

THE UPDATE



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BANKING LAW

STOP DISBURSING LOAN AFTER EXPIRY OF COMPLETION DATE

Financier is advised to be prudent in making progress releases to developer after the expiry of the date on which the developer was to complete construction of the property under financing by the financier. That was in essence the message conveyed in the High Court decision of *Ng Thiam Seng & Anor v Am Finance Berhad*ⁱ.

The plaintiffs had purchased a condominium from a developer. The defendant financed the purchase pursuant to a loan agreement and deed of assignment. Pursuant to the loan agreement, the defendant was authorized to make progress releases of the loan to the developer at various stages of completion upon being presented with the architect's certificate certifying the completion of the particular stage of construction. The developer in turn issued letters of undertaking to the defendant, undertaking to return such progress releases in the event it failed to complete the construction of the condominium within the stipulated time frame.

Despite the developer's failure to complete the condominium within the stipulated time frame, the defendant continued to make progress releases in respect of four certificates issued by the architect. Such payments were disputed by the plaintiff who sought a declaration that they were not bound to pay the defendant any sums that were released by the defendant to the developer after the stipulated date of completion.

The learned High Court judge construed several provisions of the deed of assignment and power of attorney. By s.6.03 of the latter, the defendant became an agent of the plaintiffs. As agent of the plaintiffs who was bound to act in their best interest, the defendant was obliged not to continue to make progress releases to the developer after the 36-month completion date had lapsed and work on the project had stopped without a fresh mandate. Even if the defendant was expressly authorized to continue making such progress releases, it would still have to set off all liquidated ascertained damages (LAD) due to be paid to the plaintiffs and release only the balance to the defendant. The duty on the part of the defendant/agent to act in the best interest of the plaintiffs/principals includes the duty to act with diligence and extends beyond sighting the certificate certifying the stage of completion and paying the amount to the developer. It was therefore not open to the defendant to claim that it was not obliged to keep vigil over the progress of the construction of the condominium or that it did not have any notice of the stages of progress.

Therefore, since the four progress releases were made after the completion date and without the deduction of LAD, they were clearly unauthorized and the plaintiffs were not liable to the defendant for the same.

ⁱ [2009] 4 AMR 808

BANKING / COMPANY LAW

SECURITY COMFORT THAT IS OF NO COMFORT

The plaintiff in *Thuringische Faser Aktiengesellschaft Schwarz v Bank of Commerce (M) Bhd*ⁱ, a company established in Germany deposited a sum of DM9 million (converted at that time to about RM15 million) on interest-bearing fixed deposits with the bank at a tenure of three months with a roll-over at the bank's prevailing interest rates

(the said FD). The plaintiff became a subsidiary of a Malaysia-incorporated company called TFCO and placed the monies in question on the said FD upon the representation of TFCO that the interest rates offered by the bank were more attractive than the interest rates available in Germany. The plaintiff was not aware when so doing that the bank had loaned monies of about RM30 million to TFCO and the latter had passed a resolution to the effect that the said FD were to remain with the bank as "security comfort" or as an assurance for the repayment of the

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loan granted to TFCO. Neither did the bank inform the plaintiff of the resolution. The plaintiff only discovered this after investigation upon the bank's refusal to pay over to the plaintiff monies in the said FD.

The High Court allowed the plaintiff's claim for the refund of the said FD. The bank was held to have breached its duty as a banker in unilaterally setting-off the monies in the said FD against the monies owed to the bank in the delinquent account of a third party, namely TFCO, without even enquiring as to whether the plaintiff agreed or consented to such action by the bank. The learned Judge was not convinced by the argument that the plaintiff being the wholly subsidiary of TFCO at the material time would have been aware of the placement of the said FD as security comfort for the facilities granted to TFCO.

The learned Judge refused to lift the corporate veil as no allegation of fraud was advanced. Evidence showed that TFCO did not run the plaintiff nor have management control over it. He upheld the principle of separate legal entity between a parent/holding company and subsidiary company and that a board resolution of a parent/holding company cannot bind a subsidiary/wholly-owned company.

There was also non-compliance of the provisions in s.108 of the Companies Act 1965 which required certain charges created by a company to be registered with the registrar of companies. All in all, the very fact that the bank procrastinated in revealing to the plaintiff the reason for its refusal to release the monies in the said FD until it was forced effectively destroyed the bank's case.

However, the bank succeeded in resisting the plaintiff's attempt to have the Court allow conversion of the monies to Deutsche Marks and Euros with retrospective effect to its advantage. The learned Judge held that the plaintiff having made a business decision to place its monies on fixed deposit in Ringgit Malaysia with a bank in Malaysia should bear the risk that was attendant upon its business.

ⁱ [2009] 4 CLJ 102

BANKRUPTCY

BANKRUPT NEGOTIATED SETTLEMENT OF OWN DEBT

The ability or competency of a bankrupt to negotiate with his judgment creditor to reduce debt due by him was the focus in the High Court case of *Re Hashbudin Hashim Ex P Citic Ka Wah Bank Ltd.*

In that case, The Director General of Insolvency (DGI) initially approved a sum of RM41 million as the debt due and owing to the judgment creditor (JC) arising from a banking facility granted to a company of which the judgment debtor (JD) had stood as guarantor.

Later, it came to the DGI's knowledge that a reduced sum of RM260,000 had been agreed as a result of negotiation between the JC and the JD as evident from correspondences. The DGI made application under s.42 Schedule C r.37 of the Bankruptcy Act to reduce the amount in the proof of debt which he had approved earlier. The said provision reads:

"If the Official Assignee thinks that a proof has been improperly admitted the court may on his application, after notice to the creditor who made the proof, expunge the proof or reduce its amount."

The High Court held that a bankrupt (ie. JD) was competent, even after the Adjudication order (AO) and receiving Order (RO) had been pronounced, to negotiate any settlement of his debt with his creditor and provided that any agreement

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that was reached pursuant to that negotiation was brought to the attention of DGI for his approval, such an agreement was perfectly valid.

DGI was right to act under the said provision to reduce the amount in the proof of debt. On the facts, there was evidence of a perfectly concluded agreement between the JC and the bankrupt subject only to the approval of DGI. Thus, the Senior

Assistant Registrar was right in allowing the DGI's application.

¹ [2009] 5 CLJ 170

COMPANY / INSOLVENCY

OFFER OF SECURED SUM TO WARD OFF WINDING-UP PETITION

It is not uncommon to hear complaints that it takes a long time for a claimant to obtain judgment from our courts, even for simple debts due and owing by another person. Under the rules of the courts, there is indeed a procedure known as summary judgment whereby the claimant can, without setting his claim down for trial and having to wait for years for the trial over his claim, apply for summary judgment.

Such application is basically a contest of affidavits and documentary evidence. It is suitable if the claimant holds the view that his claim is free of triable issues, namely questions that may be raised by the defendant pertaining to the claim which cannot or are not capable of being determined without holding a trial whereby witnesses appear in court to give oral evidence on the claim or defence raised.

It is a short-cut route to obtaining judgment. Even faster than such route is where there is clear and indisputable evidence (such as admission of debt) supporting the claim against a company (debtor company), the claimant may decide to bypass filling a civil suit in the court to obtain judgment and instead, proceed to file winding-up proceedings against the debtor company.

This usually takes place after the claimant has issued twenty-one-day statutory demand under s.218 of the Companies Act 1965 for the claim and the debtor company is unable, neglects or fails to make payment of the demanded debt within the said

twenty-one-day period and thus, attracts the presumption that the debtor company is unable to pay its debts and insolvent. However, the debtor company can resist the winding-up petition by showing that there is *bona fide* dispute to the claim in which event the claimant will have to file a civil suit to have the dispute adjudicated.

Apart from that, the debtor company may also within the said twenty-one-day period secure or compound for the sum to the reasonable satisfaction of the claimant. This option was the focus of the Singapore Court of Appeal decision in *BNP Paribas v Jurong Shipyard Pte Ltd*¹.

In the instant case, JSPL entered into foreign exchange contracts with its banker, BNP as counterparty. JSPL subsequently repudiated the contracts. Both parties then agreed to close-out the contracts in order to crystallize the losses with both parties reserving their respective rights and liabilities. The loss was crystallized at approximately US\$50m. BNP then sent a letter of demand to JSPL for payment.

JSPL replied with an offer to place in escrow sufficient funds to meet any judgment obtained by BNP on its claim on the condition that BNP commenced legal proceedings to recover the alleged debt. BNP rejected the escrow offer and issued statutory demand. JSPL applied to the High Court for an injunction to restrain BNP from commencing winding-up proceedings on the ground that there were triable issues to BNP's claim. The High Court granted the injunction and the Court of Appeal affirmed the decision.

In upholding the decision of the lower court, the appellate court held that where an offer to secure a disputed debt had been made, the issue of substantiality or insubstantiality of the dispute fell by the wayside and was no longer a relevant consideration given that the debtor was not unable to pay its debts. In other words, the issue of whether

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there were triable issues with respect to BNP's claim was no longer relevant. The appellate court went further when by way of *obiter*, it reaffirmed the discretionary power vested in the court not to wind up a company that was proved or deemed to be unable to pay its debts. Where a petition to wind up a temporarily insolvent but commercially viable company was filed, many other economic and social interests might be affected, such as those of its employees, the non-petitioning creditors, as well as the company's suppliers, customers and shareholders. The court is entitled to legitimately

take into account such interests in deciding whether or not to wind up the company.

ⁱ [2009] 2 SLR 949. Note that s.254(2) of the Singapore Companies Act (Cap 50, 2006 rev Ed) has provisions similar to that in s.218(2) of our Malaysian Companies Act 1965.

CONTRACT LAW

SALE OF CEMENT NOT FRUSTRATED BY FAILED SUPPLY BY ULTIMATE SUPPLIER

In our previous issue Q2 of 2009, we featured a Singapore High Court case [*Holcim (Singapore) Pte Ltd V Kwan Yong Construction Pte Ltd*]ⁱ which was about a contract for the supply of concrete that could not be carried out due to sand ban imposed in Indonesia which affected the supplier. The defendant/supplier was however rescued by a clause in the contract which absolved liability if the supply was disrupted by force majeure or circumstances beyond its control. The recently reported case of *CTI Group Inc v Transclear SA*ⁱⁱ has similar factual situation.

In that case, parties entered into two contracts for the supply of cement in Asia destined for Mexico. The contracts were an attempt to break a cartel in the Mexico cement market operated by C. For the supply of the cement, the seller entered into arrangements with suppliers which were not contractually binding. As it turned out, the sellers were unable to fulfil both contracts as the sellers' suppliers refused to supply the cement after pressure was placed upon them by C. Before the arbitration, it was found that the contracts had been frustrated by C's intervention. However, it was overturned by the High Court on appeal. The High Court took a different view and held that the contracts were not frustrated because the sellers had taken the risk of a failure of their contemplated source of supply.

On further appeal to the English Court of Appeal, it was held that the High Court judge was

right. The Court regarded the root cause of the seller's inability to deliver the cement was the abuse by C of its commercial position combined with the willingness of suppliers to acquiesce in its demand. The primary issue was thus whether such conduct was sufficient to frustrate the contracts. Recognising and applying the law on frustration, frustration occurred whenever the law recognized that, without default of either party, a contractual obligation had become incapable of being performed because the circumstances in which performance was called for would render it a thing radically different from that which was undertaken by the contract. However, the fact that a supplier chose not to make goods available for shipment thus rendering performance by the seller impossible was not of itself sufficient to frustrate a contract of this kind. The nature of the performance called for by the contracts had remained the same. Whether the suppliers had chosen to succumb to that pressure was a matter of choice. It was not a supervening event which had rendered the performance of the seller's obligations impossible or fundamentally different in nature from that which was envisaged when the contracts were made.

Unlike the Singapore High Court case of *Holcim Pte Ltd*, there was no escape clause in the contracts. What is of interest is a remark made by the Court of Appeal that a prohibition of export rendering the shipment of the goods unlawful was a supervening event that frustrated a contract for the supply of the goods concerned. This is at tangent with the decision in *Holcim Pte Ltd*. In the circumstances, it appears that the position of law in this regard remains unsettled.

ⁱ [2009] 2 SLR 193

ⁱⁱ [2009] 2 All ER (Comm) 25

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CONTRACT LAW

CONTRACTING OUT OF S.75 OF CONTRACTS ACT 1950?

The law as laid down in the landmark Federal Court decision in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy*ⁱ was again the focus of attention in the recent case decided by the apex court in *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd*ⁱⁱ. The question revolves upon the interpretation of s.75 of the Contracts Act 1950 (the Act) which reads as follows :-

' 75. Compensation for breach of contract where penalty stipulated for

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

In *Selva Kumar* case, it was a case of sale and purchase of a clinic whereby the purchaser had paid up to 80% of the total purchase price but failed to pay the balance and the vendor sought to forfeit the entire amount paid up by relying on a clause in the agreement (the liquidated damages clause) which in effect provided that if the purchaser were to default, all moneys paid to date of such breach would be forfeited absolutely as agreed liquidated damages.

The Federal Court held that notwithstanding the words in s.75 of the Act 'whether or not actual damage or loss is proved to have been caused thereby' (the words in question in s.75), the vendor who has the benefit of the liquidated damages clause must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v Baxendale*ⁱⁱⁱ. Only in cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question in s.75 will apply.

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The damages awarded must however not exceed the sum so named in the contractual provision. *Selva Kumar* case fell into the category of cases where damages could be proved by settled rules but since the vendor failed to do so, the court could not quantify any award of damages to him, but only allowed him to forfeit the amount of deposit which was 10% of the total purchase price.

In *Johor Coastal Development Sdn Bhd* case, it was a case of sale and purchase of 2 plots of land whereby the purchaser paid up to 58% (including the First Payment of 12%) of the total purchase price but failed to pay the balance price. The vendor relied upon two clauses in the sale and purchase agreement. Clause 8.2(b) provides that upon termination of the agreement all instalments previously paid by the purchaser to the vendor including the First Payment and any interest thereon paid as at the date of termination shall be forfeited to the vendor absolutely. Clause 16.2 provides that the sums stipulated in the agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party thereto thereby waives any objection it may then or thereafter have that those sums would be otherwise than fair and reasonable compensation.



The Federal Court agreed with the Court of Appeal that the 12% by whatever label it was called was an earnest deposit (a true deposit to secure the future performance of the contract)^{iv} which was not in law a penalty; it was not unusual or extortionate but a fair and reasonable deposit which, by virtue of clause 8.2(b), the vendor was entitled to forfeit it^v. On the balance sum (58% less 12%), the Federal Court (by majority) observed that the facts in *Selva Kumar* were similar to the present case and reaffirmed the law laid down in *Selva Kumar* as still good law. In other words, a party having the benefit of a liquidated damages clause is obliged to prove its loss notwithstanding the words in question in s.75. The vendor did not prove its damage. Thus, it was obliged to return the balance sum to the purchaser.

On the question whether the parties had by Clause 16.2 contracted out of s.75 of the Act, the Federal Court (by majority) held that there was no clear provision in the agreement which excluded the application of s.75 of the Act. The Federal Court (by majority) concluded by stating that the question of whether or not parties entering into a contract were

entitled to contract out of the provisions of s.75 of the Act did not arise in the circumstances of the case. It is therefore, in our view, inconclusive whether a properly worded clause in an agreement will be upheld to exclude the application of principle laid down in *Selva Kumar* case.

ⁱ [1995] 1 MLJ 817

ⁱⁱ [2009] 4 MLJ 445

ⁱⁱⁱ [1854] 8 Exch 341

^{iv} It was so held by the Court of Appeal [2005] 2 CLJ 914. Indeed, the Court of Appeal went further to hold that s.75 did not apply to a true deposit which might be forfeited in the event of a default as it represented a genuine pre-estimate of the damage suffered by a vendor. But any further sum paid towards the balance of purchase price could only be forfeited upon proof of actual damage.

a sale and did not advertise or give publicity to the sale but instead entered into confidential negotiations with the prospective buyer, DSM which culminated with the sale. One of the mortgagors (B Co.) filed a suit against D Bank to set aside the sale of all pledged shares; alternatively, for damages corresponding to the undervalue at which it alleged D bank had sold the pledged shares.

D Bank counterclaimed for payment of the unpaid balance of the loan facility (Unpaid Loan) after accounting for the proceeds of sale of the pledged shares. We shall not further dwell on the facts of the case --- which can be found in the earlier article --- unless necessary to elucidate the principles sought to be highlighted.

On the duties owed by a mortgagee to mortgagor in a sale of mortgaged property, a mortgagee in exercising his power of sale had a duty to act in good faith and also a duty to take reasonable care to obtain the true market value or proper price of the mortgaged property at the date on which he decided to sell the property. There is a difference in the reliefs available for the breach of the two duties. A failure to take reasonable steps to obtain the proper price would usually lead to a claim in damages, but not a claim to set aside the saleⁱⁱⁱ. Conversely, where there was a breach of the duty to

CREDIT & SECURITY

MORTGAGEE DUTY-BOUND TO OBTAIN PROPER PRICE (II)

This is the sequel to the article titled "Mortgagee Duty-Bound to Obtain Proper Price" featured in issue Q1 of 2009 of "The Update" which is necessitated in the light of the Singapore Court of Appeal's decision in *Beckett Pte Ltd v Deutsche Bank AG and Anor*ⁱ that partially allowed the appeal arising from the High Court decisionⁱⁱ. The appellate court's decision contains numerous refined principles concerning the duty of a mortgagee (or chargee, as the case may be) when exercising his power of sale in realizing his security, which are of no less relevance in our jurisdiction.

The case revolves upon default in repayment of a bridging loan facility when it fell due and sale of the pledged security. The principal complaint was that the mortgagee (D Bank) did not have the pledged shares valued in contemplation of

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act in good faith, the sale itself might be bad in law and be set aside. Thus, a completed sale by a mortgagee was not liable to be set aside merely because of undervalue, for undervalue was not, by itself, evidence of bad faith or impropriety.

On D Bank's reliance on a contractual clause to assert waiver on the part of B Co. of any claim for breach of D Bank's duty to obtain the best price for the pledged shares, the appellate court held that Clause 5(a) of the share pledge agreements (SP Agreements) did not give D Bank the right to sell the pledged shares in any way or at any price of its choice. Clause 5(a) reads as follows :

"If an Event of Default shall have occurred, the Bank may, without demand for payment or notice of intention and without obtaining any decree, order or authorization of the court,...immediately or at any other time as the bank shall in its sole discretion determine sell all or any part of the Pledged Shares at a public sale or (to the fullest extent permitted by law) privately, at such price and upon such terms and conditions as the Bank shall in its absolute discretion determine. The pledgor irrevocably and unconditionally authorizes and empowers the Bank... to draw up and to sign deeds of sale and purchase...and in general to do everything necessary or beneficial to pass good title to the Pledged Shares...to the purchaser, including such actions as may be required to acquire from competent authorities consent for the transfer... "

Such clause was to be construed strictly. It did not pass muster as an immunity clause since it expressly obliged D Bank to obey whatever laws that might be applicable in order to 'pass good title' and even expressly provided that, if the collateral was sold by private treaty, D Bank's discretion was circumscribed 'to the fullest extent permitted by law'. In short, an authority given to a mortgagee to sell the mortgaged property in such manner, upon such terms and for such consideration as he may think fit, must be read subject to the implicit limitation that it was to be exercised properly, within the limits of the general law, ie. with the exercise of reasonable care to obtain a proper price^{iv}.

The court also drew a fine distinction between sale at a reasonable price and taking reasonable efforts to obtain the proper price. The relevant question was not whether the price was reasonable but whether the mortgagee in exercise of the power of sale had taken reasonable efforts to obtain the best price that was available in the circumstances^v. It was the process of effecting the sale which was critical.

D Bank had prima facie failed to discharge its duty to take reasonable steps to obtain the best price for the pledged shares^{vi}. Two block of the pledged shares were unusual assets that could not be easily priced except by expert familiar with the coal industry and the global market for the type of coal produced by the company concerned. A valuation by such experts was essential to ascertain the proper price of the said two blocks. B Co. was therefore entitled to damages against D Bank for any loss that it might have suffered.

It was also B Co.'s claim to set aside the sale of the Pledged Shares based on the allegation that DSM was not a *bona fide* purchaser for value without notice since DSM had notice of D Bank's lack of good faith and impropriety in exercising its power of sale and DSM had conspired with D Bank to injure B Co. through unlawful means (by buying the pledged shares at an undervalue). In this respect, lack of independent valuation of the pledged shares would not affect the conduct of DSM in agreeing to buy the pledged shares at the price transacted between D Bank and DSM. The law did not require the prospective purchaser (ie. DSM) to safeguard the rights of the mortgagor vis-à-vis the mortgagee. That was an obligation of the mortgagee (ie. D Bank).

No prospective purchaser would act or be expected to act in such a commercially imprudent (or morally considerate) manner in the conduct of his own commercial affairs. If the mortgagee wanted to sell a mortgaged property cheaply or below market price, it was not up to the prospective purchaser to turn down a good offer. On the contrary, commercial reality would expect the latter to drive a hard bargain to force the price down. Therefore, the absence of valuation of the pledged shares was no indication that DSM did not act in good faith through actual, imputed or constructive knowledge of D Bank's breach of its mortgagee's duty to obtain the best price and/or impropriety on the part of D Bank in the sale of the pledged shares.

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It is also interesting to note another part of the court's decision that B Co.'s action to set aside the sale was impeded by its inability to pay the Unpaid Loan. It is trite that if the sale by a mortgagee of mortgaged property had been completed and the mortgagor sought to have it set aside on the ground of bad faith or impropriety, he could only do so if he pays the mortgaged debt. Such principle was also applicable where a mortgagor sought to restrain a mortgagee from exercising its power of sale in the first place, and at the time when a contract for sale had been entered into, but the conveyance or transfer of the property had not been completed.

In conclusion, B Co.'s appeal to set aside the sale of the pledged shares was dismissed, B Co.'s appeal for damages against D Bank was allowed with damages to be assessed based on the 2001 valuations of the pledged shares, D Bank was prima facie entitled to judgment for the amount of counterclaim (for the Unpaid Loan) but such judgment was stayed pending completion of the assessment of damages.

If the damages as assessed exceeded D bank's counterclaim, nothing would be payable under the counterclaim which would then be dismissed but if the damages as assessed were less than D Bank's counterclaim, then D Bank was entitled to enter judgment for the difference.

ⁱ [2009] 3 SLR 452

ⁱⁱ [2008] 2 SLR 189

ⁱⁱⁱ The reason being the complaint was not that the mortgagee was not entitled to sell but that the mortgagee had sold at an undervalue.

^{iv} See *Bishop v Bonham* [1988] 1 WLR 742

^v See *Lee Nyet Khiong v Lee Nyet Yun Janet* [1997] 2 SLR 713

^{vi} The court found that there was no explanation as to how D bank had arrived at such prices and why it considered them to be collectively the best price it could have obtained. There was also no evidence of any collapse in the Indonesian or world market for coal or some other fact affecting the value of the shares.

DIGEST OF EMPLOYMENT LAW CASES

1. MONETARY COMPENSATION VIS-À-VIS EXPATRIATE EMPLOYEE ON FIXED TERM CONTRACT

Reinstatement is the primary remedy available in wrongful dismissal cases brought under the Industrial Relations Act 1967. If, however, reinstatement is not appropriate, the Industrial Court will award monetary compensation to the claimantⁱ. Compensation constitutes two elements: (i) backwages and (ii) compensation *in lieu* of reinstatement. In *Alan Douglas McLean v Mont' Kiara International School Sdn Bhd*ⁱⁱ, the application of this principle vis-à-vis an expatriate employee on fixed term contract was demonstrated. The claimant was an expatriate teacher on two-year contract expiring 31.7.05. Prior to the expiry, a fresh two-year employment agreement was executed commencing 1.8.05. In June 2005, however, the claimant was notified that his employment would be discontinued on 31.7.05 which rendered the fresh agreement unperformed. The company conceded liability in the

claim which left the sole issue of remedy to be decided. The Industrial Court held that an expatriate who had been subject to a fixed-term contract would not have a legitimate expectation to an indefinite length in terms of his employment in the same manner as a permanent employee. Thus, he would not be entitled to compensation *in lieu* of reinstatement. On backwages, the duration of the fresh agreement of 24 months corresponded with the maximum 24 months as laid down in Practice Note No.1 of 1987 or Sch.2 of the recently amended Industrial Relations Act 1967. The claimant was unemployed for 5 months and then found alternative employment at substantially the same amount in another school. The Court rejected the company's argument that the claimant should be awarded only 5 months since anything more would allow the claimant to gain unfairly. The Court held that it had not been acceptable to allow the company to seemingly ride roughshod over the rights and obligations between parties under the employment agreement without any consequences of import. The claimant was awarded 5 months wages in full (being the period he was unemployed) and 19 months wages rescaled by 50% for his subsequent gainful employment.

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2. RELOCATION OR TRANSFER?

The movement of an employee from one place of work to another may be due to a transfer or a relocation. A transfer involves the movement of an employee within the branches or divisions of the organization which had been established at the time his contract was concluded. A relocation is where an employer shifts his business or undertakings from one place to anotherⁱⁱⁱ. During economic downturn, cases of companies closing down its factory or premises in one place and then opening a new one in another place for cost-saving or optimization purpose are not unheard of. The issue facing the affected workers is whether such workers are bound to accept the decision of the employer to relocate or they are entitled to treat their employment as terminated and claim for termination benefits. That was the issue faced by the Industrial Court in *Umi Kalsom Mat Kassim & Ors v M-Pol Rubber Products Sdn Bhd*^v. In that case, to ensure the continued survival of the company which had suffered huge accumulated losses, the company decided to operate only from two locations, ie. the Non Free Trade Zone (NFTZ) in Bayan Lepas, Penang and at Jeniang in Kedah.

It decided to relocate its operations from Free Trade Zone (FTZ) in Bayan Lepas to Jeniang. It offered 3 options to its employees: (i) to continue with the company at Jeniang with two salary increments and company providing free transportation to and fro Jeniang which was 80 km from Penang; (ii) to work with M-POL Precision Products Sdn Bhd in Penang with one salary increment; (iii) to work with M-POL Industrial Plastics Sdn Bhd in Penang with one salary increment. Both companies in option (ii) and (iii) were subsidiaries of the same holding company as that of the company. The claimants did not accept any of the options. The company then relocated to NFTZ which was a mere distance of 4 km from FTZ and the claimants were directed to report at the new place of work. The claimants rejected the relocation and claimed for constructive dismissal.

It was contended that the closure of the plant in FTZ attracted the application of Article 39(i) of the Collective Agreement (CA) which provided for payment of termination benefits in the event of a total and permanent plant closure. Non-payment of such benefits amounted breach of fundamental terms of contract of services which justified a claim for constructive dismissal. It was also argued that

the claimants were not bound to report to the new premises in NFTZ because the premises were not in existence at the time when the claimants entered into employment contracts with the company. The Industrial Court however was not with the claimants. Art. 39(i) of the CA was not applicable as the company had still been operating in Jeniang and NFTZ in Bayan Lepas, Penang---there was no total and permanent plant closure. Further, this was not a case of transfer but relocation.

Thus, the principle of law that a right of transfer cannot be implied to non-existent branches or premises at the time of making the employment contract was inapplicable. The claimants' claim for constructive dismissal was therefore dismissed.

3. RETRACTION OF RESIGNATION LETTER NOT ALLOWED

In *Yasmin Norhazleena Bahari Md Noor v Institut Kefahaman Islam Malaysia*^v, the claimant alleged that her immediate superior started making unwanted advances towards her and she complained to the Chairman of the company. However, in response, the claimant's workstation was shifted closer to her immediate superior and as a result she tendered her resignation. After being advised by the Industrial relations Department, she withdrew her resignation letter and issued another letter requesting for immediate release and claimed constructive dismissal. The Industrial Court held that had the respondent not accepted the claimant's first resignation letter, it would have been open to her to withdraw it.

However, since it had been accepted and this had been communicated to her, she could not withdraw it and consequently her second letter of resignation had no valid basis in law. The date stipulated in the Minister's reference as the date of dismissal was the date of the second letter of resignation. Since the second letter had not been valid, there had not been any letter of the claimant before the court claiming constructive dismissal. The basis for the claimant's representations to the Minister under s.20(1) of the Industrial Relations Act 1967 also collapsed.

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4. DEGRADING TREATMENT OF CLAIMANT

There are two aspects in the Industrial Court case of *T Mahendranathan v KCH Holdings Sdn Bhd*^{vi} that we wish to highlight. Firstly, the action of the company of making the claimant, Group General Manager – Tax & Corporate Affairs, to sit at a desk just beside the Accounts Clerk in the common office area at the ground floor of the company's premises when he moved from the mezzanine floor to the ground floor was regarded unfavourably against the company in a claim for constructive dismissal by the claimant. The court held that such an act showed that the claimant had been treated with humiliation which had been a fundamental breach of his contract. The claimant being in the higher management level of the company should have been accorded with a proper workstation befitting his position and status. To have made him sit at a desk, not even a table, beside the Accounts Clerk in the common area which had been so conspicuous a place had indeed been a great humiliation to the claimant. Any reasonable employer would not have so treated its Group GM unless the employer's intention had not been to be bound by the contract of employment or had been to undermine the trust and confidence of its Group GM.

Secondly, whilst the remaining part of the claimant's contract had been 42 months, the court did not award him in full. In normal dismissal cases involving confirmed or permanent workmen, the award of backwages would be limited to 24 months. To award the quantum exceeding 24 months would simply mean that a workman on a fixed term contract would be in a better position and tend to get a better award than a confirmed employee if the remaining period of his contract exceeded 24 months. Thus, if the remaining period exceeded 24 months, equity would demand that the award of backwages should be limited to 24 months. The claimant was also allowed his fixed monthly transport allowance but not other benefits such as club membership subscription fees, covered parking bay, medical fees, first class travel, local/overseas passage entitlement and annual subscription charge for one credit card, which were held as more in the nature of reimbursement and were disallowed in the absence of any evidence that the expenses had been incurred.

5. PRE-SIGNED LETTER OF RESIGNATION

An interesting point arose for determination in the Industrial Court case of *Datuk Dr Chew Han Ching v Putera Capital Berhad*^{vii}, namely whether an undated letter of resignation by the claimant deposited with the company and effected by the company 21 months later without the claimant's knowledge was valid. The claimant was appointed on 1.4.2007 as Executive Director of the company for 3 years and in furtherance thereto, he voluntarily signed and deposited an undated letter of resignation with the company. An announcement of the claimant's resignation was made in the Bursa Malaysia website on 31.12.2004 without the claimant's knowledge. The claimant sought to retract and nullify the announcement of his resignation to no avail and claimed for constructive dismissal. The company asserted voluntary resignation on the part of the claimant. The Industrial Court agreed with the company. It had been clear that the claimant had signed the undated resignation letter with full knowledge and understanding of the contents and effect of the said letter, bearing in mind that he had been executive director of a public listed company and was 52 years old when the undated resignation letter was signed. He had also not sent any letter or notice stating that he had wanted to withdraw the resignation. Thus, by signing and depositing the said undated letter of resignation, he had by his conduct and intention voluntarily allowed the company to effect his resignation at the appropriate time without having to obtain his prior consent. He had not been threatened or forced to do so by the company, hence there had not been a dismissal.

ⁱ *Dr. A. Dutt v Assunta Hospital* [1981] 1 LNS 5

ⁱⁱ [2009] 2 ILR 546

ⁱⁱⁱ *Metaldek Industries Sdn Bhd v Kamaruddin Tokimon & Ors* [1999] 2 CLJ 761

^{iv} [2009] 2 ILR 602

^v [2009] 3 ILR 75

^{vi} [2009] 3 ILR 313

^{vii} [2009] 3 ILR 329

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WHEN DOES TIME START TO RUN IN AN ACTION FOR AN ORDER FOR SALE OF LAND?

Scenario:

- 1984 Loan granted and secured by a charge over the defendant's land
- 28.1.1986 Last repayment made by defendant towards the loan
- 17.8.2000 Statutory demand in Form 16D issued
- 6.4.2001 Originating Summons filed in court for an order for sale of the land

The above were the brief facts in *Peh Lai Huat v MBf Finance Bhd*.

The defendant contended that the proceedings were barred by limitation since the loan had remained inactive for more than six years (ie. January 1986 to April 2001) before the plaintiff filed the proceedings. Reliance was placed on s.21(1) and (2) of the Limitation Act 1953 which read:

"(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued. Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to

foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued."

The defendant argued that to avoid the prohibition of s.21(1), the action should have been brought by February 1998, since the right of action accrued in February 1986.

However, the Court of Appeal ruled against the defendant. Both the appellate judges who wrote their respective grounds of decision held that s.21(1) of the Limitation Act 1953 was inapplicable. The plaintiff's action was to have the land sold by public auction (namely foreclosure action) and was not an action to recover a debt owed. It was its right to exercise the statutory remedy of an order for sale which did not arise until after the defendant had failed to remedy the default specified in the Form 16D notice (dated 17.8.2000).

The originating summons was filed on 6.4.2001, well within the 12-year period prescribed by s.21(2) of the Limitation Act 1953. In this respect, the court followed the Federal Court's ruling in *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd*ⁱⁱ that the word 'mortgage' referred to in s.21 of the Limitation Act 1953 means 'charge' as understood and provided for in Part 16 of the National Land Code.

This decision therefore, unless over-ruled, laid down the law that the time in a foreclosure action starts to run from the date the chargor has failed to remedy the default specified in the statutory Form 16D or Form 16E notice (as the case may be).

ⁱ [2009] 5 CLJ 69

ⁱⁱ [1984] 1 CLJ 286

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LEGAL PROFESSION

LAWYERS IN PENINSULAR BARRED FROM APPEARING IN CASES ORIGINATING IN SABAH OR SARAWAK BUT HEARD (ON APPEAL) IN PENINSULAR

It is now established that an advocate and solicitor from Peninsular Malaysia is prohibited by law from appearing as counsel in an appeal arising from a matter originating from the High Court in Sarawak and Sabah although that appeal is heard outside Sarawak and Sabah, ie. in Putrajaya. That is the effect of the Federal Court ruling in *Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato Ting Chek Si*.

It is common knowledge that there is restriction of right to practise before courts in the states of Sabah and Sarawak against non-residents of these states. In other words, an advocate and solicitor practising in Peninsular Malaysia (one who has been admitted to the Malaysian Bar) is barred from practising or appearing as counsel in any matter in any courts in Sabah and Sarawak. The protection for the Sabah and Sarawak Bars which restricts the right to practise only to its resident advocates is entrenched in our Federal Constitution (Article 161B).

However, prior to the ruling, advocates and solicitors practising in Peninsular Malaysia did appear as counsels in appeal at the Court of Appeal or Federal Court sitting in Peninsular Malaysia (mostly in Putrajaya) although the appeal arose from a matter originating from the High Court of Sarawak

and Sabah. In *Datuk Hj Mohammad Tufail bin Mahmud* case, this was exactly what happened at the Court of Appeal when the respondent was represented by an advocate of the High Court of Malaya (TT), leading other advocates from Sarawak. The appellant objected to the appearance of TT. The Court of Appeal dismissed the preliminary objection and held that TT had the right to appear at the Court of Appeal when it sit in Putrajaya.

On appeal, the Federal Court upon considering numerous provisions in the Malaysia Act 1963, Federal Constitution and Legal Profession Act 1976 held that an advocate and solicitor from Peninsular Malaysia was NOT entitled to appear as counsel in an appeal to be heard in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching. The appeal was thus allowed. The Federal Court also held that an advocate from Sarawak was entitled to appear as counsel in an appeal to be heard by the Court of Appeal in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching.

ⁱ [2009] 4 MLJ 165

TORT (NEGLIGENCE)

CAN DOCTOR RELY ON ENQUIRIES MADE BY NURSE REGARDING PATIENT'S ALLERGIES?

The High Court decision in *James Kenneth Eng Siew Goh (suing as administrator of the estate of Melissa Jane Goh Mei Feng, deceased) v Lee King Ong*¹ seems to have laid down an additional duty on the part of a doctor when prescribing medication to his patient if he were to rely on his making a professional judgment-call. In that case, the deceased, a patient with asthma, had gone to the defendant's clinic for the first time complaining of a fast pulse rate and hand tremors. The defendant

had not asked the deceased whether the deceased had asthma or was under treatment for asthma but had merely relied upon the answer in the negative obtained by his nurse at the reception who had been instructed to ask patients whether they had any allergies. The deceased prescribed to the deceased a beta-blocker known as 'Blocadren', which was to slow down the patient's pulse rate. After taking the prescribed Blocadren, the deceased suffered breathing difficulties, collapsed and was revived but remained in a coma and subsequently died some months later. It was not disputed that there was contra-indication to beta-blockers being prescribed to patients with asthma.

The High Court ruled that it was a basic duty of care that was owed by a prescribing doctor to ask a patient before prescribing any medication for which there was possible contra-indication, as to whether the patient had any of the conditions that

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were contra-indicated, such as allergy, illness, condition or other medication being taken. The defendant contended that the Blocadren was necessary treatment and even if it posed a material risk, the defendant's therapeutic privilege justified withholding a warning of risk in the best interests of the patient. The learned Judge disagreed with this contention. Without knowing if the deceased had asthma or not and how often and how serious the attacks were, the defendant could not have considered what the risk was and whether the therapeutic need was such that the risk should be taken. It was not a case of a professional judgment-call by a doctor between different medical practice, but a failure of exercise of basic professional judgment since the defendant did not ascertain the basic facts he needed to know before exercising his professional judgment as to prescription. If the cause of death was severe asthma attack, the court would have found for the plaintiff.

TORTS / CONTRACT

NOISE DISTURBANCE FROM WATER PUMP ACTIONABLE IN NUISANCE

The plaintiff in *Ong Koh Hou v Perbadanan Bandar & Anor*¹ was the owner of a penthouse in a condominium, the 1st defendant was the developer whilst the 2nd defendant was the property manager appointed by the 1st defendant to maintain and upkeep the said condominium. After occupying his penthouse for two weeks, the plaintiff moved out due to unbearable noise disturbance or nuisance from a defective water pump located above the penthouse. He filed a suit against the defendants for loss of use of his penthouse, depreciation in its value, loss of rental and other loss.

The High Court judge made a finding of facts that the distinct banging noise occurring approximately half hourly was due to the rapid closure of the check valve installed at the pump discharge. The 1st defendant being the developer was therefore responsible for such defective water pump problem which arose at the inception soon after the building was completed. It was not a question of lack of maintenance or failure of the 2nd defendant to rectify it. The 1st defendant however contended that it was not a nuisance ---no one else but the plaintiff complained about the banging noise. The law does not take into account the abnormal

The evidence pointed to the deceased had a severe respiratory attack. However, there was no evidence that Blocadren itself cause or trigger respiratory or asthma attacks. There was also no evidence that the deceased had an allergic reaction to Blocadren. It could not be concluded upon a balance of probabilities that it was the Blocadren that prevented medication having effect for the attack suffered by the deceased. In the premises, the plaintiff's action was dismissed on the ground of failing to prove causation, that the negligent act caused the death of the deceased.

¹ [2009] 4 MLJ

sensitivity, so contended the 1st defendant. However, the learned judge did not accept the 1st defendant's contention. Instead, the learned judge held that as the defective water pump was above the penthouse, it was reasonable to expect the plaintiff to be most affected or the only one affected by the noise. The fact that the plaintiff had to put up with a banging noise every half hour was also justifiably unbearable. Nuisance --- an act or omission which was an interference with, disturbance of or annoyance to the comfort or convenience of living according to the standards of the average person --- was therefore established.

Unfortunately for the plaintiff, he did not lead any evidence on the cost of having to rent other premises since he could not live in the penthouse. He also did not adduce any evidence for depreciation in value of the penthouse. Thus, he was only awarded all expenses directly incurred as a result of the nuisance, namely the maintenance charges for his penthouse from the time he moved out until the nuisance abated which was 22 months. He was awarded damages in the sum of RM13,169.64 against the 1st defendant. His claim against the 2nd defendant was dismissed with costs and the 2nd defendant in turn was successful in its counterclaim against the plaintiff for the outstanding maintenance charges amounting to RM88,778 as at 30.8.2006.

¹ [2009] 8 MLJ 616

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