

# THE UPDATE



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## DUTY TO TAKE REASONABLE CARE IN CARRYING OUT THE CUSTOMER'S MANDATE

A bank's contractual duty to honour payment instructions in accordance with its customer's mandate is not an absolute one. Such duty co-exists with a contractual duty to take reasonable care in carrying out its operations within its contract with its customer. Based on the general rule that a bank's pre-existing mandate is revoked by its knowledge of the customer's mental incapacity, it must necessarily be implied into the contract between a bank and its customer that the bank should not (and is entitled not to) proceed with the relevant banking transaction if the circumstances are such that they place the bank on inquiry of the customer's mental capacity<sup>i</sup>.

In the Singapore High Court case of *Hwang Cheng Tsu (by her litigation representative Hsu Ann Mei Amy) v Oversea-Chinese Banking Corp Ltd*<sup>ii</sup>, the bank was sued for breach of contract as it refused to follow the apparent instruction of its customer (the plaintiff, who had unfortunately passed away before the trial) to open a joint account in the names of the plaintiff (the customer) and her adopted daughter, Amy and subsequently, to close all the plaintiff's accounts with the bank and to repay the plaintiff the monies standing to her credit in those accounts. On or about 13.5.2008, the plaintiff who had suffered from mild Alzheimer's dementia (but which fact was not known to the bank at that time) and Amy attended at the bank's premises. Amy instructed a bank officer that the plaintiff wished to open joint account in her and the plaintiff's names (the joint account) and to transfer monies from all the fixed deposit accounts that the plaintiff held with the bank into the joint account. The plaintiff appeared dazed and was "staring into blank space" all the time while Amy was doing all the talking. When the bank officer tried to stress to the plaintiff that her monies in the existing accounts would all be paid into the joint account, the plaintiff remained non-responsive and again stared into blank space. The plaintiff did not even nod her head to give a response. When the bank officer was explaining the account opening procedure to the plaintiff, Amy suddenly interrupted and gave the peremptory command "Qin Meng" (which mean "sign" in the Cantonese dialect). The plaintiff then signed the account opening form without saying anything. Two days later, the bank

officers made a home visit to the plaintiff to verify her instruction. At that home visit, the plaintiff did not recall that she had gone to the bank with Amy just 2 days earlier. When asked the second time whether she remembered going to the bank premises to open a joint account, the plaintiff had said no. Further, when asked twice whether she wished to open a joint account, she had said no.

The circumstances on 13.5.2008 and 15.5.2008 would place a reasonable and prudent bank on inquiry of the plaintiff's capacity to give valid instructions to deal with her accounts. Therefore, the court held that the bank had not breached its contractual obligations to the Plaintiff when it refused to open a joint account.



Since the bank refused to open the joint account, on 22.5.2008, Amy accompanied the plaintiff to the bank's premises again and gave the instruction to close all the plaintiff's bank accounts and to withdraw all the monies therefrom. When the bank officer requested for the instruction to close her accounts directly from the plaintiff, Amy became agitated and told the plaintiff in a very commanding and loud voice that if the plaintiff did not transfer the money to her and close all her accounts with the bank, the plaintiff would lose all her money. The bank officer then interviewed the plaintiff, without Amy being present, to verify those instructions. When asked why the plaintiff was at the bank's premises, she shook her head and said she did not

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know. When asked whether she knew how much money she had in her accounts, the plaintiff replied that she was not sure. When asked if she could remember who visited her at her home a week earlier, the plaintiff could not. When asked who was the lady (Amy) who had accompanied her to the bank on the day of the meeting, the plaintiff said that it was her niece. The plaintiff was asked twice whether she wanted to close her accounts and had answered no, adding that there was no need to as she had no problems with the bank. The meeting ended abruptly when Amy intervened and demanded the bank officers to stop talking to the plaintiff.

The court held that in the given circumstances where face-to-face meetings had been held with the bank's customer *ie.* the plaintiff, there were reasonable grounds to believe that the plaintiff lacked the capacity to give valid instructions to operate her bank accounts. Therefore, the bank was held to have acted correctly and reasonably in refusing to close all the plaintiff's accounts and make payment of monies therefrom based on the instructions of a non-customer, Amy. The bank had thus not acted in breach of its contractual obligations when it made the decision not to close any of the plaintiff's accounts and not to make payment of monies out of those accounts in the circumstances that prevailed in May 2008. The plaintiff's claim was thus dismissed with costs on an indemnity basis and the court ordered Amy to personally bear such costs.

To sum up, if there are reasonable grounds to believe that the person attempting to make a withdrawal lacks authority to give a valid mandate (as an example of an irregularity), then the bank would be placed on enquiry. However, the mere suspicion of the bank does not constitute reasonable grounds. To determine whether there are reasonable grounds of belief (the Test), banking practice and commercial realities would have to be considered. If the answer to the Test is "no", then the bank is not placed on inquiry and all that the bank's duty of care requires it to do is to carry out the customer's mandate as per ordinary transaction with due care and diligence. If the answer to the Test is "yes", then the court must decide whether the bank had acted reasonably in the context of those irregular circumstances. This is an objective standard---whether a reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts as justifiable. The reasonableness of the bank's actions would be decisively influenced by the nature of those irregular circumstances that placed the bank on inquiry.

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<sup>i</sup>The bank however cannot suspend the banking transaction and hold on to the money in the accounts indefinitely. On the other hand, it will be impractical and commercially unworkable to expect the bank to investigate into the degree of mental incapacity of its own customer. All that the bank could have done is to carry out face-to-face meetings with its own customer to evaluate for itself the appropriate measures to be taken.

<sup>ii</sup>[2010]4 SLR 47

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## **BANKING LAW / CONTRACT LAW / TORT**

### **WHEN IS A PRIVATE BANK ACTING AS A TRUSTED ADVISOR OF ITS CLIENT AND WHEN IT IS NOT?**

The existence and, if any, the scope of duty owed by a private bank to its high net-worth clients to give investment advice was the focal issue in the decision of the High Court of Singapore in *Go Dante Yap v Bank of Austria Creditanstalt AG*<sup>i</sup>. The plaintiff (a successful and wealthy Filipino businessman) had

opened two investment accounts with the defendant's private banking department: one with the Hong Kong (HK) branch and the other with the Singapore branch, both handled by the vice-president (the VP) in the HK branch. Between July and October 1997, a number of investments in emerging markets debt instruments were acquired under the Singapore account of which some were financed using loans from the credit facility tied to the HK account. During the Asian financial crisis, several investments held under the Singapore account suffered losses. The plaintiff commenced this action against the defendant, alleging that 16 investments and loans drawn to finance them were

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not authorized by him (the unauthorized investments claim). Alternatively, even if they were properly authorized, the defendant had breached its duty owed to the plaintiff, in contract and/or in tort, by failing to advise him that it was imprudent to have maintained the investment portfolio that he was holding during the period of the Asian financial crisis (the advisory claim).

Both parts of the plaintiff's claim were rejected by the trial judge. On the unauthorized investments claim, the trial judge arrived at the conclusion that the plaintiff's conduct was overwhelmingly consistent with that of a person who treated the investments in his account as properly authorized for the following reasons: (i) he did not complain until close to two years after the investments (worth approximately US\$7m) were made; (ii) he had remitted a sum of nearly S\$1m to the defendant to service part of the allegedly unauthorized loans drawn to acquire part of the investments; and (iii) he had participated in the restructuring exercises and executed settlements for two of the allegedly unauthorized investments, which clearly showed that he accepted the losses suffered on those investments. The plaintiff therefore had failed to raise a *prima facie* case of the investments not being authorized which meant that the defendant did not have to bear the burden of proving that the investments were authorized. It followed that the defendant's failures to keep record of all meetings taken place with the plaintiff and to produce evidence of taped recordings of the parties' phone conversations (during which instructions were purportedly given by the plaintiff) were not fatal.

On the advisory claim, the court would not lightly find the existence of an additional tortious duty of care within a banking relationship that was governed by contract unless there was conduct amounting to an assumption of responsibility coupled with reliance under the *Hedley Byrne* principle<sup>ii</sup>. To determine whether the defendant owed concurrent and co-extensive duties in both contract and tort to give investment advice to the plaintiff, the relevant factors were: (a) the extent of the plaintiff's financial experience and sophistication; (b) the contractual context (including the terms of the relevant contractual documents and disclaimers, and the absence of any written advisory agreement); (c) the actual role played by the VP (including the purpose for which she was giving the plaintiff recommendations); and (d) the extent of the plaintiff's reliance on the VP<sup>iii</sup>.

On factor (a), it very much depended on the particular factual matrix concerned. The subject of the investments in this case were corporate and sovereign-linked bonds which were simple securities that could be easily understood by someone with the plaintiff's knowledge and experience. Furthermore, the plaintiff had no difficulty rejecting the VP's recommendations on occasions when he thought that they were too risky. He was therefore not an inexperienced and unsophisticated client who had to rely entirely on the defendant for advice relating to the management of his investment portfolio. On factor (b), none of the contractual terms expressly provided for an advisory relationship between the parties. The evidence of the parties' conduct suggested that the defendant was under a duty only to recommend suitable investments to the plaintiff. The mere duty on the part of the defendant to recommend securities that were available within the market and within the plaintiff's risk appetite did not necessarily mean that the defendant was thus saddled with the duty to continually give wide-ranging investment advice with regards to his portfolio. Further, the plaintiff himself by a letter regarded the Singapore account as non-discretionary (notwithstanding the fact that he had signed a discretionary investment management agreement [DIMA] with the defendant which would have meant that the defendant was empowered and had discretion to trade in securities on behalf of a client using the client's investment account without the need for the client's specific authorization) and that he would be managing his own portfolio. He never asked the VP for her opinion during the entire relationship with regards to the investments already in his portfolio. The account fee charged by the defendant was not, on a proper construction of the contractual terms, consideration for investment advice but simply for acting as the custodian of the assets held in a client's account. The fact that there were no express disclaimers or contractual terms negating a duty to advise did not aid the plaintiff either because naturally there was no need to have such provision in a standard terms agreement for opening a discretionary account [DIMA] which would have been managed solely by the defendant. In conclusion, there was no contractual duty on the defendant to continue to provide investment advice to the plaintiff after it had recommended investment products that were available in the market to the plaintiff.

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On the fulfillment of the twin criteria of voluntary assumption of responsibility and reliance to give rise to a *prima facie* duty of care under the *Hedley Byrne* principle, factors (c) and (d) were relevant. On the facts, the VP only provided recommendations of investments to the plaintiff. However, this at most would only give rise to a low-level duty of care (as in *Springwell* case) 'not to make any negligent misstatements or even to use reasonable care not to recommend a highly risky investment without pointing out that it was such'. More importantly, the plaintiff conceded that he had not relied on any of the VP's recommendations. And both parties accepted that the VP did not provide any other form of advice. That being the case, the first criterion was not satisfied--the defendant had not voluntarily assumed any responsibility for giving investment advice to the plaintiff on an ongoing basis.

The upshot was that the defendant owed no duty in contract or tort to give investment advice to the plaintiff in relation to the investments held in the Singapore account. The question of the scope of a private bank's duty to give investment advice was left open.

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<sup>i</sup>[2010] 4 SLR 916

<sup>ii</sup>*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. See also *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Rep 449, *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2010] EWHC 211 and *Credit Industriel et Commercial v Teo Wai Cheng* [2010] 2 SLR 1149

<sup>iii</sup>These four 'lower level' factors were adopted from the English High Court decision in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186.

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**BANKING LAW / GUARANTEE / BANKRUPTCY / WINDING-UP**

**STATUTORY CLAMP OF INTEREST POST DATE OF BANKRUPTCY OR WINDING-UP ORDER**

In *United Overseas Bank (Malaysia) Bhd v Mok Hue Huan & Anor*<sup>i</sup>, the plaintiff granted a loan to Monzo (M) Sdn Bhd (borrower) which was secured by a letter of guarantee and indemnity executed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants (LGI) and charges over two properties owned by the borrower. On 19.6.2002, the borrower was wound up. The 1<sup>st</sup> defendant was also adjudicated a bankrupt in Singapore. The 2<sup>nd</sup> defendant contested the plaintiff's claim for summary judgment with regard to the actual amount due to the plaintiff. The 2<sup>nd</sup> defendant's contention was that the plaintiff could not claim any interest after 19.6.2002 when the winding up order was made by virtue of s.8(2A) of the Bankruptcy Act 1967 (the Act) read with s.4(1) of the Civil Law Act 1956 (CLA). It was not in dispute that the plaintiff only obtained the order for sale of the two properties on 25.7.2006 and 3.11.2006, more than 4 years after the borrower was wound-up.

S.8(2A) of the Act reads :

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"Notwithstanding sub-section (2), 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."

S.4(1) of CLA provides that in the winding-up of any company whose assets prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable as are in force for the time being under the law of bankruptcy.

On the other hand, the plaintiff argued that its right to claim against the 2<sup>nd</sup> defendant fell under the LGI and the plaintiff was claiming the interest against the 2<sup>nd</sup> defendant as a guarantor under a separate and independent contract.

The learned High Court judge ruled in favour of the 2<sup>nd</sup> defendant. In his judgment, s.8(2A) of the Act was a "statutory clamp" on secured creditors prohibiting them from claiming any further interest on a debt (from whatever source, either from the security or from guarantors or sureties) after the statutory period of six months of the adjudication or winding-up order. Failure to do so meant that the lenders/chargees could not claim any interest post-adjudication or winding-up order. In the instant case, since the plaintiff failed to realize its securities over

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the properties before 18.12.2002, it was only entitled to the amount outstanding as at 19.6.2002.

The plaintiff's argument was held to be misconceived because there was no provision that allowed the plaintiff to contract out of s.8(2A) and the LGI was void to that extent. If the plaintiff (creditor/chargee) could not realize the security within six months from the winding-up order of the security provider (the statutory period), any contract making the guarantor liable for interest after the statutory period was void, illegal and unenforceable. Even if the plaintiff had excluded the application of s.8(2A) of the Act in the LGI, this itself would be void and unenforceable. In the learned Judge's view, the LGI was connected and made pursuant to the charge and was not an independent and separate document. Furthermore, where the consideration or object of an agreement was of such a nature that, if permitted, it would defeat any law, such an

agreement was unlawful and void by virtue of s.24(b) of the Contracts Act 1950.

With due respect, we have doubts on the correctness of this decision. Insufficient attention had been accorded to the nature of the LGI and the provisions therein. If the LGI is indemnity in nature, the plaintiff's contention that the promissory undertook an original and independent obligation to indemnify regardless of the obligation of any other obligor including the principal debtor is well established and ought not to be brushed aside.

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<sup>i</sup> [2010] 9 CLJ 764

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## COMMERCIAL TRANSACTION (SALE OF GOODS / HP)

### WHO BEAR LOSSES WHEN DEALING WITH STOLEN CAR?

Section 4 of the Sale of Goods Act 1957 (SOGA) states that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. The transfer of property constitutes the essence of the contract of sale and a seller who does not so transfer the property violates the basic contractual duty resulting in a total failure of consideration which will entitle the buyer to revoke the sale and claim for the full refund of the purchase price. Where one individual wishes to purchase a car from a car dealer but requires financing (by obtaining hire purchase facility from a financier), and if the car turns out to be a stolen car, then in such situation, who will bear the losses, where all the three parties---the car dealer, the financier and the individual purchaser---are *bona fide* victims?

In *Affin-ACF Finance Bhd v Phang Ngan Heong*<sup>i</sup>, an individual was desirous of buying a 2<sup>nd</sup> hand car bearing registration number WDK 7766 from the defendant, a second-hand car dealer and was introduced to the plaintiff to obtain financing to facilitate the purchase. The defendant testified that he had sold the car to the individual at a price of

RM120,200 inclusive of insurance premium and transfer fee and exhibited the sales invoice. The individual paid a down payment of RM40,200 and obtain hire-purchase facility from the plaintiff. The defendant (the dealer) received the balance of the purchase price from the plaintiff (the owner) and the vehicle was successfully transferred to and registered in the name of the individual (hirer) as reflected in the registration card which also contained an endorsement of ownership claim by the plaintiff.

About 21 months later, the car was seized from the hirer by the police on suspicion that it was a stolen car. Subsequent investigation by the police revealed that the chassis of the car had been tampered with and the identity of the car was actually WDR 8478 which had been reported stolen.

The plaintiff demanded a full refund of the purchase price of the car by reason of a total failure of consideration, hence the instant case. The defendant disputed any involvement with the hire purchase agreement which was between the plaintiff and the hirer and he denied any responsibility to the plaintiff as the contract of sale was allegedly between the hirer and the defendant. The defendant contended that he was himself a *bona fide* purchase of the car from a third party (previous owner) and that as such, he had acquired a 'good title' to the car

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which he could and did transfer to the hirer who had enjoyed quiet and peaceful possession of the car, notwithstanding the fact that the car was subsequently seized by the police. He alleged that the plaintiff itself was negligent when it failed to take the necessary action to ascertain that the car was genuine. The defendant also pointed out that he had never received a lump sum of RM120,200 from the plaintiff, that he was paid RM40,200 directly by the hirer as a down payment and that only the balance of RM80,000 was paid by the plaintiff after the hire purchase loan was approved.



The plaintiff relied on a decision of the High Court in *Lian Lee Motor Sdn Bhd v Azizuddin Khairuddin*<sup>ii</sup> which held that the plaintiff as the buyer of a vehicle had the right to sue for the purchase price paid as money had and received on a total failure of consideration upon proof that the seller had no good title to the vehicle which was subsequently seized by the police for being a stolen vehicle, notwithstanding the fact that the seller was himself a *bona fide* purchaser with no knowledge of any defects relating to ownership of the vehicle.

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On the other hand, the defendant relied on the Federal Court decision in *Ahmad Ismail v Malaya Motor Co & Anor*<sup>iii</sup> for the proposition that the sale agreement between the plaintiff and the defendant had been superseded by the hire purchase agreement and therefore, the plaintiff had no claim against the defendant. However, the learned Judicial Commissioner (JC) in the instant case distinguished the said Federal Court decision in *Ahmad Ismail*. There, the claim for damages was made by the plaintiff/hirer in the hire purchase transaction against the 1<sup>st</sup> defendant/car dealer. The Federal Court held that the hirer's case had been superseded by the hire purchase agreement. In the instant case, the action was filed by the owner/financier (plaintiff) who had purchased the stolen car from the dealer/seller (defendant). Although there was a subsequent hire purchase agreement between the owner and the hirer, the ownership of the car had yet to pass to the hirer. The relationship between the plaintiff and the defendant remained as buyer and seller. There was no superseding by the hire purchase agreement. Further, the plaintiff in *Ahmad Ismail* case failed against the 2<sup>nd</sup> defendant/owner/financier too because ultimately, there was no proof that the car concerned was a stolen one and the car was in fact subsequently returned to the 2<sup>nd</sup> defendant by the police.

In the view of the learned JC, the registration of the car in the name of the hirer was irrelevant as it did not amount to the passing of a good and valid title from the defendant to the plaintiff. For that to happen, it would be necessary for the plaintiff to continue to have a good and valid title to the car until the end of the hire purchase period so that it could, in turn, pass a good and valid title to the hirer. A passing of ownership at the time of the sale alone would be insufficient; the ownership had to continue to remain with the plaintiff for there to be a meaningful passing of ownership. In this respect, the learned JC chose not to follow the earlier High Court decision in *BBMB Kewangan Bhd v Tan Swee Heng & Anor*<sup>iv</sup> which held that since the appellant/financier in that case had done some inspection and investigation on the status and condition of the vehicle concerned and had agreed to accept the offer for sale from the 2<sup>nd</sup> respondent/dealer, the property or ownership of title of the said vehicle passed at the time when the sale price was fully paid just before the appellant entered into a hire purchase agreement with the 1<sup>st</sup> respondent/hirer---the doctrine of "*caveat emptor*"<sup>v</sup>

applied against the appellant. The learned JC instead preferred to follow the other High Court decision in *Lian Lee Motor (supra)*.

In conclusion, the court ruled that there was a failure of consideration in the sale contract which entitled the plaintiff to a refund of the entire purchase price of RM120,200. However, the court dismissed the plaintiff's claim of indemnity against any claim from the hirer in respect of which the limitation period had set in to preclude the hirer from filling any claim against the plaintiff.

In our view, the answer to the issue of who is to bear the losses in a tripartite relationship amongst the car dealer/seller, the financier/buyer/owner and the hirer in a case where

the subject matter of the hire purchase agreement is subsequently found to be a stolen vehicle remains very much open (in light of conflicting High Court decisions) and is also subject to factual consideration.

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<sup>i</sup>[2010] 7 CLJ 592

<sup>ii</sup>[2001] 1 CLJ 768

<sup>iii</sup>[1973] 1 LNS 1

<sup>iv</sup>[2002] 7 CLJ 377

<sup>v</sup>It means "let the buyer beware".

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## COMPANY LAW

### IMPROPER ALLOTMENT OF SHARES

In *Cheah Ngun Ying v Low Cheong & Sons Sdn Bhd & Ors*<sup>i</sup>, the powers of company to issue and allot shares came into focus. In that case, the plaintiff was the executrix of the estate of her late husband, Low Lai Kui (Low) who dies in June 1987. Whilst he was alive, Low was a director and shareholder of the 1<sup>st</sup> defendant company (the company), which was a family company established by Low's father, one Low Cheong who had also passed away shortly after Low's death. The other defendants were the brothers and sisters of Low or persons holding in trust for them or their children. Low with his 52% shareholding was the majority shareholder of the company. On 15.10.1987, however, the 2<sup>nd</sup> defendant (Low's sister, D2) and Low Cheong as directors of the company allotted 157,579 shares to several existing shareholders other than Low, as a result of which Low's shareholding in the company was reduced to about 42%. The plaintiff alleged improper purpose of the issuance and allotment of the shares to dilute Low's majority control and claimed a declaration that the allotment was in breach of the directors' fiduciary duties and was unlawful. The defence asserted that the plaintiff had agreed to set off Low's share of the net profits of the company which were available for distribution against a debt of RM230,000.00 owed by Low to the company.

At the conclusion of the trial, the High Court ruled in favour of the plaintiff. The learned Judge held that the loan given by the company to Low was not yet payable to the company as there was no evidence on any demand having been made either to Low when he was alive or to his widow, the plaintiff after his death; or on any agreement by the plaintiff to the issuance and allotment of the shares in settlement of Low's debt. Secondly, D2's evidence on the plaintiff's agreement to set off the alleged debt against the allotted shares was inconsistent and suspicious. Thirdly, D2's evidence on events on 15.10.1987 contradicted normal practice of companies which was that the board of directors would hold its meeting first and decide on the business to be transacted at the EGM and thereafter the EGM would be held. In the instant case, it was the other way round. Fourthly, both the board meeting and the EGM were minuted to have been attended by the same people (D2 and the late Low Cheong) and held at the same time and date but at different venues which prompted the trial judge to draw an inference that it was highly probable that there was no EGM held and that the minutes of the EGM were mere fabrication. Lastly, the company was financially strong in 1987 and there was no reason for the company to demand repayment of loans taken by directors.

In the circumstances, the board of the company comprising D2 and Low Cheong had not acted *bona fide* when it decided to allot and issue shares to other shareholders by capitalizing the dividends and in the case of Low, to use his dividends to set off against the loan taken by him. The power of the directors to issue shares was a fiduciary power to be exercised *bona fide* for the

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interest of the company, not for a collateral purpose. In the instant case, that power was not applied equally but selectively where the shares were allotted and issued to all the other shareholders in proportion to their respective shareholding but no shares were allotted or issued to Low or his estate. The declaratory relief was granted and order was

also made that the share register be rectified accordingly to avoid and nullify the said allotment.

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[2010] 9 MLJ 385

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## COMPANY LAW

### BOARD CIRCULAR RESOLUTION NOT CIRCULATED TO ALL DIRECTORS IS DEFECTIVE

The prologue of the judgment in the High Court case of *Dato' Raja Azwane bin Raja Ariff v Dato' Man bin Mat & Anor* aptly captured the essence of the scenario and issue before the court -- "In all companies there will invariably be majority shareholders and minority shareholders. Problems arise when the minority is not consulted and decisions are made by the majority alone. The minority may be represented by directors and sometimes the so called directors' circular resolution is not circulated to the directors representing the minority shareholders to sign. Can the majority still say in any event the result would be the same if a properly constituted board and shareholders' meeting were to be convened? The resolution would still be carried."

The plaintiff and the defendants were directors of a company (the company). The plaintiff was a minority shareholder. A board of directors' circular resolution (DCR) was served on EON Bank Berhad with only the defendants signing it (1<sup>st</sup> DCR). The company's accounts manager then retrieved this 1<sup>st</sup> DCR from EON Bank Berhad at the instruction of the defendants and subsequently, went to the same bank to serve a copy of another DCR (2<sup>nd</sup> DCR) bearing the additional inclusion of the purported signature of the plaintiff. Another similar DCR was served on Ambank Berhad. The plaintiff contended that his alleged signature in the 2<sup>nd</sup> DCR was a scanned signature and he did not sign the same. He further contended that both the DCRs had not been served on him whether for his attention or for his signature at any material time and he only knew about the DCRs after they were served on both the banks.

The DCRs sought to change the signatory arrangement with the banks concerned. Whereas previously the signatories were either the 1<sup>st</sup> or 2<sup>nd</sup> defendant from Group A and either the plaintiff or one Dato' Tan Kim Kuan from Group B, the DCRs were to authorize the banks to honour cheques signed by the 1<sup>st</sup> defendant on one part and either the plaintiff or the 2<sup>nd</sup> defendant on the other part.

Article 90 of the articles of association of the company under which the DCRs were passed provided that :-

"A resolution in writing signed by a majority of the Directors for the time being or their alternates not being less than two Directors shall be a valid and effectual resolution as if it had been passed by a meeting of Directors duly called and constituted."

The High Court held that Article 90 did not mean that the resolution did not have to be brought to the notice of all the directors. It was the consultation with all the directors, the conferring with one another and the consensus that might be arrived at that constituted the collective decision of the board, even if it was ultimately a majority's decision. The majority with a view to acting in the best interest of the company could not justifiably shut their ears to the objections and arguments raised by the minority. In the instant case, it was even more pertinent when the right of the plaintiff was being removed as in his right to be a co-signatory of all cheques without being given a right to be heard.

There was a patent lack of good faith in the submission of the 1<sup>st</sup> DCR without the plaintiff's signature as a director, the submission of the 2<sup>nd</sup> DCR bearing the scanned signature and the errors in recalling and the return of the 2<sup>nd</sup> DCR which was replaced by the 1<sup>st</sup> DCR. In the circumstances, the

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DCRs to effectuate change of signatories to the bank accounts of the company would be nullified and avoided.

It is noteworthy to recapitulate the following propositions of law distilled from an array of authorities by the Singapore High Court in *Polybuiding (S) Pte Ltd v Lim Heng Lee & Ors*<sup>ii</sup> as recited in the instant case:

Every director becomes a fiduciary by reason of being vested with the power to act on behalf of the company. That fiduciary office imposes on every director an equitable duty to act *bona fide* in the interest of the company as a whole and not for personal and ulterior reasons. Lack of *bona fides* of the directors is a good ground to invalidate the written resolution. The impropriety of individual directors will be imputed to the company which has notice of the impropriety through its directors. Since all directors collectively owe their duties to the company, no director or group of directors can exclude one or more directors from their deliberations or

exclude his input of his insight before a decision is taken.

The passage from the textbook, *Company Law*, 2<sup>nd</sup> edn, 1997 by Walter Woon sums up the legal position :

“Even if the articles allow a circular resolution to be effective when signed by the majority, notice of the resolution must still be given to all the directors.”<sup>iii</sup>

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<sup>i</sup>[2010] 8 AMR 517  
<sup>ii</sup>[2001] 2 SLR (R) 12  
<sup>iii</sup>at p.216.

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## CONTRACT LAW

### THE BATTLE OF FORMS --- THE ‘LAST SHOT’ DOCTRINE

The claimant (the purchaser) in *Tekdata Interconnections Ltd v Amphenol Ltd*<sup>i</sup> bought connectors from the defendant (the seller) in order to manufacture cable harnesses to sell to G who in turn sold engine control systems for installation in Rolls-Royce aero engines to the ultimate purchaser. The purchaser alleged that certain connectors were delivered late or were not fit for purpose or of merchantable quality. It contended that the contract of purchase was on the terms of its purchase order (PO). On the other hand, the seller argued that the contract was on the terms of its acknowledgement of the PO which stated that the seller’s terms and conditions as printed overleaf were applicable. If the seller’s argument were to be accepted its liability.

The traditional offer and acceptance analysis expounds the approach that an offer to buy

containing the purchaser’s terms which is followed by an acknowledgement of purchase containing the seller’s terms that is followed by delivery will (other things being equal) result in a contract on the seller’s terms (which is the final document passing between the parties before the contract is made). Such analysis applies in the so-called ‘battle of forms’ cases unless the documents passing between the parties, their conduct and circumstances are sufficiently strong to show that their common intention is that some other terms are intended to prevail.

At the trial, judgment was given in favour of the purchaser. In displacing the traditional analysis, the Trial Judge came to his conclusion on mainly three countervailing factors: (i) the fact that any departure from agreed times of delivery or quality as specified in the PO could have catastrophic consequences for the ultimate purchaser as well as the traveling public; (ii) the contractual commitments by the seller to G to supply on the items on terms which had largely corresponded to those of the purchaser; and (iii) the fact that at no time before the suit had the seller mentioned its own terms.

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On appeal, the decision was reversed by the UK Court of Appeal. Undue importance had been placed by the trial judge on the delivery times and quality control and the contractual commitment G had with the seller. Too much reliance had also been placed on the correspondence written after the dispute had arisen. The question of whose conditions (the purchaser's or the seller's) were intended to apply must be decided objectively on the basis of the proper interpretation of the documents which comprised the contract viewed objectively in their context when the contract was made. To quote the principal judgment, 'one has to be careful about reading too much into post-dispute correspondence...The terms of the post-dispute

correspondence do not carry the matter very far.' In the premises, the terms and conditions of the seller were held to apply to the contract contained in or evidenced by the PO in the instant case.

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[2010] 2 All ER (Comm) 302

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in the 1<sup>st</sup> defendant being the most senior officer in charge of matters relating to education in Selangor.

The High Court cited s.2 of the Government Contracts Act 1949 (Act 120) which stated:

"All contracts made in Malaysia on behalf of the Government shall, if reduced in writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all the contracts below a certain value in his department or otherwise as may be specified in the authorization."

The effects of a contract not made in accordance with s.2 was deemed not to have been made with the authority of the Government (s.6 of Act 120). Under s.8 of Act 120, no public officer shall be liable to be sued personally upon any contract which he makes in that capacity but a public officer shall be personally liable when he contracts otherwise than as the agent of the Government.

By literal construction of s.2 of Act 120, it required a written authorization by the 3<sup>rd</sup> defendant if Encik Zainal were to make a contract on behalf of the 4<sup>th</sup> defendant. Without such authorization, Encik Zainal had not been delegated with the authority to act for the 4<sup>th</sup> defendant and the alleged contract evidenced by the letter dated 4.12.1996 must be found to be *void ab initio*. As in the earlier Federal Court decision of *Suwiri Sdn Bhd v Government of the State of Sabah*<sup>ii</sup> which the learned Judicial Commissioner was bound to follow, the plaintiffs had

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## CONTRACT LAW

### CONTRACT WITH GOVERNMENT AVOIDED FOR LACK OF AUTHORITY

In *Macrotac Enterprise & Ors v Pengarah Pendidikan Negeri Selangor & Ors*, the plaintiffs made a proposal to Encik Zainal who was then the Pengarah Pendidikan, Jabatan Pendidikan Negeri Selangor (the 1<sup>st</sup> defendant) offering to supply student identification cards for students in the State of Selangor (the project). Upon approval allegedly from the 1<sup>st</sup> defendant vide letter dated 4.12.1996, the plaintiffs made various preparations to execute the project. However, due to objections from the public, the project was later shelved by the 3<sup>rd</sup> defendant, the Minister of Education. The plaintiffs contended the termination was unlawful and claimed against the defendants profit that they could have earned from the project had it not been terminated by the Minister.

The defendants maintained that Encik Zainal in granting the approval was acting without authorization and in his personal capacity, with the consequence that any resulting contract was void and not binding on the defendants. Further, the alleged contract was irregular and had contravened the prescribed procedures applicable to contracts made on behalf of the 4<sup>th</sup> defendant, Government of Malaysia. In reply, the plaintiffs contended that such procedures and regulations were the defendants' internal administrative matters and were of no concern to them, citing the rule in *Turquand* and the principle of apparent or ostensible authority clothed

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not discharged the onus to prove that there was in existence such a written authorization. The letter thus had not created any rights to the plaintiffs nor any obligations on the defendants. If at all, Encik Zainal by reason of s.8 of Act 120 must be held to be personally liable. The plaintiffs' claim against the 3<sup>rd</sup> and 4<sup>th</sup> defendants was therefore dismissed with costs.

The above finding was made notwithstanding the court's ruling that the Treasury Instructions issued by the Treasury pursuant to s.4 of the Financial Procedure Act 1957, the Treasury Circulars, Surat Pekeliling Ikhtisas or Surat Siaran served as directives, guidelines and references for the smooth running of the organizations of the defendants and were internal matters which could

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#### CONTRACT LAW / COURT PROCEDURE

#### AGREEMENT BECOMING 'UNMERGED' FROM JUDGMENT AND RESTRUCTURED INTO NEW AGREEMENT

The issue of restructuring of post-judgment debt was posed in the case of *Sri Datai Engineering Sdn Bhd & 3 Ors v Hong Leong Finance Berhad*. The 1<sup>st</sup> plaintiff had entered into 29 hire purchase agreements (the HP Agreements) with the defendant for the hire of various types of earthmoving equipments. The 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs stood as guarantors. The 1<sup>st</sup> plaintiff defaulted in the payment of rentals and interest due under each of the HP Agreement (liquidated sum). The defendant's demand for settlement of the liquidated sum were not met and the defendant sued and obtained summary judgment for the same on 3.3.1999.

Subsequently, the 1<sup>st</sup> plaintiff submitted an "application for credit restructuring, moratorium and financial support" to the defendant and provided its "turnaround plan" by a letter dated 15.1.2000. The future projects by the 1<sup>st</sup> plaintiff were in Sarawak and required the very equipment which formed the subject matter of the HP Agreements. The 1<sup>st</sup> plaintiff sought the consent of the defendant to transfer the same to Sarawak and letters to that effect were issued by the defendant to the Road Transport Department and the Customs Department.

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not be imposed on the plaintiffs in the same manner they were imposed on and applied to public officers. In light of this decision, readers are advised to be cautious when entering into contract with government through its employee and should insist on sighting the requisite letter of authorization to verify that such employee was duly authorized to make a contract that is binding and enforceable against the government.

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<sup>i</sup>[2010] 8 CLJ 592

<sup>ii</sup>[2008] 1 CLJ 123

The 1<sup>st</sup> plaintiff subsequently defaulted in the repayment terms of the restructuring proposal. The defendant notified the 1<sup>st</sup> plaintiff of its intention to repossess all 29 equipments "unless all the arrears owing under the HP Agreements are settled in full before 16.12.2002". In 2003, the defendant repossessed six excavators and the remaining equipments were eventually repossessed. The defendant attempted to enforce the summary judgment vide garnishee proceedings but was unsuccessful. The plaintiffs then took out this action for declaratory reliefs, *inter alia*, that the HP Agreements and the summary judgment had been restructured into new hire purchase agreements pursuant to the 1<sup>st</sup> plaintiff's proposal made vide letter dated 15.1.2000.

Now, when a party sues upon an outstanding sum, the principle of merger operates in that the sum or debt will merge with the judgment once the judgment is obtained in the party's favour. That debt becomes what is known as a "judgment debt". However, a successful litigant can always on its own volition expressly or by conduct or from correspondence exchanged between the parties waive the rights to enforce that judgment.

The High Court found that the HP Agreements and the judgment debt secured through the summary judgment had been restructured into new hire purchase agreements. The correspondences revealed, among others, the stand taken by the defendant which showed the defendant to have accepted the 1<sup>st</sup> plaintiff's proposal that the HP Agreements be restructured into new hire purchase agreements, the defendant reclassifying the accounts as 'performing' and the defendant

demanding for installment arrears instead of the full sum under the summary judgment. All these pointed to the inevitable conclusion that the judgment debt in the summary judgment had been restructured into new hire purchase agreements.

It would be unfair, unjust and inequitable to allow the defendant to go back on the assumption and understanding set out in the proposal and insist on its legal rights under the summary judgment. The doctrine of estoppels precluded the defendant from invoking the summary judgment. Significantly, whilst the summary judgment was procured against all the

plaintiffs, the proposal to restructure the HP Agreements did not indicate whatsoever the role to be played by the guarantors, Thus, the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs were discharged.

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[2010] 5 AMR 649

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## CONTRACT LAW / COURT PROCEDURE

### DON'T DELAY IN FILLING SUIT FOR LATE DELIVERY CLAIM !

That was the message crying out loud in the High Court decision in *Faber Union Sdn Bhd v Goodaim Realty Sdn Bhd*<sup>i</sup>. The plaintiff claimed against the defendant for damages for non-delivery of vacant possession of an apartment purchased by the plaintiff from the defendant vide a sale and purchase agreement dated 21.6.1984 (SPA). Under the SPA, the vacant possession of the apartment was to be delivered to the plaintiff within 36 months from the date of the SPA, which was 20.6.1987. Any delay in the delivery would attract liquidated damages calculated at the rate of 8% per annum of the purchase price. The plaintiff filed the suit on 19.11.1993. The defendant resisted the suit by raising time bar as a defence, contending that the limitation period of six years<sup>ii</sup> commenced from the date of accrual of the cause of action (ie. the date of breach of SPA) which was the due date of delivery of vacant possession that fell on 20.6.1987. The last date to file the action against the defendant ought to be 20.6.1993. Thus, the plaintiff's suit filed after that date was time-barred. The plaintiff's reply was that its cause of action arose on the date the vacant possession was actually delivered to the plaintiff and relied on the Supreme Court case of *Loh Wai Lian v SEA Housing Corporation Sdn Bhd*<sup>iii</sup>. The plaintiff also relied on a letter from the defendant dated 9.11.1990 to aver acknowledgment of liability on the part of the defendant of the plaintiff's claim and pursuant to s.26(2) of the Limitation Act 1953, such

acknowledgment of claim resulted in the right of action to be accrued on and not before the date of acknowledgment. Such argument if upheld would mean that the last date to file the action was 8.11.1996 which rendered the plaintiff's suit within the six-year limitation period.

The High Court judge ruled in favour of the defendant on both counts. Firstly, with regard to the accrual of cause of action, the relevant provision governing late delivery of vacant possession of the apartment in the instant case contained wordings quite similar to that in the Supreme Court decision of *Insun Development Sdn Bhd v Azali Bakar*<sup>iv</sup>:

“...if the vendor fails to deliver vacant possession of the premises in time the vendor shall pay to the purchaser liquidated damages to be calculated from day to day at the rate of eight per centum (8%) per annum of the purchase price.”

The relevant provision in *Loh Wai Lian*'s case stated that:

“Provided Always that if the said building is not completed and ready for delivery of vacant possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date *to the date of actual completion and delivery of possession of the said building to the purchaser.*” (emphasis added)

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The contractual formula for the computation of liquidated damages in *Loh Wai Lian's* case thus provided not only the *terminus a quo* (the opening date) for the calculation of damages but also the *terminus ad quem* (the closing date) which was the date of the delivery of vacant possession of the property concerned. Such formula had the effect of displacing the general rule that the purchaser's right to sue for damages accrued on the date of breach of the sale and purchase agreement, which meant the six-year period in such contract would accrue on the date of actual delivery of vacant possession of the property. However, in the instant case, as we can see from the above, there was no provision for a closing date and thus, the principle in *Insun ie.* the general rule would apply. The defendant's liability to the plaintiff arose on 21.6.1987, the last date to file the suit for the purported breach of the SPA was 20.6.1993 and the plaintiff's suit filed on 19.11.1993 was outside the time limit.

As to the contention on revival of cause of action by virtue of acknowledgment of debt by the defendant, the wordings of the letter from the defendant to the plaintiff's solicitors read as follows:

"With regards to the compensation on late delivery, we wish to inform that we are in the midst of restructuring exercise

and all claims on compensation for late delivery will be attended to upon completion of the said exercise. We anticipate that it will take several months and hope that your client will bear with us until completion of the exercise."

Applying the principle in *Wee Tiang Teng v Ong Chong Hooi & Anor*<sup>i</sup> that for there to be an acknowledgment of a claim within s.26(2) of the Limitation Act 1953, there must be an admission that there was a debt or other liquidated claim outstanding and unpaid, the said letter was at best an acknowledgement by the defendant that a claim had been made against them but did not amount to an acknowledgement of liability or indebtedness.

The plaintiff's claim was therefore dismissed with costs.

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<sup>i</sup>[2010] 8 AMR 393

<sup>ii</sup>under s.6 of the Limitation Act 1953.

<sup>iii</sup>[1987] 1 MLJ 1

<sup>iv</sup>[1996] 2 AMR 2180

<sup>v</sup>[1978] 2 MLJ 54

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false, shall be punished with imprisonment for a term which may extend to two years, and shall also be liable to fine."<sup>ii</sup>

## CRIMINAL LAW / LEGAL PROFESSION

### 1<sup>ST</sup> KNOWN CASE CHARGING A LAWYER OF ABETTING HIS CLIENT TO MAKE FALSE CLAIM

Dishonestly making a false claim in court which one knows to be false is a criminal offence. There is a specific provision in Penal Code (PC) in both Malaysia and Singapore jurisdictions, ie. s.209, concerning such an offence. The provision in the Malaysian PC states:

"Whoever fraudulently, or dishonestly, or with intent to injure or annoy any person, makes before a Court any claim which he knows to be

In the recent Singapore Court of Appeal decision in *Bachoo Mohan Singh v Public Prosecutor and another matter*<sup>ii</sup>, it was the lawyer acting for a litigant in a civil suit who was charged and convicted by the District Court and the High Court under the said provision read with s.109 of the PC for abetting (by aiding) his client to dishonestly make a false claim in court. One Mr Koh and his wife (the Sellers) had orally agreed to sell their flat (the Flat) to the buyers for \$390,000. However, the selling price stated in the Option to Purchase (OTP) was an inflated sum of \$490,000 which was, according to the Buyers' version, the result of an agreed "cash-back arrangement", under which the excess \$100,000 was to be returned to the Buyers on completion of the sale. The Sellers, however, adamantly denied having ever agreed to the

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purported cash-back arrangement. Koh became perturbed about the regularity of the transaction and approached BMS, an advocate and solicitor for advice. According to BMS, Koh's instruction to him was that Koh was not a party to the cash-back arrangement (which was illegal under the Singapore law) and came to learn about it only later. The Buyers eventually called off the purchase. The Sellers subsequently managed to sell the Flat at \$380,000 and instructed BMS's firm to file a writ of summons endorsed with a statement of claim (SOC) which referred to the OTP and pleaded the selling price on the OTP of \$490,000 but omitted to mention the orally agreed sale price of \$390,000. The SOC did not quantify the claim for damages. Ultimately, the Buyers and Sellers agreed to settle the dispute out of court and the Sellers' action was withdrawn without any defence being filed by the Buyers. BMS was then charged and convicted under the aforementioned sections.

Several questions of law of public interest relating to how the said s.209 should be construed and the scope of lawyers' duties to verify their client's instructions were then posed to the apex court in Singapore. The Court of Appeal in a lengthy judgment and by a majority of 2 to 1 came to the conclusion that BMS's conviction was wrong in law and ought to be, and was indeed ordered to be, set aside. In doing so, the court provided answers to define and clarify the ambit of the said section in probably the first known case in the Commonwealth's legal annals in relation to s.209 of the PC.

Firstly, the word "claim". It was held that for purposes of s.209 of the PC, a "claim" referred to the relief or remedy sought from the court, as well as the grounds for obtaining that relief or remedy. A "claim" might also be said to be a cause of action. It also included the defences adopted by a defendant. A claim was "made" at the close of pleadings for actions commenced by way of writs and when affidavit evidence was filed in court as directed for actions commenced by way of originating summonses (OS). If an action was settled before the close of pleadings (for writ actions) or before affidavits were filed as directed (for OS actions), no "claim" was "made" for the purposes of s.209. Where only part of the action was settled or the defendant submitted only to part of the action, a claim would be "made" at or after the close of pleadings stage or the filling of affidavits, as the case might be. On the facts of the case before the court, given that a settlement

was reached shortly after BMS filed the SOC and the action was discontinued before any defence was filed, it was not possible to say that a "claim" had been "made" for the purposes of s.209 of the PC.

Secondly, to succeed under s.209 of the PC, the prosecution must establish that the claim was "false" beyond a reasonable doubt and that the accused knew it was false.

Thirdly, where arguments of fact were concerned, a claim was "false" within the meaning of s.209 of the PC only if it was made without factual foundation. Where questions of law were involved, it could not be said that the claim made by the plaintiff or the defendant (as the case might be) was false, for it was always open to a litigant to make arguments of law. And the test for falsity was not confined to the pleadings but had to take into account the wider factual context; this necessarily included facts not revealed in the pleading itself. The real issue was whether the litigant's action had a proper foundation which entitled him to seek judicial relief.

Fourthly, whilst a solicitor should decline to accept instructions and/or doubt his client's instructions if they plainly appeared to be without foundation (*eg*, lacking in logical and/or legal coherence), there was no general duty on a solicitor to verify his client's instructions with other sources except where such instructions were inherently incredible or logically impossible, or unless there was compelling evidence to indicate that they were dubious. The fact that the opposing parties disputed the veracity of his client's instructions was not a reason for him to disbelieve or refuse to act on those instructions, and a solicitor should not be faulted if there was no reasonable means of objectively assessing the veracity of those instructions.



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Here, since the Sellers had an OTP which stated the selling price as \$490,000, their claim could not be said to be devoid of any factual foundation. Neither did BMS know the claim was false as BMS accepted his clients' version of events that they had not participated in the cash-back arrangement from the outset. There was also no objective evidence that BMS had actual knowledge that Koh was involved in the cash-back arrangement from the beginning. Koh's instructions to BMS were neither inherently incredible nor logically impossible. It could not be obviously or objectively concluded by a reasonable solicitor that Koh's instructions were false. There was no compelling circumstances that ought to have prompted BMS to investigate further

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## DIGEST OF EMPLOYMENT LAW CASES

### 1. MERE REORGANIZATION WITHOUT MORE DOES NOT PROVE REDUNDANCY

In *Robert Henry Hawkins v Rusch Sdn Bhd & Rusch Asia Pacific Sdn Bhd*<sup>i</sup>, the claimant was a British expatriate employed as a Managing Director by Rusch Sdn Bhd which had a factory in Taiping. He was also the MD of Rusch Asia Pacific Sdn Bhd based in Penang and took care of Rusch Manufacturing Sdn Bhd which had a second factory in Taiping. Rusch Asia Pacific Sdn Bhd was the parent company of the other two Rusch companies and was linked to Rusch GMBH in Germany. In 1989, an American company called Teleflex purchased the German company and became the holding company of the three Rusch Malaysian companies. The claimant had been employed on a fixed term contract beginning 1985 which had been renewed for 8 times in the past 19 years without a break until he was terminated on the ground of redundancy. The acquisition by Teleflex allegedly resulted in redundant commercial distribution units in Malaysia and other countries, hence the decision to close down these units and move its operations to Singapore. It entailed the closure of Rusch Asia Pacific Sdn Bhd and retrenchment of the claimant. However, there was no evidence that the operations of the other two Rusch companies which had factories in Taiping were affected. Unsurprisingly, the Industrial Court held that the companies had failed to discharge the burden of proving redundancy. In this respect, it was not sufficient to show mere reorganization. They had to show that

or required BMS to verify his clients' instructions with any other person, and there was no objective or neutral party with whom BMS could verify his instructions. Given the circumstances, it could not be fairly said that BMS knew or was willfully blind to the circumstances constituting the offence.

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<sup>i</sup>The Singapore provision is *in pari material* with the Malaysian provision except the word "Court" in the latter which read as "court of justice" in the former.  
<sup>ii</sup>[2010] 4 SLR 137

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the workload of the claimant had not remained the same. On the contrary, the position in the said two other companies had been kept vacant and were then filled by a local.

On the issue of compensation, the contract given to the claimant was a straight-forward fixed term contract and had not had any retirement age. There was no evidence to show that the employer had intended to give any permanency of employment to the claimant. The claimant had worked on an employment pass. Just because the contract had been renewed without a break could not by itself convert a genuine fixed term contract into a permanent one. Something more need to be shown<sup>ii</sup> as in *Han Chiang High School v National Union of Teachers in Independent Schools, W.Malaysia*<sup>iii</sup>. It was therefore equitable that the compensation be based only on the unexpired term of the contract which was 15 months. The claim for compensation *in lieu* of reinstatement which would have been one-month salary for each of his 19 completed years of service was disallowed. However, the court took cognizant of the benefits-in-kind in the remuneration package and the equivalent value of such benefits like annual flight back to UK for the claimant and his family members, accommodation, servant, utilities usage and company car usage was taken into account in computing the true remuneration of the claimant.

### 2. DRASTIC REDUCTION OF JOB SCOPE AMOUNTING TO DEMOTION

In *Mohd Fairuz Bala Abdullah v Hwa Tai Industries Berhad*<sup>iv</sup>, the claimant was employed as the Production Manager at the branch of the

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company in Kota Kinabalu (KK). He was then re-designated to become Regional Manager, East Malaysia and given an upward salary revision. Two years later, the company's branch in KK commenced operations under a new entity called Hwa Tai Food Industries (Sabah) Sdn Bhd (HTFIS), a subsidiary of the company, which continued to be the claimant's employer. Six years later, the claimant was informed that his job functions would be changed, that he would be responsible for the production and factory administration for only HTFIS under a purported organizational restructuring exercise to streamline the operation and improve efficiency and that his current entitlement to a company car, a petrol card and a hand-phone would be withdrawn. The claimant protested on his changed job functions which resulted in a drastic reduction of his job scope and the withdrawal of his benefits. The claimant claimed constructive dismissal and succeeded.

Unlike the facts in *Shahabudin Abdul Rashid v Talasco Insurance Sdn Bhd*<sup>v</sup> where there was a major management reorganization (reduction of 4 divisions to 2 major functions) and the claimant therein was re-designated without any change in his duties, the purported reorganization in the instant case involved only the claimant and his job functions were drastically reduced from being overall in charge of the entire East Malaysian operations involving marketing, sales and distribution functions to only being in charge of production and factory administration. In substance, therefore, the unilateral change in the claimant's job functions amounted to a demotion. There had been a clear breach by the company of fundamental terms of the claimant's contract of employment which justified him leaving his employment and claiming for constructive dismissal.

### **3. LIFTING OF CORPORATE VEIL TO ASCERTAIN THE REAL EMPLOYER**

The 1<sup>st</sup> claimant in *Bates (M) Sdn Bhd / AMS Dorland Intergrated Sdn Bhd v Quah Lian Gaik & Anor Case*<sup>vi</sup> was employed by Bates (M) Sdn Bhd (Bates) as the Creative Group Head. She was requested to work on the Malaysian Tobacco Company (MTC) account in Bates.

The 2<sup>nd</sup> claimant was a Creative Director employed by Bates but stationed in One Four One (M) Sdn Bhd (141), a subsidiary of Bates. His salary throughout his employment was paid by Bates.

In late December 1997, the 1<sup>st</sup> claimant was informed by the Group Account Director of Bates that she would be moved down to the office of AMS Dorland at level 5 which was the same floor 141 was located. In mid-1998, both the claimants were given a letter of resignation from Bates and a letter of appointment by AMS Dorland, both letters having been prepared by the Finance cum Human Resources Officer of Bates. AMS Dorland was not a subsidiary of Bates but the letterhead of the appointment letter from AMS Dorland had shared the same logo as Bates and had represented AMS Dorland as "A Bates Worldwide Company".

In December 2000, the claimants were informed by the Executive Creative Director cum President of Bates that MTC could not afford them and their services were terminated. The claimants disputed the genuineness of the retrenchment exercise. In its defence, AMS Dorland stated that it had 'lost' the MTC account and had no choice but to wind down its business, hence the termination pursuant to the retrenchment exercise. The claimants contended that Bates, AMS Dorland and 141 had been multiple employers of the respective claimants and ought to be made jointly and severally liable for their unfair dismissals. They urged the Industrial Court to lift the corporate veil.

Several factors were taken into account by the Industrial Court in favouring the claimants. It was Bates, through its Finance cum Human Resources Officer, which had initiated the whole process of staff transfer. Both the claimants and AMS Dorland's witness testified that they had not needed to go through an interview to be employed by AMS Dorland. Under the employment of AMS Dorland, the 2<sup>nd</sup> claimant had remained in the same office where he had worked when he was in 141. The corporate relationship between Bates and AMS Dorland had pointed to a unity of enterprise. The majority stake in AMS Dorland was held by Chafma BV which was also a substantial shareholder of Bates. There were two common directors in Bates and AMS Dorland. The telephone lines had been inter-connected between all the companies within the Bates group listed in the master phone list. The payment of the claimants' salaries was made by Bates even after their transfer to AMS Dorland and Bates paid the retrenchment benefits to the 2<sup>nd</sup> claimant. The involvement of the directors of Bates in the retrenchment exercise of the claimants by AMS Dorland and the retrenchment form issued by

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Bates negated the contention that Bates and AMS Dorland were separate legal entities with separate operations. Despite being under AMS Dorland, the 1<sup>st</sup> claimant's work had been reviewed by the senior management of Bates, which showed that Bates had the ultimate control over the productivity and quality of the 1<sup>st</sup> claimant's work. Several memos issued by Bates established Bates' continuing interest and involvement in the MTC account and the affairs of AMS Dorland as well as the claimant's employment in AMS Dorland. For all intents and purposes, the evidence adduced had shown that all management decisions of AMS Dorland had in fact been undertaken by Bates.

Further, there was no evidence offered by AMS Dorland to support its case of redundancy. Other than the claimants, the rest of AMS Dorland's staff had not been retrenched but relocated either to Bates or 141. The promotion works which the claimants had been working on were continuously carried out after their retrenchment by the creative team in Bates/141. As such, AMS Dorland had failed to show a legitimate redundancy situation. The corporate veil was lifted and Bates was held, in reality, as the actual employer of the claimants as it had continued to have actual control over the manner in which the MTC account was to be operated. On the facts and evidence, the MTC account had never been lost by Bates. Bates, 141 and AMS Dorland were held to be multiple employers for the claimants and were jointly and severally liable for their unjust dismissals.

#### **4. LEGITIMATE EXPECTATION OF LONG SERVICE GRATUITY**

In *Azizah binti Abu Bakar v Malaysia Building Society*<sup>vii</sup>, the appellant/plaintiff worked with the respondent/defendant company for almost 35 years before retiring in September 2004. Clause 6 of her letter of employment stipulated :

"No bonus shall be payable but the Society has a present scheme to pay its confirmed employees annually a New Year Gratuity equivalent to half-month's basic salary. There is also a scheme to pay its employees a Long Service Gratuity on completion of every five years service."

On 31.12.1993, the respondent revised the long service gratuity scheme which was replaced as follows:

"On retirement at the normal retirement age (55 years for both male and female), the employee concerned be recommended for a lump sum payment not exceeding 10% of each of his/her actual basic monthly salary earned during his/her period of service with the Society. If there is a break in service, service before that break shall not be taken into account for the purpose of calculating the gratuity."

Between 1998 to 2003, the respondent suffered huge financial losses which resulted its decision on 29.1.2004 to withdraw the payment of service gratuity. The employees including the appellant were informed of this decision. Upon her retirement, the appellant wrote to claim for her long service gratuity but the respondent refused on the ground that such payment was at the discretion of the respondent and the scheme had been withdrawn. The appellant sued the respondent in the Sessions Court. Dissatisfied with the Sessions Court's decision which dismissed her claim, the appellant appealed to the High Court.

The High Court allowed her appeal. Evidence was led that when the scheme was revised in 1994, the respondent had made a representation to the appellant that she was entitled to the retirement scheme. It was held that the respondent was not entitled to unilaterally withdraw the said scheme without the appellant's consent. The respondent's reliance on several provisions in the HR Manual to contend that the payment of retirement gratuity was at the management's absolute discretion was not sustainable in the absence of evidence that a copy of the HR Manual was given to the appellant. The court went further to hold that the appellant had a legitimate expectation that the service gratuity would be paid in view of the practice and custom of the respondent making such payment since 1970 till 2004 and no staff was ever denied such benefit except those who were found guilty of misconduct. The appellant thus succeeded in her claim.

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## 5. WORKING FOR 9 MONTHS AND GET 18 MONTHS BACKWAGES !

Yes, incredible but true --- that was what the claimant was awarded in the Industrial Court case of *Nooraizan Mohd Tahir v Takaful Nasional Berhad (Now known as Etiqa Takaful Berhad)*<sup>viii</sup>. The claimant was employed by the company as a Branch Manager in Kuching. Her probation of six-month was extended for another three months allegedly due to unsatisfactory performance. Her performance during the extended probation period was to be monitored and a progress report was to be made. A week before her progress performance was to be assessed, she was informed that she would not be confirmed and her employment was accordingly terminated in September 2003, on the ground of dissatisfaction with her performance during the probation period. She challenged her dismissal as without just cause or excuse.

In allowing her claim, the Industrial Court interfered with the targets set by the company for the claimant. Whilst recognizing that the courts would be very slow to comment on whether targets set by a company had been reasonable or not, where a challenge was put forth that such targets had been too high or unrealistic or that the targets had been used to stifle an employee's legitimate achievement, the court would be duty bound to enquire how such targets had been set. On the facts, the target of 264% set by the company when its usual target had been 15% to 20% of the previous year's production had obviously been unreasonable. Requiring a probationer to achieve 100% production target and terminating her services for failing to do so, whilst other confirmed employees would have suffered less damaging consequences if they had likewise failed to meet their target, had been drastic.

Further, it was not clear whose responsibility it had been to recruit replacement staff but the company was aware of such shortage and the claimant had not been getting the support she needed from the Human Resources Department of the company to replace the two key marketing staff who had resigned. The company also failed to discuss the appraisal with her in violation of its own guidelines and had acted unilaterally. In any case, no evidence was produced on appraisals or assessments of her performance for the first six months. It would also appear that the company had appraised her almost solely on her production targets and statistics without taking into account her

other functions and responsibilities (eg. to run and operate the branch in compliance with the company procedures) in respect of which the company did not take issue. On the totality of evidence, the Industrial Court concluded that the company had failed to prove that it had terminated the claimant's employment with just cause or excuse.

On remedy, evidence led showed that the claimant was holding irregular jobs for over three years after her dismissal (3-year Period) and finally got a permanent job in April 2007. The court awarded 18 months backwages, with some deductions of the irregular income she had earned during the 3-year Period and 10% deduction on account of her contributory 'misconduct' in not doing her part fully to 'push' the company more to fill up the two vacancies, knowing that the target depended substantially on getting them.



## 6. AN EMPLOYEE FIRST AND A UNION OFFICIAL SECOND

That was the message emanated from the Industrial Court decision in *Kandu Anak Sugang & Anor v Trienkens (Sarawak) Sdn Bhd*<sup>x</sup>. Both the claimants were respectively employed as a driver and a loader by the company. They were respectively the President and Secretary of the Kesatuan Pekerja-Pekerja Trienekens (Sarawak) Sdn Bhd (Union). The company decided to hold a Family Day for all its employees and attendance was compulsory. Pursuant to a meeting held a few days before the event, the Union decided that all union members would not attend the event. The 2<sup>nd</sup> claimant then issued a circular to all Union members urging them to boycott the function. On the day of

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the function, a large number of employees and their families were absent. The company conducted an investigation which resulted in charges proffered against the two claimants for instigating the Union members to boycott the function in breach of their duties to the company. The claimants were found guilty at the domestic inquiry which recommended the punishment of written warning. However, the company decided to sack them on the purported ground that their misconduct was serious. The claimants lodged a wrongful dismissal claim, the principal contention being that they were acting in their capacities as the office bearers of the Union and they ought not to be dismissed because of their union activities, citing s.4(1) and s.5(1)(d)(ii) of the Industrial Relations Act 1967 in support<sup>x</sup> (the Union Activity Contention). Thus, they could not be said to have committed any misconduct.

The court found that the words used in the circular had been that of a rally call and were angry, fiery, inflammatory, confrontational and emotive words. Evidence showed that the absentees had quoted the circular as the reason for their non-attendance. Applying the dictionary meaning of the word “instigation”, to wit “to bring something about or initiate; to incite someone to do something”, the acts of the claimants in writing and preparing the circular together with the words used therein had tantamounted to them instigating and inciting the Union members to boycott the Family Day. The court further ruled that the Family Day was an official function organized as a show of appreciation to the employees to foster goodwill and friendship amongst them and to promote industrial harmony. The acts of instigation were clearly covered by the provisions on “failure to obey and comply with all orders and directions given by the Company” and “...to faithfully observe all the rules and regulations, procedures, practices and arrangements of the Company for the time being in force”, “...fail(ed), to faithfully and diligently accept such responsibility as may from time to time assigned to (them) by the Company”. Their acts had breached the requirement “...at all times, to endeavour to the utmost of (their) ability to promote and advance the interest of the Company.” All such breaches rendered the employees liable to dismissal. The court frowned upon employees who did not participate in or tried to disrupt the official functions organized by the employer.

As to the Union Activity Contention, as much as a workman had the right to be involved in legitimate union activities, his employer also had the right to demand him to perform his duties and responsibilities with conviction and diligence. In engaging himself in union activities, the workman must at the same time ensure that his fundamental duty as a workman to his employer was not derelict. In the circumstances of the case, despite the fact that the claimants had acted pursuant to the directions of the Union, they could not claim immunity for their actions if such actions had tantamounted to acts of misconduct.

On the type of punishment, based on authorities, the company was not bound by the recommendations of the domestic inquiry panel. The conduct of instigating the boycott of the function was a serious misconduct for which a warning was manifestly inadequate and which justified dismissal. The claimants’ allegation of victimization in that the other employees who had failed to take part were left off the hook was rejected by the court on the ground that the others were mere followers and that the act of instigating a boycott was a far more serious misconduct than non-participation.

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<sup>i</sup>[2010] 4 ILR 175

<sup>ii</sup>Examples like the term on re-engagement unconditionally if there was no violation of the Rules and the stipulation of retirement age, as in *Han Chiang’s* case.

<sup>iii</sup>[1988] 2 ILR 611

<sup>iv</sup>[2010] 4 ILR 200

<sup>v</sup>[2004] 4 CLJ 514

<sup>vi</sup>[2010] 4 ILR 436

<sup>vii</sup>[2010] 8 AMR 749

<sup>viii</sup>[2010] 4 ILR 520

<sup>ix</sup>[2010] 4 ILR 558

<sup>x</sup>S.4(1) reads: “No person shall interfere with, restrain...a workman...in the exercise of his rights...to participate in its (a *trade union*) lawful activities.” S.5(1)(d) reads: “No employer...shall...dismiss...a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman...participates in the promotion, formation or activities of a trade union.” However, subsection (2)(a) of the same section states: “Subsection (1) shall not be deemed to preclude an employer from...suspending, transferring, laying-off or discharging a workman for proper cause.”

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**YOUR WORDS AGAINST MY WORDS**

What should be the yardstick to evaluate the evidence in a criminal case where the entire prosecution's case rests on the testimony of a single witness (*ie.* the complainant) and where the only possible defence is a bare denial (Situation)? The High Court in Singapore faced such Situation in hearing an appeal from the District Court by the accused against his conviction of four counts of outraging the modesty of a female Indonesian domestic worker (the maid) in his home in the case of *AKD v Public Prosecutor*<sup>1</sup>.

In the first charge, the accused was charged with rubbing his left cheek against the maid's right cheek and placing his penis against the back of her body while he was squatting behind her with his legs parted and wrapped around her back in the course of repairing the water pipe located below the sink at the wall in the back of the kitchen cabinet. In the second and third charge, he was accused of touching the maid's left breast on two separate occasions which were about four months apart. As to the fourth charge, he was accused of hugging the maid and touching her left buttock two months later. The maid only complained about such acts of molest a month thereafter, to the Indonesian Embassy when she was brought there to renew her passport.

The accused flatly denied the accusations of act of molest. He highlighted the maid's motive in making the complaints. He claimed that she was unhappy for being constantly scolded at by his wife; for his rejection of her request to return to Indonesia for two weeks to celebrate Hari Raya and when he refused to give her his laptop for free.

In Situation as posed at the outset, the High Court reiterated the approach propounded by Yong Pung How CJ in *Tang Kin Seng v PP*<sup>ii</sup> that the trial judge must examine critically the evidence of the complainant and consider every possibility. Evidence for both sides was to be analyzed to determine whether the evidence of the complainant was 'unusually convincing' or 'so reliable that a conviction based solely on it was not unsafe'. If it was not, it was necessary to identify which aspect of it was not so convincing and for which supporting evidence was required or desired. In assessing the supporting evidence, the question was whether such

evidence made up for the weakness in the complainant's evidence. All these would have to be done in the light of all the circumstances and all the evidence, including the defence evidence, as well as accumulated knowledge of human behaviour and common sense.

To the learned Judge's mind, the trial judge had failed to consider equally plausible explanations that favoured the accused's version. Aspects of the maid's evidence were not satisfactory, particularly the seemingly impossible physical positions described by the maid in relation to the first charge and the physical improbability of the accused reaching all the way around her from behind with his right hand to touch her left breast in relation to the second charge. It was also unlikely that the accused would conduct himself in such a vulgar manner openly in his home when his wife and children were all at home. There was improbability with respect to the third charge---if the maid had been previously molested twice before, it was difficult to believe that she would put herself in one-on-one situation with the accused in the dead of night. As to the fourth charge, given the three separate incidents of molest, it was incomprehensible how the maid could have allowed her perpetrator to be left alone in the bedroom with her and subsequently allowed him the opportunity to touch her again in close proximity. Indeed, the maid's inaction (in not putting on guard in the third and fourth incidents) leading to the purported touch was detrimental to the overall probability of her evidence.

The only possible corroborative evidence was a letter written by the maid to the neighbour but that was, in the view of the learned Judge, not sufficient to outweigh the problems with the maid's own evidence. The numerous inconsistencies and incoherent and incredible nature of the maid's evidence, although taken individually might not have affected the validity of the conviction, when considered in their entirety, made the conviction unsafe. The accused was thus acquitted.

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<sup>1</sup>[2010] 4 SLR 1029

<sup>ii</sup>[1996] 3 SLR(R) 444

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**WHEN DOES LIMITATION PERIOD AGAINST GUARANTOR START TO RUN?**

The plaintiff bank granted credit facilities to the principal borrower. The facilities were secured by a guarantee agreement executed by the defendants. Upon default of the principal borrower in the repayment of the facilities, the plaintiff issued a letter of demand dated 25.10.1996 to the principal borrower, giving it 14 days (grace period) to settle the outstanding sum. The principal borrower failed to do so whereupon the plaintiff commenced an action against it and the defendants (guarantors) (the Original Action). Default judgment was entered against the principal borrower but the action against the guarantors was struck off for want of prosecution. Thereafter, the plaintiff issued a letter of demand dated 10.3.1997 against the defendants. Upon their failure to settle the sums claimed, the plaintiff filed a suit against the defendants.

The above were the brief facts in the case of *EON Bank Bhd (previously known as Oriental Bank Bhd) v Mohd Yunus bin Alias & Ors*<sup>i</sup>. The defendants contended that the plaintiff's suit (filed on 18.2.2003) was time-barred under s.6 of the Limitation Act 1953 for it was more than six years from the accrual of the cause of action against them. They submitted that the cause of action accrued when the principal borrower failed to pay at the expiry of the grace period on 8.11.1996. It was argued that by virtue of the 'principal debtor clause' in the guarantee agreement, the guarantors were also principal debtors. That being so, limitation period against the guarantors would also start to run from the date the cause of action against the principal borrower accrued. The six-year period would have expired on 7.11.2002. In response, the plaintiff relied upon 'on-demand' clause in the guarantee agreement and express provision in the guarantee agreement that time provided in law for recovery should not run until a demand had been made. The demand against the guarantors having been made on 10.3.1997, it was upon the failure to pay on this demand that the cause of action against the defendants accrued. The six-year period on such basis would therefore only expire on 9.3.2003 and the suit was filed within the six-year period.

The High Court held that the 'principal debtor clause' was intended to allow the creditor the right to sue the guarantors in the event of a default without requiring the creditor to first seek recourse against the principal borrower. The creditor might sue both the principal borrower and guarantors as principal debtors at the same time, but it did not mean that a demand to the principal borrower was to be construed as a demand on the guarantors. In the learned Judicial Commissioner's view, a separate and specific demand must be made on the guarantors and it was upon the failure to pay on that demand that the cause of action against the guarantors accrued. Thus, the letter of demand dated 25.10.1996 could not be construed as one issued also to the guarantors by reason of the 'principal debtor clause'. The plaintiff's cause of action was founded on the defendants' default in relation to the letter of 10.3.1997 and not by reason of the defendants' default as principal debtor. Therefore, the claim against the defendants was not time-barred.

A note of caution is that the defendants did not adduce any evidence on the existence of a prior letter of demand against them (if any) which formed the foundation of the Original Action. If such evidence were to be made available, then time would have begun to run from the earliest date on which the creditor could have brought an action ie. the expiry of the grace period (if any) stipulated in the prior letter of demand or the date of the prior letter of demand, as the case might be --- see *Joseph Thambirajah v Bank Buruh (M) Bhd*<sup>ii</sup> and *Nik Chee Kok @ Nik Soo Kok v Public Bank Bhd*<sup>iii</sup>.

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<sup>i</sup>[2010] 9 MLJ 587

<sup>ii</sup>[2008] 2 MLJ 773

<sup>iii</sup>[2001] 2 AMR 1620

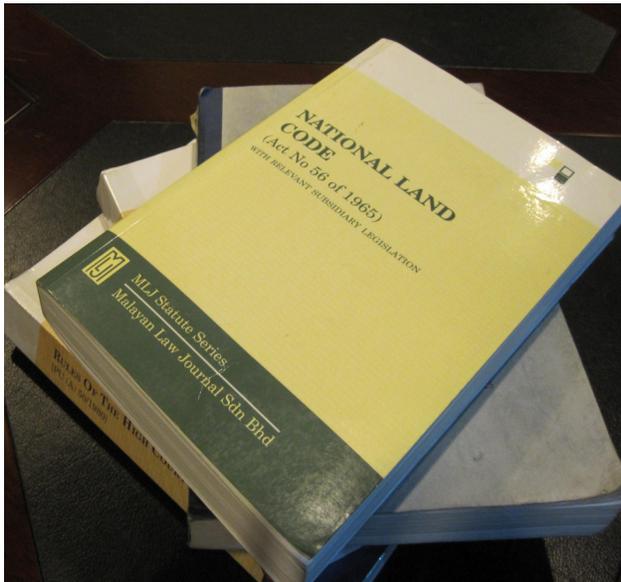
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## LAND LAW / PUBLIC AUTHORITIES

### THE BUG STOPS HERE --- GOVERNMENT LIABLE FOR 'FRAUD' IN LAND OFFICE

There shall be no immunity from liability to the land registry for not keeping a true and proper register of land titles which resulted in the public suffering losses arising from reliance on the information stated in such register. This is in essence the lesson to be learnt by public authorities, particularly land offices in our country, from the High Court decision in *Poh Yang Hong v Ng Lai Yin & Ors*.



The facts are fairly straightforward. The plaintiff entered into a sale and purchase agreement with the 1<sup>st</sup> defendant to buy a piece of land (the Land). He conducted an official land search at the land registry of the 2<sup>nd</sup> defendant (Registrar of Land Titles, Kuala Lumpur) which confirmed that the 1<sup>st</sup> defendant was the registered proprietor of the Land. In reliance on such information, the plaintiff paid the 1<sup>st</sup> defendant the full purchase price. Thereafter, he went to the Land and to his horror, found out that a 3<sup>rd</sup> party occupied the Land and claimed ownership of the Land. The plaintiff then did another search and this time, it showed the Land to belong to the 3<sup>rd</sup> party! The 1<sup>st</sup> defendant having disappeared, the

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plaintiff sued the 1<sup>st</sup> defendant for fraud and the 2<sup>nd</sup> defendant and its employer, Government of Malaysia as the 3<sup>rd</sup> defendant, for breach of statutory duty and negligence in failing to keep a true and proper register of land titles.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants disputed liability and sought to rely on the immunity and protection afforded under s.22 of the National Land Code 1965 (NLC) which provided that:

“No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, performance of any duty, conferred or imposed on him by or under this Act.”

The learned Judicial Commissioner rejected such contention. He found that it was the duty of the 2<sup>nd</sup> defendant to ensure and maintain a system of land registration that was accurate, reliable and trustworthy so that the public did not have to go behind the title to find out how a person had become the registered owner of the land concerned. This was indeed the whole purpose of the Torrens System of land registration used in our country<sup>ii</sup>. It was not open, and indeed it would defy logic, for the 2<sup>nd</sup> defendant to take shelter under the said s.22 under the ‘good faith’ protection, when two official searches on the same piece of land had yielded two different results. In his opinion, there must be hanky-panky involving the 1<sup>st</sup> defendant and the staff of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. The ‘fraud’ was something perpetrated with the help of people inside the land office. Effect must be given to s.386 of the NLC which reads:

“Any purchaser of any alienated land...who suffers any loss or damage by reason of any error in, omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of section 434.”

Public servants must be held accountable for the misdeeds of those under them. The 2<sup>nd</sup> and vicariously, the 3<sup>rd</sup> defendant were in breach of its

statutory duties under the NLC and negligent in and about the performance of statutory duty in the maintenance of the records of particulars of lands as registered with the Land Registry Wilayah Persekutuan, Kuala Lumpur. The plea of fraudulent title and the fraud of any third party could not constitute a defence to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Compensation as equivalent to the full purchase price of the Land of the sum of RM4.45 million together with interests and costs were awarded to the plaintiff.

Alarming, it was revealed to the court that there were at least 9 other pending cases of similar nature where the claims were substantial. Bearing in mind that the land office has been computerized, the infirmity within the information technology system of

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## REMEDIES

### DAMAGES OF RM2 MILLION FOR WRONGFUL DEATH WHILE IN POLICE CUSTODY !

In issue Q3 of 2010 under the heading “Police liable for failing to take reasonable care of detainee in its custody”, we reported the High Court decision<sup>i</sup> that held the police and the Government of Malaysia (D3 and D4 respectively) liable for the death of a detainee while under the custody of the former. In *Suzana binti Md Aris (Claiming as Administrator of the Estate and a dependent of Mohd Anuar bin Sharip, deceased) v DSP Ishak b Hussain & 3 Ors*<sup>ii</sup>, both parties appealed against the award of damages for the sum of RM137,220 made by the senior assistant registrar (SAR) under various heads of loss of support, bereavement, future expenditure, general damages for pain and suffering and aggravating factors including the delay in providing medical treatment.

The learned Judicial Commissioner (JC) dismissed D3 and D4 appeal. He added three other heads of damages in allowing the plaintiff’s appeal. Firstly, a sum of RM200,000 for each of the two children (aged three and nine years when their father breathed his last) as dependents of the deceased for their sustenance, support and education. Secondly, a sum of RM500,000 was awarded as aggravated damages. Such an award

the land office that had enabled intruders to invade it and destroy its integrity was a matter of grave concern, to say the least.

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<sup>i</sup> [2010] 8 CLJ 323

<sup>ii</sup> Under this system, the register of land titles is regarded as conclusive as regards matters appearing therein (s.89 of the NLC). At the heart of it is the core principle of ‘curtain’ and ‘mirror’, that is to say, persons dealing with the registered proprietor of the land need not be concerned to ascertain the validity of the information pertaining to the land as indicated on the register and the circumstances under which such proprietor came to be registered. See Teo Keang Sood & Khaw, *Land Law in Malaysia Cases and Commentary*, Chapter 1.

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was reflective of the court’s and society’s abhorrence of what happened in police custody and apathy, abuse and abdication of duty on the part of the police which resulted in the deceased’s death. Thirdly, a sum of RM500,000 was awarded as exemplary/vindictory damages under the category of oppressive, arbitrary or unconstitutional action by the servants of the government as set out in *Rookes v Barnard*<sup>iii</sup> and cited by the Court of Appeal in *Laksamana Realty Sdn Bhd v Goh Eng Hwa*<sup>v</sup>.

It is remarkable that the learned JC refused to accede to the Federal Court decision in *Mariayee & Anor v Mohamed Nasir & Anor*<sup>v</sup> which appeared to have held that parliament through s.8(2)(a) of the Civil Law Act 1956 had taken away the right of the court to award “exemplary damages” in a case where the person had died though his cause of action had survived for the benefit of his estate and that such provision covered a claim made for and on behalf of the dependants of the deceased too. The learned JC distinguished that case on the ground that it was not a case involving a breach of the fundamental right of a person (the deceased) under the Federal Constitution as in the instant case. Further, the Federal Constitution came into force on 31.8.1957 after the Civil Law Act 1956 which came into force on 7.4.1956 in West Malaysia. Thus, the court should not be barred from granting exemplary damages to the family of a person whose death had been the result of a breach of fundamental liberties and basic human rights of that person under the Federal Constitution.

In this respect, a person’s right to protection of life and liberty was provided under Article 5(1) of the Federal Constitution. A person in police custody

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who was then deprived of medical attention and assistance was deprived of his life while his liberty was being deprived by law in the case of a lawful arrest and detention. To be deprived of having access to medical help promptly when one was sick (as in the instant case when the police was found to have failed in its duty of care to properly and adequately attend to the deceased's serious sick condition) was to be deprived of life in the true sense of it in all its fullness. An award of compensation would vindicate the infringed constitutional right of the deceased. The additional award would be needed to reflect the sense of public outrage and emphasize the importance of the constitutional right and the gravity of the breach and to deter further breaches<sup>vi</sup>. The learned JC went further to state that in the event the award of exemplary damages was wrongly given, the same amount could be awarded under the head of "vindictory damages"---damages

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## TORT / CONTRACT LAW (LIMITATION PERIOD)

### WHEN TO SUE ACCOUNTANTS & LAWYERS ?

In two different cases decided under two different jurisdictions, both the Courts of Appeal in United Kingdom and Malaysia came to similar conclusion with regard to the commencement of limitation period to bring a legal action against professional service providers (accountants and lawyers respectively) for negligent advice.

First, the case against accountants in UK in *Pegasus Management Holdings SCA and Anor v Ernst & Young and Anor*<sup>1</sup>. The claimants, Pegasus and B (the sole shareholder in Pegasus), sued the defendant (E&Y) for damages for professional negligence, arising from the alleged failure of E&Y to render the claimants proper tax planning advice (on mitigating a large potential capital gains tax liability on a disposal of loan notes [adverse consequence]), which resulted in Pegasus incurring a liability for corporation tax calculated by reference to a capital gain when the relevant disposal in fact resulted in a loss. The claim was filed on 10.11.2005 pertaining to E&Y's purported breaches occurring in two distinct periods, with the 1<sup>st</sup> period concerning advice given before 2.4.1998 and the 2<sup>nd</sup> period concerning advice given between 1999 and 2002. The appeal was concerned only with the former with regard to the preliminary issue as to whether the claims in

for the purpose of vindication being essentially rights-centred (as opposed to loss-centred), awarded in order to demonstrate that the right in question should not have been infringed at all<sup>vii</sup>.

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<sup>i</sup>*Suzana Md Aris v DSP Ishak Hussain & Ors* [2010] 6 CLJ 712

<sup>ii</sup>[2010] 6 AMR 276

<sup>iii</sup>[1964] AC 1129

<sup>iv</sup>[2005] 4 CLJ 871

<sup>v</sup>[1985] 1 MLJ 427

<sup>vi</sup>See *Attorney General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324, PC

<sup>vii</sup>*Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975, HL

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contract and tort in respect of that period were time-barred. The claimants conceded that the claims in contract were time-barred. The judge at first instance held that B had suffered damage by 2.4.1998 so that his claim in tort was, likewise, time-barred.

On appeal, and in a detailed judgment, the UK Court of Appeal held that in a claim for professional negligence commenced on the basis that the client did not receive what he should have received from the transaction<sup>ii</sup>, the limitation period could run from when the negligent advice was given (ie. in this case, 2.4.1998). Damage sufficient to complete the tort could be caused by the fact that, as a result of the negligence, the client had not received what he ought to have received. It was not necessary to show that a client was immediately put into a position in which he was financially worse off than he would have been had the adviser not been negligent. To quote from the judgment:

"If a professional defendant is instructed by his client to achieve result X and he negligently achieves result Y that is equally valuable in monetary terms but does not give the client what he ought to have received, it would be surprising if he could answer the client's claim by saying he had suffered no financial loss."

Whilst there was no presumption that non-delivery by the defendant of what the claimant ought to have received meant that relevant damage had been suffered and it was a question of fact in each case whether actual damage had been established,

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it might be relatively easy for the court to draw an inference that such actual damage had been suffered to complete the tort<sup>iii</sup>. Difficulties in quantification had never been allowed to stand in the way.

In the instant case, the alleged flawed accountant's advice left B in materially worse commercial position by inhibiting the way in which he might go about acquiring qualifying trades. E&Y did not advise B that a more elaborate corporate structure was required, namely that Pegasus should by 2.4.1998 either already have several subsidiaries or at least a minuted resolution of an intention to form such subsidiaries for the purpose of carrying on qualifying trades. B was so disadvantaged immediately upon the completion of the transaction not because his shares in Pegasus were then worth less than he paid for them but because those shares did not give him control of a company with characteristics that would be proof against the adverse consequence which was what he claimed to be entitled to but did not get. He was thereby tied into a commercially disadvantageous straitjacket. The claimants' contention that as at 2.4.1998, the only damage then suffered was of a future and prospective or contingent nature<sup>iv</sup> was rejected by the appellate court. The decision of the court of first instance was therefore correct and upheld.

Second, the case against lawyers in Malaysia in *Ambank (M) Bhd v Abdul Aziz Hassan & Ors*<sup>v</sup>. The three defendants were practicing lawyers in a firm which acted for the plaintiff bank in a loan transaction to a company (the borrower). The loan was to be secured by the assignment of a subdivided piece of land (Lot 465) by a 3<sup>rd</sup> party (assignor). Both the loan agreement and 3<sup>rd</sup> party assignment were executed on 6.4.1999 on which day the loan was released. The borrower defaulted in its repayments in November 2000 and the plaintiff sought to enforce the assignment by way of private auction in April 2004. The registered owner of the master title over Lot 465 refused to give consent for the sale. Somehow, the plaintiff bank did not proceed against the said owner. Instead, it held the view that it did not have a good title to Lot 465. The plaintiff then sued the defendants alleging that they had acted in breach of contract or were negligent in failing to advise the plaintiff that the assignor did not have a good title to Lot 465 and that being the case, the 3<sup>rd</sup> party assignment was said to be invalid.

On a preliminary point of limitation, both the High Court and the Court of Appeal held that the plaintiff's cause of action, if any, would have accrued on 6.4.1999 when the assignor purportedly executed the 3<sup>rd</sup> party assignment. Similarly, under the tort of negligence, the plaintiff's cause of action against the lawyers, if any, would have accrued on the same date when it suffered damage by being encumbered with the liability of dispensing the loan secured by the invalid 3<sup>rd</sup> party assignment. The plaintiff could not be heard to argue that the period of limitation (of six years pursuant to s.6(1)(a) of the Limitation Act 1953 (the Act) began to run from April 2004 when it discovered that the assignment was invalid. S. 29 of the Act governing postponement of the limitation period until the discovery of the cause of action was only applicable to cases where the cause of action was based upon fraud or a mistake or was concealed by fraud. No such allegation was put forth by the plaintiff and thus, the plaintiff's claim filed on March 2006 was statute-barred.



<sup>i</sup>[2010] 3 All ER 297

<sup>ii</sup> The Court of Appeal appeared to have accepted that the case fell under the category of 'wrong transaction' cases as opposed to 'no transaction' cases or 'category cases', see para [84] at p.327. For the meaning of the categories, see para [28] at p.308.

<sup>iii</sup> Courts had done so in numerous 'wrong transaction' cases such as *Baker v Ollard & Bentley (a firm)* (12 May 1982, unreported), CA, *DW Moore & Co Ltd v Ferrier* [1988] 1 All ER 400, *Bell v Peter Browne & Co* [1990] 3 All ER 124 and *Knapp v Ecclesiastical Insurance Group plc* [1998] Lloyd's Rep IR 390.

<sup>iv</sup> as in 'category 3' cases such as *Law Society v Sephton & Co* [2006] 3 All ER 401.

<sup>v</sup>[2010] 7 CLJ 663

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## TORT (INVASION OF PRIVACY)

### PHOTOS OF FEMALE PATIENT'S PRIVATE PART TAKEN BY DOCTOR WITHOUT HER CONSENT

A colorectal surgeon operated on his female patient in a surgical procedure known as stapler haemorrhoidectomy. He took two photographs of her anus whilst she was under sedation without getting her prior consent. She discovered this fact post-surgery and sued the doctor for invasion of her privacy. His defence was that what he had done was in accordance with accepted medical practice and was for his records to facilitate explanation to her after the performance of the procedure. The photographs were never disseminated by him.

The above were the brief facts in the case of *Lee Ewe Poh v Dr Lee Teik Man & Anor<sup>j</sup>*. The 1<sup>st</sup> defendant was the surgeon whilst the 2<sup>nd</sup> defendant was the owner and operator of the specialist centre where the 1<sup>st</sup> defendant was practising. Both defendants maintained that violation or invasion of privacy rights was not a recognized breach in tort under the English common law and likewise, in Malaysia.

However, the plaintiff relied upon the Court of Appeal decision in *Maslinda Ishak v Mohd Tahir Osman & Ors<sup>i</sup>*, the infamous incident where a woman urinating in a squatting position was photographed by an officer of the raiding party. The learned trial Judicial Commissioner (JC) agreed with the plaintiff's contention and held invasion of privacy as a valid cause of action under Malaysian common law.

In any event, the learned JC ruled that the plaintiff had made out her case in breach of confidence or trust which was a recognized cause of action. There were three requirements to establish liability: (i) the information must have the necessary quality of confidence; (ii) the information must have been imparted in circumstances importing an obligation of confidence; and (iii) there must be an unauthorized use or disclosure of that information.

On the facts, it ought to be reasonably inferred that the said photographs taken showing the intimate part of the plaintiff's anatomy as being information having the necessary quality of confidence as it involved the modesty, decency and dignity of a woman. Secondly, the 1<sup>st</sup> defendant was duty-bound by virtue of the doctor-patient

relationship to maintain strict confidence of the said photographs which were obtained without the plaintiff's consent whilst she was under anesthesia. Thirdly, in the absence of any rebuttal evidence, the reasonable inference was that there had been disclosure or publication of the said photographs by virtue of the fact that the plaintiff was made aware of them by the nurse whom she spoke to a few days after the surgery. Therefore, even if he erred in arriving at his conclusion that invasion of privacy was an actionable tortious cause of action, the plaintiff would still succeed under the cause of action of breach of trust or confidence.

Next, on the issue of whether taking of photographs during surgical procedure was an acceptable medical practice and whether the 1<sup>st</sup> defendant was justified to do so without the patient's consent. The learned JC held that in order for a surgeon to take photographs of intimate parts of a female patient's anatomy, her prior consent, whether written or oral, would have to be obtained. Where the taking of such photographs was absolutely necessary in a particular situation and there was no opportunity to obtain the patient's consent by reason of the patient being under anesthesia, the patient must still be informed at the first available opportunity and if such consent was refused, then the images taken must be surrendered or destroyed as agreed by the patient. On the evidence, the 1<sup>st</sup> defendant had failed to obtain such consent from the plaintiff. Such failure constituted an invasion of the plaintiff's privacy or a breach of trust and confidence that the plaintiff as patient had reposed on the 1<sup>st</sup> defendant as her treating doctor. The 1<sup>st</sup> defendant and vicariously, the 2<sup>nd</sup> defendant were liable to the plaintiff's claim.

The learned JC however awarded nominal damages against the defendants in the sum of RM25,000. He refused to award aggravated damages nor exemplary damages. Aggravated damages is a form of higher compensation to show disapproval of the acts of a defendant which were carried out in such a manner that the plaintiff has suffered more than would normally be expected. To qualify for such damages, the defendant's acts must be calculated to injure the feelings of the plaintiff. This was not a case that the 1<sup>st</sup> defendant had misused her images in any way as to cause her great pain, shame, humiliation and any other psychological injury, hence insufficient evidence to justify an award for such damages.

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As to exemplary damages, it serves the purpose of meting out a serious punishment to the defendant and to deter others from behaving in the same way. The plaintiff would have to prove the culpability of the 1<sup>st</sup> defendant's conduct which must be so outrageous as to deserve punishment. The 1<sup>st</sup> defendant had not misused the plaintiff's images and coupled with the fact that the 1<sup>st</sup> defendant refused to surrender the memory card of his digital camera to the plaintiff on the ground that it contained other information but offered to delete them in the presence of the plaintiff which was however rejected, the 1<sup>st</sup> defendant could not be construed as so outrageous as to warrant exemplary damages. In any case, the plaintiff's case did not fall within any of the three categories for the award of exemplary

damages as laid down in *Rookes v Barnard (No 1)*<sup>iii</sup>, hence no merit to award such damages.

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<sup>i</sup>[2010] 8 AMR 583

<sup>ii</sup>[2009] 6 CLJ 653

<sup>iii</sup>[1964] AC 1129. The three categories are : (a) where the conduct is calculated to make or to result in a profit; (b) where there is oppressive conduct by government servants; and (c) where there is express authorisation by statute.

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erosion and preventive measures could be taken. The defence of Act of God was not available to the defendant since the uprooting was caused by the plaintiff's failure to prevent erosion.

However, the plaintiff was not an ordinary user of the road for the purpose of travel. He was using that part of the road to park his van to sell his vegetables on a daily basis. By his own account, he was struck by the fallen tree after he had finished selling and was getting into his van. Under such circumstances, it would be unreasonable to find that a duty of care existed on the landowner(defendant)'s part to ensure that the tree would not fall at any point of time while the plaintiff was conducting his business. In other words, the court held that on the facts of the case, the defendant did not owe a duty of care to the plaintiff.

Apart from that, the defence of *volenti non fit injuria*<sup>ii</sup> was held to be available to the defendant. One who habitually parked himself in an area where high trees abound ought to be aware and to know that there was always a danger that a tree might fall on him at any given time. By continuing to sell vegetables from his van at the same place on a regular basis, the plaintiff was to be taken as having assumed such a risk. The plaintiff's action in negligence therefore failed.

As to nuisance, a harm originating in some natural condition of land and not the effect of human activity was not generally actionable as a nuisance. Thus, the plaintiff's claim in nuisance also failed.

It must however be borne in mind that the decision was arrived at on the peculiar facts of the case. In an ordinary situation of a person traveling

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## TORT (NEGLIGENCE / NUISANCE)

### TREE FALLING ONTO ROAD --- IS THE OWNER OF THE LAND LIABLE FOR INJURY CAUSED TO PASSER-BY?

The case of *Pang Soo v Tong Ah Company Sdn Bhd* is an interesting read. There, the plaintiff who was a vegetable seller by hawking his trade in a small van was struck by a tree that had fallen from the defendant's land which fronted the side of the road on which he parked his van. He suffered serious spinal injuries. He claimed that the defendant had breached its duty of care by failing to conduct regular examinations of the condition of the tree which would have revealed that there was erosion at the base of the tree causing it to be unsafe. The defendant on the other hand denied negligence and attributed the uprooting to an Act of God ie, the exceptionally strong wind that blew at the material time.

The learned High Court judge preferred the expert opinion of the plaintiff to that of the defendant's expert and held that the probable cause of the uprooting of the tree was the erosion of the land area at the root of the tree. The defendant neglected to properly inspect the tree on an orderly basis which, if done, would have detected the

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on the road, the owner of the land owes such person a duty of care to properly manage a tree on his land which adjoined the road and to take precaution to prevent danger to such person in case the tree should fall. See *Thean Chew v The Seaport (Selangor) Rubber Estate Ltd*<sup>iii</sup> and *Quinn v Scott And Another*<sup>iv</sup>.

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<sup>i</sup>[2010] 8 CLJ 482

<sup>ii</sup>The maxim means that no act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. In the context of our case, it applies to running the risk of accidental harm which would otherwise be actionable as negligence.

<sup>iii</sup>[1960] 1 LNS 152

<sup>iv</sup>[1965] 2 All ER 588

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## APPEAL UPDATE (COMPANY LAW)

### “INTEREST-ED” IN NIRVANA?

In our previous issue<sup>i</sup>, we had highlighted the “Nirvana Case” in both the High Court and the Court of Appeal wherein the crux of the dispute was whether the business of Nirvana fell under Section 84 of Part IV Division 5 of the Companies Act 1965 (the Act). At the High Court, judgment was in favor of Nirvana but at the Court of Appeal, judgment was in favor of the Companies Commission of Malaysia.

On Nirvana’s further appeal to the apex court in *NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia*<sup>ii</sup>, the Federal Court affirmed the decision of the Court of Appeal. In other words, Nirvana’s business of providing burial lots and compartments for storage of urns containing ashes of the cremated on memorial parks developed by Nirvana falls within the meaning of “interest” under Section 84 of Part IV Division 5 of the Act.

The entire dispute centered on the definition of the word “interest” which, incidentally, has been defined in Section 84(1) of the Act. Whether or not it is an “interest” depends on certain elements as set out in the Act, namely, profits, assets, realization of

any financial or business undertaking or scheme, common enterprise, time sharing and investment contract. In a nutshell, Nirvana tried to argue that there was no profit and that there was no common enterprise whilst the Companies Commission of Malaysia argued otherwise. By a majority of 2 to 1, the Federal Court ruled against Nirvana, effectively saying that there was “interest”. Profits need not be in monetary form but can be in benefits and there was common enterprise between the purchaser of the plots or the urn storage compartments and Nirvana. It is however interesting to note that the dissenting judge did not agree that there were profits and that there was common enterprise.

This is the one and only case in Malaysia that reached the Federal Court on the interpretation of the word “interest” in Section 84(1) of the Act and it was held that the word “interest” ought to be given a wide interpretation. As a result, Nirvana will now have to comply with the Act wherein an approved deed (trust deed) is required before Nirvana offers to sell the “interest” to the public.

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<sup>i</sup> Law Update Issue 4 of 2008, “Fitness Centers, Urn Compartments & Burial Grounds --- What do they have in common?”

<sup>ii</sup> [2010] 5 MLJ 573

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