the Federal and respective state governments did not act fast enough on their requests to cull pigs to contain the virus spreading but permitted the situation to worsen to such an extent that led to the claimants suffering injury. The defendants were the government of Malaysia and the governments of the states of Negeri Sembilan, Perak and Selangor. The causes of action were grounded in torts, comprising numerous heads : negligence, breach of fiduciary

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duties, breach of statutory duties, negligent misstatement, fraud, unlawful deprivation of fundamental rights, misfeasance of public office, trespass to land, buildings and goods.

The defendants took out an application to strike out the action on the ground, among others, that wrong or unnecessary parties had been sued. The contention was that the wrongdoer (the primary tortfeasor) was not named and sued in the claim. It was argued that the defendants being governments could not personally commit torts.

The Federal Court overturned the decision of the Court of Appeal and held in favour of the defendants. On a proper construction of ss 5 and 6 of the Government Proceedings Act 1956 (GPA), in any claim in tort against the government, the government officer responsible for the alleged tortious act must be made a party and his liability be established before the government can be made liable vicariously as principal. It is insufficient to merely identify the officer without joining the officer as a party. It is only upon successful claim against the officer personally that a claim can be laid against the government. Therefore, since all causes of action in this case were tort or tort-based, and the officers who were responsible for the alleged wrongdoing were not joined as defendants to the

action, it was not possible to maintain a successful claim in tort against the government as primary tortfeasors. It was not just a case of joining wrong parties but one where an action had been brought against wrong parties, hence O 15 r 6(1)ⁱⁱ of the Rules of the High Court 1980 could not be applied to rescue the claimants' action for the misjoinder or non-joinder of parties. The earlier case of *Lai Seng & Co v Government of Malaysia & Anor*ⁱⁱⁱ was distinguished in that the claim arose out of the revenue laws and s 4 pf GPA allowed such claim to be directly brought against the government. Consequently, the governments were spared from a potential liability of RM135 million.

ⁱ [2009] 1 AMR 509

ⁱⁱ This rule provides that no action shall be defeated on the ground of misjoinder or non-joinder.

ⁱⁱⁱ [1973] 2 MLJ 36

CREDIT & SECURITY

CONTRIBUTION FROM CO-GUARANTORS

A company took a loan from a bank. The plaintiff and the defendants who were the directors of the company had jointly and severally guaranteed repayment of the said loan. Upon default, the bank sought to enforce the guarantee and obtained judgment in default of appearance against the 1st and 2nd defendants. The 3rd and 4th defendants however resisted the bank's claim. The plaintiff on his own accord made payment of the amount claimed by the bank which resulted in the bank withdrawing its claim against the 3rd and 4th defendants. The plaintiff subsequently sought to claim contribution from the 3rd and 4th defendants for the sum that was paid by him in settlement of the bank's claim. The 3rd and 4th defendants opposed the plaintiff's claim on the ground that there was no

agreement between them and the plaintiff to settle the amount claimed by the bank; that they had a valid defence against the bank's claim and had been deprived of their right to defend the bank's claim and that by the settlement, the plaintiff had prevented the sale of the property that had been charged as security for the said loan, the proceeds of sale of which could have been applied towards reducing the indebtedness owed by the company.



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On the above facts, the High Court in *Leong Kok Weng v Yim Chong Fun & 3 Ors*ⁱ recognized the effect of a joint and several guarantee which was to make a guarantor personally liable for the entire sum guaranteed notwithstanding that he might be only one of the guarantors.

A guarantor in a joint and several guarantee should be able to act independently of the other guarantors to discharge the guarantee without the consent of the other guarantors. Therefore, the right of the plaintiff to act independently to honour the guarantee under s 99 of the Contracts Act 1950 should not be affected, notwithstanding the fact that

the other guarantors might not be in favour of honouring the guarantee for whatever reasons or that they might have a valid defence to the bank's claim.

ⁱ [2009] 2 AMR 260

the Pledged Shares privately without going through any public auction.

The Singapore High Court held that it was settled law (in Singapore) that a mortgagee had the duty to take reasonable care to obtain a proper price for the mortgaged property. The mortgagee must inform itself of the price obtainable for the property before it agreed to sell it. Then the enquiry moved to determine whether the price actually obtainable was a reasonable price in the circumstances. Before D Bank agreed to sell the Pledged Shares for a certain price in a private sale, it had the duty to ensure that that was the proper price for the shares, and that it had selected the proper mode of sale. The argument that there could be no breach of a mortgagee's duty if there was no undervalue did not stand up under examination.

D Bank owed a duty as pledgee to sell the Pledged Shares in the open market and, as the Indonesian law under which D Bank had applied for permission to sell the Pledged Shares by private sale was not a mandatory provision, D Bank was not compelled by law to obtain such permission, and should not have made such an application. D Bank accordingly could not rely on the orders of the South Jakarta District Court to answer B Co.'s complaint of breach of duty. However, although B Co. had made out a case that D Bank failed to discharge its duties as pledgee when it sold the SME shares, it had failed to show that D Bank had in fact sold those shares at an undervalue, and thus, B Co. was awarded nominal damages of \$1000.

ⁱ [2008] 2 SLR 189

CREDIT & SECURITY

MORTGAGEE DUTY-BOUND TO OBTAIN PROPER PRICE

In *Beckett Pte Ltd v Deutsche Bank AG and another*ⁱ, the first defendant, Deutsche Bank (D Bank) gave a loan to Asminco and as security, the plaintiff, B Co. pledged to D Bank all its shares in SME under an agreement governed by Indonesian law while SME pledged all its shares in Asminco and Asminco pledged all its shares in Adaro and IBT (all shares pledged collectively referred to as 'Pledged Shares'). SME, Asminco, Adaro and IBT were Indonesian companies managed by a management group who co-owned ASMEC which in turn wholly owned B Co.

Asminco defaulted on repayment of the loan. D Bank was then approached by the second defendant, DSM, to buy the Pledged Shares. D Bank had not put up the shares on sale, and did not have them valued in contemplation of a sale. It proceeded to enter into a share sale agreement with DSM to sell all the Pledged Shares. The share sale agreement was governed by the laws of Singapore.

B Co. regarded the price for the Pledged Shares to be gross undervalue and commenced action to set aside the sale with damages for the loss B Co. had suffered as a result of the shares being sold at an undervalue. D Bank argued that it had obtained rulings from the District Court of South Jakarta that it had the right and authority to sell all

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AGREEMENT TO STIFLE CRIMINAL ACTION --- UNENFORCEABLE

It is illegal to enter into an agreement to stifle criminal prosecution. Such agreement will not be enforced by the court. So held in the case of *Kelimet anak Nyapong & Ors v Usha Bina Sdn Bhd*. The facts in brief insofar as relevant to this write-up : The defendants in that case entered into a memorandum of understanding (MOU) with the plaintiffs that in consideration of the defendants agreeing to withhold criminal charges or civil claims against the plaintiffs for damages caused to two bulldozers in the disputed area of land, the plaintiffs would not disrupt access to the said area for activities connected with the timber logging operation therein. If the plaintiffs were to be in breach of their covenant, then the defendants shall have the right to resume criminal charges against the plaintiffs and to claim for damages to the bulldozers. The plaintiffs subsequently filed a suit against the defendants to claim native customary rights over the said area and sought injunctive reliefs, in reply to which the defendants counter-claimed for the loss due to the damaged bulldozers.

The High Court in Sibu held that the MOU when used to stifle criminal proceedings was not enforceable in law. Citing the famous text of Pollock & Mulla on *Indian Contract and Specific Relief Acts*, the rationale was that if the accused person was 'Innocent, the law abuse for the purpose of extortion; if guilty, the law (is) eluded by a corrupt compromise screening the criminal for a bribe'. It must be noted that it is not necessary to prove that there was any express threat of prosecution if the transaction in fact amounted to a bargain not to prosecute. The High Court has no difficulty to dismiss the defendants' counter-claim with costs.

ⁱ [2009] 1 MLJ 98

DIGEST OF EMPLOYMENT LAW CASES

1. UNILATERAL HALVING OF SALARY

In *Ti Tiow Koon v Jintai (M) Sdn Bhd*ⁱ, the company informed the claimant that his monthly salary would be halved with immediate effect due to his poor sales performance over the past 10 months. The company further failed to pay the claimant's salary when it had fallen due at the end of September 2003. The Industrial Court held that these two acts constituted a fundamental breach which had gone to the root of the employment contract which justified the claimant leaving his employment and suing the company for constructive dismissal. The company's explanation that the reduction in salary was no more than "an inducement to improve the claimant's work performance" was rejected. Such a manner of so called "inducement" could not be encouraged and

2. LED TO BELIEVE

The claimant in *Shobashini Silvadurai v Maybank Berhad*ⁱⁱ was transferred from the bank's Kluang branch to Kulai. After her transfer, she submitted a transfer claim wherein she had claimed for meal allowances for herself, her husband and her child for a period of 14 days. Upon being questioned by a HR Executive from the bank's Human Capital Management Department (COW1), she had immediately disclosed that her child had not been with her for the 14-day period whereupon she was informed by COW1 that she would not be entitled to make a claim for her child as her child had not been with her. The claimant duly re-submitted her claims with the necessary omissions. The bank however leveled 2 charges of misconduct against her for

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submitting false claims. It was found that COW1 had advised the claimant to withdraw her claim and file afresh which she had duly done. COW1 at that point in time had not treated the matter as if it had been a false claim and neither had he dealt with the claimant as if she had committed some misconduct in making the said claim. By allowing her to re-submit, she had indeed been led to believe that it had been all right. It had thus been inconsistent of the bank to have allowed her to resubmit her first claim omitting the meal allowance for her child and later accuse her of making a false claim in the first claim. The bank was thus held to have failed in establishing the first charge against the claimant.

3. MISCONDUCT OF ABSENTEEISM & LATENESS PUNISHABLE WITH DISMISSAL BUT FOR CONDONATION

The Industrial Court's decision in *Vignaeswaran Shanmuganathan v TNB Engineers Sdn Bhd*ⁱⁱⁱ serves as a reminder to both employees and employers on absenteeism, lateness and condonation. Absenteeism is regarded as a serious misconduct which justifies the punishment of dismissal and likewise, habitual or continuous late attendance to work which shows the lackadaisical attitude of the employee who is irresponsible to his fundamental duty to work according to the time schedules and the hours of work allotted each day.

In this case, the claimant was charged for absent from work without leave or approval when on duty outside the company on 16 occasions within a period of four months (Charge 1), although none of such occasions was for more than 2 consecutive days. He was also charged (Charge 2) for late attendance to work on 60 occasions for the same period of four months. On Charge 1, the Industrial Court Chairman found that as failure to attend work continuously for more than 2 consecutive days without leave constituted a misconduct under the company's disciplinary procedure, Charge 1 was not proven since on the facts, the claimant's absence from work were not for more than 2 consecutive working days. On Charge 2, the requirement of being late for more than 3 times in a month to constitute misconduct under the same procedure was satisfied. Such habitual late attendance justified the punishment of dismissal whether cumulatively or individually even taking into account the claimant's past good conduct or performance and his long service with the company.

Nonetheless, the claimant was let off the hook by virtue of the company's condonation. The company took some 8 ½ months to issue the claimant the show cause letter for the alleged two offences. Delay in taking action against a delinquent employee must surely be construed as an act of condonation. The company through the claimant's head of department and/or his superior had taken no action to either warn or stop the claimant from repeating the alleged misconducts but allowed them to continue for 4 months. Thus, even if Charge 2 had been proven by the company, the principle of condonation applied to absolve the claimant.

4. VITAL TO FILE REPRESENTATION OF UNJUST DISMISSAL WITHIN 60 DAYS

Two High Court decisions illustrate the importance of filing representation with the Labour Office for wrongful dismissal from employment to seek reinstatement (and other compensatory reliefs) within s.20(1) and (1A) of the Industrial Relations Act 1967 ("IRA") within 60 days of the dismissal. In *Daud Abdul Kadir v Malaysian Airlines System Bhd*^v, the plaintiff had tendered a letter for optional retirement but he claimed that he did so because he was threatened and forced with immediate dismissal and the letter was submitted under duress. The letter was dated 30.3.2000 and the effective date of his early retirement was 30.6.2000. The plaintiff did not seek reinstatement under s.20(1) of IRA.

Instead, he filed a suit in the High Court for various reliefs, including a declaration that his dismissal was unjust and unlawful, damages being salary and overseas allowances up to his retirement age which amounted to reinstatement and termination benefits. The court struck down his claim as it was an abuse of process of court to file the claim in order to overcome the strict provision of s.20(1) and (1A) of IRA. Since the plaintiff had the opportunity to exhaust his avenue to seek redress at the Industrial Court for reinstatement, which he did not, the plaintiff should not be allowed to succeed in obtaining a declaration that his dismissal was unfair and unlawful.

In *Sitti Badriyah Shaik Abu Bakar v Dr Hamzah Darus & Anor*^v, the plaintiff was first suspended and then was issued with a show cause letter in respect of her actions which were allegedly against the expressed and/or implied terms of her employment. The plaintiff replied to the show cause letter. Thereafter, the defendants in reliance on a

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clause in the contract of employment which gave either party the right to terminate the contract gave three months notice to termination her services. Ordinarily, if the plaintiff were to lodge her complaint on unlawful dismissal with the Labour Office pursuant to s.20(1) of IRA, she would have a much stronger case because according to industrial jurisprudence, termination based on mere contractual notice must still be grounded on just cause or excuse for it to be justified.

What is considered to be lawful according to the law of contract and the principle of freedom of contract can never be deemed as a justified dismissal in Industrial Court.

However, the plaintiff in this case did not seek redress at the Industrial Court. She filed a writ against the defendants for a declaratory order that the notice of termination was null and void on the ground that the issuance of the show cause letter raised a legitimate expectation on the plaintiff that she would be accorded procedural fairness consistent with principles of natural justice and fair opportunity to state her case in an inquiry before any decision was made. The Court of Appeal upheld the

High Court's decision that the defendants had the contractual right to terminate the plaintiff's services by three months' notice regardless of whether she had misconducted herself. That there were allegations of misconduct and/or indiscipline against the plaintiff did not preclude the defendants from exercising their contractual right.

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- ⁱ [2009] 1 ILR 91
 - ⁱⁱ [2009] 1 ILR 195
 - ⁱⁱⁱ [2009] 1 ILR 406
 - ^{iv} [2009] 7 CLJ 397
 - ^v [2009] 2 MLJ 233

assignment transfers and other necessary instruments. Thus, the power of attorney had given the plaintiff a caveatable interest on the land, not unlike the facts in the earlier case of *Liew Mok Poh @ Liew For Chen & Chong Yat Min v Balakrishnan a/l Muthuthamby*ⁱⁱ.

LAND LAW

POWER OF ATTORNEY CREATED CAVEATABLE INTEREST OVER LAND

Can a power of attorney for valuable consideration give rise to a caveatable interest over a land? That was the issue which the High Court had to resolve in the case of *Lian Lee Construction Sdn Bhd v Joyous Seasons Sdn Bhd & Anor*ⁱ. The short answer is that it very much depends on the ambit of the power of attorney concerned.

In *Lian Lee Construction* case, the power of attorney was given by the first defendant to the plaintiff as a security for the payment of the contract price to the plaintiff for the performance of the renovation works pursuant to the first defendant's letter of award. The plaintiff's interest on the land derived from the power of attorney which empowered the plaintiff as the donee to (among others) sell, assign or charge to any person the land and for that purpose to sign and execute all



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On the other hand, another earlier case cited by the defendants to support their application to set aside the order extending the caveat entered by the plaintiff on the land and to remove the said caveat, namely *Pembinaan Masdamai Sdn Bhd v Me-Wong Builders Sdn Bhd*ⁱⁱⁱ, was distinguishable from the factual scenario in *Lian Lee Construction* case. In *Pembinaan Masdamai* case, the power of attorney was only for the appointment and instructing of solicitors, architects and engineers for the purpose of negotiating or settling with the authorities concerned with regards to a specific land. The power of attorney in *Lian Lee Construction* case gave an absolute right to deal with the land beyond the limited power to deal with the land in a limited manner such as in *Pembinaan Masdamai* case.

Having decided that the plaintiff had an interest on the land to sustain its caveat, the High Court proceeded further to consider the next two stages by applying the three-staged test laid down in the Court of Appeal's decision in *Luggage*

Distributors (M) Sdn Bhd^v and held that the plaintiff had also showed that there were serious issues to be tried and that on the balance of convenience, it was convenient to retain the existence of the caveat and maintain the status quo while awaiting the outcome of the main suit.

ⁱ [2008] 8 MLJ 387

ⁱⁱ [1990] 1 CLJ 933

ⁱⁱⁱ [1994] 2 MLJ 64

^{iv} [1995] 1 MLJ 719

days of our receipt of a notice requesting for such refund either from you or from solicitors acting on your behalf."

LEGAL PROFESSION / CONTRACT LAW

ENFORCING SOLICITOR'S UNDERTAKING

In *Nasir Kenzin & Tan v Elegant Group Sdn Bhd*ⁱ, the respondent had contracted to buy the shares of a company from the two shareholders (vendors) who were represented by the appellant which was a solicitor's firm. The appellant as solicitors for the vendors issued an irrevocable letter of undertaking to the respondent, the material terms of which are as follows:-

"In consideration of you agreeing at our clients' (vendors) request to pay the sum of RM1,000,000 to us as stakeholders, we as solicitors for the vendors hereby agree to hold the sum of RM1,000,000 paid by you to us as stakeholders and to irrevocably undertake to refund the said sum of RM1,000,000 paid by you to us as aforesaid together with all accrued interest thereon in the event of and upon the abortion or termination of the sale and purchase of all the issued share capital of (the company) by you from our clients for any reason whatsoever irrespective of whether there is any dispute as to whether the said sale and purchase has been lawfully aborted or terminated or otherwise, within seven (7)

As it turned out, the respondent terminated the sale and purchase of the shares of the company and requested for the refund of the sum of RM1,000,000 held by the Appellant as the stakeholders. However, the Appellant failed to refund the said sum, hence the filing of the suit against the appellant for breach of undertaking. The learned judge had found for a fact that the RM1 million had already been released by the appellant to the vendors.

The Court of Appeal regarded the impugned undertaking as a promise or security given in the course of the arrangement, which bound the appellant in law, for obtaining some concession from the respondent. All the respondent had to do was hand over RM1 million to the appellant as stakeholder's money of which they did. The promise required of the appellant was the return of that stakeholder sum to the respondent, in the event something shall happen, or that something shall not happen, leading to the abortion or termination of the transaction of buying the shares of the company. The appellant's capacity when giving that undertaking was one of professional ie. in the capacity of a solicitor. The non-refund of RM1 million was a clear breach of the undertaking and the

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appellant was ordered to pay the amount to the respondent.

The court took cognizance of the seriousness of an undertaking given by a member of the legal profession and unless compelled to honour the undertaking, public confidence and trust in the legal profession would whittle away. This decision drives home the vital point that a solicitor should not simply give any undertaking unless he is able and prepare to fulfill the undertaking. An undertaking will be enforced against the solicitor even though after it is given, the client dies or instructs the solicitor not to perform it or changes his solicitor. Indeed, courts take it so seriously that a person may be cited for contempt if an undertaking made to the court is breached. Having said that, before an undertaking can be enforced, it must be shown that the undertaking is given by the solicitor personally and

not merely as agent on behalf of his client. The undertaking must also be given by the solicitor, not as an individual but in his professional capacity as a solicitor. In the words of the Court of Appeal, a solicitor who acts in breach of undertaking given must be prepared to face the wrath of the court !

ⁱ [2009] 1 CLJ 47

LEGISLATION UPDATE

AMENDMENT TO NLC

We wish to bring to your attention the recent amendment made to National Land Code (NLC) on the period of breach on the part of chargor before the chargee can serve statutory notice in Form 16D (Notice of Default with respect to a Charge).

S.254(1) of NLC has been amended (vide Act A1333, with effect from 1.1.2009) by inserting the words "*which shall not be less than one month*" after the words "in the charge".

REVENUE LAW

PLEA OF LIMITATION NOT A TRIABLE ISSUE IN SUIT FOR RECOVERY OF TAX

In *Integrated Credit & Leasing Sdn Bhd v Kerajaan Malaysia*ⁱ, the Director General of Inland Revenue (respondent) had made assessments of tax payable by the appellant company for, among others, years of assessment 1986, 1987 and 1989 vide notices of assessment dated 26.12.1998. The

The section now reads as:

"Where, in the case of any charge, any such breach of agreements as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge which shall not be less than one month, the chargee may serve on the chargor a notice in Form 16D....." (emphasis ours)

Beginning 1.1.2009, all charge annexures (of chargee bank) to be entered into should take into account such amendment and provide accordingly. In other words, for charges executed after 1.1.2009, a **breach** of the charge must be for a period of **at least one month** before the chargee bank can serve Form 16D (Notice of Default with respect to a Charge).

notices were only served on the appellant's tax agent on 12.2.1999. The appellant failed to pay the amounts assessed which resulted in summons filed against the appellant to recover the same as a debt due to the government under s 106 of the Income Tax Act 1967 (the Act).

On 1.1.1999, the amendment to s 91(1) of the Act had come into force which shortened the limitation period from 12 years to 6 years from the date of the expiration of any year of assessment with

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regard to assessment or additional assessment of chargeable income and tax on a person chargeable to tax. The appellant argued that the notices of assessment were served on them on 12.2.1999, thereby rendering them being time barred under the six-year limitation period whilst the respondent replied that as the date of the notices was 26.12.1998 which was before the amendment came into force, the limitation period of 12 years was applicable.

The Sessions Court granted summary judgment which was appealed to the High Court. The learned Judicial Commissioner held in favour of the respondent on two grounds. Firstly, he was of the view that the provision of s 91(1) of the Act was very clear --- the six-year period was linked to 'expiration' of 'year of assessment'. The period was not to be calculated from the date of service of the relevant notices.

Secondly, and in any event, a plea of limitation under s 91(1) of the Act was not available to the taxpayer in proceedings for recovery of tax brought in court. There could be no triable issue on the recovery of the amount of tax raised in the

notices of assessment forming the subject matter of the suit.

It must however be noted that this judgment does not shut the doors of justice to the taxpayer who may have a legitimate issue on limitation against the revenue authorities. He can still raise the issue if he avails himself of the statutory mechanism of appeal to the Special Commissioners under the Actⁱ and through this mechanism, the issue on limitation can still be determined by the court of law by way of a case stated.

ⁱ [2009] 1 CLJ 817, [2009] 7 AMR 1

ⁱⁱ paragraph 34 of Schedule 5 to the Income Tax Act 1967

TORT / COURT PROCEDURE

IN SEEKING INJUNCTIVE RELIEF, DON'T DELAY & DON'T OFFER COMPROMISE

Delay in seeking injunctive relief against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's right, and the claimant's preparedness to be compensated by damages may work against the claimant's application for an injunction to restrain the wrongful act---that is essentially the message emitted from the UK High Court's case of *Watson and others v Croft Promosport Ltd*.

In that case, the claimants sued the defendant for nuisance in respect of noise of a loud, intrusive and repetitive nature caused by the defendant's use of the adjacent land as a motor circuit which held racing activities that produced high levels of noise. Injunctive relief was sought to restrict (but not to prohibit) the use of the circuit to what was

reasonable, contending, among others, that high levels of noise should be confined to 20 days which represented the threshold of the nuisance, and that 40 days would be acceptable upon the payment of compensation for the difference between 20 and 40 days.

The defendant submitted that the planning permissions for the use of circuit granted in 1963 and 1998 and a unilateral agreement made under s106 of the Town and Country Planning Act 1990 under which the defendant agreed to an elaborate set of monitored restrictions had altered the nature and character of the locality, so that the racing activities were permissible and proper so long as they were conducted within the limits set out in the s106 agreement. The learned Judge however rejected such contention.

Firstly, a planning authority has no jurisdiction to authorize a nuisance, although it may have the power to permit a change in the character of a neighbourhood. Secondly, whether a permissive planning permission has changed the character of a neighbourhood so as to defeat what would otherwise constitute a claim in nuisance is a question of fact and degree, and in the instant case, none of the planning permissions or the s106 agreement

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changed the essential rural character of the neighbourhood.

The defendant also failed in its attempt to establish the defence of reasonable user of the land, having regard to the intensity, frequency and duration of the noise. Likewise, the defendant's defence that the claimants "came to the nuisance" and should not be heard to complain about a feature of the locality of which they must or should have been aware was unsuccessful. The defendant had also not made out the defence of acquiescence, which is an equitable doctrine under which equitable relief (of which injunction is a specie) will be barred on the ground that there has been delay coupled with matters which, in all the circumstances, makes it unconscionable for a party to continue to seek to enforce rights which he had at the date of the complaint.

Unfortunately, two factors operated against the claimants in their quest for an injunction. Firstly,

their willingness to be compensated for noise on days exceeding the number they considered acceptable demonstrated that the claimant could be compensated by an award of damages. Secondly, although falling short of giving rise to a defence of acquiescence, there had been considerable delay in bringing proceedings. Accordingly, the learned Judge held that the instant case was not an appropriate case for granting an injunction and an award of damages was made.

ⁱ [2008] 3 All ER 1171

with the complaint. The plaintiff sued the defendant for defamation and malicious falsehood.

It was held that statements made in first information reports under s.107 of the Criminal procedure Code and in police statements made under s.112 of the same were absolutely privileged for the purpose of the law of defamation. In other words, such statements were not actionable. This must be so for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk.

However, the defendant did not plead the defence of privilege and he was barred from relying on a defence which were not pleaded. Fortunately for him, the court was with him on the defence of limitation, in that the plaintiff was well beyond the limitation of one year in an action for defamation in libel or in malicious falsehood as prescribed by the Sabah Limitation Ordinance.

ⁱ [2009] 2 CLJ 121

TORT

STATEMENTS IN POLICE REPORTS ABSOLUTELY PRIVILEGED

Can the statements made in a police report form the subject matter of a defamation or malicious falsehood suit? This issue arose in the Court of Appeal case of *Abdul Manaf Ahmad v Mohd Kamil Datuk Hj Mohd Kassim*ⁱ. In that case, the plaintiff and the defendant were members of a co-operative society which was managed by an administration committee in which the plaintiff was the honorary treasurer whilst the defendant a member thereof.

A disagreement arose between them which led the defendant to lodge a police report against the plaintiff on an allegation of criminal breach of trust. The plaintiff was arrested and later released but was re-arrested five years later and released again. The police and the public prosecutor subsequently informed the plaintiff that they would not proceed

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1. SPLIT DECISION ON UDA V KOPERASI PASARAYA

The saga involving UDA Holdings Bhd (UDA) Koperasi Pasaraya Malaysia Berhad, Dewan Bandaraya Kuala Lumpur (DBKL) and the Land Administrator Kuala Lumpur finally came to an end with the Federal Court decision in *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Berhad (& 2 Other Appeals)*ⁱ. However, it was not a unanimous decision in two of the three questions posed to the Federal Court which effectively overturned the Court of Appeal decision. For detailed background, readers are advised to refer to our Law Update Issue 3 of 2007 (in the Epilogue section for the write-up on the Court of Appeal decision) and Law Update Issue 1/2007 (under the heading 'What a Nuisance' for the write-up on the High Court decision).

In recapitulation, the Court of Appeal held that DBKL and the Government of Malaysia were also liable for breach of statutory duties under the Street, Drainage and Building Act 1974 (SDBA) (on the part of DBKL) and the National Land Code (NLC) and Road Transport Act 1987 (vicariously on the part of the said Land Administrator).

Therefore, whilst the principle that local authorities were excluded from liability in any claim for pure economic lossⁱⁱ arising from negligence (laid down in the Federal Court case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*ⁱⁱⁱ [the *Highland Towers* case]) was also extended to a cause of action of public nuisance (which finding against UDA, DBKL and the government was upheld by the Court of Appeal), the Court of Appeal refused to extend the exclusion to a head of claim under breach of statutory duties. In other words, pure economic loss is recoverable against a local authority for its breach of statutory duties.

In the Federal Court, all three judges were unanimous in ruling that DBKL was not in breach of its statutory duties under ss12 and 46 of SDBA in

respect of a road closure undertaken pursuant to the issuance of a temporary occupation licence (TOL) under s65 of NLC. The Court of Appeal's decision in this respect was thus over-ruled. However, by majority, the findings of the High Court and the Court of Appeal of liability for public nuisance on the part of UDA, DBKL and the government were affirmed. The Federal Court went on to hold, by majority, that the judgment in the *Highland Towers* case precluded a claim in all types of torts for pure economic loss against a local authority and/or the government. Thus, the Court of Appeal was in error in holding DBKL and the government liable for pure economic loss by reasons of alleged breach of statutory duty.

The net effect was that the appeal by UDA was dismissed but UDA was only liable to only 1/3 of total economic loss; the appeals by DBKL and the government were also dismissed except that both were not liable for pure economic loss suffered.

2. GUARANTORS' INDEPENDENT PRIMARY OBLIGATION

Our previous issue 4 of 2008 reported the English case of *IIG Capital LLC v Van Der Merwe & Anor* under the heading "Independent Primary Obligation on Guarantor". This decision was recently affirmed on appeal^{iv} by the English Court of Appeal. Thus, if clear language is used in a deed of guarantee, it could make a guarantor assuming a primary liability independent of the liability of the principal obligor, which means the guarantor is not able to rely on defences which would have been available to the principal obligor in respect of the principal claim.

ⁱ [2009] 1 AMR 405

ⁱⁱ Pure economic loss is financial or pecuniary loss that does not arise from any physical damage to the person or property.

ⁱⁱⁱ [2006] 2 MLJ 389

^{iv} [2008] 2 All ER (Comm) 1173

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