

THE UPDATE



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ADMINISTRATIVE LAW

SMUGGLING CARS AN ACT PREJUDICIAL TO PUBLIC ORDER

A person may be detained under the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 at the discretion of the Home Minister for a period not exceeding two years on the ground that such detention is necessary to prevent the person from acting in any manner prejudicial to public order or that it is necessary for the suppression of violence or the prevention of crimes involving violence.

In *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors*ⁱ, the appellant who was alleged to have been involved in the smuggling of stolen cars out of Malaysia was detained under the said Ordinance. The issue was whether the Minister had acted lawfully in classifying the activity of smuggling stolen cars as an act prejudicial to public order.

The provision concerned stipulates "if the Minister is satisfied". This phrase does not import a subjective element --- it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. It in fact imports an objective element --- whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

In the view of the Federal Court, whether an act of smuggling was prejudicial to public order depended on the facts and circumstances of each case. If it disrupted or has the potential to disrupt the even tempo of the life of the community or where it disrupted or has the potential to disrupt public safety and tranquility, it would prejudice public order.

The act of smuggling stolen cars might per se not be prejudicial to public order but this was a case in which a syndicate was involved as clearly stated in the grounds of the appellant's detention. This activity had the effect of providing for thieves and would-be thieves a ready market for disposal of stolen cars. Hence, the potential to disrupt public tranquility was present as no car may be safe from being either robbed or stolen by reason of the appellant's assistance in disposal thereof.

Such smuggling activity had the potential to disrupt the even tempo of the life of the community when there was serious risk of loss of property through theft. A reasonable decision-maker when faced with the facts as set out in the statutory statement would have concluded that the appellant's activity was prejudicial to public order. Therefore, the Minister did not commit any error of law in making the detention order. The application for an order of *habeas corpus* was rightly declined.

ⁱ[2010] 3 MLJ 307

BANKING LAW

IT'S A MUST TO GRANT REBATE WHEN SUIING UNDER BBA (ISLAMIC FINANCING) CONTRACT

In a landmark decision, the High Court held that where the Bai Bithaman Ajil (BBA) contract in Islamic banking was prematurely terminated upon default by the borrower, the bank was not permitted to enforce the payment of the full sale price. The court would imply a term of Islamic banking practice, ie. granting of rebate (*ibrar*) on a premature termination. The bank must grant the rebate which was the amount of unearned profit due to the premature termination.

That was the ruling in *Bank Islam Malaysia Berhad v Azhar bin Osman (and 3 other suits)*^j, which was given the task of determining the quantum of the bank's claim in a number of cases involving BBA contracts which had been held to be valid and enforceable by the Court of Appeal in *Bank Islam Malaysia Berhad v Lim Kok Hoe & Anor (and 8 other appeals)*^j.

Under the law, the bank when applying for an order for sale must state the amount due on the date on which the order for sale is madeⁱⁱⁱ. The learned Judge in a careful and analytical judgment allowed the total sale price under the property sale agreement (PSA) less the amounts paid under the instalments and further deducting the unearned

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profit of the bank computed at the day on which the order for sale was made.

Likewise, in cases of civil suit for judgment sum per se, judgment would be entered based on full sale price under the PSA less the amount of instalments paid at the time the writ was filed subject to further deduction of the unearned profit of the bank on the date of full realization as *ibrar*.

In the view of the learned Judge, an order granting the full sale price in an application for an order for sale would defeat the provisions of s.266(1) of the National Land Code 1965. This section was designed to protect the chargor who was on the brink of having his property sold at an auction to know exactly where he stood in terms of the amount of repayment in order to give him the opportunity to redeem his property from the chargee bank. Further, it would also mean that when the chargor wanted to tender payment under s.266(1), he would have to fork out and pay the chargee bank the full sale price and then wait at the mercy of the chargee bank for a

CARRIAGE / TORT

NATURE OF DUTY OWED BY A FREIGHT FORWARDER TO CONSIGNOR

The nature of the relationship between a freight forwarder and the consignor of goods came into focus in the High Court case of *Etonic Garment Manufacturing Sdn Bhd v Kunn-G Freight Systems (M) Sdn Bhd (Malaysian Airline System Berhad – Third Party)*ⁱ. The plaintiff (P) was a manufacturer of garments for the export market and engaged the defendant (D) who was a freight forwarder and licensed customs broker to arrange for the delivery by air of a consignment of garments to P's customer in Ireland. D had with the approval of P arranged for carriage of the consignment with Malaysian Airline System Berhad (MAS).

The consignment was sent by P to MAS. It was supposed to have been loaded onto two flights for delivery to its destination on 20.11.1999 and 25.11.1999. It was however on or about 21.12.1999 discovered that there was short delivery of the consignment. P's customer cancelled its order of the

rebate. This rendered the protection intended by s.266 meaningless.

In her ladyship view, a bank should not be allowed to enrich itself with an amount which was not due (ie. unearned profit, because of premature termination) whilst at the same time taking cognizance of the chargor's right to redeem his property. Thus, where the BBA contract was silent on this issue of rebate or its quantum, as an implied term, the chargee bank must grant a rebate which was equivalent to the amount of unearned profit as practiced by all Islamic banks and legitimately expected on the part of the chargor.

ⁱ[20101] 3 AMR 363

ⁱⁱ[2009] 6 CLJ 22, featured in Special Issue 1 of 2009 of "THE UPDATE".

ⁱⁱⁱS.257(1) of the National Land Code 1965

remaining undelivered goods. P filed a claim against D, alleging that D was negligent in carrying out its duties in transporting the goods which had caused loss of goods or delay in the goods reaching the destination resulting in the said cancellation.

Based on the evidence adduced, D was not a carrier but merely a freight forwarder whose responsibility was to arrange consignments between the consignee and the carrier. Upon ascertaining the transportation needs of P, D would then determine the carrier and the schedule options available and this was subject to the approval of P. D did not undertake to deliver the consignment to Ireland itself nor was it capable of doing so. By delivering the consignment from P's factory to MAS and in arranging for the transport of P's consignment through MAS, D had complied with its contractual obligations. The obligation to deliver the goods to Ireland was on MAS and not D. D had no duty to ensure that the goods were transported in a timely manner. In the circumstances, any damage, loss or loss of profit suffered by P could not be said to have arisen from the negligence or breach of contractual duty on the part of D.

ⁱ[2010] 3 AMR 444

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COMMERCIAL LAW (SALE OF GOODS)

UNAUTHORIZED USE OF CREDIT CARD FACILITY BY MERCHANT

The English Court of Appeal's decision in *Lancore Services Ltd v Barclays Bank plc*¹ should serve as a reminder to business community, particularly those merchants which provide credit card facility to their customers, to refrain from abusing the facility accorded to them by the facility provider. It also provides a comprehensive explanation of how the system for processing credit card payments operates.

The claimant (C) was a merchant who, among others, dealt with selling kitchenware through mail or telephone order and advertisement. The defendant (D) granted C a merchant service facility to process credit and debit card payments from mail and telephone order sales. The structure of such transactions was that a *cardholder* used his credit card to buy goods and services from the *merchant*, ie. C. A merchant's ability to accept card payments was governed by the terms of his *merchant services agreement* (MSA) with the *merchant acquirer*, which is D in the instant case, who supplied the facilities to enable the merchant (C) to accept card payments. In addition, the merchant acquirer (D) was also bound by the Visa and Mastercard Scheme rules. The principal issue in the instant case however revolved the effect of the conditions of the MSA.

D suspended payments to C and its merchant facility on being tipped off that C was involved in '*aggregation*'---prohibited by the scheme rules governing the rights and obligations between merchant acquirers and card issuers---which occurred when a merchant who had entered into a merchant services agreement processed card transactions for the supply of goods or services by a third party who had not entered into a merchant services agreement.

It was the findings of the trial judge that C had been engaged in unauthorized third party transactions, particularly processing payments for third parties for the sale of prescription drugs without prescription and pornographic downloads. D terminated the MSA. C sued D to recover some £1.9m held by D for onward payment (claimed payments).

Amongst the conditions of the MSA:

(i) '*Card payment*' was defined as 'a payment for goods or services provided by you or supply of cash by you which the cardholder has authorized you to charge to his or her account.';

(ii) Condition 2.1 provided: 'We will pay you the amount of all card payments (less any refunds) included in payment details which you send to us as set out in this agreement...' Under the heading 'Illegal and third party transactions', it was provided: 'You must only send us payment details for payments by cardholders to you for goods and services provided by you or the supply of cash by you to cardholders.';

(iii) Condition 4.1 provided: 'In some circumstances we will have the right not to pay you for a card payment. If we have already paid you for it, you may have to pay that amount back to us. This is called "*charging back*". We may charge a card payment back to you if you refuse to pay it even if it has been authorized. We may do this if you send us information about a transaction which is not a card payment but which has been processed by us as a card payment. If we have the right to charge a card payment back that amount will be a debt from you to us which you owe immediately. We will have the right not to pay you or to chargeback in the following circumstances: (a) if the card payment or the way in which it was carried out has broken this agreement or if the payment details or the way in which they have been sent to us have broken this agreement...'

The Court of Appeal upheld the decision of the trial judge which ruled in favour of D. On the true construction of condition 4.1, D had been entitled to decline to make a payment to C in a transaction which was not a 'card payment' but which had been processed by it as such. D's core obligation under condition 2.1 was only to assume payment obligation to pay C the amount of all card payments included in payment details sent by C. However, the card transactions in respect of which C sought payment from D in the instant case were not transactions in which C had provided the goods or services and so, the claimed payments were not card payments within the meaning of condition 2.1. D had never become subject to any obligation to make the claimed payments to C. D was therefore entitled to the right of permanent retention of the moneys under condition 4.1.

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The suggested implied term that D could only make retentions for a reasonable time in respect of chargebacks or actual loss suffered by D was inconsistent with conditions 2.1 and 4.1. There was also no basis to regard condition 2.1 as a penalty clause for D was not asserting forfeiture of moneys otherwise due to C in reliance upon or in consequence of a breach by C under the MSA. The claimed moneys had never become payable to C. Nor was there any basis to impute any agency or fiduciary relationship between D and C.

Moreover, C's contention that D had been unjustly enriched (as a result of retaining moneys

otherwise payable to C) was unsustainable. C had under the MSA agreed that it was only to be entitled to payment by D for the amount of 'Card Payments'. C assumed the risk that if it engaged in third party transactions, it would not get paid. It was not the function of the law of restitution to redistribute the risks which the parties had, by contract (ie. MSA), already allocated. Accordingly, C's appeal was dismissed.

ⁱ [2010] 1 All ER 763

Singapore, Thailand, Indonesia, Philippines and Taiwan for an immediate period of three years.

CONTRACT / TORT

BITING THE FINGERS THAT HAD FED YOU BEFORE

The High Court case of *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon*ⁱ is a classic illustration of the Malay proverb "*Harapkan pagar, pagar makan padi*" (in English, biting the fingers that had fed you before). The plaintiff (P) in August 1995 employed the defendant (D) as the marketing manager. In both the letter of offer of appointment (LO) and letter of confirmation of employment, D pledged his loyalty to P, which, among others, required him to devote the whole of his energies, attention and time to develop and extend P's business and in all matters to act loyally and faithfully for P. The summary of other pertinent provisions in the LO is as follows:

- Clause 7 D was not permitted whilst in the employment of P to engage in any private business which could tantamount to any conflict of interest.
- Clause 8 & 9 D had to, at all times, ensure the confidentiality of P's proprietary and other confidential information, such information to remain as P's property and could not be divulged to any third party.
- Clause 10 Upon D's resignation, he shall not be engaged in work or own the same trade as P in Malaysia,

In May/June 1997, D was entrusted by the managing director of P(PW-1) to take charge of the company while she was away in US to source for more advanced and speedy auto machines to solve the problem of shortage of labour and for business expansion of P. PW-1 provided D with the pricing formula on quotation which was regarded by P as confidential information of the highest order and the trade secret of P's pricing to its customers. Evidence was also adduced to show that D acquired the specialized knowledge of making carton boxes using P's method of rotary dies cut mould while working with P.

During PW-1's absence, D was busy starting a new company manufacturing rotary dies which was the same business as P. D had also approached almost all of P's employees to convince them to leave P's employment and to join D's company in the future. It was also in evidence that D instructed two of P's employees to obtain information about P's customers' orders and machine specifications for the rotary cut dies (as the learned judge put it, carrying out industrial espionage). In early August 1997, D resigned and joined P's competitor, Alpha Mould Sdn Bhd (Alpha). Prior to his resignation, D informed P's customers that nearly all of P's employees had or were about to leave P and join D's company. After his resignation, D continued to entice P's employees to leave P. All in all, 11 of P's employees joined Alpha.

P claimed for an injunction and damages against D based on causes of action in breach of contract, breach of confidence and for unlawful

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interference with P's trade whilst D's defences were that the LO contravened s.28 of the Contracts Act 1950 (the Act) and that P failed to call certain of P's customers to corroborate PW-1's testimony, hence adverse inference was to be invoked against P under s.114(g) of the Evidence Act 1950.

Unsurprisingly, the High Court held as follows:

- (1) By enticing and influencing P's employees to leave P's employment to join Alpha while D was still an employee of P, D had acted in conflict and was in breach of contract.
- (2) Confidential information would also cover information relating to customers, cost prices together with the specific needs of customers to which D had access. D had utilized P's list of customers by pinching P's customers and undercut the pricing of P when he joined Alpha. The letter from Alpha showing that 12 of P's customers had been secured by P put an end to the s.114(g) argument. D had acquired confidential information and divulged the same to P's competitors including Alpha and had utilized the same for D's own benefit. D had clearly breached clauses 8 and 9 of the LO. In addition, D had also committed a tortious breach of confidence.
- (3) D had committed the tort of unlawful interference with P's trade for the following reasons: (a) by encouraging and/or influencing P's employees to leave P's employment; (b) by failing to keep all information obtained in the course of his employment confidential; (c) by divulging P's confidential information to P's competitors; and (d) by misrepresenting to P's customers with the sole aim of damaging P's reputation and/or business.
- (4) Restraint against competition was permissible if it was fashioned in such a way as to prevent a misuse of trade secrets or business connexion. The restraint of trade clause in the instant

case was not draconian but was reasonable. The geographical area of the restraint was viewed in the context of the ease of travel and the character of the business that was under scrutiny. In the world where companies operated globally, it was reasonable to extend the restraint across the globe.

- (5) In considering s.28 of the Act, the commercial reality of the matter required some measure of flexibility and the learned Judge applied the test of reasonableness in construing the said restraint of trade clause.

The Court allowed P's claim for the sum of RM2,095,780 as damages together with interest and costs.

In our considered view, the decision of the High Court with regard to restraint of trade clause is questionable in the light of an earlier decision of another High Court, *Polygram Records Sdn Bhd v The Search*ⁱ which also referred to the earlier case of *Wrigglesworth v Anthony Wilson*ⁱⁱ. Both these decisions appeared to have taken the position that the common law position with regard to restraint of trade clause was inapplicable to Malaysia in view of the clear provision of s.28 of the Act which provided that all covenants in restraint of trade were void (subject to three exceptions which are inapplicable to the facts pattern of the instant case) and the test of reasonableness was irrelevant.

Having said that, in *Polygram Records*, the deciding judge did qualify his decision that s.28 of the Act was to be applicable to cases where a person was restrained from carrying on his trade or profession in the post-contract period (ie. such clause would be rendered void) and not during the currency of the contract (ie. such clause would be valid and enforceable).

Which position is the correct one under s.28 of the Act and the exact scope of s.28 of the Act will have to wait for another day and another decision by our appellate court.

ⁱ [2010] 8 MLJ 297

ⁱⁱ [1994] 3 MLJ 127

ⁱⁱⁱ [1064] MLJ 269

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CONTRACT

IMPORTANCE OF POLICE REPORT IN A FRAUD CASE & EFFECT OF DUE DILIGENCE AUDIT

To support a claim based on fraud in a civil suit, a contemporaneous police report on the alleged fraud must be lodged. That is basically the lesson to be learnt from the High Court case of *Chong Wan Ping & Anor v Shamshudeen Hj Mohd Yunus*ⁱ.

The plaintiffs (P) in that case entered into a joint venture (JV) agreement and a sale & purchase agreement (SPA) with the defendant, a former Myanmar citizen (D) with the intent to acquire 70% stake in three of D's companies in Myanmar. Owing to the fact that foreigners could not hold shares directly in Myanmar, secondary agreements using the names of Myanmar citizens as nominees were executed. The acquisition was completed by P paying a sum of USD2.1m. D's claim of having subsequently injected monies into the said companies was disputed by P. Subsequent receipt of USD799,000 by D was however admitted but its utilization was disputed. P sued D alleging fraud and misrepresentation by D and claimed for the return of USD2,899,000.

The learned Judicial Commissioner (JC) ruled against P. There was no evidence that a police report or its equivalent was lodged by P complaining about the fraud. The absence of such report rendered P's allegation of fraud as merely bare allegation and this was fatal to P's caseⁱⁱ.

CONTRACT

UNSUCCESSFUL QUALIFIED BIDDER SUING EMPLOYER FOR DAMAGES FOR ACCEPTING BID FROM AN INELIGIBLE BIDDER

In *Tercon Contractors Ltd v British Columbia (Minister of Transportation and Highway)*ⁱ, six teams had made submissions in response to a request of the Ministry of Transportation and Highways (the Province) for proposals for the designing and building of a highway in northwestern British Columbia, Canada (the RFEI). Later, the Province notified the six proponentsⁱⁱ that it intended to design the highway itself and issued a request for proposals

P's plea of misrepresentation also failed. The JV Agreement contained a clause that the agreement would be finalized subject to due diligence audit, and likewise the SPA, of the accounts and financial affairs of the company and P was to be satisfied as to the correctness of all the representations and warranties given in the SPA. Evidentially, P had misgivings regarding the SPA soon after the same was signed on 23.3.1995 after they had received the due diligence audit dated 13.4.1995. However, P chose to further contribute towards their 70% share of the working capital in the companies. Thus, even if there was misrepresentation (which was none, so held the learned JC), P was estopped from seeking the return of the monies as P still acted on the SPA despite being aware of the alleged misrepresentations. P's claim was thus thrown out by the court.

ⁱ[2010] 2 AMR 773

ⁱⁱThe court drew guidance from several cases, namely *David Wong Hon Leong v Noorazman b Adnan* [1996] 1 AMR 7; *Soo Lip Hong v Tee Kim Huan* [2005] 5 AMR 576; *Floral Trends v Li Onn Floral Enterprise (M) Sdn Bhd* [2006] 6 CLJ 525.

for its construction (the RFP). Open only to the original six proponents which qualified through the RFEI process that included Brentwood Enterprises Ltd. (Brentwood) and Tercon Contractors Ltd.(Tercon), the RFP set out a specifically defined project and contemplated that proposals would be gauged according to specific criteria.

The RFP also included an exclusion of liability clause which read: "Except as expressly and specifically permitted in these Instructions to Proponents, no proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim."(the Exclusion Clause) (emphasis added)

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Brentwood however lacked expertise in drilling and blasting, so in order to prepare a more competitive proposal, it entered into a pre-bidding agreement with a non-qualified bidder (EAC) to undertake the work as a joint venture. Nonetheless, it submitted a bid in its own name with EAC listed as a “major member” of the team. As it turned out, Brentwood and Tercon were the two short-listed proponents but the Province ultimately selected Brentwood for the project.

Tercon sued the Province for damages, alleging that the Province had considered and accepted an ineligible bid and that but for that breach, Tercon would have been awarded the contract. The issues before the court were:

- (i) whether the Province breached the tendering contract by entertaining a bid from an ineligible bidder; and
- (ii) if yes, whether Tercon’s claim was barred by the Exclusion Clause.

The trial judge found for Tercon on both issues but the decision was over-turned by the Court of Appeal resulting in Tercon appealing to the Supreme Court of Canada which empanelled nine judges to hear the appeal.

On issue (i), the fundamental principle, according to the Supreme Court, was that submitting a compliant bid in response to a tender call *might* give rise to a contract between the bidder and the owner/employer, the express terms of which were to be found in the tender documents. The court upheld the finding of facts of the trial judge that there was an intent to create contractual obligations upon Tercon’s submission of a compliant bid, that there was offer, acceptance and consideration in the invitation to tender and Tercon’s bid. In other words, there was a contract between Tercon and the Province arising from the tendering exercise (the tendering contract).

Under such contract, the Province was contractually bound to accept bids only from eligible bidders. Whilst Brentwood’s submission was in its own name, it was in substance the joint venture between Brentwood and EAC which was a non-qualified bidder. Evidence was adduced to show that the Province had full knowledge of the Brentwood’s bid, thought that such a bid from that joint venture

was ineligible and took active steps to obscure the reality of the situation.

In the view of the Supreme Court, such bid constituted “material non-compliance” with the tendering contract. By considering an ineligible bid and by changing the terms of eligibility to Brentwood’s competitive advantage, the Province had breached the express eligibility provisions of the tender documents and also the implied duty on its part to act fairly towards all bidders.

On issue (ii), by a majority of 5 to 4, the Supreme Court held that the Province could not seek refuge under the Exclusion Clause. The majority was of the view that the Exclusion Clause excluded compensation for claims arising “as a result of participating in [the] RFP”, not to claims resulting from the participation of other ineligible parties. Tercon’s claim against the Province therefore did not fall within the terms of the Exclusion Clause.

In this respect, the majority interpreted the Exclusion Clause by having regard to the text of the clause in its broader context and to the purposes and the special commercial context of tendering, particularly the context of public procurement which required transparency and fairness in the tendering process. Acceptance of a bid from an ineligible bidder attacked the underlying premise of the tendering process established by the RFP and liability for such an attack was not precluded by the Exclusion Clause.

The majority found that the Exclusion Clause was not intended to waive compensation for conduct like that of the Province that struck at the heart of the integrity and business efficacy of the tendering process which it undertook. Moreover, the words of the Exclusion Clause were not effective to exclude or limit liability for the breach of the Province’s implied duty of fairness to bidders.

In any event, the majority held that the language of the Exclusion Clause was at least ambiguous. The phrase “participating in [the] RFP” could arguably mean “submitting a Proposal” as contended by the Province or could reasonably mean “competing against the other eligible participants” which would have made the Exclusion Clause inapplicable to the facts pattern of the instant case. Thus, under the principle of *contra proferentem*, any ambiguity in the context of this tendering contract would be interpreted against the

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Province (which drafted the tender documents) and in favour of Tercon and would not therefore bar Tercon's damages claim.

Whilst this Canadian decision appears to have opened the door for parties to establish contractual relationship as early as at the stage of submission of a bid and to have driven home the point that the owner/employer on its part must also adhere to the rules set out in a tendering process in assessing the bids and awarding of the contract concerned failing which it faces the risk of being sued by unsuccessful bidder(s), the statutory context of the tendering process, in our view, plays a significant role in arriving at the decision.

In this respect, reference was made by the Canadian apex court to the provisions in the Ministry of Transportation and Highways Act, R.S.B.C 1996 which governed the tendering process in the instant case and which made clear that road construction works had to be awarded by public tender, absent of

the Minister's approval of an alternative process, and had to be awarded to the lowest bidder, absent approval of the Lieutenant Governor in Council. In short, the presence of such statutory provisions which were designed to assure transparency and fairness in public tenders, to a certain extent, swayed the decision of the court. Further, the owner/employer can still escape liability for non-conforming to the terms and conditions of tendering process through clear and comprehensive limitation or exclusion clauses. Thus, this decision must be cautiously read and understood.

ⁱ(2010) 315 D.L.R.(4th) 385

ⁱⁱThe term 'proponent' referred to a bidder and was defined as 'a team that has become eligible to respond to the RFP as described in Section 1.1 of the Instruction to Proponents'. In s.1.1, the RFP specified that only the six teams involved in the RFEI would be eligible.

CREDIT & SECURITY / CONTRACT LAW

UNILATERAL REVOCATION OF CONTINUING GUARANTEE BY NOTICE

A company had obtained banking facilities from a bank. Its directors and shareholders (the former directors) stood as guarantors for the repayment of the facilities. The shareholders then sold their entire shares in the company to another company (the new owner). It was a term of the share sale agreement that the directors of the new owner (the new directors) would substitute the former directors as guarantors in respect of the facilities. The bank was duly notified by the new owner.

The former directors also gave notice to the bank that neither of them would be liable to the bank from that moment onwards for any claim arising from the company's failure in servicing the facilities, since the facilities had not been utilized at all at that time and there was no money due and owing. The bank however did not act on this development despite numerous follow-up letters.

The facilities were subsequently drawn-down vide five bankers' acceptance more than a year later and the bank then informed the company

that it would not release the former directors as guarantors, as the two new directors of the company had legal suits filed against them by other banks. The company defaulted on the repayment of the facilities resulting in the bank commencing proceedings against it and the former directors.

Against such backdrop, the High Court in *Affin Bank Berhad v Agate Distributors Sdn Bhd & 4 Ors*ⁱ ruled against the bank. On a proper construction of various clauses of the letter of guarantee between the former directors and the bank (the said LG) and applying the principles set out in *Investors Compensation Scheme v West Bromwich Building Society* on construction of a contract, the court held that the said LG was terminable as to future transactions with the 14 days' notice in writing given by the guarantors (which they did) to the bank. It was also pertinent that the said LG was not stipulated to be irrevocable.

The court proceeded to decide whether, if the above conclusion was erroneous, the said LG was revocable in the absence of a contractual provision allowing for revocation by notice. S.82 and s.83 of the Contracts Act 1950 came into play. The issue boiled down to whether the consideration for the said LG was entire or divisible. If the consideration was entire, such as where a person entered into a guarantee that in consideration of the lessor granting a lease to a third person he would be

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answerable for the performance of the covenants, no effectual notice of revocation could be given by the guarantor without the creditor's agreement.

On the other hand, if the consideration was fragmentary, supplied from time to time and thus divisible, such as where a guarantee was given to secure the balance of a running account maintained with a bank or for goods supplied, then in the absence of a provision as to notice, the guarantor may terminate the guarantee at any time and he would remain responsible for any sums incurred by the principal debtor up to the time the notice was given but he would be absolved from incurring further liability after the date of the notice.

The court found that the said LG was given in consideration of the grant of continuing banking

facilities, namely letters of credit, trust receipts, bankers' acceptance and overdraft facilities, to the company which meant that the consideration for the provision of the guarantee by the former directors was divisible. Thus, the said LG was revocable by notice to the bank but only as to future transactions.

In conclusion, the former directors stood discharged or released from the said LG on the expiry of the notice period of their notice to the bank to revoke the guarantee.

[2010] 3 AMR 93

reasonable grounds upon which to sustain the belief; and (iii) the employer at the state at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Unfortunately, in the view of the Industrial Court Chairman, the evidence adduced by the company through nine witnesses appeared to be premised upon speculation and suspicion, and not upon any cogent or tenable grounds, resulting in an arbitrary and capricious exercise of its managerial rights. Thus, the claimant succeeded in his claim.

DIGEST OF EMPLOYMENT CASES

1. TERMINATION ON GROUNDS OF SPECULATION & SUSPICION

In *Saravanan Parasuraman v Nordenia-Thong Fook (Malaysia) Sdn Bhd*ⁱ, the claimant was issued a show cause letter alleging that he had induced the company's workers to take medical leave *en-masse* which had culminated in a total production stoppage in the printing section of the company resulting in the company suffering financial losses. A domestic inquiry (DI) was also subsequently held. At the conclusion of the DI, the claimant was found guilty of the charges proffered against him and was dismissed. The claimant lodged a wrongful dismissal claim.

The state of the company's evidence failed to satisfy the test as set out in the English case of *British Homes Stores Ltd v. Burcell*ⁱⁱ which laid down the law in cases where an employee was dismissed because the employer suspected or believed that he had committed an act of misconduct. In such cases, the law is that the employer must entertain a reasonable suspicion amounting to a belief in the guilt of the employee of the misconduct in question.

There are three elements to be fulfilled: (i) there must be established by the employer the fact of that belief, that the employer did believe it; (ii) it must be shown that the employer had in his mind

2. RESIGNATION BY FORCE V. NEGOTIATED RESIGNATION

Not every resignation influenced by pressure or inducement on the part of employer is to be regarded as constructive dismissal. In *Muhammad Wafa Nokman v BMW Asia Technology Centre Sdn Bhd*ⁱⁱⁱ, the Industrial Court drew guidance from two English cases, namely *Sheffield v Oxford Controls Co. Ltd.*^{iv} and *Jones v Mid-Glamorgan County Council*^v. In the former, it was stated that:

"...there must exist a principle...that where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than to be dismissed (the alternative having been expressed to him by the employer in the terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than a

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dismissal...We find the principle to be one of causation...the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give, the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle..."

In the latter, the Court of Appeal in UK held that:

"...Courts and tribunals have been willing...to look, when presented with an apparent resignation, at the substance of the termination for the purpose of inquiring whether the degree of pressure placed on the employee by the employer to retire amounted in reality to a dismissal...the principle itself, whatever its origins, is well settled. It is a principle of the utmost flexibility which is willing in all instances of apparent voluntary retirement to recognize a dismissal when it sees it, but is by no means prepared to assume that every resignation influenced by pressure or inducement on the part of employer falls to be so treated. At one end of the scale is the blatant instance of a resignation preceded by the employer's ultimatum – "Retire on my terms or be fired" – where it would... (be regarded as) a dismissal. At the other extreme is the instance of the long-serving employee who is attracted to early retirement by benevolent terms of severance offered by grateful employers as a reward for loyalty, where...(it would be regarded as) termination by mutual agreement. Between those two extremes there are bound to lie much more debatable cases...whether the borderline has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat."

In *Muhammad Wafa Nokman* case, the claimant was the Basic Infrastructure Services Manager (as well as the Administrator of the computer system) of the company. He tendered his

resignation letter but 1½ months later, lodged a complaint of wrongful dismissal premised upon constructive dismissal.

The Industrial Court took into account the circumstances under which the claimant was called up to meet the HR Manager of the company (COW-1) and the superior of the claimant (COW-2) without prior warning of the purpose of the meeting, COW-2's statement during the meeting that the claimant's misconduct was a serious one, the fact that the claimant wrote and signed the letter in less than an hour and the claimant's testimony that he had agreed to resign to avoid his record of services from being tainted which would affect future prospect of employment^{vi}. It was held that the said resignation letter was written under threat. Thus, the claimant made out his case of constructive dismissal.

Notwithstanding such finding, the court proceeded to consider whether the company was ultimately wrong in dismissing the claimant without just cause or excuse^{vii}. The company's case was that the claimant had down-loaded private information of COW-1 which act was not within the scope of his duties and was an unauthorized act.

The company was in the business of providing IT services to customers in Asia Pacific and Oceanic region where integrity and safety of data stored in the system was of utmost importance. The claimant's abuse of privileges accorded to him as an Administrator of having access to files in the computer system of the company had destroyed and betrayed the trust reposed in him by the company. It broke down the foundation of the employment agreement. The company could not be expected to retain the claimant. The dismissal was thus upheld by the court.

3. EMPLOYEE SOUGHT TO WITHDRAW LETTER OF RESIGNATION

In *Lee Nyet Choi v Naza Kia Services Sdn Bhd*^{viii}, the company sought to transfer the claimant from the post of Administrative cum Confidential Secretary in Kuala Lumpur office to Regional Executive-Northern Region in Alor Setar branch. She was given two weeks to relocate herself. Her appeal against the transfer was rejected, hence her resignation. She subsequently sought to withdraw her resignation but the company contended that they

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had already accepted her resignation and could thus not accept her withdrawal of resignation.

On the facts, the court held that the claimant's letter dated 18.5.2006 which sought to withdraw her letter of resignation dated 13.5.2006 preceded the company's letter dated 20.5.2006 which sought to accept the claimant's resignation. In other words, the company had only accepted the claimant's resignation after she had communicated her intention to withdraw it to them. Thus, her withdrawal of her resignation was valid and effective and the company's act of asking her to leave its employment was an unconscionable termination of her services.^{ix}

4. CHALLENGING MINISTERIAL'S REFUSAL TO REFER REPRESENTATION TO INDUSTRIAL COURT

The High Court's decision in *Radha Krishnan a/l Kandiah v Menteri Sumber Manusia Malaysia & Anor*^x depicted one of the few occasions that a dismissed employee successfully challenged the decision of Minister of Human Resources in refusing to refer his representation that he had been dismissed without just cause or excuse [pursuant to s.20(3) of the Industrial Relations Act 1967 (IRA)] for adjudication to the Industrial Court. In the instant case, two charges were proffered against the applicant (A) by the company: (i) that he lied to his immediate superior about the absence of a worker; and (ii) that he was not at his workplace at certain hours without seeking prior approval from his immediate superior.

A domestic inquiry was held. A claimed that because he did not want to prolong the matter, he admitted to the charges although they were not true. He was dismissed by the company. He then lodged a complaint with the 2nd respondent, Director General of Industrial Relations (R2) that his dismissal was without just cause or excuse. A conciliation meeting was held but was not fruitful.

A was subsequently informed by the 1st respondent (R1) that his representation was not a fit and proper case to be referred to the Industrial Court, thence A's application for an order of *certiorari* to quash R1's decision and for an order of *mandamus* requiring R1 to refer the same to the Industrial Court.

Firstly, the High Court reiterated the trite law that R1 was not required to give reasons when he exercised his discretion not to refer A's representation to the Industrial Court. Secondly, there was also no requirement for R1 or R2 to make the report of R2 to R1 available to A or to the company at all, relying on a passage in the judgment of the Court of Appeal in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*^{xi}.

Thirdly, the duty of reviewing court in such application was to conduct an objective examination of the facts placed before R1 at the material time to ascertain whether a reasonable man, similarly circumstanced would have arrived at the same decision as that arrived at by R1. Further, R1 must adhere to the "Hashim Yeop test" laid down in *Minister of Labour, Malaysia v Lie Seng Fatt*^{xii} and referred to in *Kathiravelu Ganesan* case, namely, whether having regard to the facts and circumstances of the given case, the representation made by the workman was frivolous or vexatious.

In the instant case, despite the challenge by A, the respondents had chosen not to exhibit A's "Job Description" and the report of the relevant officer of the company which has a direct bearing on the two charges against A. In the light of conflicting evidence and in the absence of relevant documents, it could not be verified whether a reasonable person similarly circumstanced would have arrived at R1's decision.

Therefore, it could not be said that A's representation was clearly frivolous or vexatious. Further, the objectivity of R1's decision making process was flawed as he had taken into account irrelevant facts of prior misconduct taken place about 19 years before the dismissal. Thus, orders were given in terms of A's application.

5. NON-PAYMENT OF SALARY JUSTIFIES CONSTRUCTIVE DISMISSAL CLAIM

The claimant in *Seah Ann Yee v John Hancock Life Insurance (Malaysia) Berhad*^{xiii} was served with a show cause letter to explain the discrepancies and inconsistencies in information involving six policies provided by him in the field audit. He was suspended for 14 days. He replied to the show cause letter. Notwithstanding his replies, he was served with an 'inquiry and suspension' letter dated 30.8.2002 requiring him to answer two

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charges of misconduct (falsification and manipulation of audit list of field audit report), scheduled to be held on 11.9.2002. The domestic inquiry (DI) proceeded and concluded with the verdict reserved.

The claimant's suspension was extended for a further period of 14 days which would end on 26.9.2002. On 25.9.2002, the claimant was served with a demotion letter together with the findings of the board of inquiry (DI Board) that he was guilty of the charges of misconduct and decision of the malfeasance committee. While being served with the said demotion letter, the claimant asked for his August 2002 salary which was payable to him on 10.9.2002 but was told that he would be paid on 10.10.2002. The claimant then notified the company that he considered himself constructively dismissed with effect from September 2002 and he left the company accordingly. The claimant was ultimately paid his August 2002 and September 2002 remuneration on 11.10.2002.

The Industrial Court held that based on established authorities, the employer's obligation to pay remuneration to the employee was one of the fundamental terms of a contract of employment. Failure to pay salary when it fell due would constitute a fundamental breach of the contract of employment and was tantamount to the employer evincing an intention no longer to be bound by the contract which entitled the employee to walk out of his employment and claim constructive dismissal.

Thus, on this ground of non-payment of salary alone, the claimant had succeeded on his constructive dismissal claim. The court however went on to lay down other acts against the claimant which, taken cumulatively, had been breaches of express or implied terms of the claimant's contract which justified him leaving the company on the basis of constructive dismissal.

Since the claimant had proven the company had constructively dismissed him, the burden of proof shifted to the company to prove that the claimant's dismissal was with just cause or excuse -- see *Pelanggi Enterprise Sdn. Bhd. V Oh Swee Choo & Anor*^{xiv}. The court went through the evidence in details and came to the conclusion that the company had failed to prove the said charges of falsification and manipulation against the claimant.

It was also the finding of the court that the DI was badly flawed in procedure on several grounds.

Among others, the prosecutor was also an investigator and a witness in the DI, the members of the DI Board also cross-examined the claimant in DI which went to show that the DI Board had been playing the role of the prosecutor, biasness of the DI Board members against the claimant on several instances, witnesses were permitted to put questions to the claimant and numerous flaws in the minutes of DI Board.

The punishment of demotion meted out was held to be disproportionate to the misconduct that he was (wrongly) found guilty. Notably, the claimant was not given an opportunity to mitigate --- the denial of the right to make a mitigation plea was a breach of natural justice [*Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn. Bhd*^{xv}]. All in all, the court held that the company had constructively dismissed the claimant on 26.9.2002 and the finding of guilt by the DI Board was invalid and untenable in law and that the demotion had been glaringly done without just cause and excuse.



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6. UNILATERAL VARIATION OF ONE-PAGE CONTRACT

In *Dr Timothy James Mc Avin v Natural Components (M) Sdn Bhd*^{xvi}, the claimant, an American, after a long series of communications through e-mails culminating in the claimant accepting the company's offer of employment on the terms and conditions represented to him by the company, came to Kuala Lumpur and commenced employment as a chiropractor whereby he executed a one-page contract for the purpose of processing his work permit by immigration authorities. He was assured that a proper contract listing the terms and conditions of employment would be signed at a later stage.

However, both parties subsequently endeavoured to negotiate this so-called proper contract and could not come to an agreement resulting in sour relationship. The company then terminated the claimant's services due to his failure to revert with confirmation to the letter of the solicitors of the company which proposed terms of conditions of his service. Against such background, the Industrial Court resolved in favour of the claimant.

By the one-page contract, the company had put itself in a bind as the claimant's terms of service had been scanty and any attempt to add, subtract or vary the contract would have needed both parties'

EQUITY / TRUST / COURT PROCEDURE

CONTINUING SAGA OF TAKAKO SAKAO...

1. In issue Q1 of 2010 of "THE UPDATE", we reported, under the heading "Of Constructive Trust, Resulting Trust, Trust", the successful appeal (finally) at the apex court by Takako Sakao (a Japanese) (A) in recovering a half share in a property which was supposedly to be bought under the joint names of A and the 1st respondent (R1) in equal shares but which was purchased by R1 solely under R1's name and then, sold at a higher price to the 2nd respondent (R2)---a company owned by R1's husband. To recap, the Federal Court imposed a constructive trust over a half share of the property in

consent. If new terms were to be introduced into a contract, they must be negotiated and agreed upon by both parties. They could not be introduced by either party unilaterally. Thus, the company had acted unjustly in terminating the claimant's services.

ⁱ [2010] 2 ILR 16

ⁱⁱ [1978] IRLR 379

ⁱⁱⁱ [2010] 2 ILR 48

^{iv} [1979] ICR 396

^v [1997] ICR 815

^{vi} Reference was also made to the UK Court of Appeal's case of *Sandhu v Jan De Rijk Transport Ltd* [2007] ICR 1137.

^{vii} The court's approach, namely constructive dismissal does not automatically become dismissal without just cause or excuse, appeared to be emanated from the case of *Ford v Milthorn Toleman Ltd* [1980] IRLR 30 and the Supreme Court's decision in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ (Rep) 298.

^{viii} [2010] 2 ILR 187

^{ix} See also *Yasmin Norhazleena Bahari Md. Noor v Institut Kefahaman Islam Malaysia* [2009] 3 ILR 75 and *Hai Hing Trading Sdn. Bhd, Sabah v Chin Foo Kong @ David* [1996] 2 ILR 468.

^x [2010] 7 AMR 457

^{xi} [1997] 2 MLJ 685

^{xii} [1990] 2 MLJ 9

^{xiii} [2010] 2 ILR 302

^{xiv} [2004] 6 CLJ 157

^{xv} [1997] 1 CLJ 646

^{xvi} [2010] 2 ILR 513

favour of A and held that the trust in favour of A was enforceable against R2 as R2 was not a *bona fide* purchaser for value since R2 was in substance the alter ego of R1's husband to whom R1's knowledge was to be attributed and thence to R2. There was clearly equitable fraud and R2 was liable.

Unfortunately, R2 had sold the property to a third party. Worse still, the Federal Court's direction to the Registrar of Titles to enter registrar's caveat to prohibit any dealing on the property was somehow not complied with by the Registrar who proceeded to register the transfer in favour of the 3rd party purchaser. The purchase price amounting to RM5.8 million had also been released to R2.

Fortunately for A, the Federal Court did not allow R2 to 'thumb its nose' at their judgment. In *Takako Sakao v Ng Pek Yuen & Anor (No.2)*^j the

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apex court held that it had ample jurisdiction to fashion specific relief to meet the justice of the instant case based on its peculiar facts and made an order in the nature of mandatory injunction against R2 to pay to A the sum of RM2.9 million representing one-half of the purchase price. The court further made clear that any breach of such order thereof would attract penal consequences upon the heads of R2's directors, including R1's common law husband (penal notice, the significance of this will be seen in part 2 of this write-up).

The court went on to award costs on indemnity basis instead of the usual party and party basis. It cited proposition advanced in an unreported English case of *Macmillan Inc v Bishopgate Investment Trust Plc* which held that an order for taxation of costs on an indemnity basis would be made in cases which had been brought with an ulterior motive or for an improper purpose, or where litigants conducted their cases in bad faith or as a personal vendetta or in an improper or oppressive manner or who caused costs to be incurred irrationally or out of proportion as to what was at stake.

The discretion to award costs on an indemnity basis was unfettered. The court found that R2 conducted its case in bad faith---its directing mind and will (alter ego) was R1's husband who together with R1 set themselves upon a course to unlawfully deprive A of her legitimate interest in the subject property. His conduct was to be equated as the conduct of R2 and R2 was ordered to pay costs to be taxed on an indemnity basis.

2. The Respondents did not give up following the Federal Court's decision in *Takako Sakao v Ng Pek Yuen & Anor (No.2)*. It went on to apply for a stay of execution (pursuant to s.80 of the Courts of Judicature Act 1964) on both the judgments in *Takako Sakao v Ng Pek Yuen & Anor*ⁱ(the principal judgment) and *Takako Sakao v Ng Pek Yuen & Anor (No.2)* pending the outcome of an application by R2 to have the apex court to review the principal judgment pursuant to rule 137 of the Rules of the Federal Court 1995 --- *Takako Sakao v Ng Pek Yuen & Anor (No.3)*ⁱⁱⁱ. The apex court held that:

2.1 once it had finally disposed of an appeal, there was nothing left to protect or preserve and it had no power to stay its effect;

2.2 the principal judgment merely declared the existence of a constructive trust and made no positive order. Since no committal or other execution process might be issued to enforce a declaration, no question of staying it might arise;

2.3 in answer to R2's submissions that the order to direct payment of ½ the purchase price was a monetary judgment which could not carry a penal notice and thus, such order was liable to be set aside *ex debito justitiae*^{iv} on the review application, the court held that the nature of A's case was a proprietary claim entitling her to trace her beneficial ownership in the property into the purchase price then in the hands of R2. So long as a proprietary claim attached, equity acting *in personam* would seek out and restore the property or its product or substitute to the wronged beneficiary, subject to the well known exceptions. In the instant case, the original thing was the building in which the partnership (of A and R1) conducted its restaurant business. The "product or substitute for the original thing" was the purchase price that R2 received when it sold off "the original thing" so that the trust impressed on the immovable "original thing" followed into the "product or substitute" as it was "the nature of the thing itself". An order to disgorge trust property or the product or substitute thereof was not a monetary judgment^v;

2.4 though the court had power to direct a non-party (in this case, R2's husband) to pay costs of any suit, appeal or other proceeding, the oral application by A's counsel for an order to direct R2's husband to pay costs out of his own pocket was refused as he was not warned at the earliest opportunity that A would apply for costs against him. This went against one of the guidelines laid down in *Symphony Group Plc v Hodgson*^{vi} which was cited with approval by the apex court.

3. Nonetheless, it remains to be seen whether the respondents would succeed, on merits, in their application to the Federal Court to review the judgments made under rule 137 of the Rules of the Federal Court 1995.

ⁱ[2010] 2 AMR 814

ⁱⁱ[2010] 1 CLJ 381

ⁱⁱⁱ[2010] 2 AMR 821

^{iv}as of right.

^vThe court applied *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 and cited *Foskett v McKeown* [2000] 3 All ER 97 as a modern application of the process of tracing trust property.

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LAND LAW / COURT PROCEDURE

**STRICT COMPLIANCE OF O.83 R.3(3) AS
CONDITION PRECEDENT FOR THE MAKING OF
AN ORDER FOR SALE OF CHARGED
PROPERTY**

It is common for a financial institution (the bank) to require a borrower of a housing loan to charge the property which purchase is financed by the loan as security for the repayment of the loan. In the event of default of the loan repayment, the bank (the chargee) will enforce the charge and apply for an order for sale under s.256 of the National Land Code (the Code) of the land against the borrower/chargor. To resist an action for such an order, the onus is on the chargor to satisfy the court that there is cause to the contrary to refuse the order. It has been established by the Supreme Court in *Low Lee Lian v Ban Hin Lee Bank Bhd*^d and subsequent cases that “cause to the contrary” can be either one of the following three categories:

- (i) where the chargor is able to successfully impeach the chargee’s title to the charge on any of the grounds provided in s.340 of the Code;
- (ii) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order for sale;
- (iii) where to grant an order for sale would contravene some rule of law or equity.

For landed property which comes under the Registrar’s title, the application for an order for sale must be filed in the High Court. The chargor must comply with O.83 r.3(3) of the Rules of the High Court 1980 (RHC) read with O.83 r.3(6). The former reads:-

“ Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right of possession arises and, except where the court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of :

- (a) the amount of the advance;
- (b) the amount of repayments;
- (c) the amount of any interest or installments in arrears at the date of issue of the originating summons and at the date of the affidavit; and
- (d) the amount remaining due under the charge.”

The latter reads:-

“Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that money is due and payable and give the particulars mentioned in paragraph (3).”

In *Suresh Emmanuel Abishegam & Anor v RHB Bank Bhd*^f, the plaintiff/chargee was unable to produce the written notice of variation of interest rate that it imposed on the defendants/chargors. The written notice was a term under clause 4 of the loan agreement under which the plaintiff/chargee was bound to provide. The High Court held that such an omission had not in any way prejudiced the defendants/chargors because in the ordinary course of business, they would have had notice of such a change from the monthly statements of account that were sent to them.

The Court of Appeal ruled otherwise. It subjected the affidavits filed by the plaintiff/chargee to close scrutiny and found a serious irregularity. The notice of recall of housing loan and the subsequent statutory notice of demand (Form 16D) stated the interest due on the loan as the BLR (Base Lending Rate) of 6%+3.5% per annum. However, the loan agreement provided the interest chargeable as the flat rate of 10.25% per annum. Unusual as it may be, the loan agreement did not make the BLR as the base from which the rate of interest was to be added to, subtracted from or varied as was commonly found in loan agreements of banks. Therefore, claiming interest due based on the BLR of 6%+3.5% per annum contrary to the terms of the loan agreement constituted an incorrect and unlawful claim and could not, under the circumstances, constitute a valid statement of amount of interest legally due and owing as at the

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date the originating summons was filed as required under O.83 r.3(3) of RHC.

The plaintiff's failure to state correctly the interest charged in its supporting affidavit was a failure to meet the condition precedent for the making of an application for an order for sale under category (b) of *Low Lee Lian*ⁱⁱⁱ.

The order for sale ought not to be granted and the defendants succeeded in their appeal. It is however noteworthy that the court reiterated the obiter in *Low Lee Lian* that where an order for sale was refused only on the ground that a condition precedent to O.83 r.3(3) of RHC was not met, the application could not be treated as being heard on merits and it was open to the chargee to begin an

action anew to be supported by a proper affidavit alluding correctly to the particulars required under O.83 r.3(3) of RHC.

ⁱ[1997] 2 CLJ 36

ⁱⁱ[2010] 4 CLJ 685

ⁱⁱⁱSee also *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791, where the Court of Appeal held that the failure to state in the supporting affidavit the BLR it imposed on the defendant had left the borrower in the dark as to the actual interest rate charged and such omission was fatal to the application for an order for sale.

REVENUE LAW

DEDUCTIBILITY OF CERTAIN EXPENSES FROM GROSS INCOME FOR PURPOSE OF TAX COMPUTATION

Promotion of business through branding, marketing and advertising incurs expenses. Are such expenses deductible against the gross income to arrive at the chargeable income of the business?

Under s.33(1) of the Income Tax Act 1967 (ITA), only outgoings and expenses wholly and exclusively incurred in the production of income are deductible from the gross income. And s.39(1)(l) of ITAⁱ expressly prohibits the deduction of certain expenses, one of which is 'entertainment expenses' unless these fall within one of the provisos to that provision where deduction is permitted. In this respect, 'entertainment' is defined under ITA to include:-

- (a) the provision of food, drink, recreation or hospitality of any kind; or
- (b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a),

by a person or an employee of his in connection with a trade or business carried on by that person.

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Hereinbelow, we cite a few instances on the application of such law on certain types of business promotion.

1. Provision of complimentary items

In *Aspac Lubricants (M) Sdn Bhd (dahulunya dikenali sebagai Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri*ⁱⁱ, the taxpayer was in the business of blending and selling lubricants for motorized vehicles. The taxpayer gave away promotional items such as mugs, T-shirts and umbrellas (which carried the taxpayer's company logo) to its customers (customers' items) who purchased the taxpayer's products. Inland Revenue Board (IRB) treated the expenses for the customers' items as entertainment expenses and such view was accepted as correct by the Commissioners of Taxation and the High Court.

The Court of Appeal ruled otherwise. The proper approach in determining whether the expenses for the customers' items were incurred in the production of income was to examine the true nature of the transaction between the taxpayer and its customers. On the facts, the taxpayer expended the monies in respect of the customers' items for the sole object of promoting its business and therefore, such expenses could not be described as entertainment within s.39(1)(l) of ITA.

In addition, the customers' items amounted to consideration in law. Viewed from any of the perspectives, the transactions in respect of the customers' items were plainly made for the sole

purpose of business promotion within s.33(1) of ITA and were not entertainment expenses within s.39(1)(l) of ITA. Expenses incurred for such items were thus deductible from the gross income.

2. Airfares and accommodation expenses incurred in sponsoring doctors to medical conferences

In *SM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*ⁱⁱ, the taxpayer was a pharmaceutical company which distributed, among others, specialist medications which could only be sold with a doctor's prescription. The taxpayer was prohibited by law from advertising those medications to the public. Essentially, the sale of such medications depended on doctor's prescriptions. In order to promote its products, the taxpayer approached doctors and educated them on the medical benefits of those medications and it sponsored senior doctors to medical conferences (mostly abroad) that featured the taxpayer's medications. Upon return, these doctors attended local conferences organized by the taxpayer to comment on those medications.

At such conferences, the taxpayer's representatives interacted with the attending doctors and impressed upon them the effectiveness of those medications and relevant brochures and posters were given. Naturally, the taxpayer incurred airfare and accommodation expenses in sponsoring the doctors to the conferences abroad and locally. The Special Commissioners of Taxation ruled that the taxpayer incurred such airfare and accommodation expenses as part of its business promotion strategy. The doctors were not sponsored to the conferences because the taxpayer wanted to entertain or be hospitable to them, but for the sole purpose of promoting its medications, given the restrictions that it faced. Thus, such expenses did not constitute entertainment expenses.^{iv}

REVENUE LAW

INFRASTRUCTURE FEE CHARGEABLE WITH STAMP DUTY IN TRANSFER OF PROPERTY

The respondent (R) in *Pemungut Duti Setem v BASF Services (Malaysia) Sdn Bhd* purchased a

3. 'Feng shui' (geomancy) fees

Interestingly, in a Singapore case, the Income Tax Board of Review held that 'feng shui' (geomancy) fees were not deductible as outgoings and expenses wholly and exclusively incurred for the production of the taxpayer's income under s.14 of the Income Tax Act (Cap.134) (the Act).

In *XT Club Pte Ltd v Comptroller of Income Tax*^v, the geomancy advice was rendered in connection with the construction of the club (which was built and operated by the taxpayer as a proprietary club) and its facilities, all of which were fixed assets and of a capital nature. The expenses related to 'feng shui' advice were held to be of a capital nature being one-off expense and were not deductible as income expenditure. In other words, such expenses were in substance a capital expenditure.

In so ruling, 'feng shui' arguably constitutes an asset or an advantage for the enduring benefit of a trade^{vi}.

ⁱ This provision was inserted by the Finance Act 1988 and took effect from the year of assessment (YA) 1989. Subsequent amendment allowed for half of the entertainment expenses to be deductible expenses from YA 2004.

ⁱⁱ (2007) MSTC 4,271, [2007] 5 CLJ 353

ⁱⁱⁱ Rayuan No PKCP(R) 26/2008

^{iv} The material is partly extracted from "Tax Guardian" vol.3/No.2/2010/Q2.

^v (2009) MSTC 5,741

^{vi} See *Atherton v British Insulated and Helsby Cables, Ltd.* (1925) 10 TC 155, at p.192-193.

property pursuant to an agreement known as the Purchase, Sale, Development and Infrastructure Agreement under which R paid: (i) the purchase price of RM84,593,372; (ii) the development fee of RM24,794,609; and (iii) the infrastructure fee of RM61,257,269.

In Form 14A transfer form submitted to the appellant, the Collector of Stamp Duties (A) for adjudication of stamp duty, R stated the

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consideration for the property as RM84,593,372. A however assessed the stamp duty on the sum of RM170,645,250 – representing the aggregate value of the purchase price, development fee and infrastructure fee. The High Court allowed the appeal of R and held that the assessment of the stamp duty should be based on two components only viz the purchase price and the development fee while the third component ie. the infrastructure fee should be excluded.

On appeal, the Court of Appeal agreed with A. The Court set out the fundamental principles governing stamp duties for the conveyance of properties. Among others, stamp duty under the Stamp Act 1949 is imposed on an instrument and not on a transaction; the parties' description of the instrument is immaterial as the real and true meaning thereof is to be ascertained; and conveyance of a property is an instrument chargeable with stamp duty under item 32(a) of the First Schedule.

An examination of the relevant clauses in the agreement revealed that the three payments were to be construed collectively and/or

conjunctively. Among others, the deposit, as the initial consideration and the first step in the performance of the agreement, was stated to have been paid as a sum "towards the purchase price, the development fee and the infrastructure fee." Clause 2(1) of the agreement referred to the purchase price, the development fee and the infrastructure fee jointly as the Price.

The payment and refund provisions also supported the conclusion that the three components were to be read as a whole and not as separate and distinct payments. Thus, the Court answered the question that given the factual background, upon the true construction of the relevant clauses of the agreement and in the light of the relevant provisions of the Stamp Act 1949, the infrastructure fee was part and parcel of the consideration in the transfer instrument and so attracted stamp duty.

[2010] 4 CLJ 556

TORT

POLICEMAN OWES DUTY OF CARE TO SUSPECT IN PURSUIT

Yes, puzzling as it may sound, but that was the decision in the High Court case of *Syarizan Sudirmin & Ors v Abdul Rahman Bukit & Anor*ⁱ. In that case, the 1st plaintiff (P1) (then aged 15 years old) was riding his motorcycle with the 2nd plaintiff (P2) as a pillion. On seeing a police roadblock ahead of him, P1 made a 'U' turn in order to escape from the police. P1 was not wearing a crash helmet and had no valid motorcycle licence. The first defendant (D1) who was a Lans Corporal policeman then chased the plaintiffs on D1's motorcycle and when he came abreast with the plaintiffs, D1 kicked P1's motorcycle which caused the plaintiffs to fall resulting in serious injuries. P1 became a paraplegia and was wheelchair dependant for the rest of his life.

The learned High Court judge held that a policeman in pursuit did owe a duty of care to the suspects he was pursuing. The standard of care on

such policeman and in such situation was to exercise such care and skill as was reasonable in all the circumstancesⁱⁱ. On the facts of the case, he held that D1's act of kicking P1's motorcycle who was riding at a fast speed (even though he was attempting to escape from police for a traffic offence) was most unjustified and unlawful. He disagreed with the contention of the defendants' counsel that P1 was the author of his own misfortune and rejected the application of the maxim of "*ex turpi cause non oritur actio*"ⁱⁱⁱ to the case.

The learned judge did however find P1 to have contributed to the damage he suffered by virtue of riding his motorcycle at a very fast speed and not wearing crash helmet. The liability was apportioned at 75% against D1 and 25% contributory on the part of P1. P1 was awarded exemplary damages as D1's act of kicking P1's motorcycle to prevent P1 from escape for a mere breach of traffic regulation was unjustified, unacceptable, unlawful, unauthorized, wilful and oppressive. The award of such damages was to mark the court's disapproval towards such conduct

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of D1 and to deter him from repeating it. A sum of RM50,000 was awarded in this respect.

Among others, P1 was also awarded general damages for pain and suffering and loss of amenities (paraplegia) of RM300,000, compensation of RM500 per month as cost of domestic help for P1's father who had given up his job as a fisherman to look after P1 for 342 months upon taking into account his life expectancy and loss of earnings at RM500 per month for 16 years. The Government of Malaysia named as the 2nd defendant was held vicariously liable under s.5 of the Government

Proceedings Act 1956 since D1 was acting in the course of his employment when the negligent act was committed.

ⁱ [2010] 3 CLJ 877

ⁱⁱ The learned Judge appears to be relying on the English case of *Marshall v. Osmond & Anor* [1983] 2 All ER 225.

ⁱⁱⁱ It means an action does not arise from an act which the law forbids.

TORT

CONDUCT CANNOT AMOUNT TO SLANDER

The plaintiff in *Proton Parts Centre Sdn Bhd v Mohamed bin Zainal (and Anor Appeal)*ⁱ was the managing director of the 1st defendant, while the 2nd defendant was the chairman of the board of directors of the 1st defendant and the chief executive officer of the 3rd defendant.

The cause of action of an alleged tort of slander was based on the act of the 1st defendant in preventing the plaintiff from entering his office and in sealing his office in full view of the employees working in the premises. The defendants applied to strike out the plaintiff's claim for disclosing no reasonable cause of action.

The plaintiff relied on a passage in a textbook wherein the author stated that defamatory gestures and conduct were slanders, such as where

the claimant had been physically removed or escorted from the defendant's premises on the summary termination of employment which conveyed the impression to bystanders that the claimant had been guilty of improper conduct. The defendants' counter arguments were premised on two classic works on the law of torts, namely *Clerk & Lindsell on Torts* and *Winfield & Jolowicz on Tort*. These two authorities merely stated two forms of slander: by spoken words or other sounds and by gestures.

The Court of Appeal agreed with the defendants and ruled that the mere act of the security officer preventing the plaintiff from entering the premises of his office and in sealing the premises could not in law amount to the tort of slander. There were no defamatory words uttered or any gesture made by the officer concerned. Conduct as opposed to words or gesture could not amount to slander and thus, the defendants' appeal was allowed.

[2010] 3 AMR 815

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

The Publisher of THE UPDATE is TAY & HELEN WONG LAW PRACTICE of Suite 703 Block F Phileo Damansara I No. 9 Jalan 16/11 46350 Petaling Jaya Selangor Darul Ehsan Malaysia Tel (603) 79601863 Fax (603) 79601873 email: lawpractice@thw.com.my website: www.thw.com.my

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