

# THE UPDATE



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## SRI LANKA CRICKET NO LONGER GOOD LAW

The single question that came up for a ruling of the Federal Court in *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* reads :

*“Does the failure of the Yang di-Pertuan Agong to issue a Gazette Notification pursuant to s.2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (CREFA) declaring the United Kingdom to be a party to the New York Convention render a Convention Award made in the United Kingdom unenforceable in Malaysia, notwithstanding the fact that all conditions ordinarily required for the enforcement of the said Award under CREFA have been satisfied?”*

Readers would recall that in our previous issue 2 of 2006, we featured the decision of the Court of Appeal in *Sri Lanka Cricket v World Sport Nimbus Pte. Ltd.*<sup>ii</sup> which held that there must be a Gazette Notification declaring a nation state as a party to the New York Convention before the arbitration award obtained in that nation state could be summarily enforced in Malaysia pursuant to CREFA. The nation state in that case was Singapore. In the instant case, the nation state was United Kingdom in which the appellant obtained an arbitration award.

The respondent relied upon the decision in *Sri Lanka Cricket* whilst the appellant contended that the said s.2(2)<sup>iii</sup> did not make it mandatory for a gazette notification to be issued before a nation state could qualify as a Contracting State under the New York Convention. The Federal Court by a majority of 3 to 2 accepted the appellant's contention and in the process, re-wrote the law laid down in *Sri Lanka Cricket*.

The majority held that on a proper construction of CREFA and taking into account the legislative intent, s.2(2) merely provided that if the Yang di-Pertuan Agong had issued a Gazette Notification declaring a particular state as a Contracting State, the Gazette Notification could be relied upon by the parties as forming conclusive evidence of the fact that the State was a Contracting State under the NYC. That was as far as the said s.2(2) went --- it was merely an evidential provision and thus, the issue whether a State was a party to the New York Convention could be proved by adducing such other evidence as might be appropriate.

The majority drew a distinction between the phrases 'conclusive evidence' and 'exclusive evidence'. The former meant evidence so strong to overbear any other evidence to the contrary; the latter meant the only facts that have any probative force at all on a particular matter in issue. Emphasis was also placed on fact that s.2(2) was to be found in the interpretation section of CREFA and not part of the substantive provisions. The answer to the question was therefore negative.

In the instant case, it was not in dispute that United Kingdom was a Contracting State under the New York Convention. In the upshot, the appeal was allowed and the order of the High Court giving leave for the enforcement of the award against the respondent in reliance upon s.27 of the Arbitration Act 1952 and CREFA was reinstated.

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<sup>i</sup> [2010] 1 CLJ 137

<sup>ii</sup> [2006] 3 AMR 750

<sup>iii</sup> s.2(2) reads : “The Yang di-Pertuan Agong **may**, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, be **conclusive evidence that that State is a party to the said Convention.**”

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## BANKING LAW

### TWO OD FACILITIES, ONE CURRENT ACCOUNT

In the course of performing our work, we have come across cases where two overdraft facilities were given by a bank to the same customer at different times. However only one current account was maintained to operate both facilities. In other words, the second overdraft facilities were merged with the first overdraft facilities in one same account which was originally opened for the purpose of the first overdraft facilities. Such practice is not advisable and should be discontinued in the light of the recent High Court decision in *Alliance Bank Malaysia Berhad v Sail bin Yalang*<sup>i</sup>.

In that case, the bank had provided the borrower an overdraft facility in the sum of RM180,000 (1<sup>st</sup> OD) secured by a letter of guarantee (LG1). Later, the bank provided the borrower a further overdraft facility in the sum of RM50,000 (2<sup>nd</sup> OD) secured by a second letter of guarantee (LG2). The respondent was one of the two guarantors to the two overdraft facilities. The borrower defaulted and the bank took out a legal suit against the borrower and the two guarantors. The sessions court found that the respondent signed LG1 but not

LG2. However, the bank was unable to prove how much the borrower owed under the 1<sup>st</sup> OD. As a result, the sessions court only awarded nominal damages of RM10 to the appellant against the respondent.

On appeal, the High Court upheld the decision of the sessions court. The respondent was only held liable under LG1 and therefore his liability was limited to the debt in respect of the 1<sup>st</sup> OD and could not be extended to the 2<sup>nd</sup> OD. To lump together the debts under both facilities and ask the respondent to pay for the combined amount was to expect the respondent to assume responsibility for both facilities when his liability was only for the first facility. The High Court also held that the bank could not rely on the conclusive evidence clause in LG1 as it still did not answer the question of how much the borrower owed under the 1<sup>st</sup> OD

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<sup>i</sup>[2010] 7 MLJ 316

## BANKING LAW

### DON'T DELAY IN STOPPING PAYMENT ON STOLEN CHEQUES

P operated a current account with D. One day, P's premises was broken into and burgled. However, it was only five days later that P discovered that certain cheques from its cheque book were missing and on the same day, P sent a letter to D to request cancellation of five cheques. The letter only reached D the next day by which time four of the five cheques (the stolen cheques) had been paid out by D over the past six days to K who was the payee on the stolen cheques. P sought to recover the total amount of the stolen cheques from D. P contended that the signatures on the stolen cheques were forgeries.

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The above are the brief facts in the case of *Prima Nova Sdn Bhd v Affin Bank Berhad*<sup>i</sup>. D relied on the newly enacted provision of s 73A of the Bills of Exchange Act 1949 (BEA) and argued that P's negligence had contributed to the forged signatures on the stolen cheques.

S.73A of BEA provides, among others, that notwithstanding s.24 of the Act, where a signature on a cheque is forged and the person whose signature it purports to be knowingly or negligently contributes to the forgery, the signature shall operate and shall be deemed to be the signature of the person it purports to be. S.24 of the BEA deals with forged or unauthorized cheque and provides, among others, that where a signature on a cheque is forged, the forged signature is wholly inoperative and no right to retain the cheque or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless such party is precluded from setting up the forgery.

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This section has always been regarded as the codification of the common law position on the absolute liability of a banker which pays out on a forged cheque drawn on its customer's account and the defence of estoppel<sup>ii</sup> that the banker can rely upon to ward off such customer's claim. Insofar as the defence of estoppel is concerned, the nature of the duty of a customer owed to his banker when drawing cheques was laid down in *MacMillan*<sup>iii</sup> and *Greenwood*<sup>iv</sup> which is twofold : he must exercise due care in drawing his cheques so as not to facilitate fraud or forgery (the MacMillan test) and he must inform his bank at once when he discovers that cheques purported to be signed by him are forged (the Greenwood test)<sup>v</sup>. If the banker can establish one of these duties has been breached by its customer, it will form a good defence to its customer's claim against the banker for wrongfully honouring forged cheques.

The High Court in *Prima Nova* case ruled that by virtue of the words 'notwithstanding s.24 of the Act', s.73A of BEA has modified the strict liability<sup>vi</sup> imposed by s.24 of BEA. It also arrived at the findings that firstly, there was a delay of six days before D was notified by P of the burglary. Evidence showed that on the day of burglary itself, P knew that the cheque book had been touched or handled during the burglary but P did not immediately inform D to stop payment of all cheques drawn from the account. P was therefore negligence.

Secondly, P offered no explanation as to why P did not keep the cheque book in the safe but in a locked drawer which was levered open during the burglary. Such failure to take reasonable steps to ensure the safety of the stolen cheques was another instance of negligence on the part of P which enabled the forgery of the signatures on the stolen cheques.

On our view, it appears that the first instance as laid down above could arguably be regarded as falling under the Greenwood test (ie. the defence of estoppel under s.24 BEA could be applied) and there need not be recourse to s.73A of BEA; whilst the second instance appears to have enlarged the defence available to a banker against a customer's claim for wrongfully honouring of forged cheque. In other words, the learned judge ruling in the second instance widens the duty owed by the customer to take reasonable precautions in the management of his business to prevent forged cheques from being presented to his banker.

This decision is therefore significant in that it opens the door to bankers in defending claims on forgery of cheques beyond the two traditional tests. Such judicial stand does accord with the earlier decision of another High Court judge in *Leolaris (M) Sdn Bhd v RHB Bank Berhad*<sup>vii</sup> where Datuk Ramly J (as he then was) held that the failure of the bank customer to supervise its employee and monitor her duties as its accountant/corporate administrator, the customer's failure to conduct checks on its cheque books and to check all banking transactions carried out by the bank on a regular basis --- in short, the customer's failure to exercise due care in protecting its own interests from any misconduct of its own employees --- were instances of the customer's own negligence which contributed to the forgery of cheques.

The learned judge expressly held that s.73A of BEA applied. Banking industry will certainly welcome these two decisions but whether the appellate court will adopt similar stand remains to be seen.

<sup>i</sup> [2010] 7 AMR 229

<sup>ii</sup> BY virtue of the wordings 'unless such party is precluded from setting up the forgery' in s.24 BEA.

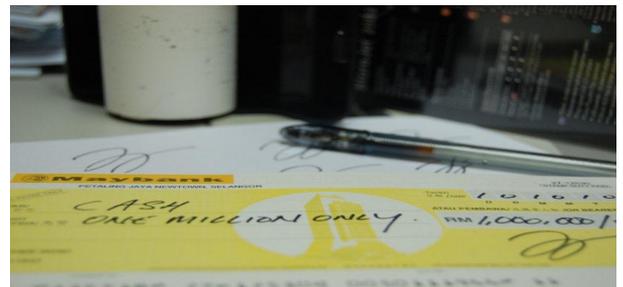
<sup>iii</sup> *London Joint Stock Bank Ltd. V MacMillan and Arthur* [1918] AC 777

<sup>iv</sup> *Greenwood v Martins Bank* [1932] 1 K.B.371

<sup>v</sup> See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd (No.1)* [1986] AC 80, *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 AMR 612

<sup>vi</sup> It is trite that the liability of a bank for making payment on its customer's forged cheques is founded on the tort of conversion which is a tort of strict liability.

<sup>vii</sup> [2009] 7 MLJ 671



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## BANKRUPTCY

### EFFECT OF ANNULMENT OF BANKRUPTCY

The decision of the Federal Court in *Sardar Mohd Roshan Khan v Perwira Affin Bank Bhd*<sup>i</sup> draws attention to the effect of annulment of bankruptcy (as opposed to a discharge of bankruptcy). In that case, A filed a civil suit against R to recover monies on grounds of R's negligence and/or breach of trust. Three years after the suit was filed, A was adjudicated a bankrupt. Five years later, A obtained judgment against R (the said judgment). A actually took six months to settle a debt with the Inland Revenue Department and his other creditors and nine months before the said judgment was obtained, his bankruptcy was annulled by the High Court on the ground that he had settled his debt in full. The issue was whether by virtue of his bankruptcy being annulled, the said adjudication order was wiped out and put him in the same position as if there had been no adjudication.

It is to be noted that A did not obtain the sanction from the official assignee for him to continue with his action against R during the period of time he was a bankrupt as provided under section 38 of the Bankruptcy Act 1967 (the Act). It was thus contended that A had committed an unlawful act and the court should not aid an illegality. The judgment entered against R was thus invalid, so the argument goes.

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## COMMERCIAL LAW (SALE OF GOODS)

### WAS THE RIGHT PARTY SUED?

In *Ng Chooi Kor v Isyoda (M) Sdn Bhd*<sup>i</sup>, P was in the business of supplying building materials whilst D was a building and civil contractor who was the main contractor for several projects (the said projects). It was P's case that at D's request made through one Mr. Soo (Soo) who was D's Project Coordinator, P had supplied building materials and provided services to D. P sued D for the sums allegedly due and owing by D for the supply of the goods and services. D denied making of such request and claimed that almost 70% of the works in the said projects had been sub-contracted to KTS

The Federal Court subjected section 105 of the Act to detailed analysis. The said provision states, among others, that where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may annul the adjudication. The court also reviewed relevant legislations and cases from England and Australia and previously decided Malaysian cases before it arrived at its decision.

Once the bankruptcy was annulled, the effect of that annulment was as Sterling LJ had said in *Re Keet*<sup>ii</sup>: "that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication. In other words, the effect of annulment to A was as if he was never a bankrupt. The answer to the question posed 'whether an annulment of an order of bankrupt against a person has the effect of validating any act done by him prior to the annulment which would otherwise be unlawful by virtue of the bankruptcy' was affirmative. The annulment of A's bankruptcy acts retrospectively.

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<sup>i</sup>[2010] 2 CLJ 661

<sup>ii</sup>[1905] 2 KB 666

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Builders Sdn Bhd (KTS) in which Soo was a director. It was D's case that the requests were made by Soo acting on behalf of KTS and not D.

The Court of Appeal disagreed with the findings of the High Court which threw out P's claim. The appellate court scrutinized the oral and documentary evidence with a fine-tooth comb. Here, and due to space constraint, we wish to highlight only a few aspects that we perceive as significant in swaying the appellate court to allow P's claim:

- (1) The failure of D to explain why the four statements of accounts and numerous invoices and delivery orders (the Documents) had on them its rubber stamp marks;
- (2) P's evidence was supported by his lorry driver's testimony and by numerous documentary evidence in the form of the

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Documents and D's company profile which described Soo as its project co-ordinator;

- (3) Three payments were made by D directly to P;
- (4) Soo's testimony via a statutory declaration and an affidavit that he had placed D's rubber stamp marks on the Documents without D's authority and merely signed them in order to assist P to obtain direct payment from D was not consistent with the testimony of another director of D and in any event, ought not to be admitted as evidence since Soo's statements could not be tested in court by the process of cross-examination<sup>ii</sup>.

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#### COMPANY

#### DIRECTORS LIABLE FOR DEBTS OF COMPANY

Can the directors of a company be personally liable to a judgment creditor for judgment sum obtained against the company? The answer is "possible". The relevant provision that can be relied upon is s.304(1) of the Companies Act 1965 (the Act). The relevant case on point is *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors*<sup>i</sup>.

In that case, a company, IDSM, had in 2003 purchased electronic component goods from P Co. IDSM failed to pay for the goods and P instituted legal action in 2004. IDSM initially defended the suit and filed counter-claim but two years later, IDSM abandoned its defence and counterclaim which resulted in judgment entered. P thereafter commenced fresh action against the four directors and/or shareholders of IDSM on the ground that they had during the subsistence of the civil suit against IDSM unlawfully dissipated the assets and funds of IDSM which rendered the judgment against IDSM a 'paper' judgment.

The events relied upon by P were:

- (i) the down-sizing of IDSM by the sale of two units of shop-houses and cuts in manpower;

Thus, the totality of all the evidence given on behalf of P led to the inescapable conclusion that the supply of the goods and services were made at D's request, not KTS and that there was infact privity of contract between P and D.

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<sup>i</sup> [2010] 3 CLJ 162

<sup>ii</sup> IT is not clear from the grounds of judgment as to why Soo was not available for cross-examination.

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- (ii) the shifting of all physical assets to its holding company in Singapore without any consideration;
  - (iii) the assignment of its trade receivables amounting to RM3 million to the holding company for no consideration;
  - (iv) write-off of its stocks, plant, equipment, machinery and trade receivables before ceasing operations.

Evidence was led through the auditor of IDSM that it was unjustifiable and incorrect to write-off the stocks, plant, equipment and machinery to zero value without supporting documents and to transfer trade receivables to the holding company. Neither the auditor nor an independent valuer was allowed to inspect and verify the write-off. The auditor in fact qualified IDSM's 2004 audited accounts as he was unable to form a professional opinion as to whether the said accounts had been properly drawn up in accordance with the provisions of the Act and approved accounting standards so as to give a true and fair view of IDSM's affairs.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied any personal knowledge of events (ii), (iii) and (iv). Further, they were only minority shareholders and were not decision-makers. The 3<sup>rd</sup> and 4<sup>th</sup> defendants were directors as the holding company's corporate representatives and admittedly the management of IDSM. Whilst admitting to event (iii), they contended that they were merely carrying out normal corporate exercise of selling assets and reducing workers to cut losses and these acts could not be said to have intended to defraud P.

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The main issue was whether the business of IDSM had been carried on with the intent to defraud creditors or for any fraudulent purpose within the meaning of s.304(1) of the Act and if affirmative, whether any of the defendants was knowingly a party thereto. S.304(1) reads :

“If in the course of the winding-up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.”

The High Court Judge went into considerable details the scope of and the law on s.304(1) of the Act. On the facts, the learned Judge held that when IDSM purchased the goods in 2003, the directors of IDSM already knew that there was no reasonable prospect of P receiving payment for

the purchase price, IDSM being down-sized at that time and there was no reason for the directors to think that funds would become available to settle the purchase price. The write-offs, stripping of assets and diversion of RM3 million to the holding company were reflective of the dishonest intention and collateral purpose practiced by the management of IDSM. The business of IDSM was clearly carried on with the intent to defraud creditors within the meaning of s.304(1) of the Act.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants were however let off the hook as the management of IDSM throughout the period in question was in the control of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. Indeed, the 3<sup>rd</sup> and 4<sup>th</sup> defendants were held to be acting knowingly to safeguard the interests of the holding company. In the circumstances, they were held to be personally, jointly and severally liable to P for the judgment debt due and owing by IDSM to P.

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<sup>i</sup> [2010] 1 MLJ 185, [2010] 7 AMR 25

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## **CONTRACT LAW (FRANCHISE)**

### **NON-RENEWAL OF FRANCHISE INVALID**

The word “franchise”, in the context of modern day commerce, refers to “privilege or exceptional right, granted to person, corporation, etc.; right to market company’s goods or services in particular area”<sup>i</sup>. Almost any commodity or service can form the subject-matter of a franchise. Some of the famous examples in Malaysia are the burger chain of McDonald’s, pizza chain of Pizza Hut, doughnut chain of Dunkin’ Doughnut, coffee cafe chain of Oldtown Kopitiam. The Franchise Act 1998 (the Act) had been enacted to regulate the law on franchise and was the focus of the High Court’s decision in *Noraimi binti Alias v Rangkaian Hotel Seri Malaysia*.<sup>ii</sup>

In this case, the defendant (D) owned the exclusive franchise rights to a medium cost hotel chain under the name of ‘Seri Malaysia’. The plaintiff (P) was the franchisee of one of defendant’s hotels in Kuantan, Pahang. Under the franchise agreement dated 18.4.1995 (the agreement), the premises, facilities and equipment were supplied by D whereas P managed the premise and business under D’s banner of Seri Malaysia. The initial term of the franchise was for a period of 8 years expiring on 21.1.2003. The agreement also provided for a renewal of the franchise for another term of eight years subject to terms and conditions. Vide a letter dated 7.1.2003, D informed P of its decision to extend the franchise by 3 years till 21.1.2006 subject to the terms and conditions in the agreement. By a letter dated 10.4.2006, D informed P that the agreement which had expired on 21.1.2006 would not be renewed with effect from 1.6.2006.

Relying on the Act, P sued D for breach of the agreement and sought declaratory orders and damages. It was contended that the non-extension or non-renewal of the agreement for the reasons contained in the letter dated 10.4.2006 was a breach

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of the agreement and a violation of the safeguards statutorily provided under ss 32 and 34 of the Act. The learned Judicial Commissioner (JC) ruled for P.

Firstly, it was held by the learned JC that the application of the Act was not dependent on when a franchise agreement was made. Whilst recognizing the basic principle that in the absence of express words or necessary implication, statutes affecting substantive rights were prospective while those affecting procedure were retrospective, it was held that upon construing the Act as a whole, the application of the Act remained prospective in that it governed franchises and regulated relationships between franchisors and franchisees from the date of coming into force of the law which was 8.10.1999, regardless of when the franchise agreement was entered into.

Secondly, despite the non-registration of the franchise (which was granted before 8.10.1999) within 12 months from the commencement of the Act<sup>iii</sup>, there was also no evidence that D had been exempted from registration under s 58 of the Act. That being so, the Act applied to the franchise in question from 8.10.1999 even before the expiry of the first term of eight years of franchise.

Thirdly, it was the finding of the court that D's intention not to renew the agreement was because it had expired on 21.1.2006. Such reason was not within clauses 3.2 or 3.3 of the agreement which clauses related to conditions for renewal including the condition that there be no violation of any of the obligations set out in the agreement. The expiration of the agreement might be a reason for termination of the franchise but not for refusal to renew. Thus, D's refusal to renew was invalid as it violated the terms of the agreement.

Fourthly, the learned JC drew attention to s 32 of the Act which made non-renewal or extension of a franchise without compensation in the two circumstances an offence. The two circumstances are: (1) where the franchisee is barred by or the franchisor has refused to waive the operation of some restraint of trade clause in the franchise agreement six months before expiration of the agreement; (2) where the franchisee has not been given at least six months' notice of the franchisor's intention not to renew the franchise. Other than these two circumstances, there could be non-renewal or extension without having to pay any compensation whilst non-renewal or non-extension

for cases falling under the two circumstances though permissible obligated payment of compensation. In the instant case, no compensation was offered. The non-renewal of the franchise was therefore invalid under both the agreement and the Act.

Fifthly, although clause 7 of the agreement entitled the franchisor to terminate the agreement when the term expired or in some other situations stated therein, the present case was not an instance of termination but a case of non-renewal. D's attempt to rely on several alleged breaches of the agreement by P (which could have fallen under clause 7 of the Act) was rejected by the learned JC as the facts showed that D did not act or rely on them as the basis for non-renewal.

Sixthly, although at first brush it might appear that if there was compliance of s 32 of the Act the damages granted would be compensation of six months' loss, on closer examination of s 32, the amount of compensation was still dependent on the facts. In this case, the amount due must be what P would have received had D complied with the terms of the agreement. Such being the case, P was awarded compensation for the loss of profit that she would have received for the period of renewal expected, which in this case was 5 years. Evidence showed that the average income was RM27,500 per month and there was no issue of mitigation. In the circumstances, P succeeded in her claim and was awarded the sum of RM27,500 per month for five years.

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<sup>i</sup> See *Reader's Digest Great Encyclopaedic Dictionary*, Oxford University Press 1976, as cited in the case under report herein.

<sup>ii</sup> [2010] 7 AMR 54

<sup>iii</sup> s 61 of the Act.



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## CONTRACT LAW / LAND LAW

### FAILURE TO PAY REDEMPTION SUM ON TIME

The Federal Court case of *Soon Yee Ling & Anor v Lim Ah Hun*<sup>i</sup> demonstrates the importance of clear and precise drafting of contractual provisions. In that case, the appellants (vendors) sold certain pieces of land (lands) to the respondent (purchaser) vide a sale and purchase agreement dated 11.4.2000 (SPA) at a price of RM1,600,992. The vendors paid a deposit of RM264,992, leaving a balance of RM1,336,000 to be paid within one year from the date of the SPA, which meant the completion date of the SPA fell on 11.4.2001. The lands were at that time charged to two banks. Out of the balance sum, it was agreed (section 2 of the Fourth Schedule of the SPA) that the purchaser paid the full redemption sum for the lands to the banks within 60 days from the date of the SPA with an extension of one month. In other words, the last date for the purchaser to comply with the said section on redemption of the lands fell on 11.7.2000. The purchaser however failed to redeem the lands on the said date. The vendors gave notice of termination and forfeited the deposit sum.

The principal question posed to the court was 'whether the vendors were entitled to terminate the SPA and to forfeit the deposit for the non-compliance by the purchaser of the condition to redeem the property within the time stipulated notwithstanding there being time thereafter for the completion of the entire contract'<sup>ii</sup>.

Reliance was placed by the counsel for the vendors on clause 7(a) of the SPA which read, among others, that the Balance Purchase Price shall

first be applied towards payment of the redemption money, if any, due and owing by the vendors in respect of any charge or encumbrance over the lands. On the other hand, there was no specific provision on the consequences of any default in the payment of the redemption money.

The Federal Court held that the redemption sum formed part of the balance purchase price. Therefore, any failure by the purchaser to pay the redemption sum in accordance with the said section 2 of the Fourth Schedule would tantamount to a failure to pay the balance of the purchase price, which constituted a breach of the SPA. Clause 8 of the SPA thus came into play. Such clause entitled the vendors to forfeit absolutely the deposit as agreed liquidated damages if the purchaser shall fail to pay the Balance Purchase Price or any part thereof.

Time having been made essence of the SPA (clause 22 of the SPA), the SPA became voidable at the option of the vendor pursuant to s.56(1) of the Contracts Act 1950. The vendors had given proper notice to the purchaser to terminate the SPA and forfeit the deposit sum. The answer to the principal question posed was therefore in the positive and the decision of the High Court was reinstated.

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<sup>i</sup>[2010] 2 CLJ 785  
<sup>ii</sup>i.e. 11.4.2001.

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## CONTRACT LAW / SECURITIES LAW

### ENFORCING & FORESTALLING FORCED SALE OF UNPAID SHARES

The defendant was a client of the plaintiff who was a stockbroker. Under the relevant rules of the Kuala Lumpur Stock Exchange (KLSE) in force at the material time, the defendant was to pay for the purchase of shares quoted on the KLSE on the seventh day of purchase after the day of transaction (T+7) failing which the plaintiff was bound to force-

sell the shares in the open market on the eight day (T+8). The defendant did not pay for the shares in various counters and the plaintiff sued him for the loss (short-fall) suffered after forced sale was carried out.

The above were the brief facts in *PM Securities Sdn Bhd v Tan Hock Leong @ Tan Hock Keng*. The defendant raised two defences: (i) that the plaintiff failed to sell the shares in several counters (the first group of counters) on T+8 in contravention of the KLSE Rules; (ii) that the plaintiff disposed of the shares in the other counters (the second group of counters) despite having agreed with the defendant to with-hold the sale upon the defendant depositing with the plaintiff as security several lots of shares of substantial value (the

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Security) which the defendant did. Due to such action, the defendant claimed that he had suffered loss for which he counter-claimed.

The Court of Appeal held for the defendant. By failing to dispose of the first group of counters, the plaintiff was in breach of the agreement and should not be entitled to claim any loss arising therefrom. As to the second group of counters, it was open for the plaintiff to agree to waive the requirement to force-sell on T+8 --- s.64 of the Contracts Act 1950 came into play. However, as no time limit had been fixed within which such counters could be sold by the plaintiff should the defendant fail to pay them, time became at large. By virtue of s.47 of the Contracts Act 1950, the plaintiff was

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#### COURT PROCEDURE / CONTRACT LAW (GUARANTEE)

#### LAST PAYMENT THAT DID NOT EXTEND THE SIX-YEAR LIMITATION PERIOD

A housing developer company (the said borrower) obtained a loan for a housing project from the plaintiff. The said borrower defaulted on the loan and was wound up on 4.4.1988. The plaintiff subsequently filed a suit on 23.9.1991 against, among others, the 2<sup>nd</sup> defendant who had acted as a guarantor in respect of the said loan.

It was common ground that the plaintiff had made a demand on the guarantee (which presumably was an on-demand guarantee) against the 2<sup>nd</sup> defendant on 28.5.1984. Thus, the 2<sup>nd</sup> defendant contended that the plaintiff's claim was time-barred by s 6(1)(a) of the Limitation Act 1953<sup>i</sup> (the said Act) as the six-year period expired on 28.5.1990. The plaintiff on the other hand relied on s 26(2)<sup>ii</sup> of the said Act to argue that time started to run only from 16.7.1991 which was the last date that the liquidator of the said borrower made payments to the plaintiff. The action having been filed on 23.9.1991 was thus not time-barred.

The above are the brief facts and contentions advanced in the case of *EON Bank Berhad v Lim Chin Hin & 4 Ors*<sup>iii</sup>. The learned High Court judge agreed with the 2<sup>nd</sup> defendant that the plaintiff's claim against the 2<sup>nd</sup> defendant was time-barred. Firstly, to invoke s 26(2) of the said Act, the

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obliged to grant a reasonable period of indulgence to the defendant before selling the shares. In their Lordship's view, a mere six days after the deposit of the Security was too soon and unreasonable under the circumstances. Therefore, the plaintiff also failed on its claim in respect of the second group of counters.

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<sup>i</sup> [2010] 1 AMR 166

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plaintiff must show that the payments to the plaintiff were made by the 2<sup>nd</sup> defendant and not anyone else, such as the liquidator.

The wordings 'the person liable or accountable' in s 26(2) of the said Act in the context of the facts of the instant case was not the borrower but the 2<sup>nd</sup> defendant, the guarantor. To trigger the operation of s 26(2), that payment must be made by the 2<sup>nd</sup> defendant himself or his agent but in the instant case the payments to the plaintiff which started from 4.4.1988 till 16.7.1991 were made by the liquidator of the said borrower who was not an agent of the 2<sup>nd</sup> defendant.



Secondly, the payments made by the liquidator were pursuant to an agreement cum assignment dated 19.10.1984 (the said assignment) made by the said borrower in favour of the plaintiff. Under the said assignment, the said borrower

assigned to the plaintiff all proceeds of sales under the sale and purchase agreements that they as vendor/developer were entitled to receive from the purchasers of the housing units in the project.

The learned High Court judge agreed with the submission of the 2<sup>nd</sup> defendant's counsel that the payments made by the liquidator under the said assignment were not payments made in respect of the borrower's debt. The monies (i.e. the proceeds of sales) having been assigned to the plaintiff no longer belonged to the said borrower; they were the property of the plaintiff. The monies did not come from the liquidator but from the purchasers' financiers. On this ground too, the plaintiff's

contention that the last payment for the purpose of s 26(2) was the payment on 16.7.1991 failed.

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- <sup>i</sup> The prescribed period for a claim in contract is six years.  
<sup>ii</sup> S 26(2) provides that where any right of action has accrued to recover any debt...and the person liable or accountable therefore...makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the last payment.  
<sup>iii</sup> [2010] 7 AMR 127

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winding-up order was made) since the order for sale was in fact obtained more than four years after that date.

The issue is whether s.8(2A) of the Act protected a guarantor who was not a bankrupt as well.

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#### CREDIT & SECURITY / BANKING LAW / LAND LAW

#### RECOVERABILITY OF INTEREST POST AORO OR WINDING-UP DATE

The impact of the winding-up of a borrower company on the indebtedness of its guarantor was examined in the High Court decision in *United Overseas Bank (M) Bhd v Mok Hue Huan & Anor'*.

In that case, the plaintiff granted a loan to a company known as Monzo secured by a charge over Monzo's properties and a letter of guarantee and indemnity dated 15.2.2001 executed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Monzo was wound up on 19.6.2002. The 1<sup>st</sup> defendant was adjudicated a bankrupt on 25.10.2002. The plaintiff obtained order for sale of Monzo's properties on 25.7.2006. The amount that was stated to be due to the plaintiff was RM1,022,134.77 as at 19.6.2002.

This date is significant because under s.8(2A) of the Bankruptcy Act 1965 (the Act) (which is applicable to the winding-up scenario by virtue of s.4(1) of the Civil Law Act 1956), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order. Therefore, the plaintiff could not claim any interest after 19.6.2002 (the date the

The plaintiff in its claim against the 2<sup>nd</sup> guarantor maintained that it was entitled to continue to charge interest against the 2<sup>nd</sup> defendant even after the borrower/principal/chargor ie. Monzo was wound up under the separate and independent contract, to wit, the letter of guarantee and indemnity dated 14.11.2000.

The High Court however agreed with the 2<sup>nd</sup> defendant that s.8(2A) was a 'statutory clamp' on the secured creditor prohibiting them from claiming any further interest on the secured debt after the date of adjudication order or winding-up order (the said date) if the secured creditor failed to realize their security within six months after the said date. The court proceeded to hold that parties could not contract out of s.8(2A) of the Act.

Thus, any provision in the letter of guarantee and indemnity making the guarantor liable for interest after the said date if the secured creditor/chargee is unable to realize the security within six months from the said date is void and unenforceable.

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In effect, to quote the learned High Court judge, 'the profit making venture of the lender ends on the date of winding up of a company or bankruptcy of a person.'

It must also be noted that the phrase 'realize his security' in s.8(2A) has been construed to mean receiving payment of proceeds from the successful bidder pursuant to the order for sale<sup>ii</sup>. Thus, taking into account the usual period for completion of sale in an auction sale, the lender/chargor actually has only about two months after the date of adjudication order or winding-up order to sell the

secured/charged property in order to recover any interests after the said date.

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<sup>i</sup>[2010] 7 MLJ 293

<sup>ii</sup>OCBC Bank (Malaysia) Bhd v Tan Eng Kee & Anor[2003] 3 CLJ 161

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## DIGEST OF EMPLOYMENT LAW CASES

### 1. "YOU GET OUT OF MY OFFICE"

That was the remark uttered by the managing director (MD) of the company/employer to the claimant/employee in the case of *Sure Catch Fishing Tackle Mfg Sdn Bhd v Lily Ng & Anor*<sup>i</sup>. The claimant and the company had earlier amicably settled the first representation made by the claimant against the company for constructive dismissal and pursuant to such settlement, she reported to work. The claimant claimed, that she was given two alternatives by the MD --- to resign or be sacked, that she was given certain documents to sign and that when she refused to sign those documents without first reading the contents, the MD made that remark to her. The claimant took it as a dismissal by the employer and left the company. The claimant did subsequently write a letter to her employer to claim that she regarded herself as having been sacked by virtue of that remark. The letter was left unanswered by the employer. She then claimed constructive dismissal (the second representation). The High Court held that whilst the MD's remark constituted a threat to sack the claimant, it was nothing but a hollow threat which, at most, amounted to gross intimidation. It was still short of any conduct that could reasonably evince that the company had held itself not bound to the contract of employment. The words "You get out of my office" were certainly uncouth and uncivil but could not be construed as words conveying the effect of dismissal. There were altercation and tension, the MD's conduct could have been regarded as unreasonable and the

claimant's letter was not answered but in the learned High Court judge's view, the total conduct of the company was not any act of oppression or victimization that amounted to constructive dismissal. A reasonable tribunal would not have reached the conclusion that claimant was dismissed and given that the reasoning was flawed with *Wednesbury Unreasonableness*<sup>ii</sup> (in that proper inferences were not drawn from the MD's conduct), the Industrial Court's award was quashed.

### 2. MISREPRESENTATION OF QUALIFICATIONS

In *Royal Sungei Ujong Club v Vijaysankar Arumugam*<sup>iii</sup>, more than 2 years after employing the claimant as the Club Manager, the club discovered that the claimant had been dishonest about his qualifications when he had applied for the position. He declared that he was an MBA degree holder when he was not. He claimed that he possessed a diploma in human resource management from a university but he produced another certificate from another university. At the end of the domestic inquiry, he was found guilty. The Industrial Court found, on a balance of probabilities, that the claimant had misrepresented his qualifications in his application letter and resume. Misrepresentation is misconduct whereby the elements of dishonesty and deception are involved. A misrepresentation is a statement which conveys a false or wrong impression. As club manager, the claimant was in charge of all the staff and had access to confidential information relating to members of the club. Since he had misrepresented to the club regarding his qualifications, the club would not be able to repose any trust and confidence on him. His dismissal was with just cause and excuse.

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### 3. 'LOCUM' THAT IS NOT A WORKMAN UNDER IRA

The claimant worked as a 'locum'<sup>iv</sup> at the clinic. He worked irregular hours and at the end of each month, he would personally write his monthly entitlement to locum and traveling allowances based on the actual number of days he worked and he would indicate when payment should be made to him. Given such features, was the claimant a 'workman' under the Industrial Relations Act 1967? The Industrial Court in *Dr Thambirajah Ahgoram v People's Klinik (Jurosha Sdn Bhd)*<sup>v</sup> held that such conduct appeared to be that of a medical practitioner providing locum services rather than a medical practitioner employed as a workman of the company. In other words, the claimant had been employed under a contract for service as opposed to a contract of service. On that score, the claimant's claim was dismissed.

### 4. EMPLOYER TO TAKE REASONABLE CARE FOR SAFETY OF EMPLOYEE

In the Singapore Court of Appeal's case of *Chandran a/l Subbiah v Dockers Marine Pte Ltd*<sup>vi</sup>, the appellant (A) worked for the respondent (R) as a stevedore. One day, he was instructed by R to move cargo containers on board a vessel. Prior to the commencement of work, no safety inspection or safety briefing was carried out by R's supervisor; neither was any safety equipment supplied to A even though he was required to work from heights. During the course of his engagement on board the vessel, a ladder on which A was standing suddenly detached from the hull of the vessel which caused A to fall about 10m into the hatch of the vessel. A sustained severe injuries. Under common law, employers are required to take reasonable care for the safety of their employees in all the circumstances of the matter. The Court went on to hold that an employer could not wash his hands off all responsibility for the

safety of his employees simply because the employees were sent to work at a site controlled by others. The law continued to place on an employer an obligation to take reasonable care for its employees' safety. In other words, duty to take reasonable care for the safety of workers is non-delegable and personal and persists even if employees are delegated or deployed to work in premises not belonging to the employers. In the instant case, R had failed to meet two aspects of its duty. R should have performed the following but did not do so: (a) carry out a risk assessment exercise, including inspecting the access to the hatch in question and the defective ladder for signs of danger to its workers, prior to the commencement of work; and (b) take reasonable measures to minimize the risk of its workers falling from heights by providing safety equipment such as safety belts and safety harnesses. In the result, R was held to be fully liable for the injuries that A suffered.

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<sup>i</sup> [2010] 1 CLJ 114

<sup>ii</sup> 'Wednesbury Unreasonableness' [or otherwise known as 'irrationality'] is one of the grounds that the judicial courts may rely upon, in a judicial review application, to grant the relief of *certiorari* to quash the decision of the administrative tribunal (which includes the Industrial Court)

<sup>iii</sup> [2010] 1 ILR 35

<sup>iv</sup> As cited by the company's counsel, the word 'locum' is defined as 'a person who undertakes the professional duties of someone else in his absence, **esp. a physician** or member of the clergy who **stands in for another**, a person who **holds office temporarily** --- The New Shorter Oxford English Dictionary on Historical Principles.

<sup>v</sup> [2010] 1 ILR 179

<sup>vi</sup> [2010] 1 SLR 786

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### EQUITY / LAND LAW / TRUST

### OF CONSTRUCTIVE TRUST, RESULTING TRUST, TRUST UNDER S.433B(1)(C) OF NLC...

The Japanese litigant in *Takako Sakao v Ng Pek Yuen & Anor*<sup>j</sup> could finally heave a huge relief

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when the Federal Court rectified a substantial wrong committed by both the trial judge at the High Court and the first tier appellate court, ie. the Court of Appeal. Ordinarily, when there are concurrent findings of fact, it would need very clear and convincing reasoning to justify the final appellate court to interfere with those findings and the court would only do that in the rarest cases.

In the words of Gopal Sri Ram FCJ who delivered the judgment, the instant case was one in which so much of the judgment at the first instance

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that was based on facts should not be allowed to stand because it had occasioned a miscarriage of justice and there was an unwarranted deduction based on faulty judicial reasoning from admitted and established facts.

In brief, the appellant (a Japanese) (A) and the 1<sup>st</sup> respondent (R1) were partners in the business of a restaurant. They decided to acquire the building in which the restaurant operated. A claimed that there was a mutual understanding that the building was to be purchased and registered in the joint names of A and R1 in equal shares. A subsequently provided a sum of RM194,000 towards the purchase price.

However, R1 proceeded to purchase the building solely under R1's name and then, sold it at a higher price to the 2<sup>nd</sup> respondent (R2)---a company owned by R1's husband, and in the process, denied A's right to a half share in it. A then sued R1 to enforce a trust, claiming that she and R1 were co-owners and R1 held A's share in the property under a trust.

Both the trial judge and the Court of Appeal ruled against A. Among others, it was held by both courts that s.433B of the National Land Code 1965 (NLC) barred A from enforcing any trust that could have arisen in her favour by reason of her contribution towards the purchase price. S.433B provides, among others, that: (a) a non-citizen or a foreign company may acquire land; or (b) land or any share or interest in such land may be transferred to or created in favour of any person as trustee where the trustee or the beneficiary is a non-citizen or a foreign company; only after the prior approval of the state authority has been obtained upon a written application by such non-citizen or foreign company.

The Federal Court held that R1 acquired the property pursuant to the mutual arrangement between R1 and A that the property would be acquired in their joint names in equal shares. As partners, A and R1 owed each other a duty to act with utmost good faith. There was a pre-existing fiduciary relationship.

R1's act was clearly unconscionable and in breach of her fiduciary duties which amounted to equitable fraud. The law thus would impose a constructive trust over a half share in the property in favour of A. Both the lower courts fell into error in

classifying the equitable obligation owed by R1 as a resulting trust. The Federal Court pointed out that the device of resulting trust was to give effect to the implied intention of parties in relation to the acquisition and disposal of property. On the other hand, a constructive trust is imposed by law regardless of the intention of the parties. It is imposed only in certain circumstances whereby equity fastens upon the conscience of the holder of a property a trust in favour of another in respect of the whole or a part thereof. In the view of the apex court, the fact pattern of the instant case fell squarely within the parameters of a constructive trust as explained in *Paragon Finance lic. V DB Thakerar & Co<sup>ll</sup>*.

The trust in favour of A was enforceable against R2 as R2 was not a *bona fide* purchaser for value. 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 (which was essentially unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence).

There were special circumstances to show that R2 was a mere façade concealing the true facts. The Court of Appeal therefore erred in finding R2 not liable because R2 was not privy to the agreement between A and R1. Trusts are an exception to the common law rule of privity of contract.

Last but not least, A must still overcome the obstacle posed by s.433B of NLC in order to enforce the constructive trusts established in A's favour. In this respect, the Federal Court held that the underlined words "created in favour of any person as trustee" in s.433B(1)(c) of NLC referred to an express trust registered in accordance with s.344 of NLC. It did not include within its purview constructive trusts which arose by operation of law. A constructive trust was not 'created' by individuals, it arose by operation of law.

Thus, s.433B(1)(c) of NLC has no application to the constructive trust imposed upon R1. S.433B(1)(a) of NLC was also inapplicable because it was not A (a foreigner) who acquired the property but R1 (in breach of her fiduciary duties). R1 was not a foreigner, so s.433B(1)(a) did not apply to her. It was merely a consequence of R1's unlawful acts that a constructive trust was imposed

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upon her in respect of a one half share in the property and that was not caught by s.433B.

A's appeal was allowed with costs.

It is also noteworthy that the instant case was not one in which A sought to evade compliance of s.433B by having the property registered in R1's name. The outcome might be different if she was guilty of any such equitable misconduct. In truth, however, A was a victim of equitable fraud committed upon her by R1 and equity would regard her as a beneficiary under a constructive trust.

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<sup>i</sup>[2010] 1 CLJ 381  
<sup>ii</sup>[1999] 1 All ER 400

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## LAND LAW / BANKING LAW

### PURCHASING AUCTIONED PROPERTY WITH CAVEAT

In *Norazian binti Mohd Adnan v Gale Force Sdn Bhd*<sup>i</sup>, due to a default of the loan in respect of which the property was charged as security, the defendant held a public auction (privately conducted) for the property. On 22.9.2008, the plaintiff successfully bid for the property at a price of RM1.7 million and paid a deposit of RM170,000.00 upon signing the memorandum of sale (the sale agreement). Among the salient terms of the proclamation of sale, the property was to be sold on an 'as is where is' basis; no warranty was given as to whether vacant possession would be delivered; and all bidders shall be deemed to have carried out all investigations and examinations of the property and the title particulars.

Upon obtaining a banking facility to complete the purchase of the property, a search was conducted on the property on 31.10.2008. It was discovered that a private caveat had been lodged on the property by one SK Reka Sdn Bhd (the caveator) on 22.9.2008 at 2.53pm i.e 37 minutes before the auction was completed. Neither the plaintiff nor the defendant was aware of the caveat which was premised on the ground that the caveator had on 7.5.2008 entered an agreement with the borrower/chargor to purchase the property and had paid RM32,000.00 as deposit.

No attempt was made by the plaintiff to remove the caveat. Instead, the plaintiff commenced proceedings against the defendant for a declaration

that the sale agreement was void for common mistake and frustration owing to the existence of the caveat and demanded for a refund of her deposit.

The High Court held that the plaintiff as a successful bidder for property at an auction, was an aggrieved party within the ambit of s 327(1) of the National Land Code and should have applied to have the caveat removed as a wrong had been done to her which could affect her title to the property. The plaintiff's submission that the sale agreement was void and/or frustrated because the defendant could not have delivered good title to the defendant due to the caveat was rejected by the court. The sale agreement of the property to the highest bidder was on 'as is where is' basis and the balance purchase price was payable in three months. No attempt was made by the plaintiff to remove the caveat, neither was any attempt made to seek extension of time from the defendant to pay the balance purchase price. In the words of the learned judicial commissioner, the plaintiff was fixated with the termination of contract without even attempting to comply with the terms of the sale agreement. The plaintiff could have completed the sale by paying the balance purchase price when due and by attempting to remove the caveat. By failing to do so, the plaintiff had breached the sale agreement. The defendant was entitled to forfeit the sum of RM170,000.00 which was a sum reflecting earnest performance of the sale agreement and was therefore regarded a true deposit representing 10% of the purchase price.

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<sup>i</sup> [2010] 7 AMR 341

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## LEGAL PROFESSION / TORT (NEGLIGENCE)

### NO MORE IMMUNITY FOR ADVOCATES

The legal profession in Malaysia is a fused profession, that is to say, a practising lawyer can be an advocate as well as a solicitor. This is in contrast to the English system where the legal profession is divided into two separate branches : barristers and solicitors. A barrister has a right of audience in the judicial courts of justice while a solicitor deals with the preparatory stages of court action in addition to non-litigious matters such as conveyancing. Prior to 2000, barristers/advocates enjoyed immunity from legal suits brought by clients ---*Rondel v Worsley* and *Saif Ali & Anor v Sydney Mitchell & Co*<sup>ii</sup>. The immunity was necessary on public policy grounds in that a proper administration of justice may not be achieved if barristers/advocates are inhibited by the fear of being sued for negligence by a disgruntled client at the expense of exercising the duty he owes to the court, issues already decided at a trial may have to be re-litigated at the ensuing negligence suit in order to establish the negligence and damage flowing and the existing general immunity attached to all other participants in the judicial proceedings viz judges, court officials, witnesses or parties to ensure that trials are conducted without the stress and fear in the higher interest of the advancement of justice.

The position of an advocate and solicitor in Malaysia is exactly the same as that of a solicitor in England and if there is an act of negligence, it is immaterial to consider whether the act is one normally done in England by a barrister or solicitor -- see the Federal Court's decision in *Miranda v Khoo Yew Boon*<sup>iii</sup>. The High Court however in *Mohd Noor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut*<sup>iv</sup> extended the immunity against liability to an advocate and solicitor in his work which was intimately connected with the conduct of litigation in court, an approach that was adopted in *Saif Ali* case.

Now, the law in England on immunity of advocates was re-examined in 2000 in *Arthur JS Hall & Co v Simons*<sup>v</sup>. The House of Lords rejected immunity in both civil and criminal cases. Thus, advocates are in principle liable for negligence in the same way as other professionals.

In the light of this development, the issue as to whether advocates in Malaysia involved in the conduct of litigation in court should continue to be

accorded immunity from being sued for negligence came up for determination in the recent High Court case of *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm)*<sup>vi</sup>. It was held that there was no longer any compelling reason to retain the immunity due to the public policy considerations, the details of which were set out in *Hall's* case. Thus, advocates in Malaysia should be treated similar to those in England.

The learned Judge made some pertinent remarks on the difficulty in proving negligence against advocates in the conduct of a case in court. In court proceedings, an advocate has no duty to be right but only to ensure that he has acted with integrity and diligence in exercising reasonable care and competence. On the facts of the case, the arguments put forward by the defendant (acting for the plaintiff in opposing a suit taken out by the plaintiff's former solicitors, WMN, against the plaintiff for outstanding legal fees) in reply to the preliminary objection raised by WMN were appropriate and justifiable. The fact that the judge in that suit held a different view did not mean that the defendant had been negligent. It was a matter which could have gone either way as it sometimes happened in the court of law. It was a judgment call. As such, there was no negligence on the part of the defendant in the conduct of that suit.

<sup>i</sup>[1969] 1 AC 191

<sup>ii</sup>[1980] AC198

<sup>iii</sup>[1968] 1 MLJ 161

<sup>iv</sup>[2001] 5 MLJ 561, [2001] 2 CLJ 364

<sup>v</sup>[2000] 3 All ER 673

<sup>vi</sup>[2010] 1 MLJ 284, [2010] 1 CLJ 913



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## REMEDY / CONTRACT LAW

### TIME IS OF NO ESSENCE DESPITE 'TIME IS OF THE ESSENCE' CLAUSE

The decision of the Federal Court in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* is crucial in spelling out the rights of a purchaser of a property vis-à-vis the property developer in a scenario where the developer fails to complete the construction of the property within the time agreed upon in the contract which contains a clause that makes time the essence of the contract and another clause on payment of liquidated damages (LAD) by the developer if there is a delay in the delivery of the property.

In that case, the respondent (R) purchased a commercial shop lot in a project known as Berjaya Times Square which was developed by appellant (A). Under the agreement, A was to deliver R's lot to R by 23.11.1998. Clause 22 of the agreement provided that if A delayed in making delivery, A had to pay LAD calculated from day to day at the rate of 12% p.a on the purchase price. Clause 32 made time as the essence of the agreement. A failed to make delivery on the stipulated date. R on its part did not immediately after 23.11.1998 make an election to rescind the agreement and continued to make further progress payments. As it turned out, A's further assurance to deliver R's lot by the end of 2002 did not materialize. R then sought to rescind the agreement and claimed for the refund of the full purchase price paid to A. Both the High Court and the Court of Appeal ruled in favour of R.

On final appeal to the apex court, A succeeded. A relied on the fact that the project it had undertaken was never abandoned and had in fact been completed, albeit beyond the originally stipulated time limit. As such, R was neither entitled to rescind the agreement at common law nor entitled to terminate it for breach by A. It was contended that the promise to pay LAD rendered time no longer of essence for the purpose of s.56 of the Contracts Act 1965 (the Act).

The Federal Court extensively reviewed, and restated, the law governing the rights of an innocent party where there was a breach of contract by the guilty party, choices open to the innocent party in such circumstances, the 'misuse' of the term 'rescind' (which was actually an equitable remedy) to

a situation of putting an end to a contract broken by the guilty party, limited common law quasi-contractual remedy of restitution in cases where there has been a total failure of consideration, the interaction between s.40, s.56, s.65 and s.66 of the Act, and previous decided cases which favoured innocent purchasers who terminated contracts upon the failure of developers to construct houses within the agreed time.

It was held on the facts that this was not a case where there had been a total failure of consideration *eg.* the project was abandoned or nothing had been constructed as at the date the purchaser sought to terminate the agreement. In the instant case, the construction had commenced and was well on its way. There was a delay in the delivery of vacant possession but for such breach, the contract had provided a remedy --- the payment of LAD based on the agreed formula.

Therefore, although the contract had provided that time was of the essence, such provision (clause 32) must be read along with other provisions of the contract to determine if time was truly of the essence. The court laid down the proposition that a clause providing for the payment of a sum whether as a fine, a penalty or as liquidated damages calculated on a daily basis for the period that the work undertaken remains unfinished on the expiry of the time provided in the contract would, in the absence of a contrary intention to be gathered from the contract, point to time not being of the essence. In other words, a promise to construct and deliver a building within a stipulated time coupled with the promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence.

Thus, upon a proper construction of the agreement, time was not of the essence, R was not entitled to terminate the agreement when A failed to deliver the unit of shop lot on the stipulated date and R was only entitled to receive compensation as calculated on the agreed basis.

Will there be any difference if R were to immediately elect to terminate the agreement when A failed to deliver the unit on time, instead of R continuing to make payment and negotiating for a later date of delivery? The Federal Court by way of *obiter dicta* held that R's conduct had caused time to cease to be of the essence even if time was of the

#### IMPORTANT

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essence in the first place. However, it is our respectful view that given the *ratio* of the decision--- that the agreement upon proper construction does not make time of the essence---R would still not be entitled, on the facts of the case, to terminate the agreement given the state of construction of the project.

What will be the outcome if the project has been abandoned or that the property has not been constructed at all when the time for delivery arrives and the purchaser opts to terminate the agreement? It appears to us that in such a scenario, the purchaser is entitled to put an end to the agreement since there is a total failure of consideration, as

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### **TORT (BREACH OF CONFIDENCE)**

#### **OFF THE RECORD**

The High Court's decision in *Dato' Vijay Kumar Natarajan v Choy Kok Mun*<sup>i</sup> brings up the alternative claim for breach of confidence founded on tort instead of breach of contract. Though the plaintiff failed in his claim, the case provides us the rare opportunity (at least insofar as our Malaysian case law is concerned) to see how a cause of action based purely on tortious liability for breach of confidence should be formulated to succeed.

Firstly, the facts. P, a practising lawyer, had borrowed from UOL Credit Sdn Bhd (UOL) a share financing facility to help his friend one Dato' Peh. Dato' Peh later defaulted in repaying the facility which resulted UOL commence legal action against P. P then offered to settle part of the facility. In a meeting held at P's office between P and D (the general manager of UOL), D brought along a draft settlement agreement prepared by UOL's solicitors, Skrine, to be entered into between Dato' Peh and UOL. P had made some amendments to the Skrine's draft and produced his own handwritten draft (the Matters in Confidence). P informed D that whatever transpired in his office should be 'off the record' to which D agreed. Subsequently a dispute arose between P and UOL concerning the settlement and P commenced legal action against UOL for various declaratory reliefs concerning P's settlement agreement with UOL. In the course of the said legal action, D had affirmed several affidavits

shown in several cases<sup>ii</sup> cited by the Federal Court with approval in this case.

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<sup>i</sup> [2010] 1 MLJ 597, [2010] 1 CLJ 269, [2010] 2 AMR 205  
<sup>ii</sup> *Tan Yang Long v Newacres Sdn Bhd* [1992] 1 MLJ 289, *Chye Fook v Teh Teng Seng Realty Sdn Bhd* [21989] 1 MLJ 308, *Law Ngei Ung v Tamansuri Sdn Bhd* [1989] 2 CLJ 181.

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and disclosed the Matters in Confidence which D had agreed to keep confidential, hence the present suit brought by P against D for breach of confidence.

Now, the law. A breach of confidence can arise independently of any right in contract. It is based upon a broad equitable obligation of conscience, the action for such breach is an equitable remedy. Three elements must be established to succeed in a case of breach of confidence : (i) the information itself must have the necessary quality of confidence about it; (ii) the information must have been imparted in circumstances importing an obligation of confidence; and (iii) there must be an unauthorized use of that information to the detriment of the party communicating it<sup>ii</sup>. As to (i), the reason as to why the communicator of information (in our case, P) wants the communicatee (D) to keep it confidential must be considered and has to be reasonable or rational.

Next, the court's finding. In the learned Judge's view, there was nothing confidential about the information passed between P and D, ie. the Matters in Confidence. The agreement by D to keep confidential the Matters in Confidence by itself did not confer on the information a quality that qualified it to be 'confidential' for the purpose of the tortious liability. The information sought to be protected must be of a nature that the courts through judicial precedents have recognized its confidentiality, eg. trade secrets, information of intimate relationship between spouses, information between a professional and his client and cases involving literary ideas. In this case, P had failed to plead the reason why P wanted the information to be kept confidential. The court nonetheless proceeded to consider the reasons advanced through testimony in

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court and found that all three reasons that could have formed the basis of confidentiality were unsustainable. The first reason that P ran the risk of disciplinary action by Bar Council for breach of a rule of professional etiquette for meddling in the work of another solicitor---the courts would refuse to uphold the right to confidence when to do so would cover up wrongdoing. The second reason that it would be improper and extremely embarrassing for P to find the work of Skrine inadequate---the learned Judge rejected this reason as unreal and held that the reason why P rectified Skrine's draft was to ensure it to be in consonance with P's interest. The third reason that P did not want his settlement to be linked to Dato's Peh's settlement with UOL---the learned Judge found that such reason would not be undermined even if the Matters in Confidence were to be disclosed to the world at large. The learned Judge concluded that the Matters in Confidence did not have the necessary quality of confidence, the transaction on the Matters in Confidence was

personal in nature but there was no invasion of privacy. The court would only grant remedy for transactions which were personal in nature if there was an invasion of privacy.

Last but not least, the guide for future cases. The learned Judge opined that to enable the court to evaluate the quality of the information sought to be protected, essential particulars namely : (i) particulars pertaining to the necessity to maintain confidentiality over the information; (ii) particulars pertaining to the relationship of the parties, must be pleaded in the statement of claim. Omission to do so runs the risk of having the claim dismissed.

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<sup>i</sup>[2010] 7 MLJ 215

<sup>ii</sup>*Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, approved by the House of Lords in *A-G v Guardian Newspapers (No.2)* [1990] 1 AC 109.

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