

# THE UPDATE



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## BANKING LAW / CONTRACT LAW

### BANK DUTY-BOUND TO VERIFY UNUSUAL AND SUBSTANTIAL CASH WITHDRAWALS & BE ALERT ON UNUSUAL TRANSACTION

The relationship between a banker and its customer relating to the drawing and payment of the customer's cheque(s) against the monies in the customer's account is that of principal and agent; and as agent, the banker owes fiduciary duties to its customer and *prima facie*, is also bound to exercise reasonable care and skill in carrying out the instructions of its customer. The standard of care to be observed is that derived from the ordinary practice of bankers. Although a banker is under a duty to obey a customer's mandate, the banker cannot rely entirely on the mandate to turn a blind eye to any unusual or out of the ordinary cash withdrawal.

The case of *Yatin Bin Mahmood v Mohd Madzhar Bin Sapuan & Ors*<sup>1</sup> is an example where the bank was held liable for breach of duty in failing to verify unusual and substantial cash withdrawals with the account holder, notwithstanding it having acted according to mandate.

In this case, the plaintiff (customer) had an account with the 3<sup>rd</sup> defendant (bank) and the mandate was given by the plaintiff to the 1<sup>st</sup> defendant to operate his account. The signature specimen card also carried the name and signature of the 1<sup>st</sup> defendant. Eight cash withdrawals amounting to RM235,611.91 were made on 13.5.1999 and 14.5.1999. The High Court held that all transactions were carried out by the 1<sup>st</sup> defendant under the mandate and the bank in acting in accordance with the mandate was duly authorized. However, the eight cash withdrawals by the 1<sup>st</sup> defendant in the short span of time was not only unusual but was so out of ordinary that it ought to have aroused doubts in the 3<sup>rd</sup> defendant's mind and caused the 3<sup>rd</sup> defendant to make inquiry from the plaintiff. By failing to make the inquiry as an honest

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## BANKING LAW / TORT (LIBEL)

### MISTAKE DOES NOT ABSOLVE LIABILITY FOR THE MAKING OF DEFAMATORY REMARK OF 'REFER TO DRAWER' IN DISHONOURING CHEQUE

and reasonable person would, the 3<sup>rd</sup> defendant had acted recklessly. Therefore, notwithstanding the mandate, it was the duty of the 3<sup>rd</sup> defendant to make inquiries and their failure or neglect to do so showed that they had not observed reasonable skill and care in and about executing the plaintiff's orders.

The other interesting feature of the decision was that the bank was held liable despite honouring an "apparent" duly authorized cheque. In this respect, a cashier's note for RM439,939.07 in the plaintiff's name was credited into the plaintiff's account on 14.6.2000. On 16.6.2000, the 1<sup>st</sup> defendant transferred RM439,439 into the 1<sup>st</sup> defendant's account with the 3<sup>rd</sup> defendant under a cheque dated 14.6.2000 signed by the 1<sup>st</sup> defendant without the knowledge and consent of the plaintiff (but, as far as the bank was concerned, such cheque was properly drawn and issued). On 19.6.2000, the 1<sup>st</sup> defendant also made a cash withdrawal of RM500 from the account leaving a credit balance of RM9.83. The court held that the fact that almost immediately after RM439,939.70 was credited into the account, RM439,439.00 was transferred into the 1<sup>st</sup> defendant's account ought to have raised doubts in the 3<sup>rd</sup> defendant's mind leading to the making of an inquiry before the transfer was approved. By failing to make the inquiry, the 3<sup>rd</sup> defendant had failed to exercise reasonable skill and care in carrying out the plaintiff's instructions and was thus liable for the amount of RM439,939.07 which had been wrongly misappropriated by the 1<sup>st</sup> defendant.

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<sup>1</sup> [2010] 8 MLJ 647

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Ordinarily, when a customer, X (drawer) issues a cheque on his account in Bank Y in favour of a payee, Z, and when Z presents the cheque, X's account in Bank Y does not have sufficient funds, Bank Y is entitled to dishonour the cheque and Bank Y will in most instances return the cheque to Z with the endorsement 'Refer to Drawer' stamped on the

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reverse side of the cheque or to the collecting bank for Z with a slip of paper marked in the same way.

The remark 'Refer to Drawer' when used by a banker in such circumstances, has been accepted to mean that there are insufficient funds to meet the cheque. It follows that if, in the above example, X's account in fact has sufficient funds to meet the cheque presented for payment and it is a mistake on the part of Bank Y in dishonouring the cheque, then Bank Y will be:

- (a) in breach of the term in the contract of banker and customer between Bank Y and X that the customer's cheques be honoured to the extent of its credits; and
- (b) liable in defamation as well for it is established that publication of such remark was defamatory of the customer.

On (b), what is the legal position if the mistake of the bank was genuine and without any malice? Can the bank rely on the common law defence of qualified privileged to answer the customer's claim based on the tort of defamation? In this respect, whether a communication is privileged for the purpose of that defence depends on the fulfillment of three conditions: (i) the occasion on which the defamation was published must be a 'privileged' one; (ii) the defamation must be related to the occasion; and (iii) there must not be malice. In the Australian High Court case of *Aktas v Westpac Banking Corporation Ltd and Anor*<sup>j</sup>, conditions (ii) and (iii) were satisfied. The issue turns on whether the publication was on a 'privileged' occasion under condition (i).

In that case, the appellant, P, was the sole shareholder of a company known as Homewise which conducted a real estate agency business. Homewise was required under the law of the State of New South Wales (NSW) to maintain a trust account through which rentals moneys received on behalf of their clients could be managed. It was also the law that such trust account was exempt from the operation of garnishee orders<sup>ii</sup>. Homewise maintained three accounts with the 1<sup>st</sup> respondent, R, one of which was the trust account.

Following a dispute, a judgment was obtained by a 3<sup>rd</sup> party against Homewise, including a garnishee order. The 3<sup>rd</sup> party presented the garnishee order to R. In response, R mistakenly

changed the status of Homewise's trust account so as only to allow credits to the account. Homewise drew 30 cheques on the trust account and all these cheques were dishonoured by R upon presentation with the remark 'Refer to Drawer'. At all times, there were in fact sufficient funds in the trust account to cover the amounts of the cheques. P succeeded in his claim against R under breach of contract but failed in his claim in defamation in both court of the first instance and the NSW Court of Appeal which held that R had a complete defence of qualified privileged.

By a majority of 3 to 2, the apex court of Australia, the High Court held that the said defence was not available to R. Under condition (i) as aforesaid, an occasion is privileged where one person has a duty or interest to make the publication and the recipient has a corresponding duty or interest to receive it. In other words, is there any reciprocity of interest and duty between the bank and the payee? To answer this question, it is necessary to show that both the givers and the receivers of the defamatory information has a special and reciprocal interest in its subject matter of such a kind that it is desirable as a matter of public policy, in the general interests of the whole community concerned, that the communication in question should be made with impunity, notwithstanding that it was defamatory of a third party.

In the majority view, there was no sufficient reciprocity of duty and interest between R and the 30 payees of the cheques, so as to justify the communication of the fact of and the reason for the dishonour of Homewise's cheques. There was no public interest established, justifying the need for qualified privilege to attach to the occasion of communicating the fact of and reason for the dishonour of the cheques. R had an interest in communicating *its* refusal to pay the cheques but the payees had no reciprocal interest in receiving the communication of refusal to pay the cheques which were regular on their face in cases where the drawer (P) of the cheques had funds sufficient to meet their payment. There would only need to be communication between R and the payees if the occasion had called for the (rightful) rejection of the cheques. Where there should have been, but for the error by the bank, sufficient funds to meet the cheques, the only matter of common interest had been in the bank paying the cheque. Citing the proposition stated in an English case<sup>iii</sup>, the bank

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could not, by making a mistake, *create* the occasion for making the communication and what R in the instant case sought to do was to create an occasion of qualified privilege by making a mistake which called for a communication on their part.

In fact, in the majority view, there was a countervailing public interest in ensuring an efficient and stable banking system, in maintaining observance by banks of statutory requirements and in the speed, accuracy and reliability of transactions conducted within the banking system, all of which militated against allowing the common law defence of qualified privilege to operate in the instant case. P therefore succeeded in his claim in defamation and damages was accordingly awarded to him.

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## COMPANY LAW (NAME)

### D.G.KOM v DIGI.COM

The mobile telephone name known as “DiGi” is a house-hold name in our country. Most people may not be aware but the decision of the High Court in *D.G.Kom Sendirian Berhad v Pendaftar Syarikat & Anor*<sup>i</sup> put in focus the fact that prior to the ‘invention’ of the name “DiGi”, there was another entity which had used the name that resembled, at least phonetically, “DiGi”.

In that case, the plaintiff was incorporated under the name of “DG-Kom Sdn Bhd “ on 13.7.1982. It changed its name to its present name “D.G.Kom Sdn Bhd” on 11.7.1989. It carried on a business related to information technology.

The 2<sup>nd</sup> defendant was incorporated on 28.3.1997 which was almost 15 years after the incorporation of the plaintiff, under the name of “Mutiara Swisscom Sdn Bhd.” This name was later changed to DIGI Swisscom Berhad on 16.12.1998 and finally, to the current name “DIGI.COM Berhad” on 18.4.2000. The 2<sup>nd</sup> defendant, as the holding company of DiGi Telecommunications Sdn Bhd which was the operator of the cellular telephone network known as “DiGi”, was carrying on a business related to telecommunications.

When the plaintiff learnt of the 2<sup>nd</sup> defendant’s change of name, it objected in writing to

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<sup>i</sup> [2010] 268 ALR 409

<sup>ii</sup> A garnishee order basically freezes the bank account of the judgment debtor which is the subject of the attachment and requires the bank (as the garnishee, which is indebted to the judgment debtor for the amount in credit in the said account) to pay to the judgment creditor the amount in the account or so much thereof as is sufficient to satisfy the judgment, unless the garnishee disputes liability to pay such amount to the judgment debtor or some other third party asserts its claim on the debt sought to be attached.

<sup>iii</sup> *Davidson v Barclays Bank Ltd* [1940] 1 All ER 316

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the 1<sup>st</sup> defendant, the Registrar of Companies, on the ground that the changed name “DIGI.COM” was similar to the plaintiff’s name “D.G.Kom” and would cause confusion. Having heard the 2<sup>nd</sup> defendant’s explanation and been satisfied with it, the 1<sup>st</sup> defendant allowed the 2<sup>nd</sup> defendant to continue its operations under its current name. Dissatisfied, the plaintiff appealed to the High Court against such decision of the 1<sup>st</sup> defendant pursuant to s.11(10) of the Companies Act 1965 (the Act).

As the learned Judge put it, the principal issue was whether there was a similarity between “D.G.Kom” and “DIGI.COM” which had and continued to cause confusion to the public, which in turn rendered the continue use of the latter’s name, ‘undesirable’ within the ambit of s.22(1) of the Act. The said provision, among others, empowers the 1<sup>st</sup> defendant to disallow the use of a name which, in his opinion, is undesirable.

The learned Judge, relying upon two New Zealand cases<sup>ii</sup> which decided on provisions in their statute governing companies that were *in pari material* with s.11(10) of the Act, ruled that the court’s wide powers to accept all relevant evidence, whilst not restricted to the evidence or material placed before the 1<sup>st</sup> defendant (the registrar), were restricted to evidence available or could have been available and relevant as at the date of registration (18.4.2000) and the date of exercise of the registrar’s decision (ie. 8.6.2001). Events and documents occurring after that date were inadmissible for the purpose of the appeal.

The learned Judge drew substantial guidance from the oft-cited New Zealand case of *South Pacific Airlines of New Zealand Ltd v*

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*Registrar of Companies*<sup>iii</sup> which defined “undesirable” as embracing “any name(s) which would offend public policy or might give offence to any particular section of the community, or any particular religion. Each name must be considered by the registrar in the light of its own merits or demerits, but it is clear that any name that might mislead the public or a recognized section of the public in any particular locality, or would be likely to cause confusion, is undesirable, irrespective of the intentions or the motives or the purposes of the defendant.” She considered the submissions of the plaintiff that the sound of the names “D.G.Kom” and “DIGI.COM” bore substantial similarity and the defendants’ submissions that the plaintiff’s name when spelt out was pronounced as “D dot G dot Kom Sendirian Berhad” whilst the 2<sup>nd</sup> defendant’s name which if spelt out sounded “DIGI dot Com Berhad” which was different. She ruled that whilst the 2<sup>nd</sup> defendant’s name was derived from a completely different source to that of the plaintiff, in that the word “DIGI” was derived from the word “digital” and the word “COM” was derived from the word “communications”, and the plaintiff’s name had no such origins, the two names when said aloud did sound similar. Thus, there was some degree of similarity in both names specifically with reference to their pronunciations and sounds only.

However, based on evidence adduced, there was only a small degree of confusion that had arose in a relatively small group of people who had dealings with primarily the plaintiff. This “confusion” was mainly in relation to the misspelling of the plaintiff’s name. There was no evidence that showed any segment of the public or the public at large was “deceived” to the extent that the plaintiff’s customers or businesses were diverted to the 2<sup>nd</sup> defendant or *vice versa*.

Further, the plaintiff and the 2<sup>nd</sup> defendant were in dissimilar business activities, with the plaintiff being supplier of large scale computer

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## COMPANY LAW (OPPRESSION)

### MINORITY MUST LEARN TO ACCEPT MAJORITY RULE

Complaints of ‘oppression’, ‘disregard of interests’, ‘unfairly discriminate’ or ‘otherwise prejudicial’ under s.181 (1)(a) and (b) of the

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equipment and systems to large organizations while the 2<sup>nd</sup> defendant was a digital communications company well-known for its “016” airwave. There was also no clear evidence of a segment of the public at large concluding that the plaintiff and the 2<sup>nd</sup> defendant were inter-related or associated.

In addition, applying the more stringent test propounded in the Singapore jurisdiction in the case of *Drilex Systems Pte Ltd v Registrar of Companies & Anor*<sup>iv</sup>, there was no detriment or damage arisen from the “confusion” described. Indeed, not even administrative inconvenience had been established.

In the circumstances, it could not be concluded that a serious risk of confusion arose to the public or a real likelihood of confusion must have been reasonably apparent in or around 8.6.2001. The 1<sup>st</sup> defendant could not be said to have not exercised judiciously his discretion by the application of a wrong principle or by consideration of extraneous matters. The learned Judge arrived at such decision notwithstanding the plaintiff’s submission that directing a change of name of the 2<sup>nd</sup> defendant would not disrupt its operations or its business, as the 2<sup>nd</sup> defendant was a holding company and any change of name would not affect the trade name or goodwill entrenched in the name “DIGI” enjoyed by its subsidiary, a mobile telephone service provider. The appeal was accordingly dismissed with costs.

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<sup>i</sup>[2010] 5 AMR 140

<sup>ii</sup>*Charisma Waterbeds Ltd v The Registrar of Companies & Anor* [1986] 2 BCR 197; *Vicom New Zealand Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600.

<sup>iii</sup>[1964] NZLR 1

<sup>iv</sup>[1993] 2 SLR 345

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Companies Act 1965 (the Act) must be in relation to the status or rights of the complainant as a member of the company and not in any other capacity. This reminder was recapitulated by the Court of Appeal in *Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors*<sup>i</sup>.

In that case, the appellant (A), the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (R2 and R3) were the shareholders and directors of the 1<sup>st</sup> respondent company (the Company), with A and R3 holding 100,001 shares

each whilst R2 holding 100,002 shares in the Company. A was also a sales representative of the Company and was given various perks including usage of a company car and petrol allowance in the form of a Shell card. Dissatisfaction arose among the respondents when they noticed A's lack of participation or interest in the running of the Company. A was also not keen to agree with any plans to expand the business of the Company. The respondents came to know of A's involvement in another company whose main business was similar to that of the Company. The Company therefore cancelled A's Shell card and demanded the return of the company car. At that time, sums were owed to A, R2 and R3 as director's fees. Upon the Company's failure to pay the director's fees, A served a statutory notice under s.218 of the Act seeking to wind-up the Company. R2 and R3 requisitioned for an EGM of the Company to remove A as a director, to increase the authorized capital of the Company for its expansion plans (the Capital Increase Resolution) and to set off the director's fees owed by the Company to all the directors by allotment and issue of shares credited as fully paid (the Set-off Resolution). A claimed that the proposed resolutions were oppressive to him and petitioned for reliefs under s.181 of the Act. The petition was dismissed by the High Court and on appeal, was likewise dismissed.

In doing so, the appellate court reiterated that under s.181(1)(a) of the Act, the element of 'oppression' or 'disregard' must involve at least an element of lack of probity or fair dealing to a member as against his right as a member. Oppression or disregard of interest on a director of a company did not come within the purview of s.181(1)(a). Thus, A's complaints regarding the proposed resolution to remove him as a director and withdrawal of the company car and the Shell card was in relation to A's status as a 'director' or 'sales representative' and not as a member of the Company. On this ground alone, the court would have dismissed the petition.

The court nonetheless proceeded to rule on other grounds. It was the finding of the court that the actual purpose that A presented the s.181 petition was to exert pressure on the Company to pay him the outstanding director's fees. The court held the view that s.181 was not meant to be used as 'debt collection facility' by a director against the company and recited the principle that if the real purpose of a petition was to obtain payment of money allegedly owed by the company, it would be refused even if

the directors or majority of shareholders had been guilty of improper or unreasonable conduct which constituted a *prima facie* case for relief under s.181<sup>ii</sup>.

The Capital Increase Resolution was necessary to obtain financing for its expansion plan. The Set-off Resolution was necessary to preserve the cash flow of the Company in view of the expansion plan. Furthermore, such exercise would collectively affect all three shareholders of the Company and would not single out A alone and prejudice A's rights as a member of the Company. There was therefore no element of unfair discrimination or disregard of A's interest as a member of the Company within the ambit of s.181(1)(b) of the Act.

In essence, A's complaints were held to comprise mainly matters within the internal management of the Company. Granting and withdrawal of perks to directors, company executives or employees were purely regulated within the company itself. Issuance of shares as well as appointment and removal of directors were also matters to be decided by the company according to its memorandum and articles of association either by the board of directors or the shareholders in general meeting. In making such decisions, generally, the majority ruled. It was only when the rule passed over into rule oppressive of the minority or in disregard of their interest that s.181 could be invoked. Persons who joined a company as shareholder must learn to accept majority rule. The court should be slow in interfering or enquiring into the desirability or wisdom of the acts of those who controlled or managed the company's affairs under the pretext of minority protection under s.181. It could not be the function of the court to make management decisions and to substitute its opinions for those of the directors and the majority of the members. The provisions of s.181 should not be stretched too far as to allow minority or individuals to abuse them just because they did not agree or were dissatisfied with the action taken by the majority or the board of directors. Otherwise, a company's operation would collapse.

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<sup>i</sup>[2010] 5 MLJ 342

<sup>ii</sup>see *Re Bellador Silk Ltd* [1965] 1 All ER 667; *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326

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## COMPANY LAW (OPPRESSION)

### LEGITIMATE EXPECTATION FOR RETURN OF INVESTMENT IN AN IDLE COMPANY

What amounts to oppression of minority shareholder in the context of s 181 of the Companies Act 1965 (the Act)? Such question often arises when we deal with a or some shareholder(s) of a company who only has/have minority shareholding in the company and who complain(s) that the majority shareholder(s) has/have behaved and acted in such manner oppressive to him or them or in disregard of his or their interests as shareholders of the company. In the recently reported case of *Lim King Kow v Indra Kemajuan Sdn Bhd & Ors*<sup>i</sup>, the High Court reiterated several established principles in answering the aforesaid question in the course of deciding a winding up petition filed by a minority shareholder (the petitioner, "P") against a company (the 1<sup>st</sup> respondent, "IK"), the majority shareholders (the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, "R2" and "R3" accordingly) and all the other directors of IK who had no share in IK.

To constitute oppression, there must be a visible departure from the standard of fair dealing or fair play or where the oppressed is constrained to submit to some over-bearing act or attitude on the part of the oppressor. The question of whether there is oppression in a given case is a question of facts to be answered not by a consideration of events in isolation but as a part of a consecutive story<sup>ii</sup>. In the words of the learned Judge, there is no universal definition on the meaning of 'oppression'.

In this case, IK was incorporated in 1982 with P and R3 as its promoters. As at December 1995, R3 with his shareholding (5%) coupled with that of R2 (80%) and R4 (10%) effectively controlled 95% of the issued capital of IK whilst P held 5%. IK was dormant from its inception till 1993 when it purchased a piece of industrial land (the Land) which was subsequently sub-divided and sold (4 lots in 1996 and 2 remaining lots in 1999), ultimately realizing proceeds of RM10.5 million in 1999. By then, P had resigned as director of IK (with effect from 10.8.1996) and had been repaid the monies he loaned to IK. It was P's case that he resigned because he could not tolerate the abuse of R3. IK remained idle until 2005 when it purchased another piece of land (Lot 552) before the presentation of the petition. At the date of the presentation of the petition, P held 5% of IK with R2 holding 90% and

R3 5%. As to the shareholding in R2, P held 10% whilst R3 and his family company held 65%. R3 (who was also the managing director of IK and R2), R4, R5 and R6 were the directors of IK.

Of the numerous acts complained of by P, the learned High Court judge ruled the following acts as oppressive to P or in disregard of or unfairly discriminated against or were otherwise prejudicial to P's minority interest, which justified relief to be granted under s 181 of the Act:

- (1) the payment of directors' fees which was resolved and approved in June 2000 and which were purportedly for the services rendered by the directors since the incorporation of IK. Such payment was however only made to the directors holding office in IK in 2000 (including R5 who only came on board in 1996), which meant IK was left out. Evidentially, the crucial decision to purchase the Land was made and the development of the Land took place during the time P was a director of IK. All things that propelled IK to become profitable were put in place during the time P was a director. Thus, if the directors' fees were for services rendered to IK since its incorporation, then P's contribution should not have been totally disregarded and P should not have been left out of a share of those directors' fees.
- (2) R3 testified that IK existed because of the Land. Such being the case, after the sale of the Land in 1999, the business object of IK had been achieved. Capital and accumulated profits of IK had however not been reinvested for years (1999-2005). Under such circumstances, the return of investment was a legitimate expectation on the part of P. The investment of R4 was returned together with profits, by way of the purchase of R4's shares by R2 (which was controlled by R3). Yet, despite several offers (in 1996, 2000 and 2005) by P to sell his shares in IK, the buying-out never materialized. P's investment was 'detained', so to speak. It was on account of the majority's will that IK was completely idle for six years, which could not have served the interest of the minority. It was an abuse of the majority rule to have IK idle for years in the face of demand by P for the return of his

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investment. Such abuse was a visible departure from the standards of fair dealing and a violation of the conditions of fair play which P was entitled to expect from the majority. If there was no use for capital, rightly it should be returned.

- (3) The contention that Lot 552 purchased in 2005 as a business undertaking of IK was rejected. In the learned Judge's view, Lot 552 was hurriedly purchased to lend a convenient excuse to the majority to resist the petition for it was an undisputed fact that there was no development of Lot 552 which was just left in its original condition since 2005.

In summary, the total story showed that the affairs of IK were conducted in a manner oppressive

#### **COMPANY LAW (QUASI PARTNERSHIP)**

#### **OPPRESSION IN THE CONTEXT OF QUASI-PARTNERSHIP INCORPORATED COMPANY**

In *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corporation (M) Sdn Bhd & Anor'*, the petitioner (P) had entered into a joint-venture (JV) agreement with the 2<sup>nd</sup> respondent (R2) to form Pacific-Ngiu-Kee S/B, the 1<sup>st</sup> respondent (the company) for the purpose of operating a supermarket/departmental store (the store). P was the minority shareholder with a 30% shareholding whilst R2 held 70%. P appointed three directors to the board of directors of the company, one of whom was the chairman whilst R2 had five, one of whom was the managing director (MD). R2 managed the store with the management committee comprising the MD, an executive director and a financial controller from R2 and two other members from P. The parties agreed that the JV relationship between P and R2 was akin to partners in a joint-venture business under the corporate umbrella of the company.

Disputes subsequently arose which led to P taking out a petition under s.181 of the Companies Act 1965 (the Act) for an order that R2 disposed of its 70% shareholding to P or, alternatively, that the company be wound up. P's allegations were that R2 had breached the fiduciary duties it owed to P and such breaches came within the purview of

to the minority. That should not be allowed to continue. The majority opposed winding up relief sought by P, whilst P wanted out of IK. Of the options, the reduction of share capital of IK was most appropriate where the capital of IK would hardly be touched. It was ordered that the capital of IK be reduced by 5%, ie. by the purchase of 5% shares owned by P in IK and by the payment of 5% of RM3.79 million (the unappropriated profits of IK in 2007) by IK to P.

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<sup>i</sup>[2010] 8 MLJ 831

<sup>ii</sup> See *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237

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s.181(1)(a) and (b) of the Act<sup>ii</sup>. Three specific instances were relied upon by P:

- (i) R2 and the 3<sup>rd</sup> respondent had been paying the salaries of the employees of R2 out of the funds of the company;
- (ii) The staff of the company had been assigned to look after another store of R2;
- (iii) R2 had charged the company an unjustifiable rate of interest for an unverified operational advance of RM3.78 million.

The High Court found for P. On appeal, the decision was reversed and held that the action/conduct of R2 did not amount to oppression/dishonesty or an unfair disregard of P's interest within the ambit of s.181(1) of the Act. Before the Federal Court, the determinative question posed was whether, in conducting the affairs or business of a JV company incorporated under the Act but which was in the nature of a quasi-partnership, a breach by one JV partner (of the fiduciary duties that it owed to the other partner) automatically constituted or equated to conduct or action that was proscribed under s.181(1) of the Act and attracted the remedies provided for under s.181(2) thereof.

The answer to the question was in the negative. The critical question remains as to whether R2's breach of its fiduciary duties was an oppressive conduct, unfair disregard of P's interests, unfairly discriminatory action and/or prejudicial action within

#### **IMPORTANT**

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the purview of s.181(1) of the Act. The mere breakdown of the quasi-partnership relationship in terms of trust and confidence was not itself sufficient to justify the grant of relief under s.181(2) of the Act. There was no support in equity “for such a stark right of unilateral withdrawal”<sup>iii</sup>. P’s contention that upon proof of breach(es) of fiduciary duties resulting in it losing trust and confidence in R2, that would and do constitute conduct proscribed under s.181 of the Act and there ought to be parting ways as it would be unfair to leave a party locked into the company as a minority shareholder was rejected by the apex court. Ultimately, P must still show that R2 and R3’s breach(es) of their fiduciary duties actually amounted to oppressive conduct, an unfair disregard of P’s minority interests, and/or conduct that was unfairly discriminatory and/or prejudicial to P within the meaning of s.181(1)(a) and (b) of the Act.

The Federal Court did not stop there. It went on to consider the findings of the court below on the three specific instances which, in the view of the apex court, were mainly derived from inferences and summations from the primary undisputed facts and, therefore, could be re-examined on appeal.

On (i), the arrangement to pay salaries of R2’s employees from the funds of the company was known to the board of the company. It was also acknowledged that the company saved RM1.8 million as a result of such arrangement. In any event, the arrangement had ceased. On (ii), the use of the company staff to take care of another store of R2 had stopped and the store had been asked to reimburse the salaries paid to the staff. On (iii), the said advance was made to assist the company financially since loans from the banks were not forthcoming. Such move could not be described as oppression or prejudicial to P’s interests or evidence of bad faith or lack of probity in the conduct of the company’s affairs. P was also held to have failed to discharge its onus to establish that the purported advance sum of RM861,366.65 had not been

verified or that the sum had been siphoned out of the company for the benefit of R2. As to the interest rate charged on the said advance, it had been agreed upon by the board of the company. At any rate, the said three instances even if proven were trivial for the purpose of s.181 of the Act.

There are two features in the decision of the Federal Court that we wish to highlight. Firstly, the court reiterated the central theme of s.181 of the Act as ‘unfairness in the context of a commercial relationship’, which is a statutory exception to the general rule in *Foss v Harbottle* that the courts are reluctant to interfere with matters relating to the internal management of incorporated companies. However, in a quasi-partnership incorporated company, there is an added factor which members are obliged in law to observe, namely to act in good faith to one another. Secondly, the court appeared to lay some emphasis on the fact that in instance (i) and (ii), the acts complained of had stopped and thus, they could not be regarded as conduct oppressive or unfairly prejudicial to or disregard of P’s interests. With due respect, cessation of such acts do not necessarily rule them out of s.181(1) of the Act, for there is limb (b) in s.181(1) which catches ‘some act of the company has been done...which unfairly discriminates against or is otherwise prejudicial to one or more members.’ On that score, this aspect of the apex court’s decision must be read with caution.

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<sup>i</sup>[2010] 6 CLJ 721

<sup>ii</sup>There are basically four categories of complaints under both limbs: oppressive conduct, an unfair disregard of the petitioner’s minority interests and conduct that was unfairly discriminatory and/or prejudicial to the petitioner.

<sup>iii</sup>as per Lord Hoffmann in *O’Neil v Philips* [1992] 2 All ER 961

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## COMPANY LAW (WINDING UP)

### DON’T BE BUSYBODY !

In *Siti Esah bt Taib v Mentiga Corp Bhd*<sup>i</sup>, the petitioner (P) having obtained a judgment against the respondent (R, a public listed company) filed a

winding-up petition (the petition) on 28.4.2008 against R arising from R’s failure to comply with the statutory notice of demand issued pursuant to s 218(1)(e) and (2) of the Companies Act 1965 for the judgment sum of RM51,204.03 (as at 17.1.2008). Pending hearing of the petition, R through its solicitors sent a cheque for the sum of RM50,786.34 to P’s solicitors in settlement of the judgment sum. P’s solicitors however returned the cheque on the ground that “the amount was insufficient to pay all the creditors”. There were in fact 162 creditors who

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had filed notice of intention to appear on petition to support the petition. R took out an application to strike out the petition on the ground that R had the ability to pay the sum stated in the petition and the petition was filed for collateral purpose and to exert pressure on R to settle the claims of other creditors.

The High Court judge allowed the striking out application. In His Lordship's opinion, P had abused the process of the court in her conduct in exerting pressure on R to settle not just the judgment debt due but the alleged claims of all other supporting creditors. P was also inconsistent in her stand when she averred in her affidavit-in-reply that R's payment was rejected because it was not the full sum of her claims as at the hearing date on 24.4.2009 (which amounted to RM53,289.62) and also, acceptance of the payment would amount to undue preference to the prejudice of the other creditors --- these grounds that were not advanced in her solicitors' initial rejection of the payment tendered by R. In this respect, the court regarded the conduct of parties subsequent to the filing of the petition as a relevant fact under s 8 of the Evidence Act 1950 to reinforce the fact in issue that the

petition was filed for a collateral purpose. The other factor that swayed the learned Judge's mind was that the debt due was only RM50,786.34 and P could have resorted to other less drastic means of enforcing the judgment, eg. by writ of seizure and sale.

The learned Judge found that the primary purpose of P's filing the winding-up petition was not to recover her judgment debt but appeared to have been clouded with the interests of other creditors who had claimed for their alleged debt through P. Authorities clearly established that the court would not allow itself to be used as a debt-collection agency or as a means of bringing improper pressure to bear on a company. In the circumstances, P's petition was struck out.

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[2010] 8 MLJ 589; [2010] 4 AMR 666

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## CONTRACT LAW / REMEDIES

### WORLD CRUISE THAT WENT AWRY

A holiday is supposed to be a break from hassles, stress and annoyances of day-to-day living, a period of leisure and pleasure. Unfortunately, in some instances, what was supposed to be a welcome break or a once in a lifetime experience turned out to be more stressful than one's ordinary life. Does one have any recourse against the travel services provider for one's sufferings in this respect?

Ordinarily, a contract between the customer(s) and the travel services provider when booking a holiday means that the latter has a legal obligation to provide "holiday" as it was represented to be. Thus, the travel services provider can be held responsible for practically every aspect of the meant-to-be holiday experience, ranging from the state of the hotel, quality of the food to the comfort of the sleeping arrangement throughout the entire holiday period, for which a breach may lead to compensation to the customer(s).

Generally, breaches of contract are usually remedied by an award of damages to compensate the injured party to place him, so far as money can do, in the same position as he would have been in had the contract been properly performed in accordance to the terms. It is settled law that no damages in contract will be awarded for the injury to the claimant's feelings, or for his mental distress, anguish and annoyance, subject to certain exceptions, one of which is where the court had granted damages for the losses suffered in the case of a failure, arising from a breach of contract, to provide holiday of the advertised standard or some other form of entertainment or enjoyment and for the resulting disappointment and mental distress. The legal principle underpinning this rule is that disappointment and distress is no more than a mental reaction to the breach and the financial consequences that flow from such breach. When, however, the reaction is not a mere reaction to the breach or the financial factor, but itself is a resulting damage, compensation for disappointment and distress may be recovered in, for example, "holiday" cases, the latest of which is the UK Court of Appeal decision in *Milner and Milner v Carnival plc (trading as Cunard)*<sup>i</sup> which is consistent with the stand taken by the courts in earlier cases such as *Jarvis v Swans Tours Ltd*<sup>ii</sup>, *Jackson v Horizon Holidays Ltd*<sup>iii</sup> and *Adcock v Blue Sky Holidays Ltd*<sup>iv</sup>.

### **IMPORTANT**

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In *Milner and Milner*, the plaintiffs paid some £59,000 for a three-month round the world cruise that was advertised to be a “legendary experience exceeding expectations”, but the long awaited special “holiday of a life time” turned out to be a stressful and upsetting trip for both Mr. and Mrs. Milner. In brief, the stormy sea conditions soon after the departure of the ship from Southampton caused the floor plates in the Milners’ cabin vibrated and loud noise reverberated which made sleep impossible for two nights. The Milners were then offered an inside cabin with no natural light but which lacked some of the amenities of their original chosen cabin. They left their clothes unpacked and they walked downstairs and through corridors in their dressing gowns to sleep in the inside cabin and returned to their own cabin during the day. They were then offered a suite but for only two or three days, although eventually it was made available to them for the rest of journey from New York to Los Angeles. Thereafter, they had no choice but to return to their original cabin and they suffered when the ship encountered heavy seas again. The ship arrived in Hawaii four days later and the Milners disembarked. Their journey lasted 28 days and they missed 78 days of the world cruise. After six weeks, they joined another cruise liner and returned to Southampton.

The defendant (the Cunard) offered a refund of £48,300 which the Milners accepted, leaving the cost of £10,800 as the net cost of the holiday, hence the suit for compensation for the damage that they suffered from the ruined holiday. The court of first instance awarded to the Milners some £22,000, including £5,000 for the diminution in value of the cruise, £15,000 for distress and disappointment and £2,000 for Mrs Milner’s unused gowns.

The defendant went on to appeal to the Court of Appeal. It was held that it was “excessive and disproportionate” for the trial judge to award £5,000 for the diminution of value as it was wrong to use the full cost of the holiday as the benchmark of damages instead of the amount actually paid after the refund and that a major part of the cruise was not enjoyed because the Milners voluntarily abandoned the ship in Hawaii. The appeal was allowed and the Milners ended up with an award of a total sum of £12,000 for the failure of the Cunard to meet their legitimate expectations, comprising £3,500 for diminution in value and £8,500 for inconvenience and distress.

The significance of this decision was the guidelines laid down by the court in considering the appropriate measure of damages in “holiday” cases. There are four aspects. Firstly, compensation for pecuniary loss, the monetary difference between what was bought and what had been supplied. Secondly, compensation for consequential pecuniary loss, such as the cost of alternative accommodation and travel arrangements. Thirdly, compensation for physical inconvenience and discomfort. Fourthly, compensation for mental distress. The level of distress is measured by the extent of the failure to meet reasonable expectations, which is a question of fact and degree in each case. No precision is possible in assessing the quantum of damages for inconvenience and distress. Whilst comparable figures could be found in the awards in other holiday cases (which took into account the type of holiday and features of the holiday), the court would take into account level of damages in other fields such as psychiatric damage in personal injury cases, injury for feelings in cases of sex and race discrimination, in order to ensure consistency in the award of damages. The assessment of damages would be made under two heads of (i) diminution in value and (ii) distress and disappointment. The court must be cautious not to have duplication in the two elements.

In our view, despite the guidelines, the assessment exercise is far from easy or certain. Fortunately, most people do not find themselves in such terribly ruinous circumstances, but problems can and do happen, even if they do not quite amount to a “holiday from hell” but the smaller concerns that spoil what is intended to be a relaxing holiday experience. Victims of the “spoilt holiday” will be able to recover damages despite difficulties in assessing the damage, but it is rare for such victims to be able to claim for the full refund or a huge amount for the diminution in value of the holiday contracted for or large compensation for the disappointment and distress unless the holiday was a total fiasco from the start to the finish.

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<sup>i</sup>[2010] 3 All ER 701

<sup>ii</sup>[1973] 1 All ER 71

<sup>iii</sup>[1975] 3 All ER 92

<sup>iv</sup>unreported, 13 May 1980

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## CONTRACT LAW

### PUFFING AND GLOATING OF CONDO TO INDUCE PURCHASE CAN BE ACTIONABLE MISREPRESENTATION

In *Balakrishnan Devaraj & Anor v Admiral Cove development Sdn Bhd*<sup>1</sup>, the plaintiffs were husband and wife who had purchased a unit of condominium from the defendant/developer in a project known as the “Marina Bay Condominium” in Port Dickson (the project). The plaintiffs’ case was that the 1<sup>st</sup> plaintiff (P1) who had visited the defendant’s office where he saw a miniature model of the project displayed was very attracted since the condominium had sandy beach front and direct access to the beach. During the official launch, he was shown a miniature model and a printed brochure of the proposed project showing a sandy beach front. P1 selected a unit and paid an earnest deposit which led to a sale and purchase agreement (SPA) of the unit. During negotiations, P1 made it explicitly clear to the defendant through its servants or agents at the official launch that the purpose of his purchase a beach front property was to enable the plaintiffs and/or their guests and children to visit on weekends and during holidays and gain access to the sea for swimming and to be able to relax and lay about immediately upon exiting the backdoor of their own unit. To induce the plaintiffs to sign the SPA, the defendant through its servants or agents represented to P1 that the plaintiffs would be able to swim directly upon exiting their own unit. The plaintiffs subsequently discovered that the said representations by the defendant and through the miniature models and brochures were false when they went to their purchased unit for a holiday. Among others, a long concrete steel like wall was erected right across the sea fronting the plaintiffs’ unit, rocks and boulders were placed all along the front of the seaside outside the plaintiffs’ unit and sewerage discharge was led off visibly into the sea in front of the plaintiffs’ unit, all of which prevented the plaintiffs from using the beach in front of their own unit. The plaintiffs rescinded the SPA and sued for loss and expenses and damages.

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## CONTRACT LAW

### AN EARTHQUAKE-AFFECTED SALE

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Whilst the High Court dismissed the plaintiffs’ claim, the Court of Appeal reversed such decision and held the defendant to be liable. A misrepresentation must be a false statement of existing fact which is normally made prior to, or during the preliminary stages of a contract and is made with the intention and has the effect of inducing the party to whom it is made (representee) to enter into the contract with the representor. For a misrepresentation to be actionable, the representee must rely upon the representor’s statement in entering into the contract and the representor must have the intention or realized that the statement will or probably will be relied upon by the representee. A contract entered into through misrepresentation is voidable at the option of the innocent party---s. 19(1) of the Contracts Act 1950 (the Act) read with s.66 of the Act.

The trial judge was, in the view of the Court of Appeal, clearly wrong when he held that the miniature model was a “silent model with no such assertion” of representation alleged by the plaintiffs. On the contrary, the miniature model spoke, represented and asserted the presence of the sandy beach and the sea and access to them. There was misrepresentation on the part of the defendant that the unit came with direct access to the sandy beach which induced P1 to pay the earnest deposit and eventually sign the SPA. Whilst vacant possession of the unit was given some time in 1999, evidence showed that P1 was medically unwell to travel to visit the unit until August 2002 on which occasion the plaintiffs discovered the falsity of the representations made by the defendant. The delay in the issuance of notice to rescind on 31.10.2002 was thus acceptable and was not an affirmation of the misrepresentation which would have precluded the plaintiffs from the relief of rescission of the SPA. The defendant was ordered to return the purchase price together with interest, costs and damages for misrepresentation to be assessed.

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[2010] 7 CLJ 152

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In *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd*<sup>1</sup>, the plaintiff (Norwest) put up on sale its shares (NC Shares) in a wholly-owned subsidiary which in turn owned a Chinese corporation with a phosphate mining, processing and production business in Sichuan, China (the

Chinese Business). The sale was stated in the Information Memorandum issued by the seller as on an “as is, where is” basis. The prospective buyer, the defendant (Newport), performed a due diligence on the Chinese Business. On 9.5.2008, Newport submitted the Firm Letter of Offer (9 May Offer) prescribed in the Information Memorandum, stating that it wished to purchase the NC Shares for \$10.25m “subject to terms and conditions in the Sale and Purchase Agreement *to be negotiated*” (the italicized portion being added by Newport). On 12.5.2008, at 2.38pm, an earthquake measuring 7.9 on the Richter scale struck the Sichuan province, causing substantial damage to the Chinese Business. At about 4.20pm, Norwest e-mailed Newport, purporting to accept the 9 May Offer. At that time, both parties were not aware of the earthquake. Eventually, Newport declined to complete the sale. On 1.8.2008, the NC Shares were sold to the parent company of Norwest (HH) for \$4.5m. Norwest then sued Newport for the difference between the price offered in the 9 May Offer and the price obtained from HH. Newport counterclaimed for the deposit it paid to Norwest.

The High Court of Singapore dismissed Norwest’s claim and allowed Newport’s counterclaim. Firstly, the learned Judge held that contrary to Newport’s argument that the 9 May Offer was incomplete and subject to contract, the parties had reached substantial agreement, since the most essential matters in a sale and purchase transaction --- the price, subject matter and risk --- had been agreed upon. The agreement would have been only incomplete as to mechanics of the sale but that would not prevent any contract from coming into existence as the mechanics could easily be supplied by the court having regard to what was usual and reasonable in the circumstances. Thus, the parties had entered into a valid and binding agreement immediately upon Norwest’s acceptance of the 9 May Offer.

Secondly, Newport’s 9 May Offer was objectively aimed at gaining access to and control over the Chinese Business in the state and condition it was actually in at the time of the offer – ie, vertically-integrated and fully operational phosphate mining, processing and production business. The fact that the sale was on an “as is, where is” basis meant that the buyer could not ask for the subject matter to be better than it actually was, but at the same time, and crucially for this case, the buyer had not agreed to accept anything less. It was therefore

entirely possible for the contract between Norwest and Newport to be affected by the damage caused by the earthquake to the Chinese Business.

Factually, after the earthquake, the Chinese Business was substantially not in the same state and condition it was in at the time the 9 May Offer was made. Between 12.5.2008 (the date of acceptance) to 1.8.2008 (the date of sale to HH), Norwest was nowhere near being able to deliver the Chinese Business in the state and condition it was actually in at the time of the offer. It followed that the eventual sale to HH on 1.8.2008 made it impossible for Norwest to perform its end of the bargain and thereby to claim for the price. There was no point at which Norwest could claim to be entitled to the \$10.25m price, which meant that Newport was entitled to recover the deposit it placed with Norwest on the ground of total failure of consideration. In other words, the learned Judge ruled that it was Norwest who wrongfully and totally disabled itself from performing the contract by selling the NC Shares to HH based on the interpretation of the term “as is, where is” in the Information Memorandum from which the 9 May Offer was taken and the events and circumstances leading to the end of the contractual relation between the parties.

That said, the learned Judge proceeded with the alternative perspective of common mistake. In her view, the usual objective approach to offer and acceptance, or the doctrine of common mistake, was more than adequate to provide a principled approach to changes in circumstances occurring after an offer was made and *before the offer was purported to be accepted*. If the change of circumstances was known to the parties, it became a part of the context in which they dealt with each other, and the question then was whether the offeror’s original intention to make an offer had, on an objective view, changed in light of the change of circumstances. If, as in this case, the change was unknown to the parties, then the doctrine of common mistake should apply, subject to its other requirements being met. The doctrine struck an appropriate balance between the interests of the offeror and offeree: it applied only to a *common* mistake as to something which was the *common* basis of the parties’ agreement. The doctrine, which resulted in a *void contract*<sup>ii</sup>, was also conceptually sound. It recognized, on one hand, that there might be a factual meeting of minds when parties dealt with each other while under a common mistake, including a common ignorance about a change of

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circumstances which falsified the parties' initial beliefs. On the other hand, it held that, when the common mistake was such that it fundamentally altered the basis on which the parties dealt, and when no party had expressly or impliedly assumed the risk of the mistake, the parties ought to be relieved by operation of law from the contract which would otherwise result.

It is noteworthy that the learned Judge preferred the above two approaches (the total failure of consideration approach and the objective approach of offer and acceptance and the doctrine of common mistake) over the other two approaches contended by Newport. She refused to follow the approach taken in the English decision of *Financings Ltd v Stimson*<sup>iii</sup> which implied a condition onto the offer made that the subject matter of the contract was to remain in substantially the same condition as at the time of the offer (the implied term approach), because the parties in this case had already made provision for the risk of any damage or change to the Chinese Business by virtue of the "as is, where is" basis explicitly stated in the Information Memorandum. She also refused to follow the New Zealand decision in *Dysart Timbers Limited v Roderick William Nielsen*<sup>iv</sup> which recognized a rule of law that an offer would lapse upon a fundamental change of circumstances (the rule of law approach) because that rule was based on a situation where

both the offeror and offeree were aware of the change of circumstances, unlike this case where neither the offeror nor the offeree knew about the change.

For sake of completeness, it must be stated that the learned Judge at the end of her judgment highlighted a vital distinction between frustration and offer situations --- in a frustration situation, the parties were in a binding contractual relationship from which they could not unilaterally withdraw; in an offer situation, the offeror was always free to withdraw or modify his offer. In this case, as stated above, the learned Judge did not proceed on the basis of frustration of contract but on the basis of total failure of consideration, in the main and the basis of common mistake, in the alternative., to arrive at her decision that Newport was entitled to the refund of the deposit.

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<sup>i</sup>[2010] 3 SLR 956

<sup>ii</sup>In the Malaysian context, it would have been covered under s.21 of the Contracts Act 1950 as "agreement void where both parties are under mistake as to matter of fact".

<sup>iii</sup>[1962] 1 WLR 1184

<sup>iv</sup>[2009] NZSC 43

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## CONVEYANCING

### LAWYERS MADE LIABLE ON THEIR UNDERTAKING

In *Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor*<sup>i</sup>, Semenda Sdn Bhd (the Vendor) entered into a sale and purchase agreement of a property with CD Anugerah Sdn Bhd (the Purchaser). The Purchaser's Solicitors by way of a letter dated 5.2.1998 to the Vendor's Solicitors undertook on behalf of their client (ie. the Purchaser) that they would release the balance purchase price within 3 weeks from the date of presentation of the transfer. The Vendor's Solicitors by way of a letter dated 6.2.1998 forwarded the requested documents (including the original title deed and transfer form) to the Purchaser's Solicitors on the conditions, among others, that the documents were to be presented to the land office AND upon the Purchaser's Solicitor's

undertaking to release the balance purchase price within 3 weeks from the date of presentation of the transfer. The Purchaser's Solicitors accepted the documents forwarded without any qualification. The transfer was duly registered in favour of the Purchaser on 24.2.1998 which meant that the balance purchase price ought to have been paid over to the Vendor's Solicitors by 17.3.1998 .

When no payment of the balance purchase price was forthcoming after the said 3 weeks, the Vendor's Solicitors wrote to the Purchaser's Solicitors demanding for the payment. The Purchaser's Solicitors however resiled from their undertaking and replied that they had yet to receive the balance purchase price from the Purchaser and that the undertaking given in their first letter was from their client and not from their firm.

The Court of Appeal ruled in favour of the Vendor and the Vendor's Solicitors. In the grounds of their judgment, the court took cognizant of the importance of undertakings insofar as transactions of sale and purchase of property (conveyancing

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transactions) are concerned --- "The issuance of a letter of undertaking from one legal firm to another is the epitome of conveyancing practice". In this instance, the letter of undertaking dated 6.2.1998 was used to release the documents before the full payment of the purchase price had been made. Therefore, the Purchaser's Solicitors should have returned the documents to the Vendor's Solicitors if the Purchaser's Solicitors were unable to perform the obligations, specifically the release of the balance purchase price within 3 weeks from date of presentation as the firm had not received such money from its client. Instead, the Purchaser's Solicitors received the requested documents without any qualification whatsoever and caused the transfer to be registered. In so doing, the Purchaser's Solicitors were held to have agreed to accept and comply with the letter of undertaking dated 6.2.1998 and must be held responsible for their undertaking.

It is noteworthy that the appellate court remarked that "(T)he fact that the undertaking is

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#### CRIMINAL LAW / TORT

#### **POLICE LIABLE FOR FAILING TO TAKE REASONABLE CARE OF DETAINEE IN ITS CUSTODY**

The plaintiff in *Suzana Md Aris v DSP Ishak Hussain & Ors*<sup>i</sup> was suing in her capacity as the wife and administrator of the estate of her husband (the deceased) who died while being detained in a police lock-up. The claim was based on negligence, that the defendants had failed to observe the requisite duty of care in detaining the deceased. It was not disputed that the deceased had been lawfully arrested on suspicion of being a drug addict and produced within 24 hours of the arrest and ordered by a Magistrate to be remanded for 14 days pursuant to s.4 of the Drugs Dependents (Treatment and Rehabilitation) Act 1983.

As there was no evidence against the two police personnel named as the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff's action against them failed. However, the claim against the 3<sup>rd</sup> defendant as the head of the Royal Police of Malaysia and the 4<sup>th</sup> defendant, the Government of Malaysia, remained to be adjudicated. The court found no evidence that the

made on behalf of their client should not and will not absolve themselves from the need to be responsible for their action in ensuring that all are in order before such letters of undertaking are issued or accepted or even acted upon." and cited the proposition in the Privy Council case of *T Damodaran v Choe Kuan Him*<sup>ii</sup> that "(T)he main purpose and value of a solicitor's undertaking in transactions for the sale of land is that it is enforceable against the solicitor independently of any claims against one another by parties to the contract of sale."

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<sup>i</sup> [2010] 4 MLJ 157

<sup>ii</sup> [1979] 2 MLJ 267, at p.269.

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deceased had been assaulted or improperly handled from the time he was brought into custody till he was found dead. However, absence of assault or mistreatment did not exonerate the defendants from liability, for it was the duty of the police, having taken the deceased into their custody, to ensure that the deceased's health and well-being were taken care of during the period he was in its custody. The police had breached that duty of care. The deceased died of a massive pleural effusion secondary to bronchopneumonia which was not a terminal disease. Evidentially, the deceased had severe lung infection for at least 2-3 months before his death which arose from 'casseous necrosis', ie. the presence of tuberculosis. Had the police acted responsibly and sent the deceased to hospital earlier, he could have been treated and saved.

The fact that the deceased had been suffering from tuberculosis before he was taken into custody would not absolve the defendants from liability as, under the egg-shell skull principle, they would have to take their victim as they found him. Thus, the police were negligent in having failed to take reasonable care of the deceased while he was in their custody and judgment was entered against the 3<sup>rd</sup> and 4<sup>th</sup> defendants with loss and damages to be assessed.

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<sup>i</sup>[2010] 6 CLJ 712

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## DIGEST OF EMPLOYMENT LAW CASES

### 1. CONFRONTATIONAL ATTITUDE A MISCONDUCT

In *Tang Sung Teck v Chin Lian Long Motor Vehicle Co Bhd*, the applicant/claimant (C) was hired as the general manager of the respondent employer (R). C's employment was terminated by R on the grounds, among others, that he had proved to be 'unreasonable, discourteous and difficult to the Company's Directors and supporting staff'. The Industrial Court found in favour of R based on four instances of misconduct that provided sufficient evidence in support of this ground:

- (i) The 'mocking' letter that C wrote to the Managing Director of R (MD) in which C wrote "If you said that I was absent from my place of work, then could you tell me who is the person sitting in my office on the dates mentioned by you" in reply to the explanation sought by the MD on the alleged absence of C from office on specified dates. The Industrial Court found such response as contemptuous, mocking and sarcastic coming from a subordinate to his superior;
- (ii) C's demand for an apology from the MD for castigating him for not removing the tainted glass in C's office;
- (iii) C's accusation that the MD was encroaching into his areas of work and C's intimation that if the company's business suffered, the MD would be responsible;
- (iv) The unauthorized interview that C gave to a newspaper reporter.

On an application by C to the High Court for judicial review of the decision of the Industrial Court, the High Court upheld the decision. In doing so, the High Court took cognizance of the Industrial Court's approach of considering cumulatively the 'confrontational' letters written by C [ie. (i) to (iii) above] in determining whether C had been guilty of 'serious misconduct' within the ambit of clause 10(b) as charged by R against C in the letter of termination. In the learned Judicial Commissioner (JC)'s view, the issue was not whether C had been undiplomatic or rude but whether his confrontational and belligerent attitude had made it impossible for R to allow him to continue as its general manager. C

held a leadership position and therefore it was not unreasonable of R to consider his confrontational attitude as falling within the ambit of serious misconduct. The learned JC went further to hold that C's act of giving *unauthorized* interview (behind the back of his superiors) in which he credited himself for the innovations and increased efficiency of the company came within the ambit of the said clause 10(b) too. The Industrial Court's decision was therefore not tainted with 'Wednesbury unreasonableness'<sup>ii</sup> or that his decision was tainted with illegality or rationality.

The punishment of dismissal was not disproportionate to the misconduct committed by C. His conduct of continuously challenging and confronting his directors in a very rude and rebellious manner for at least seven months before his dismissal did not contribute to a harmonious climate in the workplace which made it impossible to retain him in the position of leadership as the general manager of R. The finding of the Industrial Court thus did not offend the principle of proportionality or was otherwise perverse or irrational (in the 'Wednesbury sense') so as to warrant interference of the High Court<sup>iii</sup>.

### 2. PROFITABLE COMPANY CARRYING OUT RETRENCHMENT EXERCISE

The six claimants in *Abdul Jalil Ali & Yang Lain v Phillips Malaysia Sdn Bhd*<sup>iv</sup> were retrenched upon a reorganization exercise carried by the company pursuant to which the PBC Division of the company was sold to another company, 3D Networks Sdn Bhd (3D Networks) and the claimants were regarded as redundant, hence the retrenchment. The company had however before terminating the employment of the claimants procured continued employment in 3D Networks for them with letters of offers on conditions that were substantially similar (though not identical) to that with the company which were rejected. The Industrial Court held that the mere fact that the company had been profitable had not disentitled it from management decisions to sell out or divest its business units and reorganize its business and operations which might result in surplus workforce and the need to carry out a retrenchment. The company's act in the present case was for a *bona fide* cause and there was no evidence to show the retrenchment exercise a colorable one or arbitrary, capricious or an act of victimization. By rejecting 3D

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Networks' offer of employment, the claimants had put themselves in jeopardy of being terminated. They could not compel the company to transfer them to other departments or companies within the group as they lacked the requisite skills, expertise and experience. The claimant's retrenchment was thus held to be *bona fide* carried out.

### **3. NO TERMINATION SIMPLICITER OF EMPLOYMENT CONTRACT**

In *Ho Lee Ha v Airport View Hotel*<sup>v</sup>, the claimant (C) was the sales and marketing manager of the company when she was dismissed by the company pursuant to a contractual provision in the letter of appointment which stated that 'On confirmation either party will require to give one month's written notice or payment in lieu of notice' in order to terminate the employment. C filed a representation to the Director General of Industrial Relations Department (DGIR) pursuant to s.20(1) of the Industrial Relations Act 1969 (IRA) that she had been dismissed without just cause or excuse. In the proceedings before the Industrial Court, the company advanced an alternative ground that the company took the step against C due to her misconduct as she had notified prospective clients of the company that pork was on sale at the premises of the company which resulted cancellation of their events with the company, thence monetary losses and loss of reputation to the company (the pork issue).

On the company's contention that this was purely a case of master and servant relationship based on the law of contract which justified the company's reliance on the contractual provision to determine C's employment, the Industrial Court chairman castigated the company for their complete misunderstanding of the industrial law applicable in our country. C's case fell under IRA and not the Contracts Act 1965. The company could not by any contractual rules or regulations of its own shut the duty of the court from enquiring into the issue as to whether the dismissal of C was with just cause or excuse. As an employer, the company could not merely rely upon the contract for an unfettered right to hire and fire C for such a right was subject to industrial adjudication. Contrary to the contention of the company, this was not a case under which common law principles of master and servant applied but it involved the employment relationship between employer and employee where the Minister

of Human Resources had found it fit to refer it to the Industrial Court under s.20(3) of IRA to be adjudicated upon.

Notwithstanding such finding, the Industrial Court ultimately ruled in favour of the company on the alternative ground. In this respect, it is the law that a claimant's case, upon reference to the Industrial Court by the Minister, is being re-heard before the Industrial Court. C had merely responded to 'the pork issue' by stating that it was 'red herrings' and had no significance to C's claim. Failure to rebut the company's contention on 'the pork issue' was tantamount to admission to the allegation that C was responsible for the cancellations on the alleged reason. The court also found that there was no evidence that pork was in fact served on the company's premises. On the balance of probabilities, C was held, by her conduct, to have failed to live up to the trust and confidence placed in her by her employer to carry out her duty to market the hotel business. She should have channeled her alleged complaint in a responsible manner and her contumacious conduct destroyed the very fabric of employer-employee relationship which had also caused irreparable damage to the reputation of the company. Her dismissal was with just cause or excuse and her claim was dismissed.

### **4. ILLEGALLY OBTAINED EVIDENCE ADMISSIBLE IN INDUSTRIAL DISPUTE ADJUDICATION**

In *Yap Fat v Southern Investment Bank Bhd / Southern Bank Berhad*<sup>vi</sup>---an Industrial Court case, the bank (the employer being sued) objected to the production (by the claimant employee) of certain documents on the ground that they were the property of the bank and had been illegally obtained without the bank's express permission and/or knowledge. The Industrial Court was urged not to follow the common law position that "illegally obtained documents can be admitted as evidence in court so long as the same is relevant" and cited a previous Industrial Court award<sup>vii</sup> to that effect. However, the Chairman presiding over *Yap Fat's* case refused to follow the earlier case and ruled that the common law position was applicable in the Industrial Court. Such proposition is in tandem with s.30(5) of IRA which requires the court to act according to equity and good conscience and the substantial merits of the case without regard to technicality and legal form. In the Chairman's view, if

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the court were to insist that documents obtained by employees had to be with the consent or permission of the employer before it became admissible, then it would surely burden the claimant, for such requirements would constitute mere technicalities and legal form which ought to be disregarded. Further, one would hardly expect an employer to give consent to the production and admissibility of documents if the contents therein were not in his favour. No more burden should be imposed on the poor employee who had lost his job.

However, the Chairman was with the bank in ruling that the production of certain documents which had related to credit facilities granted to some customers of the bank and was thus governed by the secrecy provision under s.97(1) of the Banking and Financial Institutions Act 1989 (BAFIA)<sup>viii</sup> was to be prohibited. The court being a court of equity and good conscience would not allow the production of documents which contravened the law.

## **5. EMPLOYEE OPTED TO RESIGN INSTEAD OF BEING RETRENCHED**

The Court of Appeal's decision in *Jebsen & Jessen Engineering (M) Sdn Bhd v David Sandanasamy & Anor*<sup>ix</sup> demonstrated the rare occasion that the appellate court opted to disagree with both the court of the first instance (ie. the Industrial Court) and the first-tier appellate court (the High Court) and allowed the company (employer)'s appeal and quashed the award of the Industrial Court. In the instant case, factually, the company had a session with the 1<sup>st</sup> claimant on 31.7.1998 and briefed him on the adverse economic situation faced by the company before intimating to him that he was to be retrenched.

The 1<sup>st</sup> claimant was allowed to go home after the briefing session to think over and make up his mind as to whether he wanted to tender his resignation. About a week later, he tendered his resignation letter but on his terms, viz, he gave the company 2.5 months' notice the effect of which he received 2.5 months' salary *in lieu* and agreed that his last day of work was on 31.7.1998. As to the 2<sup>nd</sup> claimant, the briefing session was held on 8.7.1998 and he tendered his resignation letter in the same afternoon. His request to work till 31.7.1998 was accepted by the company. On the aforesaid rather similar state of facts, the Court of Appeal held that both the parties had come to a settlement. The

evidence showed that the claimants tendered their resignation and collected monetary benefits without any protestation. Neither of them pleaded that they were threatened or forced or coerced into tendering their resignation. Both the courts below failed to critically analyse the evidence and erred in law in concluding that the resignations were forced resignations in the absence of any plea of coercion or duress. In the circumstances, the company's appeal was allowed with costs.

## **6. A DIVORCE WHICH IS NOT DIVORCE IN THE TRUE SENSE !**

The Industrial Court case of *Mohamad Faisal Shafie v MAS Catering Sdn Bhd*<sup>x</sup> proves to be an interesting revelation how the Industrial Court in our country generally, in our view, tend to favour employees. In that case, the claimant forwarded a divorce certificate notifying the company of his divorce from one Zaiton Husin (Zaiton) 6 months after the claimant's divorce. Investigation revealed that during the six month period, the claimant had utilized the benefits and privileges in favour of Zaiton despite her ceasing to be an 'eligible dependant' under the terms and conditions of employment (1<sup>st</sup> Charge). It was also undisputed that the claimant had utilized concessional travel and the company's guarantee letter for hospital and the surgical benefit schemes in favour of Zaiton (2<sup>nd</sup> Charge). He also made an application for a personal loan to seek medical treatment for Zaiton (3<sup>rd</sup> Charge). Pursuant to show cause letters and domestic inquiry, he was found guilty of all three charges and dismissed from service. He claimed wrongful dismissal under IRA. The Industrial Court ruled in his favour against the company.

The divorce was '*talak rajiee*' under the Islamic law which means the parties may re-marry (*rujuk*) within the '*eddah*' period and if no '*rujuk*' takes place, the divorce becomes absolute. During the period of '*eddah*' which is normally 3 months 10 days (100 days) with effect from the date of divorce, the ex-husband remains obliged to his ex-wife for her accommodation, food, clothes, medical expenses and all benefits which the ex-wife has enjoyed before she was divorced. On that score, the court held that the claimant had not committed any form of misconduct. There were justifications and reasons for his conduct as particularized in the three charges. He had to continue to take care of the welfare and well-being of Zaiton during the '*eddah*'

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period when Zaiton had still been regarded as his spouse and eligible dependant and where she had still been eligible for all benefits which she had previously enjoyed whilst she had been married to the claimant. Article 12 of the claimant's terms and conditions of employment had not defined 'wife' or 'spouse' and had not defined 'dependants' to exclude those who were no longer married but still under the 'eddah' period. Indeed, the court remarked that the same article had not stated that 'wife' or 'spouse' or 'dependant' must be 'lawful wife who is lawfully married'! Thus, the claimant had not committed the misconduct as alleged in the 1<sup>st</sup> and 2<sup>nd</sup> Charge in the context of Islamic Law.

As to the 3<sup>rd</sup> Charge, as the application for loan was made 11 days after the 'eddah' period was over, the company succeeded in proving the 3<sup>rd</sup> Charge. However, in view of the claimant's past 17 years' unblemished service record, and the fact that he had fully repaid the loan, the punishment of dismissal in the circumstances of the case was held to be harsh and inappropriate. Thus, the claimant was still awarded compensation *in lieu* of reinstatement and backwages albeit deduction of 50% for his contributory conduct which undeniably was the root cause that led directly to the charges proffered against him.

## **7. ENDING A CONTRACT OF EMPLOYMENT ON GROUND OF FRUSTRATION DUE TO PROLONGED ILLNESS**

The scenario: an employee was on an exceptionally prolonged medical leave. His medical condition had persisted and indeed, worsened and the likelihood of his being able to return to work had appeared dim. He suffered from a 'temporarily total disability' which meant that he had not been 'currently able to perform his normal duties.' It was uncertain as to when he would recover. There was no medical or hospitalization policy manual in force in the company. The question: can the company dismiss the employee on the ground that the contract of employment had been frustrated due to his medical condition?

The answer is 'yes', in the case of *Pauline Peck v Saratim Insurance Agency Services Sdn Bhd*<sup>xii</sup>, based on the totality of circumstances (including the nature of the illness, the long absence [182 days] from work and the likely length of the continuing absence, the need of the employer for

work done by the employee, the impact of the absences on others who work with the employee) and having regard to the overall evidence (including the medical report and oral testimony of the doctor treating the employee concerned) and background. By frustration, it is meant that there has been such a change of circumstances (which was not reasonably foreseeable at the time the contract was made) that events make it physically impossible for a contract to be performed.

Numerous cases including English authorities were cited in support of the proposition that in cases where the incapacity or illness was so serious and prolonged so as to prevent the employer from getting what he had bargained for in a contract of employment which rendered further performance of the contract totally impossible or something radically different from what the parties bargained for, the employer is entitled to terminate the contract by operation of law on the ground of frustration. The Industrial Court held that on the facts of the case, the company had acted reasonably in dismissing the claimant/employee based on the principle of frustration of her contract of employment due to her prolonged medical condition and the uncertainty as to when she would recover. The dismissal of the claimant was therefore with just cause or excuse. Perhaps the principle that 'the employer cannot be expected to go to unreasonable length in seeking to accommodate someone who is not able to carry out his job to the full extent'<sup>xiii</sup> echoed the sentiment of this case.

## **8. EMPLOYEE RENEGADING A 'NEGOTIATED' RESIGNATION**

In *Omron Electronics Sales and Services Sdn Bhd v Phoon Wai Kit & Anor*<sup>xiii</sup>, the 1<sup>st</sup> respondent (R1) was appointed as a manager in Omron Malaysia Sdn Bhd which was wholly owned by Omron Asia Pacific Pte Ltd. Two months later, R1 was transferred to the applicant company (Company A), the wholly owned subsidiary of Omron Malaysia Sdn Bhd. About six years later, R1 was seconded to FS Automation Pte Ltd (wholly owned by Omron Asia Pacific Pte Ltd) for two years to undertake the venture into the marketing of lower cost electronic components for the Malaysian market. But after a year it became clear that the business failed and the holding company decided to close it down. FC Automation Pte Ltd terminated R1's secondment. R1 returned to Company A where he had to occupy one

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empty desk temporarily since his previous room had been converted into a director's room and there was no vacant room available. Angry and distraught, R1 contemplated to resign and approached Company A to query whether he would be entitled to any extra payment if he left since he had been with the company for some time, to which the answer was 'no'. R1 even requested the General Manager of Company A to appeal on his behalf to the Board of Directors for some form of *ex gratia* payment. Upon approval of the Board for an *ex gratia* payment on compassionate grounds, R1 tendered his letter of resignation. Upon receipt of such letter, Company A proceeded to pay to R1 RM60,274 which included an *ex gratia* amount of RM53,550 as a gesture of goodwill for the number of years of service in Company A. After receiving the monies, R1 filed a claim for reinstatement under s.20(1) of IRA which was then referred to the second respondent (R2). R1 contended before the Industrial Court that he was forced to resign. R2 ruled in favour of R1 and awarded to R1 payment of compensation *in lieu* of reinstatement amounting to RM212,531. Against such award, Company A applied to the High Court for *certiorari* to quash the award of R2. The High Court granted the relief. It was held that there was no evidence adduced to show that R1 was not allowed to think over the matter, not allowed to come out of the office and was physically restrained and had signed under protest<sup>xiv</sup>.

On the converse, evidence adduced showed that R1's resignation was voluntary. R2 had erred in not identifying the proper issue to be decided ie. whether Company A had forced R1 to resign. R2 had given too much weight to Company A's conduct of not giving R1 a room, not giving him any work to do and taking away the tools of his trade---all of which might be relevant in a claim of constructive dismissal but were not elements to be considered in deciding whether there was a forced resignation. Therefore, R2's decision was perverse, irrational and unreasonable that no reasonable body or body of

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## ENVIRONMENTAL LAW / COURT PROCEDURE

### ADVERSELY AFFECTED PERSONS NOT BUSY BODIES

You must have heard of news about actions by local authority in total disregard of planning

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persons could have made and the award was accordingly quashed.

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<sup>i</sup>[2010] 5 CLJ 834

<sup>ii</sup>This phrase basically refers to the principle of law that the decision of public decision-maker (in our case, the Industrial Court) could be quashed if it had been affected by illegality, irrationality, procedural impropriety and proportionality.

<sup>iii</sup>The learned JC referred to the ground-breaking decision of the Federal Court in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 which permitted examination of the *process* of decision-making as well as *substance (merits)* of the decision in deciding whether the decision was affected in the *Wednesbury* sense and the decision of the Court of Appeal in *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 CLJ 837 which laid down the guidelines to be followed in reviewing a decision of the Industrial Court.

<sup>iv</sup>[2010] 3 ILR 130

<sup>v</sup>[2010] 1 ILJ 84

<sup>vi</sup>[2010] 3 ILR 350

<sup>vii</sup>*Japan Travel Bureau (M) Sdn. Bhd. v Wong Siew Ngow* [2006] 2 ILR 1176

<sup>viii</sup>In essence, the provision seeks to protect information relating to the customers of the bank from disclosure into public domain subject to certain exceptions.

<sup>ix</sup>[2010] 6 CLJ, 911; [2010] 3 ILR 457

<sup>x</sup>[2010] 3 ILR 552

<sup>xi</sup>[2010] 3 ILR 630

<sup>xii</sup>*Garricks (Caterers) Ltd v V Nolan* [1980] 1 IRLR 259

<sup>xiii</sup>[2010] 7 CLJ 372

<sup>xiv</sup>The court referred to the elements as cited in *Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* [1998] 1 LNS 258.

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legislation or structure plan to the detriment of residents or inhabitants of the affected areas or zones. Such was the situation in the High Court case of *Awang @ Harun bin Ismail v Kerajaan Negeri Kedah & Ors*<sup>i</sup>. In that case, the 1<sup>st</sup> defendant (Kedah State Government) (D1) had on 16.12.1997 assented to the structure plan for the District of Yan from 1995-2000 under which the Gunung Jerai Forest Reserve was to be preserved as a water catchment forest and any activity which could destroy the natural environment and affect the

supply of clean water was not allowed. The structure plan was duly gazetted. Notwithstanding this, D1 subsequently in September 2001 made an about turn, granted approval for a quarry on a 100 acre site in Gunung Jerai and in October 2001 declared the quarry site as ceasing to be a forest reserve. In April 2002, the 5<sup>th</sup> defendant (D5) was given a 30-year lease of the site by the 4<sup>th</sup> defendant (D4) whilst the 3<sup>rd</sup> defendant (D3) approved an environmental impact assessment for the quarry project sometime in 2005. The sixth defendant (D6) was the quarry operator. Blasting operations commenced at the site in the quarter of 2006. D5 had not applied for planning permission as required under s 19 of the Town and Country Planning Act 1976 (TCPA). The 2<sup>nd</sup> defendant (D2), Yan District Council accordingly issued a stop order against D5 in March 2006 but the stop order was never enforced by the said district council.

The plaintiffs (P) were the inhabitants of the area covered in the structure plan which was located within the 1-3km of the quarry. Despite P's appeals, the authorities allowed the quarry to continue its operations. P filed proceedings in court for various reliefs (declaratory orders, injunction and consequential orders) against the defendants.

The defendants applied to strike out P's suit on technical ground that wrong procedure had been used and lack of *locus standi*<sup>i</sup> on the part of P. They succeeded at the High Court but lost at the Court of Appeal. On further appeal, the Federal Court dismissed the defendants' application (which appeared to only centre on striking out and the procedure issues) and remitted to the High Court for hearing on merits. Once again, the defendants contended that the issue of *locus standi* remained open and that P must prove their *locus standi*.

The High Court ruled that the issue of *locus standi* had been fully ventilated in the earlier string of application and appeals and the matter was res judicata and that the defendants were estopped from raising the same point. The learned Judicial Commissioner (JC) however proceeded, in case he was wrong in his ruling, to determine the issue of *locus standi*.

The learned JC drew substantial guidance from previous decisions of the appellate courts, particularly the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*<sup>ii</sup>. The relevant test at this stage was the test of threshold *locus standi* --- that the applicant (ie. P) should be "adversely affected". The test called for a flexible approach. Only in the most obvious case ie. where the applicant has no interest at all, could it be said that an applicant had no threshold *locus*. In the instant case, P were not mere busy bodies and were not mere public-interest or public-spirited individuals. *Prima facie*, P were persons who have sufficient personal interest in the legality of the impugned action. They came within the class of persons the structure plan sought to protect: those who have homes, orchards or padi fields within the area, those whose source of water were the rivers running in the area for which the forest represented an important water catchment area. P came within the class of persons to be protected by TCPA.

Furthermore, where there has been an illegality, such unlawfulness of the public authority's conduct would override any objections on the lack of *locus standi* of the applicant. In the present case, the illegality was clear. S 22(4) of TCPA clearly meant that no development should be carried out if it contravened the structure plan. The structure plan having been gazetted became subsidiary legislation and has the force of law and could not be disregarded. The learned JC wondered how the defendants could justify the approval, existence and operation of a quarry on the very site the structure plan stated it to be protected.

In summary, whichever way you look at it, P were held to have more than amply demonstrated the intimate nexus between them and the decision sought to be impugned.

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<sup>i</sup>[2010] 4 MLJ 83

<sup>ii</sup>It means standing to sue, the right of a litigant to move the court in relation to the facts which form the substratum of his complaint.

<sup>iii</sup>[2006] 3 MLJ 164

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## CHALLENGING RESERVED PRICE FIXED FOR PROPERTY TO BE AUCTIONED OFF

How do you determine the reserved price for property set for auction? That was basically the question before the High Court in the case of *Arbainah Othman v CIMB Bank Bhd*<sup>i</sup>. Pursuant to an application of the respondent bank/chargee, the Land Administrator had at a land enquiry on 28.5.2009 made an order for sale of a piece of land together with a shop-house in Batu Pahat (the said property) and fixed the reserved price of the said property at RM150,000 and scheduled the public auction of the said property on 7.10.2009. The appellant who was the registered owner/chargor of the said property was represented at the enquiry and did not oppose the decision of the Land Administrator. However, the appellant subsequently filed a motion to appeal against the Land Administrator's decision, contending that the reserved price should be at RM300,000 being the market value pursuant to s 263(2)(d) of the National Land Code 1965 based on the valuation report of her valuer dated 20.7.2009 whereas the respondent bank's reserved price as accepted by the Land Administrator was based on its valuer's valuation report dated 10.5.2007. The respondent in reply produced another valuation report dated 7.9.2009 by another valuer which assessed the market value of the said property at RM160,000.

Faced with such divergence in the market value assessment, the High Court referred to the criteria on how to derive the market value of real property as laid down by the Federal Court in the land acquisition case of *Ng Tiou Hong v Collector of Land Revenue, Gombak*<sup>ii</sup>:

"Firstly, market value means the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell

and the purchaser to buy at the market price without any element of compulsion. Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future eg, the possibility of it being used for building or other developments. Fourthly, in considering the nature of the land, regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not be given unless it is supported by, or coincides with, other evidence. ... The safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of acquisition (*in our case, the time of sale*). The prices paid for such sales can be used as comparables subject to making allowance for all the circumstances..."

The High Court preferred the respondent's latest valuation report over the appellant's valuation report. The former had cited a recent comparable sale on 18.5.2009 of a property (a non-Bumiputra and renovated unit of similar size) situated along the same road as the said property for RM200,000. This comparable was compared with the other comparable (PTD 8553) in the respondent's earlier valuer's report which was a non-Bumiputra lot of similar size

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located along the same road as the said property and sold on 14.10.2003 for RM170,000. On the other hand, the latter totally ignored the aforesaid two sales within the vicinity of the said property and instead took into account sales of double-storey, intermediate shophouses in different areas in Batu Pahat and made no mention whether these comparables were Bumiputra or non-Bumiputra lots. In the circumstances, the High Court upon further taking into account the restriction-in-interest of the said property (being a Bumiputra lot) and the lapse of six years after the sale of PTD 8553

fixed the reserved price of the said property at RM170,000. The appellant's appeal was allowed but with no costs.

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<sup>i</sup>[2010] 5 CLJ 955  
<sup>ii</sup>[1984] 1 CLJ (Rep) 289

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## REMEDIES / COURT PROCEDURE

### INJUNCTION TO PREVENT DISSIPATION OF ASSETS

It is not unusual that a dispute which has developed into a legal suit will take some time for the court to determine. In the interim period, there is a possibility that the party who is sued (defendant) will siphoning off or remove his assets with a view to render the judgment to be obtained in due course by the party suing (plaintiff) futile or meaningless. Fortunately, the law does not work in vain. The plaintiff has recourse by applying for an injunction before judgment against the defendant to restrain the defendant from dealing with its assets whilst awaiting for the final adjudication of the dispute. This type of injunction is now widely known as *Mareva* injunction, named after the case which first established the availability of such interim relief.

The recently reported case of *Robert Doran & Ors v Kuan Pek Seng*<sup>i</sup> provides an illustration of how such relief was granted to the plaintiff. In that case, the plaintiff(P)'s claim arose from two shareholders agreements involving P, the 1<sup>st</sup> defendant (D1) and two other persons. The two shareholders agreements led to the acquisition of two companies in the form of the 21<sup>st</sup> and 22<sup>nd</sup> defendants (D21 and D22) to implement the intention of the parties. The terms of the agreements would have resulted in P holding a majority in terms of board members and the highest percentage of shares among the shareholders of D21 and D22. P however did not exercise his right to control the Board of Directors of either D21 or D22 and was content to allow D1 and his nominees to control the boards notwithstanding P1 provided the bulk of

finance required by the two companies. A resolution to amend the articles of association of D22 was subsequently passed which enabled D22 to pass circular resolutions without the consent of P or his interest. This event was then seized upon by D1 to pass resolutions which effectively resulted in D1 securing full control of the Board of Directors of D22. Thereafter, the assets of D22 were transferred to the 15<sup>th</sup> to 17<sup>th</sup> defendants (D15 to D17) purportedly by way of set-off of monies due from D22. D22 was thereafter voluntarily wound-up.

P1 was most upset with the events and filed the suit for, among others, declaratory relief and damages against D1 and his associates in the form of remaining defendants responsible for the current state of D22. P contended that pursuant to the two shareholders agreements and under the circumstances, D1 and P were partners and in a fiduciary relationship and thereby obliged to act with utmost good faith, mutual trust and confidence with each other. The acts of D1 in amending the articles, causing the assets of D22 to 'disappear' and finally liquidating D22 without P's knowledge and consent were clearly acts in breach of the agreements and fiduciary duties. D1 in defence argued that the agreements had been determined by conduct of parties and consequently, he owed no duties to P, that D22 owed substantial sums to creditors such as D15 to D17 and the set-off by transfer of assets was reasonable and that the voluntary winding-up of D22 was the natural consequence of the company being without any factory premises, machinery and income and ability to meet its numerous creditors.

The High Court applied the three-fold test before a *Mareva* injunction was to be granted: (i) the applicant had a good arguable case; (ii) the respondent had assets within the jurisdiction; and (iii) there was a real risk of the assets being dissipated or removed before judgment which must

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be established by solid evidence. P had no problem in discharging its burden as regards ingredient (i) and (ii). As to (i), whether the two agreements were subsisting or determined in law was a serious question to be tried. P had indeed produced evidence which demonstrated a good arguable case with the prospect of success at the trial. As to (ii), the assets of D22 were still within the jurisdiction as D1 acknowledged having transferred such assets to three locally registered companies in the form of D15 to D17. As to (iii), which had always been the most difficult to be fulfilled, the court held that it was entitled to draw inferences from the defendant's previous action which showed that his probity was not to be relied upon. It went on to find six major grounds where there was overwhelming evidence of *prima facie* dishonest conduct on the part of D1 and his associates. Among others, the circumstances under which confirmation of indebtedness by D22 to its alleged creditors was issued which preceded the issuance of five s. 218 statutory notice to wind-up D22 raised doubts as to the genuineness of such confirmation and such notices; the unusual admission of D1 the issuance of the five notices was at his instigation; the lack of explanation as regards the 430 metric tons of processed material of D22

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#### TORT (DEFAMATION)

#### CAN THE OPERATOR OF A SEARCH ENGINE ON THE INTERNET BE LIABLE FOR THE PUBLICATION OF DEFAMATORY MATERIAL?

A recent UK High Court judgment has clarified the extent of liability (if any) of an operator of a search engine on the internet in defamation. In *Metropolitan International Schools Ltd trading as SkillsTrain and/or Train2Game v Designtecnica Corp (trading as Digital Trends) and others*<sup>1</sup>, the way in which Google operates and its potential liability for search results were closely examined by Eady J in arriving at his decision.

Briefly, the facts. The claimant provided adult distance learning courses on the internet. The 1<sup>st</sup> defendant operated a website which provided bulletin boards for discussions by the public, the contents of which were accessible to internet search engines. This website was said to provide 'news, professional reviews, and opportunities for public discussion of the latest consumer electronic products, services and trends'. The 2<sup>nd</sup> defendant, Google UK Ltd, was a subsidiary of the 3<sup>rd</sup>

and its sale proceeds; concerns on genuineness of the deed of settlement of debt between D22 and D15 to D17; the questionable conduct of D1 in the events leading to the liquidation of D22 and the circumstances surrounding the passing of the resolution to amend the articles and of the circular resolutions.

The court concluded that under such circumstances, a refusal of the *Mareva* injunction would involve a real risk that any judgment in favour of P would remain unsatisfied due to the risk of dissipation of assets. The court accordingly granted the *Mareva* injunction against D1 to D4, D13 to D14, D19 to D21 until the trial of the action, order for disclosure by way of affidavit of the whereabouts of the assets of the same defendants and order for disclosure of corporate and financial documents of D1, D3, D4, D7, D10, D21 and D22.

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[2010] 6 CLJ 105

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defendant, Google Inc, which operated an internet search engine. The 2<sup>nd</sup> defendant did not operate the Google search engine, and according to its defence, it carried on a sales and marketing business but did not provide online services.

The basis of claimant's case was that the 1<sup>st</sup> defendant hosted web forums that included threads which defamed the claimant by, *inter alia*, accusing the claimant of various transgressions, from providing wildly poor value for money in their distance learning courses to exploiting students and being little more than a scam. Google was named as a defendant because it was alleged to have 'published or caused to be published' at [www.google.co.uk](http://www.google.co.uk) and/or [www.google.com](http://www.google.com) a search return for the Train2Game thread which set out the following words defamatory of the claimant: "Train2Game new SCAM for Scheidegger" (Scheidegger being a former trading name of the claimant). In other words, the claimant sued the defendants in respect of defamatory comments which had been posted on the 1<sup>st</sup> defendant's website and which appeared as a 'snippet' of information accompanying the hyperlink when searching under the claimant's name on Google. The 3<sup>rd</sup> defendant being domiciled in US applied to set aside the order for service outside jurisdiction on

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grounds, including, that as a search engine, it ought not to be held responsible for publication of the words complained of, so that the claim had no reasonable prospect of success and ought to be struck off *in limine*.

For the benefit of our readers, briefly how a search engine works on internet. The internet comprises web pages containing information and each page has a unique address (the URL). The page will appear when the URL is typed into an internet browser. Each website address ends with a 'top level domain', which is a series of letters often denoting the country in which the website is registered. Thus, many websites which are accessed in the United Kingdom will end up with the ".uk" domain. Google operates search engines for all the major 'country code top level domains' (ccTLDs). The principal reason why this is done is to enable Google searches to provide appropriate results for local users. It was explained in the case, by way of example, that a search on the word 'bank' would yield different results on [www.google.co.uk](http://www.google.co.uk) from those appearing on [www.google.co.ca](http://www.google.co.ca) (where primarily Canadian banks would appear). This is because it would be impossible for Google to search every page available on the web in real time and then deliver a result in a time frame acceptable to users. What happens is that Google compiles an index of pages from the web and it is this index which is examined during the search process. It is necessary to emphasise that the index is compiled and updated purely automatically (ie without human input). This process is generally referred to as 'crawling' or 'web crawl'.

When a search is carried out, it will yield a list of pages which are determined (automatically) as being relevant to the query. The technology ranks the pages in order of 'perceived' relevance – again without human intervention. The search results that are displayed in response to any given query must depend on the successful delivery of crawling, indexing and ranking. Content on the internet is constantly being crawled and re-crawled and the index updated.

It is obvious that Google has no control over the search terms entered by users of the search engine or of the material which is placed on the web by its users. The complaint against the 1<sup>st</sup> defendant related to information appearing on one of its web bulletin boards posted by third parties. As stated above, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had no control

over the 1<sup>st</sup> defendant or over what appeared on its bulletin boards. The claimant's claim against them however premised on a search result identified as follows:

'Since 25 March 2009 or around 25 March 2009, on each occasion that an Internet search is performed on "Train2Game" the 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendant published or caused to be published at [www.google.co.uk](http://www.google.co.uk) and/or [www.google.com](http://www.google.com) a search return for the Train2Game thread which for 3 weeks preceding the date of these particulars set out the following words defamatory of the claimant as the third and fourth highest search result:

"Train2Game new SCAM for Scheidegger"...

The natural and ordinary meaning is that the claimant's Train2Game course was a scam or fraud intended to deceive, and a further example of the claimant's fraudulent conduct.'

The UK High Court endeavoured to see how the relatively recent concept of a search engine could be made to fit into the traditional legal framework (unless and until specific legislation was introduced). At common law, for a person to be fixed with responsibility for publishing defamatory words, a mental element must be present following the case of *Bunt v Tilley*<sup>ii</sup>. The learned Judge found that Google had no real control over the allegedly defamatory material appearing on the screens of searches. Crucially, therefore, he found that Google was not the 'publisher' of the snippet. His comparison with a library catalogue was especially interesting. The analogy was drawn with a search carried out in a large conventional library. If a scholar wished to check for references to his research topic, he might consult the library catalogue. It was hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue. On the other hand, if the compilers had made effort to be more informative, by quoting brief snippets from the books, the position might be different. Suppose the catalogue recorded that a particular book contained allegations of corruption against a living politician, or perhaps it went further and spelt out a particular activity such as 'flipping' homes to avoid capital

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gains tax, then there could be legal liability on the part of the compiler under the 'repetition rule'.

The learned Judge however held that when a search was carried out by a web user via the Google search engine, there was no human input whatsoever from the 3<sup>rd</sup> defendant. None of its officers or employees took any part in the search; it was performed automatically in accordance with computer programs, ie. by the web-crawling 'robots'. In the words of the learned Judge:

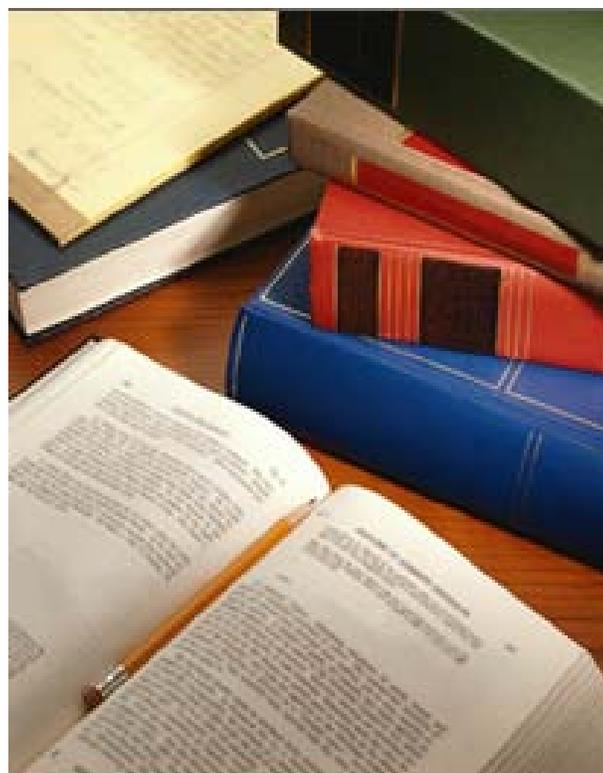
'When a snippet is thrown up on the user's screen in response to his search, it points to him in the direction of any entry somewhere on the web that corresponds, to a greater or lesser extent, to the search terms he has typed in. It is for him to access or not, as he chooses. ... (T) third defendant has no role to play in formulating the search terms. Accordingly, it could not prevent the snippet appearing in response to the user's request... There being no input from the third defendant, therefore... it cannot be characterized as a publisher at common law.'

In the earlier case of *Godfrey v Demon Internet Ltd*<sup>iii</sup>, the defendant therein stored information posted by other people, transmitted it to subscribers, and had knowledge that the words complained of were defamatory and the defendant also had the ability to take them down from the web. In the instant case, however, the 3<sup>rd</sup> defendant neither stored nor hosted the relevant information in the same sense as *Demon Internet* and the claim was based upon the automatically generated search result. The learned Judge unsurprisingly ruled that a search engine was a different kind of internet intermediary and it was not possible to draw a complete analogy with a website host as in the case of *Demon Internet*. One could not merely press a button to ensure that the offending words would never reappear on a Google search snippet; there was simply no control over the search terms typed in by future users.

In addition, the 3<sup>rd</sup> defendant also contended that it should be regarded as a mere facilitator, rather than a publisher, in respect of the publication of the 'snippet'. By way of analogy with the role of

telephone carriers who were considered to be 'facilitator' of telephone calls rather than being responsible for their publication, it was argued that it was neither necessary nor proportionate to impose potential liability for defamation on the owners or operators of a search engine in respect of material thrown up automatically on any of their 'snippet' search results. In cases where there was a genuine need for compensation or vindication, the relevant complainant would (at least in theory) had a remedy, somewhere, against the person(s) who put the original article on the web, to which the search engine has merely drawn attention.

The court agreed. The 3<sup>rd</sup> defendant did not authorise or cause the snippet of information to appear on the web user's screen in any meaningful sense; it merely, by the provision of its search service, played the role of a facilitator.



The other question posed was whether the legal position was or should be any different once the 3<sup>rd</sup> defendant had been informed of the defamatory content of a 'snippet' thrown up by the search engine. The learned Judge ruled that given the particular nature of a search engine, even when the search engine had been notified or informed of the defamatory content of a snippet, it was not

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possible to fix it with liability on the basis of authorisation, approval or acquiescence<sup>iv</sup> of the offending words. It was practically impossible, and disproportionate, to expect the 3<sup>rd</sup> defendant to embark on a wild goose chase in order to determine where the words complained of might from time to time appear on the internet, especially given the precautions the 3<sup>rd</sup> defendant had already taken in putting in place its 'notice and take down'<sup>v</sup> policy.

In conclusion, the court held that the 3<sup>rd</sup> defendant was not in any way, whether on the basis of authorship or acquiescence, responsible for the publication of the offending words in respect of the automated activities of its search engine.

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<sup>i</sup>[2010] 3 All ER 548

<sup>ii</sup>[2006] 3 All ER 336

<sup>iii</sup>[1999] 4 All ER 342

<sup>iv</sup>The law recognizes that a person can become liable for a publication of a libel by acquiescence; that is to say, by permitting publication to continue when he has the power to prevent it.

<sup>v</sup>In essence, once the search engine (eg. Google) has notice of legitimate complaint of offending material, steps

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## TORT (NUISANCE AND NEGLIGENCE)

### RENOVATION WORKS THAT CAUSED NUISANCE TO NEIGHBOUR

In *R Kanasingam a/l R Rajkasingam & Anor v Wong Chong Fatt & 3 Ors*<sup>i</sup>, the plaintiffs and the 1<sup>st</sup> and 4<sup>th</sup> defendants were neighbours who had purchased their double-storey link houses from the developer, the 2<sup>nd</sup> defendant. The plaintiffs claimed to have suffered damage and loss of value to their house due to the nuisance perpetrated by the 1<sup>st</sup> and 4<sup>th</sup> defendants' renovations to their house, whilst against the 2<sup>nd</sup> defendant, they claimed that it owed a duty of care to them to ensure that the structural integrity of their house was safeguarded and that the style, shape and structure of the house viewed as a whole would be represented in its marketing literature. As against the 3<sup>rd</sup> defendant, Majlis Bandaraya Shah Alam, it was contended that it was in breach of its duty of care by its failure to ensure that the renovations were carried out pursuant to the approved plans and would not adversely affect the plaintiffs' house.

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are taken to ensure that certain identified URLs are blocked, in the sense that when web-crawling takes place, the content of such URLs will not be displayed in response to the Google searches carried out on google.co.uk. However, in the present case, whilst the 3<sup>rd</sup> defendant had blocked access from [www.google.co.uk](http://www.google.co.uk) to the specific URLs identified on behalf of the claimant, that would not stop somebody from searching on [www.google.com](http://www.google.com), nor would it prevent a third party who was responsible for the content of the site in question from moving it to a different web page while giving it a different URL and avoiding the block. This is what was meant by 'practically impossible and disproportionate to expect the 3<sup>rd</sup> defendant to embark on a wild goose chase'. Unlike a website host, the 3<sup>rd</sup> defendant was not hosting a website and did not have anything from which to 'take down' the offending material in the way that a website host could have done.

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The High Court found that the renovation of the 1<sup>st</sup> and 4<sup>th</sup> defendants' house did not follow the plans as approved by the 3<sup>rd</sup> defendant and was major. Evidentially, very fine hair line cracks had developed on the party wall due to the stress of the extra load from the new works at the 1<sup>st</sup> and 4<sup>th</sup> defendants' house. Coupled with the warning by the expert produced by the 1<sup>st</sup> and 4<sup>th</sup> defendants of the need to keep monitoring closely as the work progressed. inferences were drawn that the renovation works had substantially affected the structural foundation and integrity of the plaintiffs' house. Apart from such physical damage, the renovation works had resulted in a loss of light at the front entrance and at the kitchen area to the rear of the plaintiffs' house; loss of view from the windows of kitchen, bedroom 2, master bedroom, living/dining area and at the entrance porch and terrace of the plaintiffs' house. Such damage related to the aspect of nuisance relating to the interference with the enjoyment of the neighbour's land<sup>ii</sup>. Evidence was also led to show the drop in the market value of the plaintiffs' house brought upon by the damage in terms of structure and aesthetic.

In respect of the claim against the 2<sup>nd</sup> defendant, the 1<sup>st</sup> and 4<sup>th</sup> defendants had complied with the relevant renovation guidelines issued by it and obtained the necessary local authorities

approval. There was no stipulation in the deed of mutual covenants which obliged the 2<sup>nd</sup> defendant to ensure that the concept of gated community and the main structural layout of the houses were not varied in any material manner. The 2<sup>nd</sup> defendant was only required to be responsible to maintain security and the maintenance of the common property and facility at housing enclave. Thus, the 2<sup>nd</sup> defendant had no control over the renovation works carried out by the 1<sup>st</sup> and 4<sup>th</sup> defendants.

As against the 3<sup>rd</sup> defendant, it was the finding of the court that it was negligent when it permitted the 1<sup>st</sup> and 4<sup>th</sup> defendants to commence renovation on their property two months before it approved the plans and it failed to check if the stop order and demolition order it issued had been complied with, despite complaints from the plaintiffs. The 3<sup>rd</sup> defendant was held to be aware of glaring variations from the approved plan and the wrongdoing of the 1<sup>st</sup> and 4<sup>th</sup> defendants, yet it failed

to take requisite enforcement action to prevent damage to the plaintiffs' house. The court refused to apply the protection afforded by s.95(2) of the Street, Drainage and Building Act 1974 to shield the 3<sup>rd</sup> defendant from liability.

The court accordingly made numerous orders, including an order that the 1<sup>st</sup> and 4<sup>th</sup> defendants' house be reverted to its original state or reinstated according to the original plan approved by the local authority.

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<sup>i</sup>[2010] 8 AMR 241

<sup>ii</sup>The learned Judge referred to the Federal Court decision in *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors* [2000] 4 MLJ 200 for the three forms of private nuisance which was described as 'unlawful interference with a person's use or connection with his land'.

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