

THE UPDATE



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WE ARE 10 YEARS OLD !

Yes, recently, our firm celebrated its 10th anniversary. Partners, lawyers and staff were present at the dinner held in KL Hilton to commemorate the auspicious day. In conjunction with the occasion and as a mark of gratitude, gifts were presented to our clients and business associates who have stood by us in the past 10 years and without whose invaluable support we would not be where we are today. Once again, allow us to say a BIG THANK YOU.

Let us share with you some of the snap shots taken at the dinner...



What's an anniversary without a speech?



The birthday cake



Cake cutting



Group photo



Gift from the staff



10th Anniversary commemorative mugs

IMPORTANT

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AGENCY

HIGH NATURE OF AGENT'S DUTY OF FIDELITY - -- SINGAPORE & ENGLISH PRINCIPLE

In the Singapore case of *Yuen Chow Hin and Anor v ERA Realty Network Pte Ltd*, P engaged J as agent to help them find a buyer for their flat. J and M were associates of D firm. J, M and D had entered into D's "Associate Agreement" which expressly stated that there was no employment relationship between the parties and provided for the charging of commission to clients or customers for services rendered by the associate.

J informed P that a client wanted to buy the flat for \$650,000. This 'client' was in fact M's wife, a fact unknown to P at that time. P then directed J to make a counter-offer of \$688,000 which was accepted by the 'client'. A week later, an option to purchase was granted to the 'client' and a commission agreement was signed by P to pay commission of 1% of the purchase price to D. The option was exercised by the 'client' two weeks later.

Unknown to P, the 'client' had granted an option to purchase the flat to another person, T ("T's Option") one week before the 'client' exercised her option vis-à-vis P. T's Option was for the price of \$945,000 which was exercised by T (the subsidiary sale) one day before the 'client' exercised her right of option granted by P. P eventually discovered the full facts and sued D for breach of contract, on the ground that D had breached an implied term that D would use its best endeavours to obtain the best price for P and not act in conflict of interest, or obtain any secret profit.

The High Court allowed P's claim, holding that a property agent when engaged to sell or buy real property was the agent of the person who engaged him, who was his principal. The property agent had a responsibility to act in his principal's interests---not his own, or his friends', or his relatives' or his boss'. He could not create benefits for himself or his friends without due disclosure. The relationship between an agent and his principal was fiduciary in nature, one founded in trust.

The conduct of J and M was therefore ethically wrong and amounted to a breach of duty and fraud. The concerted efforts of J, M and 'client' (M's wife) had resulted in P selling their flat for less

than what they might have had they been properly and honestly advised. The profit the 'client' made from the subsidiary sale was a secret profit even though the 'client' herself was not a housing agent. D were ordered to pay P the sum of \$257,000 being the profit made by the 'client' as well as all disbursements and expenses incurred by P in uncovering the 'client's' relationship with M and M's relationship with J and costs on an indemnity basis to emphasize the gravity of the misconduct and breach of duty in this case.

Interestingly and coincidentally, around the same time the Singapore case was decided, the English Court of Appeal had also delivered a decision in *Imageview Management Ltd v Jack*ⁱⁱ on similar principle. The English courts however went further in penalizing the agent---he was made to disgorge all the agency fees already collected by him from the principal !

The defendant was a footballer and asked B to negotiate with a football club in UK with a view to play professionally with the club. B agreed that he (via the claimant company) would act as the defendant's agent and if the negotiations were successful, the defendant was to pay the claimant 10% of his monthly salary. B also agreed a secret deal with the club, under which the club paid the claimant a fee of £3,000 for getting the defendant work permit, albeit the actual value of the work done was less than £1,000.

The defendant played for the club and began paying the 10% due under his agency contract but stopped when he discovered the work permit contract. The claimant sued the defendant for unpaid agency fees while the defendant counterclaimed for the agency fees he had already paid as well as the full £3,000 received by the claimant from the club or the 'excess' above the real value of the work done.

The court disagreed with the claimant's contention that the undisclosed side deal 'was none of the defendant's business'. The claimant in negotiating a deal for itself had a clear conflict of interest---the more it got for itself, the less there would or could be for the defendant. There was indeed a realistic possibility of a conflict of interest, for the secret profit was not only greater than the work done but had related to the very contract which was being negotiated for the defendant.

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Once a conflict of interest was shown, the right to remuneration went. The relief was not to be confined to merely damages such as those for a tort or breach of contract but what the remedy should be when the agent had betrayed the trust reposed in him. The defendant was accordingly not obliged to pay any more agency fees and was entitled to the repayment of the fees already paid by him. There was also no allowance to be given for skill and effort of the claimant in obtaining the profit, because the

claimant as a fiduciary had been involved in surreptitious dealing.

ⁱ[2009] 2 SLR 786

ⁱⁱ[2009] 2 All ER 666

BANKING

DYMM LIABLE FOR STANDBY LETTER OF CREDIT

The recently reported Federal Court decision in *Standard Chartered Bank Malaysia Berhad v Duli Yang Maha Mulia Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang Di Pertuan Besar Negeri Sembilan Darul Khusus & Anor*¹ are special for two reasons : it is one of the few cases decided by Special Court which was set up to adjudicate civil claims involving sovereign head of states, in this case, the Ruler of the state of Negeri Sembilan and it is also one of the few local decisions on Uniform Customs and Practice for Documentary Credit, International Chamber of Commerce (UCP 500).

In the plaintiff's suit, the bank (SCBMB) claimed for the amount of USD\$999,772.44 and commission or alternatively, for a declaration that SCBMB was entitled to set-off the said sum and commission fee against the fixed deposit of the defendant who was, in brief, the Yang Di Pertuan Besar of Negeri Sembilan (DYMM) pursuant to a Letter of Set-off executed by DYMM. The claim arose from a Standby Letter of Credit (SBLC) issued by SCBMB at DYMM's request to the benefit of one Connecticut Bank of Commerce (CBC). The amount had been paid to CBC, hence SCBMB's claim of reimbursement against DYMM. DYMM raised several issues, among others, that the SBLC was revocable; that SCBMB was estopped from recognizing or accepting any call on the SBLC or exercising any rights under the Letter of Set-off since it had issued notice of rescission on behalf of DYMM to the confirming bank, Standard Chartered

Bank New York (SCBNY); and that there was fraud by CBC when it made a claim on the SBLC since it had no right to do so as the loan to Texas Encore LCC (TEC) for which the SBLC was issued was never released by CBC to TEC.

The 5-member Special Court held against DYMM. Firstly, there was no doubt at all that SBLC was irrevocable. Secondly, the SBLC could only be rescinded with the consent of the beneficiary which was CBC. Although DYMM issued a letter to SCBMB requesting that SBLC be suspended, and SCBMB obliged DYMM to send the notice of rescission to SCBNY to be passed to CBC, there was no response from the beneficiary. Silence by the beneficiary could not be held to amount to consent and neither should SCBMB be held liable simply because it assisted DYMM to convey his intention to rescind the irrevocable SBLC to CBC, something SCBMB did out of respect of the status of DYMM and the sensitivity of the issue. Notably, SCBMB repeatedly stressed its position that consent of the beneficiary was necessary to rescind the irrevocable SBLC. The stand taken by SCBMB was that the SBLC was clearly irrevocable. Thirdly, there must be a 'promise' on the part of SCBMB for DYMM to found estoppel. It was not the law of estoppel to hold that someone was stopped merely because he obliged another person at the latter's request while at the same time he made clear his legal position on the issue which was to the opposite effect. Lastly, DYMM's pleaded case was that notwithstanding the intimation to suspend the SBLC, CBC proceeded to release the funds to TEC. The DYMM's pleaded case contradicted the issue of fraud contended by DYMM. Thus, SCBMB's claim against DYMM was allowed.

ⁱ[2009] 3 CLJ 709

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CAP OF INTEREST RATE ON PROVABLE DEBTS

A judgment had been obtained against a company which included contractual interest at the rate of 1.5% per month on the judgment sum. The company was then wound up. The judgment creditor filed its proof of debt based on the judgment. However, the official receiver (OR) admitted the debt at a lesser sum, after capping the interest rate at 6% per annum instead of 18% per annum as per the judgment. The OR relied upon s.291(2) of the Companies Act 1965 (CA) read with s.43(6) of the Bankruptcy Act 1967 to justify his decision.

On the above set of facts, the High Court in *Ipmuda Berhad v Eurodec Development and*

Construction Sdn Bhd held that the OR was right to apply the relevant provision in the bankruptcy laws governing proof of debts of an individual to the winding-up of companies. The interest on the provable debt of the company should be capped at 6% per annum and should be calculated up to the date of the winding-up order. The judgment creditor's application to reverse or vary the OR's decision was therefore dismissed with costs.

¹[2009] 2 AMR 532, [2009] 2 MLJ 464, [2009] 2 CLJ 711

CONTEMPT OF COURT

WEARING T-SHIRTS CONVEYING IMAGE OF KANGAROO COURTS IS CONTEMPTUOUS

Wearing a T-shirt imprinted with a palm-sized picture of a kangaroo dressed in a judge's gown (contemning T-shirt) within and in the vicinity of the court when an assessment of damages hearing arising out of defamation actions instituted by the Minister Mentor and the Prime Minister of Singapore against an opposition leader was being held was an act of scandalizing the court amounting to contempt of court. That was the decision of the Singapore High Court in *Attorney-General v Tan Liang Joo John and others*¹.

Any act done calculated to bring a court or a judge of the court into contempt or to lower his authority constitutes scandalizing a court or a judge and is a contempt of court. The *raison d'être* for the offence of scandalizing the court is the preservation of public confidence in the administration of justice. The Attorney-General of Singapore contended that the respondents had engaged in a deliberate and calculated attempt to scandalize the Singapore judiciary by stigmatizing it as a 'kangaroo court'. According to Black's Law Dictionary, a kangaroo court is a self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted or parodied; a court or tribunal characterized by unauthorized or irregular

procedures, especially so as to render a fair proceeding impossible; a sham legal proceedings.

Given the context in which the contemning T-shirt had been worn (in and around the Supreme Court at the same time as the assessment of damages hearing), a reasonable viewer would have apprehended that it was a reference to the expression 'kangaroo court' and intended to cast aspersions on the way in which the assessment of damages hearing was being conducted and on the Singapore justice system. In the High Court Judge's view, contemning conduct could take many forms including pictures and physical acts. A powerful and evocative image has as much inherent power as a written article to shake public confidence in the justice system. The instant case was about much more than mere wearing a T-shirt. The conduct of the respondents in posing for the photograph at a location where it was obvious that they would be seen by and photographed by the press communicated to an average member of the public the respondents' conviction that the Singapore courts were 'kangaroo courts'. The imputation that the Singapore courts were 'kangaroo courts' was the worst form of insult possible against a court system. Coupled with the fact that the respondents were deliberately unforthcoming on many of the circumstances surrounding their contemning acts and their refusal to apologize and lack of contrition through certain statements made in court, a custodial sentence was meted out.

¹[2009] 2 SLR 1132

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CONTRACT

FAILED BLACKMAILING

The facts in the Singapore High Court decision of *Tam Tak Chuen v Khairul bin Abdul Rahman and others*ⁱ make interesting reading. P and D were partners of a clinic which was subsequently corporatised with each one holding an equal number of shares and both were directors of the same. Some time later, D obtained a video footage from a closed circuit camera of P having sexual relations with a clinic employee in the clinic's consultation room. At a meeting three months later, P was confronted with the video footage. D presented P with three options : one, D would offer to buy out P's half share for \$50,000 and P was to resign from his directorship; two, P would buy D's half share instead and D would resign; or three, D would apply to court for the company to be wound up and the incriminating video footage would be tendered to court as evidence. P chose option one. Subsequently P brought a suit seeking a declaration that the agreement to sell his shares to D and resign as a director ought to be set aside as having been procured under duress.

To succeed, P would have to prove that illegitimate pressure had been exercised on him by D. A threat was illegitimate where the terms secured as a result of the threat of lawful action were so manifestly disadvantageous to the complainant (P) as to make it unconscionable for the defendant (D) to retain the benefit. The court duly recognized that cases where a threat of lawful action that was not unlawful in itself would be regarded as illegitimate so as to constitute duress were 'relatively rare'. However, in this case, on the evidence adduced in

CONTRACT

CONTRACT TO SUPPLY CONCRETE FRUSTRATED BY SAND BAN

In *Holcim (Singapore) Pte LKtd v Kwan Yong Construction Pte Ltd*, the plaintiff was a manufacturer and supplier of concrete whilst the defendant was a construction company. Both parties entered into a contract for the supply of concrete ("Contract") whereby the plaintiff was to supply

court, the pressure applied by D to apply to wind up the company and tender the video footage as evidence in support of such application was illegitimate because it was an abuse of legal process (D was acting with a collateral motive), made in support of an unreasonable and wrongful demand, amounting to unconscionable conduct.

Once the element of illegitimate pressure was proven, the burden was thrown to D to show that the pressure had contributed nothing to P's decision to execute the decision and his consent had not been vitiated. The factors that have to be considered to disprove the second element include whether P did or did not protest; whether he had alternative courses open to him; whether he was independently advised, and whether after entering into the contract P took steps to avoid it. By D's offer of three options, D would have succeeded but for the fact that the options proffered by D had not been genuine---D had in fact only prepared documents for the transfer of shares to him and not *vice versa*.

The judgment was therefore given in favour of P against D whereby the documents executed by P and the agreement to sell shares in the company to D were set aside.

ⁱ [2009] 2 SLR 240

ready-mixed concrete to the defendant based on certain terms in the plaintiff's quotation. Subsequently, Indonesia banned the export of sand to Singapore. Because all sand used in the construction industry was sourced from Indonesia, the construction industry was caught off guard. The plaintiff wrote to the defendant to advise that it was unable to supply concrete based on the plaintiff's quotation. The issue was whether the plaintiff was entitled to rely on the doctrine of frustration to be discharged from further performance of the Contract in that the sand ban had rendered its obligations radically different from what was originally undertaken in the quotation, hence performance had become impossible.

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The Singapore High Court held that performance of one's contractual obligations at a greater expense than had been anticipated did not amount to impossibility of performance. The plaintiff would not be able to rely on the doctrine of frustration and be discharged from performance of the quotation merely because performance turned out to be too difficult or onerous.

However, the plaintiff was saved by a provision (Clause 3) in the Contract which read:-

"...The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots and shortage of materials, Acts of God or any other factors arising through circumstances beyond the control of the Supplier."

The court held that the plaintiff could no longer perform the Contract because of the non-availability of sand, an event outside its control and which caused it to close down two plants. The Contract was accordingly frustrated. The court further held that where any of the events specified in

Clause 3 occurred, the plaintiff had no obligation to deliver concrete to the defendant.

The sand ban which arose through circumstances beyond the plaintiff's control and which took place without the fault of either party, qualified as a force majeure. Unless the sand ban was lifted, the plaintiff could not resume its obligation to supply concrete to the defendant without an alternative and continuous source of sand at a reasonable cost. Thus, the plaintiff was rightfully entitled to treat the Contract as discharged due to frustration.

ⁱ [2009] 2 SLR 193

CONTRACT / LEGAL PROFESSION / TORT

CLIENT TO BEAR LOSS CAUSED BY DISHONEST LAWYER

Vendors of a property were liable to pay the purchaser the monies paid by the purchaser to the vendors' solicitors who had absconded with the monies. That was the costly lesson learnt by the 1st and 2nd defendants who were the vendors of a house sold to the plaintiff in the case of *Wong Hiong Hung & Anor v Chang Siew Lan (p)*ⁱ.

The 1st and 2nd defendants (vendors) were represented by Messrs JL Lim & Co (the vendors' solicitor) whilst the plaintiff (purchaser) was represented by the 3rd defendant (purchaser's solicitor). The purchaser paid the balance purchase price to the purchaser's solicitors who subsequently issued a cheque made payable to the vendors' solicitors. This payment was made pursuant to the undertaking by the vendors' solicitor to redeem the property from the existing chargee. The vendors'

solicitor subsequently issued another cheque towards payment of the redemption sum to the existing chargee but this cheque was dishonoured. The property was never redeemed and the vendor's solicitor absconded with the money. The existing chargee subsequently auctioned off the property.

The Court of Appeal held that the vendors' solicitor was the agent of the vendors. There was provision in the sale and purchase agreement (SPA) which manifested an express and irrevocable authority given by the vendors to their solicitor to accept money payable pursuant to the SPA, to utilize the same to discharge the existing charge over the property, and to act and deal with all matters pertaining to the transaction in order to give effect to the terms and conditions of the SPA. The vendors were therefore vicariously liable for the wrongful act of their solicitor.

On the claim against the purchaser's solicitor, provisions in the SPA did not impose any contractual obligation on the purchaser's solicitor to effect payment of the balance purchase price to the chargee directly. On the converse, it was abundantly clear that the payment of the balance purchase price was to be made to the vendor's solicitor which was complied with by the purchaser's solicitor. There was

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therefore no breach of contractual duty or negligence that could be imputed to the 3rd defendant. Further, there was nothing to render the disappearance of the vendor's solicitor reasonably foreseeable. The purchaser's solicitor was in the circumstances held not liable to her client (the purchaser).

Readers are advised to be prudent with appointment of solicitor because as alluded to above, where a solicitor accepted a sum of money in the capacity of the solicitor for his client, so as to utilize it to redeem the property, but had instead

CRIMINAL / REVENUE

DIRECTOR NOT CRIMINALLY LIABLE FOR NON-REMITTANCE OF TAXABLE PORTION OF EMPLOYEES' INCOME TO INLAND REVENUE ?

The director of Deltria Sdn Bhd must have let out a huge relief when the High Court overturned his conviction in the Sessions Court on his failure as a director to remit the taxable amount which was deductible and payable by the company on the employees' income to the Inland Revenue in the case of *Dato' Muhamad Farid bin Haji Ahmad Ridhwan v Pendakwa Raya*ⁱ.

It is undisputed that every employer, if directed by the Inland Revenue, is obliged to remit the total amount of tax deducted from the remuneration of employees during the preceding month to the Inland Revenueⁱⁱ failing which and if without any reasonable excuse, the employer shall be guilty of an offence under the Income Tax Act 1967 (ITA)ⁱⁱⁱ. It is also undisputed that under s.75 of the ITA, responsibility of doing all acts and things required to be done by or on behalf of a company for the purposes of ITA shall lie jointly and severally with, among others, the directors of the company. The pertinent question is whether a director of a defaulting company can be criminally guilty of an offence in the instance of a failure of the company to remit the taxable amount which was deductible and payable by the company on the employees' income (defaulting company) to the Inland Revenue.

The High Court disagreed with the finding of the lower court. In the learned Judge's opinion, the

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absconded with it, the client would have to bear the loss !

ⁱ [2009] 3 CLJ 751, [2009] 4 AMR 64

Sessions Court has failed to consider s.75A of ITA which provides that where any tax is due and payable under ITA by a company or any debt from an employer under any rules made pursuant to s 107 and the employer is a company, a director at the relevant time shall be jointly and severally liable for such tax or debt and shall be recoverable under s 106 of ITA from that person. The said s 106 provides that tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government. Therefore, in the view of the learned Judge, the combined effect of s 75 and 75A was that a director of the defaulting company was liable for such tax or debt due and payable by the defaulting company which were to be claimed through civil proceedings. However, there was no provision that allowed any action to claim for the debt or arrears of tax by way of criminal proceedings.

With due respect, we have reservation on the soundness of the said decision. Whilst s 75A of ITA concerns recoverability of tax or debt due and payable to the Inland Revenue from a director arising from the defaulting company's act or omission, it has unnecessarily and wrongly been used to exclude the right of the Public Prosecutor to bring criminal proceedings against the director. Be that as it may, it remains to be seen whether this decision will be confirmed by the Court of Appeal in due course.

ⁱ [2009] 3 MLJ 378

ⁱⁱ s 107 ITA read with r 10 of Income Tax (Deduction From Remuneration) Rules 1994 (ITDRR)

ⁱⁱⁱ r 17 of ITDRR

1. TAKING OF PERSONAL LOAN FROM SUPPLIER

The claimant in *Nur Faridah Nanyan v GKN Driveline Malaysia Sdn Bhd*ⁱ was employed as a Buyer in the Purchasing Department of Materials of the company. The company found out that the claimant took a personal loan from a supplier which conveyed the impression that with such granting of loan, the supplier could expect more business from the company in future. The said supplier was indeed hoping to receive more business offers from the company after lending the money to the claimant. The company's Ethical Standards Policy prohibited its employees from indulging in such practice. The Industrial Court held that the claimant had breached the company policy. Her actions of taking such a loan had shattered the trust and confidence reposed in her and had put the company in an embarrassing position. She had abused her position and caused a conflict of interest. Her actions had bordered on dishonesty and the company was justified in dismissing her.

2. IMPORTANCE OF FRAMING PROPER CHARGES AGAINST EMPLOYEE

The Industrial Court's decision in *Lim Boon Keong v On Semiconductor, SCG Industrial Malaysia Sdn Bhd*ⁱ illustrates the importance of proper drafting of charges to be leveled against an employee in domestic inquiry. Here, the evidence showed that the claimant had on numerous occasions requested for commission from one of the respondent's customers for introducing clients, in violation of the company's written policy. No commission had however been actually ever paid to the claimant. The court agreed with the respondent's argument that when the company's code of business conduct contained a provision that forbade any employee from accepting gifts, any request or demand for gifts or commission by the claimant from any party would constitute a breach of the said provision. However, that was not the end of the story. The charge against the claimant was that the claimant's act was in violation of the respondent's code of business conduct and disciplinary policy, and the charge spelt out 5 provisions of the former and 7 items of the latter. The court found that the respondent had failed to establish any of the 7 items stipulated in the charge.

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As the charge used the conjunction "and" instead of "or", the failure of the respondent to prove any breach of the listed disciplinary policy in the charge meant that the charge as a whole had not been proven although the violation of a provision in the code of business conduct had been proven. So, the court ruled that the respondent had failed to prove the charge! The cautionary words of the Industrial Court Chairman with regard to the framing of a proper charge are reproduced herein:-

"...When the respective articles of the code and the respective items of the disciplinary policy are listed out one by one in the charge, they form the ingredients of the charge of which the respondent was under the burden to prove them. These alleged violations of the respective specific articles in the code and items in the disciplinary policy are not placed in the charge to make it more palatable. Once they become the ingredients of the charge, the employer who alleged the employee to have committed such breaches must accordingly prove them. ...It would be an exercise of unfair labour practice to cast a net in the hope that the employee could be caught in any of the breaches that the employer had listed out unless evidence could be adduced to prove each and every one of those itemized violations of the code and the policy. Employer must realize the risk and danger of listing a wide range of violation but is unable to prove them. However, if the employee is charged in the alternative..., then it suffices when the employer can prove one of the two violations and not necessarily to prove both. Similarly, if it is intended that either one of the listed items suffices to constitute the violation, this court would expect the conjunction "or" to be used..."ⁱⁱⁱ

3. BIASED INVESTIGATION

Once there is any indication that the investigation into a complaint against an employee may be biased, it is advisable to remove the element of bias to ensure impartiality of the investigation. That was the lesson sent out in the Industrial Court decision in *Maybank v Cheo Ai Mee*^{iv}. The company had conducted an audit investigation report regarding the manipulation of savings accounts and misappropriation of funds. The claimant was the subject of investigation. However, the claimant claimed that she had been threatened by one of the investigators (COW-2) during investigation and she lodged a police report on the incident. There were also numerous instances which showed inaccuracy, omissions and biasness in the audit report, discrimination by and questionable attitude of the

hostile and prejudiced auditor (COW-2) against the claimant. It prompted the court to remark that the company at the outset should have removed COW-2 from the investigation team once it was aware of the police report against COW-2. Its failure to do so had resulted in the biased audit report which led to the issuance of a show cause letter to the claimant who duly responded. The company however failed to revert to her on the outcome of her reply but chose to transfer the claimant who consequently claimed constructive dismissal. The Industrial Court Chairman indeed had some harsh words against the company's move to victimize the claimant :-

“... COW-1 (the Human Resource Manager) needed a scapegoat to show the market that the company had taken action to identify and discipline. It had conducted a shabby investigation due to prejudice, it had allowed the likely culprit to escape and had covered –up his fraudulent dummy transaction, it had discovered a lot of negligence and administrative errors by the staff. But it had to appease the market and restore confidence in its customers. It could not admit that many staff had contributed to the insider fraud. It would be so much easier to blame just one person...”

And the court went on to find that the company had breached all the five restrictions to the managerial prerogative in the transfer of employees. The claimant was reinstated to her former position without the loss of any financial benefits, promotions and bonuses in relation to her position.

4. IS A SALARIED PARTNER AN EMPLOYER ?

That was the interesting question posed before the Industrial Court in *Tetuan Choong & Co v Tan Sook Yin*^v. The firm of lawyers had employed the claimant as a legal assistant and subsequently promoted her to the position of salaried partner. No

INSOLVENCY

ATTEMPT TO ENFORCE JUDGMENT AFTER MORE THAN 17 YEARS

A Malaysian bank obtained a judgment in Malaysian High Court against a Singaporean who

partnership agreement was entered whilst the firm had contributed EPF for her and she had been paid a salary over and above the profits she had earned. She had not been asked to contribute to the outgoings or equity of the firm and her decision must be approved by the sole proprietor of the firm. On the other hand, there was indeed an oral agreement between her and the firm when she became a partner. The claimant had conducted herself as a partner and staff and clients had always regarded and treated her as a partner. Her name appeared on the letterhead of the firm as a partner and she had not been denied access to the accounts of the firm. She had also informed the insurance company that she had been a partner and made a statutory declaration to that effect. The Industrial Court recited the common law principle that a salaried partner may or may not be a partner in the true sense depending on the facts, it matters not the label attached to the relationship between the partners but the substance of it^{vi}. After considering the evidence in its totality, the Industrial Court concluded that the claimant was a partner in the true sense. Since she was not an employee of the firm, she could not have been dismissed without just cause or excuse nor could the firm have constructively dismissed her. Her claim was thus dismissed.

ⁱ [2009] 1 ILR 610

ⁱⁱ [2009] 1 ILR 587

ⁱⁱⁱ at page 605 A-F.

^{iv} [2009] 2 ILR 204

^v [2009] 2 ILR 281

^{vi} *Stekel v Ellice* [1973] 1 All ER 465

acted as a guarantor in relation to loans granted to two Malaysian companies. The said bank waited for almost 18 years before it decided to commence bankruptcy proceedings in Singapore High Court against the said debtor. Was it too late for the said bank?

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That was the question arise in the Singapore Court of Appeal's decision in *Ambank (M) Bhd v Yong Kim Yoong Raymond*. For a better understanding, the relevant dates are stated below:

- 3.11.1988 the said bank obtained judgment against the said debtor in Malaysia ("the Malaysian Judgment").
- 12.10.1994 the Malaysian Judgment was registered in Singapore ("the Registered Judgment") under the provisions of the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA").
- 18.9.2006 the said bank served a statutory demand on the said debtor.
- 10.10.2006 the said bank instituted bankruptcy proceedings against the said debtor.

For the benefit of our readers, in Malaysia as well as in Singapore, no action upon a judgment shall be brought after expiration of 12 years from the date on which the judgment became enforceable. If however more than 6 years have passed since the date of judgment, leave of court is required before a writ of execution to enforce the judgment may be issued.

The said debtor opposed the bankruptcy proceedings and one of the grounds relied upon was that the Registered Judgment was not a debt "enforceable by execution in Singapore" under s 61(1)(d) of the Bankruptcy Act of Singapore ("BA 2000") because the said bank had not obtained leave of court under O 46 r 2(1)(a) of the Rules of Court of Singapore. The said bank contended that s 61(1)(d) was only applicable when the debt relied upon to present the bankruptcy application was incurred outside Singapore. Since s 3(3)(a) of RECJA provided that a foreign judgment that was registered in Singapore was "of the same force and effect" as a judgment originally obtained in the Singapore courts, the Malaysian Judgment upon registration was effectively converted to a Singapore judgment.

Accordingly, the Registered Judgment by virtue of its registration under RECJA became for all intents and purposes a 'Singaporean debt' and thus s 61(1)(d) did not apply. It was further contended that the present Rules of Court provided that the

Rules shall not apply to bankruptcy proceedings and thus, O 46 r 2(1)(a) had no application. The said bank further argued that in any event, the words "enforceable by execution in Singapore " should be given a wide meaning, requiring the Registered Judgment to be only *capable* of enforcement, and not a narrow meaning, requiring the judgment to be *immediately* executed by one of the specified modes of execution provided under the Rules of Court. The said bank reiterated its stand as consistent with established principle of law that insolvency proceedings, including bankruptcy, were not technically considered to be proceedings to the actual execution or enforcement of a judgment.

The Singapore appellate court looked into the legislative history and purpose of s 61(1)(d) of BA 2000, including minutes of proceedings of the public hearing of the Select Committee on the Bankruptcy Bill, in arriving at this groundbreaking decision. Firstly, the Singapore Court of Appeal held that the registration of a foreign judgment under RECJA would not change the fact that the debt itself was in substance actually incurred outside Singapore. S 61(1)(d) applied to all bankruptcy applications based on foreign debts, whether registered as foreign judgments or not, so long as the underlying debt relied upon for the bankruptcy application was incurred outside Singapore. The said debt arose in Malaysia and was in every way a debt "incurred outside Singapore" which attracted the application of s 61(1)(d) of BA 2000.

Secondly, it would be anomalous that, for a registered foreign judgment in Singapore where more than six years had lapsed since the date of judgment, leave of court was required before a writ of execution could be issued [as per O 46 r 2(1)(a)], yet, no leave at all would be required to commence the manifestly more draconian bankruptcy proceedings. The lapse of six years after judgment would ordinarily in itself justify refusing the judgment creditor leave to issue writ of execution unless the judgment creditor could show that the circumstances of his case took it out of the ordinaryⁱⁱ (or that 'demonstrably just to do so'ⁱⁱⁱ). It was thus inappropriate that a foreign judgment creditor could circumvent such burden by alternatively commencing the more draconian bankruptcy proceedings.

Thirdly, the applicability of the Rules of Court should not have a bearing on the proper construction of the words "enforceable by execution

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in Singapore” in s 61(1)(d) of BA 2000. The narrow meaning was adopted by the court, which held that BA 2000 had simply and expressly provided that leave should first be obtained under O 46 r 2(1)(a) before a bankruptcy application based on a foreign debt payable by virtue of a judgment for which more than six years had passed since its date of registration could be proceeded with.

In the circumstances, since the said bank did not obtain leave under O 46 r 2(1)(a), it did not

LEGAL PROFESSION

RETIRED JUDGE APPEARING AS COUNSEL

A retired High Court Judge’s attempt to appear as a leading counsel for one of the parties turned out to be futile when the other party succeeded in getting him to be disqualified from doing so. This happened in the case of *Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd*. Dato’ RK Nathan (RKN) was the High Court judge who had presided over the suit no less than 13 times.

Subsequent to his retirement, the suit was disposed off before another judge who allowed the plaintiff’s claim. The defendant had appealed against the said decision and filed an application for stay of execution. RKN who was then back in practice appeared as leading counsel for the defendant. The plaintiff objected to his appearance and applied for his disqualification. The High Court upheld the plaintiff’s objection. While the court did not think that on the facts, there was any breach of rule 3 (advocate and solicitor not to accept brief if embarrassed) or rule 4 (advocate and solicitor not to accept brief if professional conduct likely to be

REMEDY / CONTRACT

ACTION AND JUDGMENT AGAINST JOINT CONTRACTORS/TORTFEASORS

R obtained a summary judgment against A and C. When A failed to satisfy the judgment sum, R commenced winding up proceedings against A. R

satisfy s 61(1)(d) and the bankruptcy application was dismissed.

ⁱ[2009] 2 SLR 659

ⁱⁱ Dipika Patel v Sarbjit Singh [2002] EWCA Civ 1938

ⁱⁱⁱ Duer v Frazer [2001] 1 WLR 919

impugned) of the Legal Profession (Practice and Etiquette) Rules 1978 (LPR), the court regarded the conduct of RKN would be ‘incompatible with the best interest of the administration of justice’ within the ambit of rule 5 of the LPR. RKN’s appearance would certainly give rise to an appearance of conflict.

There might not be actual conflict but the appearance of conflict in the eyes of a fair minded reasonably informed member of the public was sufficient to render it incompatible with the best interest of the administration of justice. The court was very concerned with the general public’s perception of impropriety in RKN’s handling of the matter. The disqualification was not imposed as a punishment for misconduct but for protection for the parties and the wider interest of justice. The court thus exercised its inherent jurisdiction to control its own processes and to determine which persons should be permitted to appear before it as advocates.

ⁱ [2009] 3 AMR 738

had also presented a winding up petition against C. R’s lawyer raised an interesting point in objecting to the winding up petition against R, namely that the judgment has established a joint liability against A and C and by R having already instituted a winding up petition against C, R had elected to recover the same judgment from C and was consequently barred from filing a similar one against A. A essentially relied on the ‘technical rule’ that where there were joint contractors/tortfeasors, if judgment was signed against one, the other was discharged.

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The Court of Appeal in *Sateras Resources (M) Bhd v Pengurusan Danaharta Nasional Bhd & Ors*ⁱ however rejected the argument. It held that the 'technical rule' as propounded in the English decision of *Parr v Snell & Ors*ⁱⁱ and applied in *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors*ⁱⁱⁱ was inapplicable to the above facts. The final judgment was obtained against both A and C in the one and same action and remained uncontested. R sought a fruition of the judgment and the filing of the petitions for winding up constituted a different cause of action based on a judgment debt. The action on the unsatisfied judgment against C could not operate as an extinguishment of the debt for as long as it remained unsatisfied.

Following from this decision and an earlier High Court decision in *Alliance Bank Malaysia Bhd v Mukhriz bin Mahathir & Anor*^{iv}, whilst one must be cautious when suing on a joint liability basis, the 'technical rule' must not be applied indiscriminately. It would appear that the rule is applicable only in cases where the contract is a 'joint' contract or where there are joint tortfeasors. It is not applicable in cases where the contract is based on 'joint and several' liability or where there is some rule or statute which prevents its operation, like Order 13 in

the Rules of the High Court 1980 which allows a plaintiff to enter a judgment in default of appearance or pleading against one and later go on and sign judgment against the others in a case of a debt or liquidated demand. The basis of the rule is that there shall not be more than one judgment on one entire contract or put it in a technical way, the contract is merged in the judgment and therefore the cause of action on the contract is gone. The basis is not the election of the plaintiff but the right of each joint contractor to have his co-contractors joined as parties so as to have them all before the court.

ⁱ [2009] 2 MLJ 538

ⁱⁱ [1923] 1 KBD 1

ⁱⁱⁱ [2002] 2 CLJ 741

^{iv} [2006] 4 MLJ 451

TORTS (NEGLIGENCE) / BAILMENT

DO MEN OWN THEIR SPERM ? CAN MEN SUE FOR DAMAGES FOR MENTAL DISTRESS DUE TO DAMAGE TO THEIR SPERM?

A very interesting and indeed a novel question arose in the English Court of Appeal case of *Yearworth & others v North Bristol NHS Trust* about the ability to sue in respect of damage to sperm. Six men diagnosed with cancer were advised that the chemotherapy treatment they would undergo might damage their fertility. They then produced samples of semen to be frozen by the hospital (for which the defendant trust was responsible) which had a fertility unit licensed under the Human Fertilisation and Embryology Act 1990 (the 1990 Act) and to be stored for the possible future use of the sperm therein. They signed forms consenting to storage and use of sperm in which the defendant made express representations including 'We are pleased to be able to store sperms for your

future use....your sperms will be stored in liquid nitrogen (at minus 196°) in the Haematology Laboratory...The Laboratory is run to a high professional standard. However, accidents can occur in any laboratory...we cannot therefore, give an absolute guarantee that your sperms would still be in a useable condition in five or ten years time, but we can undertake to look after them with all possible care.' Subsequently, the amount of liquid nitrogen in the tanks in which it was stored fell below the requisite level; the men's semen thawed.

The men sued the defendant trust, alleging that as a result of the loss of their sperm, they suffered not merely mental distressⁱⁱ, but a psychiatric injury, ie. a mild or moderate depressive disorder. The defendant admitted it had a duty to take reasonable care of the sperm and that it had been in breach of that duty in respect of an automatic system for topping up the nitrogen. However, it denied liability. On the trial of preliminary issues: (1) whether the damage to the sperm in itself constituted a personal injury to the men; (2) whether the sperm was the property of the men; (3) if the answer to either was 'yes', upon what basis the amount of their damages should be assessed, the defendant contended that the regulatory provisions

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in the 1990 Act in relation to live human gametes had eliminated or circumscribed many of the rights normally incidental to ownership so that any rights of ownership of the sperm otherwise vested in the men for the purposes of an action in negligence had been removed. At the appeal, an additional question was posed - whether the men had a distinct cause of action against the defendant under the law of bailment.

On (1), the Court held that damage to and consequential loss of the sperm did not constitute personal injury. It would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or personal injury to him. On (2), for the purposes of their claims in negligence (in the context whether an action in tort may be brought for loss of the sperm consequent upon breach of the defendant's duty to take reasonable care of it), the men had ownership of the sperm which they had ejaculated. While their rights to the use of their sperm had been eroded to a limited extent by the 1990 Act, overall they still retained the ownership of their sperm.

The interposition of medical judgment (in that they would likely to have medical assistance in using the sperm), made compulsory by the 1990 Act, between their wishes (to use their sperm in a certain way) and the use of the sperm did not derogate from their ownership. There were numerous statutes which limited a person's ability to use his property without eliminating his ownership of it. Moreover, by its provisions for consent, the 1990 Act assiduously preserved the ability of the men to have directed that the sperm be *not used* in a certain way; their negative control over its use remained absolute. And the sperm could *not* be stored or continue to be *stored* without their subsisting consent. The analysis of rights relating to the use and storage under the 1990 Act had to be considered in the context that, while the licence-holder (the fertility unit of the hospital) had duties which might conflict with the wishes of the men, no person other than each man had any rights in relation to the sperm which he had produced.

On bailment, there had been a bailment of the sperm by the men to the unit. The unit had

chosen to take and acquire exclusive possession of the sperm; its assumption of responsibility for careful storage had been express and unequivocal; it had held itself out as able to deploy special skill in preserving the sperm; it had extended and broken a particular promise to the men. The arrangements between the men and the defendant for the storage of their sperm had been closely akin to contracts and should fall within the ambit of the principles which applied to breach of contracts.

On (3), the Court briefly went into analysis of the area of the law relating to recoverability of damages for psychiatric injury or mental distress caused by breach of contract and noted the expansion of the categories of contracts in this area from 'a contract for a holiday, or any other contract to provide entertainment and enjoyment'ⁱⁱⁱ to 'contracts which are not purely commercial but which have as their object the provisions of enjoyment, comfort, peace of mind or other non-pecuniary personal or family benefits'^{iv}.

The Court held that the arrangements between the men and the defendant fell into such category. The reference to peace of mind fit the object of arrangements designed to preserve the ability of men to become fathers notwithstanding an imminent threat to their natural fertility. Their object was also the provision to the men of non-pecuniary personal or family benefits. Thus, the men were held to be in law capable of recovering damages for psychiatric injury and/or mental distress in bailment.

ⁱ [2009] 2 All ER 986

ⁱⁱ The argument was that it was patently foreseeable that, already in a vulnerable condition, they would be likely to suffer a severe adverse reaction to the news that unless they were to recover their natural fertility, their chances of becoming a father, represented by the storage of their sperm, had been lost.

ⁱⁱⁱ *Jarvis v Swan Tours Ltd* [1973] 1 All ER 71

^{iv} *Johnson v Unisys Ltd* [2001] 2 All ER 801

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1. McCURRY RETAINS ITS NAME

In our previous issue 4 of 2008, we featured the High Court decision of *McDonald's Corporation v McCurry Restaurant (KL) Sdn Bhd* [2008] 9 CLJ 254, whereby McDonald's Corporation (the operator of the famed McDonald's chain of restaurants, food and beverage business) succeeded in obtaining an injunction to restrain the defendant from using the prefix "Mc" or any other confusingly or deceptively similar prefix in the course of trade and an order requiring the defendant to change its name. On 29.4.2009, the defendant succeeded at the Court of Appeal to over-turn the decision and recovered its right to use back "McCurry" as the name of its Indian food restaurant. The appellate court ruled that there was no evidence to show that McCurry was passing off McDonald's business as its own and there were several distinguishing features between the two in the conduct of their trade. The news on this decision was carried in the local dailiesⁱ and the full text of judgment has just been published in [2009] 3 CLJ 540. The defendant's presentation of its business was in a style and get-up distinctively different from that of the plaintiff. The plaintiff's get-up consisted of a distinctive golden arched "M" with their word "McDonald's" against a red background. The defendant's signboard carried the words "Restoran McCurry" with the lettering in white and grey on a red background with a picture of a chicken giving a double thumbs-up and the wordings "Malaysian Chicken Curry". The items of food available at the plaintiff's outlets all carried the prefix "Mc" whilst none of the items served at the defendant's outlet carried the prefix. The type of food served differed, one was typical Indian food whilst the other was fast food. The type of customers patronizing the defendant's outlet was mainly adults and senior citizens while children were the main patrons of the plaintiff's outlets. In short, in the totality of circumstances of the case, the use of the name "McCurry" could not by itself lead to the inference that the defendant sought to obtain an advantage from the usage of the prefix "Mc". Indeed, as the Court pointed out, a restaurant in UK named

"McChina" was allowed to carry on its business selling only Chinese foodⁱⁱ. Therefore, the Court concluded that there was no proof of the tort of passing off of the plaintiff's trade name to which goodwill was attached.

2. ONLY EXCEPTIONAL CIRCUMSTANCES AND OPPRESSION CAN BAR INJUNCTION AGAINST NUISANCE

In our previous issue Q1 of 2009, under the title 'In seeking injunctive relief, don't delay and don't offer compromise', we reported a decision of the High Court in UK which refused to grant an injunction for an actionable nuisance as there was considerable delay in bringing the proceedings and there was a willingness to accept compensation. However, on appeal, the Court of Appeal in *Watson & Others v Croft Promo-Sport Ltd*ⁱⁱⁱ allowed the claimants' appeal. It was held that established authorities made clear that judges could only refuse to grant injunctions where exceptional circumstances applied or where it would be oppressive of the defendants. The reasons given by the High Court judge did not come within any of these two factors. As to the fact that the claimant was prepared to accept monetary compensation up to a certain level of inconvenience, it did not mean that damages were therefore an adequate remedy for inconvenience suffered in excess of that level. In the view of the English Court of Appeal, the case was one of substantial injury to the claimants' enjoyment of their properties. An injunction was therefore ordered to restrict the defendants' use of the circuit to their core activities.

ⁱ Page 9 of the New Straits Times, April 30, 2009 and page N26 of the STAR, May 1, 2009.

ⁱⁱ *Yuen Yu Kwan Frank v McDonald's Corporation* [2001] 1 WL 1422899. Also see *McDonald's Corp v Future Enterprises Pte Ltd* [2005] 1 SLR 177.

ⁱⁱⁱ [2009] EWCA Civ 15

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