

THE UPDATE



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Abbreviations

Jur	:	Jurisdiction
MY	:	Malaysia
SG	:	Singapore
HKG	:	Hong Kong
AU	:	Australia
UK	:	United Kingdom

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A SHALLOW VICTORY

The plaintiff succeeded in its claim against the defendant bank (the bank) for the latter's wrongful repudiation of a financing contract due to the latter's refusal to allow drawdown of the 3rd and last tranche, but the win was superficial. The defendant bank, though losing the suit, had no cause to complain as the damages awarded against it was nominal whilst its counterclaim against the plaintiff based on the amount of financing disbursed was allowed. That is in essence the upshot of the High Court case of *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Berhad*.

At the request of the plaintiff, the defendant agreed to provide a facility in the sum of RM97 million to partially finance the construction and development of a Steckel Hot Strip Mill Plant (the project) under an *Al Istisnaa'* Islamic financing arrangement. The defendant was to purchase the project from the plaintiff for RM97 million pursuant to an *Al Istisnaa'* purchase agreement (APA) and concurrently, the defendant was to sell the project back to the plaintiff for RM185,360,000 under an *Al Istisnaa'* sale agreement (ASA) payable by way of quarterly instalments. Pursuant to the APA, the defendant disbursed the entire facility amount of RM97 million into an account known as the financial project account (FPA). From the FPA, the defendant had allowed drawdown on the facility in two tranches totalling RM58.7 million, leaving a 3rd tranche yet to be drawdown.

The defendant withheld and refused the final tranche, citing that the plaintiff had failed to meet a condition precedent in clause 5.1(v) (clause 5.1(v)) which required the plaintiff to submit evidence satisfactory to the bank that it had secured facilities totalling approximately USD80 million from foreign EXIM banks for the purpose of partly financing the project. The plaintiff contended that the refusal amounted to a repudiation of the *Al Istisnaa'* arrangement and accepted such repudiation vide a letter and sought damages against the defendant. One year after such acceptance of repudiation of the APA, the defendant responded to accept the plaintiff's termination but in turn alleged breach of the APA on the part of the plaintiff as aforesaid.

Trial proceeded. Evidence was led that the plaintiff had produced a letter of offer and acceptance for a financing facility from WestLB Bank (WestLB) in the sum equivalent to EURO85 million. The defendant contended that the WestLB's offer and acceptance was not sufficient evidence satisfactory to the bank under clause 5.1(v) and that in disbursing the entire facility into the FPA, it had only granted a one-off waiver and indulgence. The plaintiff's case was that notwithstanding the defendant's contention, the defendant had waived its right to insist on compliance of clause 5.1(v) by its own conduct, including the fact that the defendant had disbursed the entire facility amount into the FPA which the defendant was only able to do upon compliance by the plaintiff of all conditions precedent under clause 3.1 of the APA.

The trial judge ruled in favour of the plaintiff. Though the phrase 'evidence satisfactory to the bank' conferred discretion on the defendant to determine what amounted to satisfactory evidence, the failure to communicate to the plaintiff that the WestLB's offer and acceptance was insufficient to constitute compliance was detrimental to the defendant's case. Unless the plaintiff was informed otherwise, any reasonable person would, from the conduct of the defendant, be making a similar assumption to that made by the plaintiff, to wit, that the WestLB's offer and acceptance was evidence sufficient for the purpose of fulfilling clause 5.1(v). Even when the 3rd drawdown notice was issued, there was no response from the defendant in clear and unequivocal terms that the reason for refusing and/or withholding the last drawdown was due to non-compliance of clause 5.1(v).



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The defendant's conduct had thus caused reasonable presumption on the part of the plaintiff that the plaintiff had fulfilled all the necessary conditions precedent. It would be unfair for a party (the plaintiff) to be led to believe that something that needed to be done had been done to the satisfaction of the other, only to be told eventually that it was not the case but instead was merely a grant of waiver or indulgence. A waiver or indulgence in the circumstances of the case must be clear and unequivocal in writing. Further more, the 1st and 2nd drawdown permitted to the plaintiff and the defendant's release of entire financing amount into the FPA without reservation, despite the drawdown advice from its solicitors that the defendant might disburse only 'subject to fulfillment of all conditions', gave the impression that all conditions precedent had accordingly been complied with.

The refusal or withholding of the final drawdown on the facility amounted to a breach of the APA which entitled the plaintiff to treat the same as repudiation and to rightly terminate the same. On assessment of damages, the trial judge drew distinctions between the facts in the infamous cases of *Mae Perkayuan*ⁱⁱⁱ and *Chendering Development*^{iv} and the instant case. Unlike the two earlier cases, the financing provided by the defendant in this case was only to partially finance the project. There was no evidence to show that the failure of the project was contributed solely by the breach of the defendant for failing to allow the 3rd tranche, unlike the other two cases where it was clear that the withholding of funding by the bank had caused the project therein to fail. In any event, the plaintiff had withdrawn its claim on loss of profit from the project. The plaintiff's claim for the amounts of the 1st and 2nd tranche was misconceived as the same could not be a loss to the plaintiff and were in fact a direct benefit to the plaintiff, consequential to the *performance* and *not a breach* by the defendant of its obligations

under the APA. As to the head for amount due and owing to turnkey contractor for more than seven years, a defence of limitation would have set in which meant the plaintiff did not suffer any actual loss. This therefore prevented any claim under this head. A token sum of RM50,000 was awarded to the plaintiff as nominal damages.

On the other hand, the defendant's counterclaim for the outstanding balance due and payable under the facility was allowed. The trial judge cited *Mae Perkayuan* for the proposition that the bank's claim for recovery of loan was an entirely separate matter from the borrower's claim against the bank and there was no ground in law to exempt the plaintiff's liability to repay the financing amount. The plaintiff's reliance on the principle that a party ought not to be permitted to take advantage of or benefit from its own breach^v was rejected. However, in accordance with the method of computation laid down by the same judge in her earlier decision in *Bank Islam Malaysia Berhad v Azhar b Osman & Other Cases*^{vi}, the quantum of counterclaim must deduct the unearned profit which had not become due to the defendant.

ⁱ[2011] 1 AMCR 302

ⁱⁱThe phrase means evidence acceptable to and at the sole discretion of the bank, see lines 33 on p.311, *ibid*.

ⁱⁱⁱ[1993] 1 AMR 1079

^{iv}[2004] 1 MLJ 657

^v*Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489

^{vi}[2010] 3 AMR 363, a write-up which can be found in Issue Q2 of 2011 of THE UPDATE.

BANKING LAW

BANK LIABLE FOR INADVERTENTLY DIVULGING ACCOUNT

In *Wong Yeng Mun v CIMB Bank Bhd*, the plaintiff had opened an account with the defendant bank jointly in his name and the name of his son

from his previous marriage (direct access account). The plaintiff had given his correspondence address at Jalan Bengkudu in Kepong Baru (the Kepong address) and had been receiving monthly statements of accounts at this address. However, about 10 years later, without the plaintiff's consent, the defendant sent the statement of accounts to an address at Bukit Seputeh (the Seputeh address) which resulted in the plaintiff's wife knowing about the direct access account. Problems emerged between the plaintiff and his wife which caused the plaintiff to suffer anxiety, trauma, depression and health problems. The plaintiff claimed that due to

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such discovery, he had to share the amount of his savings in the direct access accounts with his wife. Alleging a breach of duty on the part of the defendant in failing to keep the confidentiality of his account and transactions with the defendant, the plaintiff claimed damages against the defendant. The defendant's main defence was that there was nothing in the contract between the parties which prohibited the defendant from sending the bank statements to the Seputeh address and that it was never agreed that the defendant could only send the statements to the correspondence address ie. the Kepong address.

The trial judge held that on the totality of the evidence adduced, the plaintiff never informed the defendant of any change of address and neither did he authorize the defendant to use any address other than the Kepong address. For the direct access account, only one correspondence address was given to the defendant. Evidence showed clearly that the defendant had obtained the Seputeh address from the plaintiff's application for a credit card or through his wife's application for a credit card. The defendant's witness had admitted that after the merger exercise involving the defendant bank, the defendant started giving separate statements of account to joint account holders and

at different addresses. Such act was at the defendant's own volition. It is established law that there is an implied term in the contract between a banker and his customer that the banker will not divulge to third persons without the consent of the customer, express or implied, either the state of the customer's account or any of his transaction with the bank or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by a court or the circumstances give rise to a public duty of disclosure or the protection of the banker's own interests requires it. The defendant had thus breached such duty and was liable to the plaintiff. However, the plaintiff's claim for exemplary and aggravated damages was disallowed as the defendant's action was not deliberate and intentional or carried out with a cynical disregard of the plaintiff's right.

ⁱ[2011] 1 CLJ 785

BANKING / CONTRACT LAW

BANK'S WORD SHOULD BE ITS BOND

The promissory estoppel in its broader sense was applied in the context of private banking by the Singapore Court of Appeal in *Lam Chi Kin David v Deutsche Bank AG*.ⁱ The appellant was a private banking client of the respondent (the Bank) and had opened a Private Wealth Management Account (the Advisory Account) and a Foreign Exchange (FX) GEM Account. Several agreements were signed, including a Master Agreement which was intended to apply to all transactions between the Bank and the appellant. Pursuant to a Service Agreement, the appellant was granted a credit line of USD200m secured by his currency deposits held under a Security Agreement. The relevant transactions entered into by the appellant and the Bank were FX contracts made under a "Carry Trade Investment Strategy" which involved the appellant arbitraging on the interest rate differentials between different currenciesⁱⁱ.

In early October 2008, the relevant exchange rates moved against the appellant. On 7/10/2008, the Bank faxed him a letter (the 7/10 Letter) informing him that his collateral availability was "Negative USD610,000". The next day, the collateral shortfall increased and the Bank faxed him another letter (the 8/10 Letter) informing him of a shortfall of about USD2.3m. On 10/10/2008, the increased shortfall resulted in his account being in "negative equity"ⁱⁱⁱ, ie. if his assets were to be liquidated on that day, the proceeds from the liquidation would not be sufficient to cover his liabilities to the Bank. The Bank faxed him another letter (the 10/10 Letter) informing him that the collateral shortfall was USD5,460,370.02 and requesting that he take "immediate steps to restore the shortfall in the Collateral Value by 5pm Singapore time today".

Later that day, the Bank's relationship manager told the appellant that the Bank would not close his account if he could give a commitment to remit additional funds by 13/10/2008 (the next business day). The appellant protested on the basis that he had earlier been promised a 48-hour grace

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period (the Grace Period), through the Bank's managing director, for any margin call. The manager did not deny this but maintained that the Bank could close out his account immediately. The appellant declined to give the commitment and the Bank proceeded to close out all his FX contracts on 10/10/2008. The Bank then demanded for the resulting shortfall. The appellant rejected the demand and filed a suit against the Bank for damages for wrongfully closing out his FX contracts on 10/10/2008. The Bank counterclaimed for the shortfall which was denied by the appellant on the ground that the Bank was estopped from closing out his FX contracts during the Grace Period.

Trading in currencies, arbitraging on interest rate differentials

The Singapore apex court held that the trial judge erred in construing the 7/10 Letter and 8/10 Letter as margin calls. In fact, these letters were notifications of his collateral availability and his Advisory Account shortfall respectively and both contained the note that they were intended for "discussion purposes only". On the other hand, the 10/10 Letter was a margin call letter but it was given in breach of clause 2.6 of the Master Agreement which provided for the giving of one business day's notice for the delivery of additional collateral or by reducing the appellant's Total Exposure.

The trial judge had ruled that the promise of the Grace Period did not operate as an estoppel against the bank insisting on its strict contractual rights as the appellant had not relied on the promise to his detriment such as to make it inequitable for the Bank to resile from that promise. The appellate court disagreed with the trial judge's 'overly narrow view' of detrimental reliance in the context of promises made by bank officers when soliciting private banking clients. In the court's view, there was

sufficient detrimental reliance as the appellant had changed his position by obtaining a substantial credit line from the Bank, and by providing collateral (which he had to transfer from his accounts with other banks) for the benefit of the Bank. Without the promise of the Grace Period, the appellant might not have exposed himself to such large FX transactions.

In any event, even if there was no detrimental reliance, the appellant was entitled to succeed on the broader principle that where a promisor (the Bank) had obtained an advantage from giving a promise to the promisee (the appellant), it should not be allowed to resile from its promise, although the promisee had suffered no detriment. This principle was especially relevant in the context of private banking where if the banks engaged in the business of wealth management could not be trusted with their words, they should not be allowed to be in this business. The courts would not allow a bank to claim that "my word is not my bond". In the circumstances, it was inequitable for the Bank to resile from its promise to honour the Grace Period and to make the margin call in the terms of the 10/10 Letter.

As additional ground and in *obiter*, the Bank's promise of Grace Period constituted a binding undertaking by the Bank to give the appellant 48 hours to meet any margin call, which varied the relevant terms of the Master Agreement and the Service Agreement relating to margin calls. The appellant provided the consideration for this variation when he agreed to do, and did, business with the Bank by entering into the relevant FX contracts which gave both a factual and legal benefit to the Bank.

The appellant's appeal was allowed with costs and he was entitled to damages to be assessed on the basis that the Bank was only entitled to close out his FX positions on 13/10/2008 at the earliest.

ⁱ[2011] 1 SLR 800

ⁱⁱAs elaboration, the appellant would buy currencies carrying low interest rates and convert them into other currencies carrying higher deposit interest rates, and thereby lock in a guaranteed gain from these differences in interest rates.

ⁱⁱⁱIt means the mark-to market value of his liabilities exceeded the market value of his collateral assets.

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BANKRUPTCY

A SERIOUS REPRIMAND TO INSOLVENCY OFFICE

A person had been adjudicated bankrupt. About three years later, he applied for an order of discharge under s.33 of the Bankruptcy Act 1967 (the Act). Three reports pursuant to s.33(3) of the Act were prepared by the Director-General of Insolvency (DGI). The amount of unsettled debts was shown as about RM20.3 million while the credit balance in the estate of the bankrupt was RM37,442. The family members of the bankrupt had agreed to contribute RM200,000 to help him to partly settle the debts. The total amount of RM237,442 was only sufficient to declare a dividend of 1% to 32 creditors. The High Court granted a conditional discharge subject to the bankrupt being made to pay a sum of RM10,000 per month for a period of 10 years.

The above were the facts in gist in the case of *Lim Hun Swee v Pemiutang-pemiutang Penghakiman: Malaysia British Assurance Berhad*. Both parties were dissatisfied with the decision and appealed to the Court of Appeal. The judgment creditors challenged the reports by DGI as incomplete, attacked the DGI for his failure to carry out a proper investigation into the bankrupt's affairs and contended that the dividend of 1% was manifestly low and did not comply with the provisions of s.33(4) of the Act which required at least a 50% dividend to be paid to the creditors where a bankrupt had committed an offence under the Act.

The appellate court allowed the appeals by the judgment creditors and dismissed the bankrupt's appeal. Out of the three reports which were brief, two were prepared after objections were raised by the creditors and this showed that it was not a thorough investigation by the DGI's officer. Further, there was contradiction in the DGI's reports. It also raised a number of questions on the actual income, expenses and assets 'stashed away' by the bankrupt. Under s.33(6) of the Act, there were 13 factual situations, the existence of any one of which could bar the court from granting an order for discharge. In the view of the court, the DGI must fully investigate all 13 situations. A general statement to the effect that "none of the facts under s.33(6) of the Act exists" as found in the DGI's report was insufficient. Whilst it is true that the court was

obliged under s.33(8) of the Act to take into consideration a report by DGI on the hearing of an application for an order of discharge, it did not follow that the court was bound to accept the statements therein. On the converse, the court was duty-bound to scrutinize the truth and reliability of the statements and in appropriate cases when the court was satisfied that the report was incomplete and misleading, the court was not bound to accept the so called *prima facie* evidence of the statements contained in DGI's report. The status of "prima facie" evidence under s.33(8) was rebuttable and not conclusive. This was particularly so in the instant case where the amount of debts was huge, the bankruptcy was initiated by the bankrupt himself, the application for an order of discharge was only filed two years and 10 months after the adjudication and receiving order and the dividend declared was only 1% of the total debts.

The appellate court went through the evidence with a fine tooth comb and found that the DGI had inadequately dealt with s.33(6)(a), (b), (f) and (m) of the Act, apart from erroneously stating that the bankrupt did not commit any offence under the Act when evidence clearly showed that he had failed to comply with s.16(2)(a) of the Act in failing to submit his statement of affairs within seven days from his being adjudged bankrupt. That being the case, by reason of s.33(4) of the Act, the 1% dividend declared was manifestly below the minimum requirement of 50% and the court should have refused the discharge or suspended the order.

The bankrupt's contention that on giving up the whole of his property, he should be a free man again, able to earn his livelihood and having the ordinary inducement to industry was rejected by the court. The court held the view that it was bound to have regard not only to the interest of the bankrupt or the creditors but also to the interest of the public and of commercial morality. In appropriate and deserving cases, a bankrupt may be discharged from his bankruptcy but not at the expense of commercial morality and public perception on bankruptcy law in the country. An order for a discharge should not be granted easily without proper and complete investigation into the affairs of the bankrupt.

The parting words of the appellate court judge are worth repetition here:

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"An order for a discharge should not be granted easily without proper and complete investigation into the affairs of the bankrupt. The public as well as commercial players should not be imbued with the perception that a person can easily borrow money (even in big amount) from financial institutions or create debts with other business creditors, then stash the money away, whether in his own name or any other persons and need not be repaid; then personally apply for a bankruptcy order against him and after a short period apply for an order for a discharge with a minimum or too little dividend to be paid to the creditors, and after the discharge he can enjoy a luxury life. If

this practice and perception is not checked, then commercial morality would decline. In this type of fiasco, the court and the DGI should be blamed for not carrying out their duties effectively under the bankruptcy law."

ⁱ[2011] 2 MLJ 218, [2011] 1 AMCR 157

BANKRUPTCY / LAND / CONTRACT LAW

CAN A BANKRUPT CREATE A CHARGE OVER HIS LAND?

In *Bank Pembangunan dan Infrastruktur Malaysia Bhd v Omar bin Hj Ahmad*ⁱ, the bank granted a loan to a borrower which was to be secured by a third party charge over certain Malay reserve land owned by the defendant. The charge was duly executed by the defendant but attested by an advocate and solicitor instead of the land administrator as required under the National Land Code. The bank later found out that the defendant had in fact been adjudicated bankrupt about ten months before he executed the charge. The bank applied to the court for reliefs including an order directing the defendant execute a valid registrable third party charge over the land before the relevant land administrator.

The High Court dismissed the application. On appeal, the bank succeeded. It was held by the Court of Appeal that whilst the charge was not registrable as a legal charge, the execution by the defendant chargor was cogent evidence of his expressed antecedent agreement to provide security for the loan. A third party equitable charge had thus been created for subsequent registration as a third party legal charge upon due and proper attestation by the relevant land administrator.



Palace of Justice in Putrajaya which houses Federal Court & Court of Appeal

The bankruptcy of the chargor did not at all affect his capacity to execute the third party charge. Indeed, on established authorities, it is an erroneous belief that once a person is adjudged bankrupt, the right to enter into contracts ceases until such time he is discharged. Whilst he may not enter into a contract that would amount to his carrying on a business, it is significant that there is no blanket prohibition, express or implied, for a bankrupt to enter into a contract.ⁱⁱ Further, since the land at the material time had not become registered under the name of the official assignee pursuant to s.349(3) of the National Land Code, the defendant was capable of creating a charge. In any event, s.12 of the Malay Reservations Enactment provided that no Malay reserve holding shall vest in the official assignee on the bankruptcy of the proprietor thereof.

ⁱ[2011] 1 MLJ 810

ⁱⁱ*Re Kwan Chew Shen t/a Syarikat Kaaf* [1987] 1 CLJ 314

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A DISHONEST VENTURE

The extent of duties owed by a director to the company and the state of mind required to make liable a third party who assists in the breach of fiduciary obligation were examined in the High Court decision of *Karisma Wira (M) Sdn Bhd v Salleh bin Abdul Majid & Anor*ⁱ. In that case, the 1st defendant (D1) was appointed a director of the plaintiff (P) through contracts of employment which had a prohibition against ‘*melarikan projek/kontrak/kerja kepada syarikat lain/syarikat principal*’ (diverting project/contract/work to other company/principal company) (prohibition clause). D1’s main task was to actively lobby the Royal Malaysian Air Force and the Ministry of Defence (the Ministry) to secure a project to supply a ‘High Performance Human Centrifuge’ (HCPC) --- a training aid for fighter pilots in the air force to maintain combat effectiveness. To this end, through D1’s efforts, P eventually secured an agency agreement with an established American company called ETC to supply the HCPC product. However, before the project was secured, D1 ceased employment with P and joined the 2nd defendant (D2) as director. It later turned out that D1 had replaced P as the local agent of ETC. About three years later, ETC obtained the contract for the sum of RM54 million from the Ministry.

P alleged that D1 had diverted a business opportunity which he had been working on from P to himself and D2. It filed the claim against D1 for breach of fiduciary duty and breach of contract and against D2 for abetment. The defendants denied any liability on the grounds that there was no maturing business opportunity in the instant case, the HCPC contract was awarded whilst D1 was no longer in the employment of P and D1 was in no position to know that the contract would be awarded to ETC when he left P since there were other competitors for the project.

The trial judge allowed P’s claim against both defendants. It is elementary that a director stands in a fiduciary relation to the company. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguished obligation of a fiduciary is the obligation of loyalty. The numerous facets of this core obligation were set out in *Bristol and West Building Society v Mothew (t/a Stapley &*

Co)ⁱⁱ. Reference was also made to the Canadian Supreme Court decision of *Canadian Aero Service Ltd v O’Malley*ⁱⁱⁱ which has facts not dissimilar to the instant case.

The trial judge made a finding that when D1 left the employment of P, the business opportunity was ripe and not in its infancy as contended by the defence and the award of the contract was imminent, only awaiting an improvement in the Malaysian economy. It was noted that the project which the defendants obtained from the Ministry was the exact same one pursued by P. The learned judge held that a director of a company was precluded from obtaining for himself, either secretly or without the approval of the company, any property or business advantage either belonging to the company or for which it had been negotiating and especially where the director was a participant in the negotiations on behalf of the company. It did not matter that he had resigned before he obtained the benefit of the contract. That no loss was caused to the company or that any profit made was of a kind which the company could not have obtained was immaterial. P was also not required to prove that the benefit would have been obtained by P but for the breach by D1. There was more than sufficient evidence that D1 had breached his obligations of trust and fidelity. In addition, D1 had contractually committed a breach of the prohibition clause.

As against D2, evidence showed that D2 had full knowledge of the situation existed between D1 and P and of D1’s role in pursuing the project on P’s behalf. The learned judge applied the approach in the Privy Council decision in *Royal Brunei Airlines v Tan Kok Ming Philip*^{iv} that “a person who dishonestly procures or assists in a breach of trust or fiduciary obligation is liable in equity to make good any resulting loss”. In the context of the accessory liability principle, acting dishonestly or with a lack of probity means simply not acting as an honest person would in the circumstances. This is an objective standard. Honesty and dishonesty are mostly concerned with advertent conduct, not inadvertent conduct and carelessness is not dishonesty. Thus, for the most part, dishonesty is to be equated with conscious impropriety. The learned judge found that D2 would certainly have appraised itself of the business opportunity of P being diverted in a commercially unacceptable way through commercially unacceptable conduct. There was clearly a lack of probity and conscious impropriety on the part of D2 which resulted in the conclusion

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that D2 had knowingly and actively facilitated the breach of fiduciary duty by D1 when D2 was allowed to be used as a vehicle to obtain the benefit for itself and D1, thus evincing a reckless disregard for P's rights.

No estoppel could be invoked against P for P was entitled to bring the action only when the contract was eventually awarded as its cause of action crystallized at that point of time.

P was granted the remedy for accounts from both defendants for all the profits^v they had received from the HPHC project. Upon deduction of the amounts as contractually agreed, P was entitled to payment of the net sums on the basis of 60:40 in P's favour as agreed under the contract of employment between P and D1. No allowance for expenses, skill, expertise, effort and resources contributed by the

defendants was permitted as in the view of the court, most of the hard work had already been done before D1 left P and the award of the contract was only pending the improvement of the economy of the country.

ⁱ[2011] 1 AMCR 217

ⁱⁱ[1996] 4 All ER 698

ⁱⁱⁱ[1974] 40 DLR (3d) 371

^{iv}[1995] 3 MLJ 74

^vThe trial judge inferred that there would be an agreement by ETC and the defendants as to how much commission the defendants would be paid in relation to the HPHC project.

COMPANY LAW

DEFEATED BY SELF DUE DILIGENCE !

Under what circumstances should the court lift the corporate veil and make the director(s) of a company liable for the debts it contracted on the ground that its business had been conducted with intent to defraud or for fraudulent purpose within the ambit of s.304(1) of the Companies Act 1965 (the Act)? The High Court had the occasion to answer this question in the case of *Cyber Village Sdn Bhd v Illustra IT (M) Sdn Bhd & 3 Ors*ⁱ.

By an agreement dated 30.1.2002, the plaintiff created an education website and supplied computer hardware and software to the 1st defendant which failed to pay invoices issued therefor. Judgment in default was entered against the 1st defendant which resulted in a judgment debtor summons (JDS) taken out against one of its directors, the 3rd defendant. In the course of the JDS proceedings, the 3rd defendant testified that the 1st defendant had ceased operations around 2001 and might be treated as insolvent, that it was unable to settle its debts and that it did not have any assets. Based on such evidence as well as audit report and financial reports for the financial year 2001 filed by the 1st defendant with the Companies Commission of Malaysia (which showed it had liabilities that far

exceeded its assets), the plaintiff claimed that the individual defendants as the principal directors of the 1st defendant had carried on the business of the 1st defendant with intent to defraud creditors of the company or for fraudulent purpose and thus, such individual defendants should be personally responsible for the debts of the 1st defendant.

The trial judge went beyond the evidence recorded at the JDS proceedings and the audit and CCM reports. There was ample evidence of the plaintiff taking conscious steps to satisfy itself of the financial status of the 1st defendant. All these efforts and steps undertaken by the plaintiff would not be necessary but for the poor or bad financial shape of the 1st defendant of which the plaintiff was aware. Despite the 1st defendant's position, the plaintiff proceeded to contract with the 1st defendant. Whatever concerns the plaintiff might have had on the 1st defendant's financial ability were allayed by the 3rd defendant's representations on his family background, the assurance that he had the backing of wealthy and reputable investors, the visit by its chief executive officer to the 1st defendant's premises and his scrutiny of the on-sell contracts. In the circumstances, the court was not persuaded that there was fraudulent trading or that there had been any intent to defraud. There was no reason to lift the corporate veil and find the principal directors personally liable under s.304(1) of the Act. The plaintiff's claim was thus dismissed.

ⁱ[2011] 1 AMCR 53

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FETTERING A SHAREHOLDER'S RIGHT TO VOTE

The recent decision of the Hong Kong Court of First Instance in *Sunlink International Holdings Ltd v Wong Shu Wing*ⁱ is worthy of mention for at least two reasons. Firstly, it shows how the relief of *Mareva* injunctionⁱⁱ may be shaped, ingeniously, to prevent a shareholder from exercising his voting rights in shares. Secondly, it exemplifies the court's intervention in a shareholder's proprietary right to vote.

P1, a company listed on the Hong Kong Stock Exchange, suffered serious financial problems and its shares were suspended. Provisional liquidators (PLs) were appointed and it was later put under the delisting process. D1, who was P1's chairman and director held, directly through D2, 33.38% of P1's share capital. D1 and D2 had earlier executed a deed charging those shares (the Shares) to D5 as security for a loan (the Deed). The Deed allowed D5 to require the Shares to be transferred into its name and to direct how the Shares were voted. PLs considered that the return to the creditors would be higher if there was a restructuring of P1, rather than liquidation, leading to a resumption of trading in its shares.

During the delisting process, PLs and P1 entered into an exclusivity agreement with an investor for a 12-month period for the Investor to assist in the formulation of a resumption proposal pursuant to which it advanced a substantial sum to P1's group to continue its existing operations. These plans included an additional capital injection (the CI). General meetings for the purpose of passing the resolutions to approve the CI (the CI Resolution) were, however, adjourned when it became clear that Ds would vote against the resolutions. If CI Resolution was not passed, the Shares would be delisted and the prospect of any restructuring would be lost.

Ps brought the suit against D1 for alleged serious breach of fiduciary duties on several instances seeking, among others, damages and final orders enjoining D1 from voting against the Resolutions. On its application for an interlocutory injunction restraining Ds from voting the Shares against the Resolutions, Ps contended that D1's voting against the Resolutions would diminish the

value of its assets to which Ps were entitled to look to satisfy their claim for damages and thus, Ps were entitled to a *Mareva* injunction to restrain D1-2 from voting against the Resolutions the (1st Ground).

The court accepted that its jurisdiction to grant a *Mareva* injunction extended to preventing a debtor from destroying the value of his assets to the detriment of his creditors either because he had an ulterior purpose or simply for no rational reason and that in an extreme case, such jurisdiction could justify preventing a shareholder from exercising his voting rights in shares, following the judgment of Vinelott J in *Standard Chartered Bank v Walker*ⁱⁱⁱ. However, on the facts, the injunction would not be granted on this 1st Ground. In the view of the judge of the first instance, D1 and D2 having defaulted in the loan repayments, D5 could perfect its security pursuant to the terms of the Deed. It was thus arguable that the economic value in the Shares had been or could shortly be transferred to D5 and if D1-D2 were to vote against the CI Resolution and diminish the value of the Shares, it would not amount to a diminution of D1's assets which would otherwise be available to P1 when it came to enforcing any judgment P1 might obtain against him.

Ps however succeeded on the 2nd ground. It is trite that a shareholder does not owe fiduciary duties to a company and the right to vote is a proprietary right in respect of which, in most circumstances, the shareholder is entitled to vote in any manner as he wishes and without regard to the interest of other shareholders or the company as an entity. However, in the judge's opinion, the authorities demonstrated that the court would intervene to prevent a shareholder voting in a way which would result in the destruction of the economic value of other shareholders' shares^{iv} for no rational reason. Here, Ds had not demonstrated that they were exercising their voting rights in good faith. Their explanation that there were better proposals available had not been supported by any evidence of such proposals. Further, D3-D5's continued insistence on voting against the CI Resolution was so irrational that the court would infer that they were not acting in good faith.

Whether our Malaysian courts will follow the inroad made by the Hong Kong court upon a shareholder's right to vote remains to be seen.

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ⁱ [2010] 5 HKLRD 653

ⁱⁱ An injunction to restrain a defendant from removing its assets from the jurisdiction of the court or from dissipating them pending trial as first propounded in *Mareva Compania Naviera v International Bulk Carriers Ltd* [1980] 1 All E.R.213.

ⁱⁱⁱ [1992] 1 WLR 561

^{iv} The judge held that when a shareholder acquired shares in a listed company, part of the economic value that

attached to the shares was reflective of its listed status. The listed status was regarded by him as an inchoate asset of the company.

CONTRACT / COMPANY LAW

COMPANY RESOLUTIONS ENFORCEABLE AS A CONTRACT

In *Kumpulan A Besik Sdn Bhd v Araman Jaya Sdn Bhd*, the defendant had by a company resolution appointed the plaintiff to develop and manage a privatized development project. The plaintiff in turn by its company resolution accepted the contract from the defendant. Based on the understanding between the parties, the plaintiff in anticipation of the project initiated and executed preparatory works and incurred considerable costs. Subsequently, the defendant, despite being awarded the project from the Selangor State Government on 28.2.1995, failed and/or refused to appoint the plaintiff to the project. The plaintiff thus filed a suit against the defendant for all costs and expenses incurred as well as damages for loss of profit.

On the first issue, the High Court sitting in Shah Alam held that the directors' resolutions passed by the plaintiff and the defendant on 16.3.1993 were legally binding on both parties and

constituted a valid and enforceable contract. They contained parties' clear understanding and intention to enter into legal relations whereby contractual assurances were respectively made for the purposes of the said project. The contractual promises made were mutually and financially beneficial to the parties and were clearly supported by consideration.

On the second issue, the plaintiff had succeeded in proving that it had incurred expenditure in engaging various professionals for the purpose of the said project. It had also shown that it had paid monthly remunerations to the defendant's directors totalling RM590,000 from February 1992 until January 1998 and other payments had been made to purportedly settle the matters relating to the said project. Having considered the evidence in its entirety, judgment was entered for the plaintiff in the sum of RM2.5 million, interest and costs.

ⁱ [2011] 1 AMCR 432

CONTRACT LAW

HOW AN OPTION WHICH HAS NO DETAILED TERMS ON COMPLETION WAS ENFORCED

"The parties present at the meeting had previously and unanimously agreed that the property held by Multi Capital Ltd

(D3, the company or C), namely, Flat 1, 27th Floor, Block 3, Winfield Building and Carpark No. D9 (Property A), should be continued to be held by the company. However, the parties present at the meeting and Party D all agreed to grant to Party B – an option (option), so as to enable Party B and/or her nominee to purchase Property A on or before 28 September 2004 at the price of \$8,905,282 (see Annexure 1). The purchase may be carried out in the form of sale and purchase of the company. If Party B fails or is unable to exercise her

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option on or before that day, then Party B should be deemed to have relinquished the option."

The above were the terms (originally recorded in Mandarin) contained in the option granted by D1-3 to P as part of the agreed terms to part ways in a business relationship between P and D1-2 in the Hong Kong case of *Lau Suk Ching Peggy v Ma Hing Lam*ⁱ. The Property A was purchased on behalf of D1-2 in the name of the company, C and at all material times, was occupied by P who had provided financial consultancy services to D1-2. Before 28.9.2004, P gave notice of her intention to purchase the shares of C.

However, a formal agreement could not be agreed upon and completion did not take place by 28.9.2004. P brought a suit against D1-2 seeking specific performance. P did not succeed in her claim for specific performance at the first instance because the trial judge found that P would not have the necessary funds to enable her to complete the purchase had the vendors been willing to proceed with the sale on 19.10.2004, the date the writ was issued. Thus, nominal damages of \$10 was awarded. On appeal, the Court of Appeal held that to validly exercise the option, P had to not only exercise the option but also to complete the purchase of the shares by 28.9.2004. The award of nominal damages was discharged and P's claim was dismissed.

The Court of Final Appeal allowed P's appeal. The apex court held that it had merely been necessary by 28.9.2004 for P to give notice of her intention to exercise the option, rather than to complete the purchase of the Property A or the shares. It could also not be readily implied that there was a condition precedent that P had to pay the whole of the purchase price of Property A in order to exercise the option. However, given that a plaintiff

who seeks an order for specific performance must, both at the date of the writ and the date of the order, show that he is ready, willing and able to perform at the proper time in future all such terms and conditions to be performed by himⁱⁱ, and that no date had been fixed for completion, P was required to show that he was, at the date of the writ, ready, willing and able to pay the purchase price at whatever date the court should fix for completion and remained to be so right till the date of the order. For this purpose, it was necessary for P to show that she had not been substantially incapacitated from completing or had not determined not to complete at the then indeterminate time in the future when the court should fix a completion date. This threshold was not a high one and P had, in the view of the final appellate court, surmounted it.

P had therefore validly exercised the option and a binding contract was concluded for the sale and purchase of Property A. The Court of the First Instance should have inquired how long each party reasonably required to complete and fixed a completion date accordingly. As the events unfolded, C had sold the property before the final appeal which rendered specific relief impossible. This caused the apex court to rule that P was entitled to damages assessed as at the date when the property was sold, being the difference between the market value of the property represented by the selling price and the price P was obliged to pay to purchase C's shares.

ⁱ[2010] 13 HKCFAR 226

ⁱⁱSee *Mehmet v Benson* (1965) 113 CLR 295, 314.

CUSTOMS AND EXCISE / TORTS (NEGLIGENCE)

NO DOUBLE JEOPARDY FOR ERRONEOUS IMPOSITION OF DUTY SHORT-PAID

In *Setia Harian Sdn Bhd v Sea Eagle Maritime Sdn Bhd & Ors*ⁱ, the plaintiff imported a

consignment of beer from China and appointed the 1st defendant to assist in the customs clearance. The 1st defendant's agent informed the plaintiff that the customs duty – indicated on the customs declaration form as prepared by the 1st defendant – was RM36,751.20 which was duly paid in cash by the 1st defendant. The said consignment was released and delivered to the plaintiff's premises. Ten days later, the 2nd defendant (the customs authorities) raided the plaintiff's premises and the plaintiff, upon being notified that the customs duty paid was only RM20,297.20, made payment of the duty short-paid

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of RM16,454 together with the imposed fine of RM5,000. The 2nd defendant then issued a 'Penerimaan Tawaran Kompaun Kerana Melakukan Kesalahan Di Bawah Akta Kastam, 62/1967' (the Compound). The Compound clearly stipulated that upon payment of the amount and fine, the consignment of beer would be released without any condition. Three days later, however, the 2nd defendant informed the plaintiff that the actual customs duty payable for the beer was RM261,214.56. The plaintiff refused to pay the additional (recalculated) duty which resulted the beer to be seized by the 2nd defendant three days later and ultimately forfeited. The plaintiff claimed against the 1st defendant for negligence in discharging its duty as the plaintiff's customs agent, and the 2nd defendant and vicariously the 3rd defendant (Government of Malaysia) for negligence or failure in properly assessing the customs duty. The 2nd and 3rd defendant counterclaimed for the short-paid customs duty of RM261,214.56. Until the trial, the 2nd defendant had yet to prosecute the plaintiff on the alleged unpaid duty.

The trial judge held against the 1st defendant that the imposition of the fine, the payment of the duty short-paid and the subsequent seizure of the beer were consequential from the 1st defendant's negligence. As a licensed customs agent and freight forwarder, the 1st defendant had a duty to ensure that they entered the correct details such as quantity, tariff code and other particulars of the consignment in the customs declaration forms. That the 1st defendant had clearly failed to properly discharge its duty was borne out by events that unfolded to the plaintiff's detriment. An order for damages to be assessed was made against the 1st defendant.

However, the plaintiff's claim against the 2nd and 3rd defendants were fatally defective in not making the officer of the Government who was responsible for the alleged tortious act as a party to the suit which was a prerequisite under ss.5 and 6 of the Government Proceedings Act 1956ⁱ. The plaintiff's claim was dismissed on this ground alone without considering the substantive issues. As to the counterclaim, the trial judge took note of s.17 of the Customs Act 1967 (s.17) which dealt with payment of duty short-paid due to inadvertence, error or any

reason whatsoever on the part of any officer of the 2nd defendant and which provided the deficiency to be payable on demand. When the officer of the 2nd defendant demanded the plaintiff to pay the deficiency of RM16,454 under the notice of seizure, he was exercising the power under s.17. When the officer of the 2nd defendant returned to the plaintiff's premises on the second occasion, he was also acting under the same notice pursuant to s.17. To the trial judge, it was not fair and reasonable. The provision of s.17 might be resorted to in a situation in which there was deficiency due to one instance of inadvertence or error on the part of the customs officer but should not be extended to cover situations subsequent to the first instance. It would offend Article 7 of the Federal Constitution as it exposed one to repeated prosecutions for the same offence. The 2nd and 3rd defendants' counterclaim was therefore dismissed with costs.



Not Duty Free but Double Duty!

ⁱ[2011] 1 CLJ 116

ⁱⁱSee the Federal Court ruling in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663

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DIGEST OF EMPLOYMENT LAW CASES

1. DEPARTING FROM LIFO IN RETRENCHMENT EXERCISE

It is not mandatory to follow the principle of Last In First Out (LIFO) in carrying out a retrenchment exercise. The company can depart from such principle and use other objective criteria. This message was emitted in the Industrial Court decision in *Nirmala Devi N Letchumanan v Informatics Training Technology Sdn Bhd*. There, the claimant worked as a lecturer with the company at its KL Centre. Four years later, she was issued with a letter of retrenchment which stated that due to restructuring and reorganization, her position had become redundant. The claimant contended that she had been terminated without just cause or excuse. One of the issues arose for determination was whether the retrenchment had been carried out in conformity with the accepted standards of procedure. The claimant contended that although she was the senior most in the Business Department, she was retrenched ahead of others who were more junior. The company's response was that in the selection of employees for retrenchment, the management looked into the headcount needed for efficient operation. The company had to make a selection from the lecturers that had the ability to teach other subjects apart from the subjects that they had originally been engaged to teach. The claimant had mainly taught Business Administration subjects whilst the more junior lecturers had taught many more subjects and could easily take over the claimant's job functions. Furthermore, the junior lecturers were also retained to teach students who had already been in the system and who needed to be taught until the completion of the module. Thus, the reasons given by the company for departing from the LIFO principle were held to be valid. The court remarked that in retrenchment exercise, seniority was not the only factor and drew attention to the criteria stipulated in Article 22(b) of the Code of Conduct for Industrial Harmony, one of which was the need for the efficient operation of the establishment. The other issue raised by the claimant was that she had not been warned of the impending retrenchment. To this, the court held that there had not been any obligation on the employer to consult or warn his employees before embarking upon retrenchment. To expect the company to have done so would have derogated from the recognized prerogative of an employer to close down, reorganize and restructure its business in the way it

liked be it for the purposes of economy or convenience provided it had acted *bona fide*.

2. NO REFERENCE IF REINSTATEMENT WAS OFFERED AND REJECTED

In *Sunny Khoo v YB Menteri Sumber Manusia, Malaysian & Anor*ⁱⁱ, the claimant was employed by the 2nd respondent company as its Head of Finance and Credit Control. The 2nd respondent had vide two letters alleged that the claimant was not supportive of a merger of the Finance & Credit Control Department of two companies in the Mines Resort Group and had agreed to resign on six-month notice. This was disputed by the claimant who regarded himself as dismissed and did not report to work for three weeks. The 2nd respondent then issued a letter which withdrew all its letters issued to the claimant earlier and requested him to report for work in the same position and on the same terms and conditions of employment. The claimant failed to do so on the ground that the 2nd respondent had failed to comply with his conditions for reinstatement and that the matter was then with the Minister pursuant his representation of wrongful dismissal under s.20(3) of the Industrial Relations Act 1967. The Minister decided not to refer the representation to the Industrial Court for adjudication since the company had made the offer for reinstatement which was spurned by the claimant, hence there was no serious issue that required adjudication. The High Court agreed and dismissed the claimant's suit for *certiorari*ⁱⁱⁱ. In industrial law, reinstatement is the primary remedy. An acceptance of it or an unreasonable rejection of it by the workman must be treated as having put an end to the dispute. Thus, if the employer reinstates or offers to reinstate the employee to his former employment without loss of any benefits or privileges, there was simply nothing to refer because of the reinstatement or the offer thereof. The Minister therefore did not commit any error of law in refusing to refer the claimant's representation to the Industrial Court.

3. LESSER PUNISHMENT THAN SACKING

The applicant in *Malaysian Philharmonic Orchestra v Arne Walter Neckelmann*^{iv} was an organizer of musical performance whereas the respondent was employed as Section Principal, Cello for a two-year term. Upon complaints made against the respondent for conducting himself in an unprofessional and highly unbecoming manner in

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berating his regular stand partner, a show cause letter was issued. The respondent denied the allegations. The applicant then re-designated him to Tutti Cello and re-adjusted his salary. On the respondent's claim of constructive dismissal, the Industrial Court decided that the applicant was contractually not entitled to re-designate the respondent and adjust his salary. It held the view that the employer's right to punish by demotion must be expressly provided contractually which was absent in that case. On judicial review, the High Court quashed the decision. Legally, if the contract of employment permits the employer to dismiss its employee for misconduct, the employer will also be permitted to impose a lesser punishment if the circumstances warrant it although the contract contains no such provision. The Industrial Court had failed to consider the previous conduct and letter of warning in respect of his lack of leadership which justified the mode of punishment meted out to the respondent.

4. CONSIDERATION FOR VARIATION OF EMPLOYMENT CONTRACT

In the Hong Kong Court of Appeal decision in *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd*^v, P had been a cabin attendant with Cathay Pacific Airways (CP) since 1979. Clause 25A of P's employment contract provided that (a) an employee could resign by giving one month's notice or one month's pay *in lieu*; (b) an employee who was required to resign or retire by CP would be given one month's notice or one month's pay *in lieu*, except (c) where s/he was dismissed for cause "without notice or benefit". Under clause 26, employees in categories (a) and (b) but not (c) were entitled to a 'retirement grant'. In 1991, CP issued a handbook dealing with housing, medical and travel benefits. This included a retiree travel benefit scheme (RTB) involving travel concessions for staff and eligible dependants for pleasure purposes. In 1993, before P had reached the normal retirement age of 40, her employment was terminated by CP giving one month's notice *in lieu* and paying a retirement grant. P claimed for entitlement to the RTB.

The Court of Appeal agreed with the Court of the First Instance that the RTB provisions had contractual force and were not mere discretionary benefits which CP could withhold from its cabin attendants. The RTB provisions dealt with the employee's overall remuneration package which was of day-to-day relevance to the continuing

relationship between employer and employee and a basis for inferring a contractual intent. Further, CP considered the RTB provisions to be binding on itself and its employees and had consistently observed those provisions; there was no known case of CP departing from them. The presence or absence of the word 'guide' was not decisive and, in any event, the handbook was not described as only a guide. On the consideration for the variation, a contracting party could not use his promise to perform, or his actual performance of, a pre-existing contractual obligation (effectively past consideration) as consideration for the new promise in his favour by his opposite contracting party. Fresh consideration was required. Rigour of this general rule had been ameliorated, there being "a trend towards a pragmatic appraisal of consideration in commercial relationships", and it would take very compelling reasons for a court to hold that what were regarded as contractual by the parties actually had no contractual force in law for want of consideration. In this case, the necessary consideration for the variation was supplied by P not exercising her contractual right to leave CP, P having been satisfied with an enhanced remuneration package. Finally, on a proper construction of the contract and the RTB provisions, the RTB provisions applied to a dismissed employee like P who had been asked to leave by payment *in lieu* of notice.

5. OF NON-COMPETITION, ANTI-POACHING & NON-SOLICITATION CLAUSES...

Restrictive covenant was the focus of the Hong Kong Court of First Instance in the case of *Midland Business Management Ltd Lo Man Kui*^{vi}.

There, D was an assistant sales director in charge of eight branches covering high-end and luxury properties whose employment contract included: (a) a post-termination non-compete clause preventing D from engaging in the business of estate agency in respect of sale and purchase or leasing of properties "in areas in relation to which D had been assigned to work or which were contained in data files kept or list of properties prepared by P to which D had obtained access" within 6 months immediately preceding the date of termination (the Zone) for a period of six months (the Non-competition Clause); and (b) an anti-poaching clause preventing D from approaching or soliciting 'any other current employee of P' (the Anti-poaching Clause). On D's leaving its employment and joining a rival property agency, P sought to enforce the restrictions.

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It was held that the Non-competition Clause extended beyond P's customers and if it were enforceable, D would be prohibited from serving new customers within the Zone, even those with whom P had no prior connection. Further, the legitimate interest relied on by P was not any confidential process or system in its operation but the non-exclusive trade connections between each individual estate agent and its customers. Such interest was already protected by two other clauses which prevented D from approaching and soliciting any real estate business from persons who had been within one year immediately preceding the date of termination customers of P (the Non-solicitation Clause). The court rejected P's contention that the extensive protection vide the Non-competition Clause was necessary (as in the English Court of Appeal decision in *Thomas v Farr Plc*)^{vii} on account of the difficulty in policing compliance with the Non-solicitation Clause since, as the argument went, the solicitation could be done by a subordinate agent instead of D himself.

As to the Anti-poaching Clause, whilst P was entitled to have protection in respect of the stability of their sales staff, the expression 'any other current employee of P' encompassed all current employees including non-sales staff, regardless of their importance, those working outside the Zone and even those who joined P after D had left. The anti-poaching restraint was too indiscriminate.

P's counsel's attempt to urge the court to apply the blue pencil-approach in *Sadler v Imperial Life Assurance Co of Canada Ltd*^{viii} by deleting the unenforceable parts in the Non-competition Clause - -- "... for whatever reasons [D] shall not, without ... prior written consent, directly or indirectly be engaged as director, partner, principal, owner, shareholder, consultant, agent, subagent, or servant or otherwise, ~~or accept employment or otherwise, or be concerned with or interested in any business concern of estate agency in Hong Kong~~ in respect of the sale and purchase or leasing of properties ..." failed to address the problem in the Non-competition Clause which remained unreasonable. P's application for interlocutory injunction against D was dismissed.

6. SEASONAL WORK AND DAILY PAID WORKMAN

In *Edwin Anak Bakar v Sarku Marine Sdn Bhd*^{ix}, the claimant had commenced employment with R as a deckhand around the period 1992-1993. He was subsequently promoted to the position of

mechanic. In May 2004, the claimant was told by R that he had been laid off. On the claimant's complaint of wrongful dismissal, the claimant was held to be a workman. The facts that his employment had been on a seasonal basis which in turn had depended on the securing of projects by R and that he had not been required to sign a letter of employment did not mean that he had not been an employee. The pattern whereby the claimant having worked for some time offshore on a project and returned to shore and waited for a period of time before he was contacted again to return to work offshore for another project ought not to exclude him as being a workman. A contract of employment could still exist without the parties having to sign a formal letter of employment. It was clear that R had at all times during the course of the claimant's employment exercised its due control and supervision over his work, the degree of control exercised over him being the critical element in deciding whether the employment relationship was one of contract of service or for services. Further, R had been paying contributions towards his SOCSO and EPF. The definition of "workman" under s.2 of the Industrial Relations Act 1967 had not been restricted exclusively to only those earning a monthly salary but also covered persons who had been paid on a daily basis.

7. CAN A REPUDIATORY BREACH BE CURED BEFORE ACCEPTANCE?

The answer is a resounding "No" as decided in the UK case of *Bournemouth University Higher Education Corp v Buckland*^x. The claimant in that case was a university professor and course unit leader. He failed a high number of students in the year-end examination. The papers were re-marked by the programme leader who criticized the original marking. They were then marked again by a different member of the academic staff with improved results, which the board of examiners confirmed without consulting the claimant who thereupon complained to the university authorities. An inquiry chaired by a senior academic vindicated the claimant, criticized the university and acknowledged that the third marking should not have been undertaken without consultation with the claimant. The claimant was not mollified and considered that he had not been exonerated and resigned with effect from the academic year-end. He then brought proceedings for unfair constructive dismissal.

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The employment tribunal upheld his claim, holding that confirming marks given by a different member of the academic staff without consulting the claimant amounted to a fundamental breach of the implied term of trust and confidence in his employment contract. The claimant had not affirmed the breach by waiting for the result of the inquiry before resigning. The Employment Appeal Tribunal however allowed the appeal by the employer, holding that the breach had been remedied by the time the claimant gave his notice of resignation.

On further appeal, the Court of Appeal held that under the general law of contract, a repudiatory breach of contract, once complete^{xi}, was not capable of being remedied so as to preclude acceptance of the breach. There was no justification to introduce any exception to employment law which formed an integral part of the general law of contract. Thus, it had been entirely proper for the claimant to exercise his right to accept his employer's repudiatory breach by a long period of notice, given that his students would have been otherwise adversely affected. The appellate court also rejected the employer's attempt to change the test of breach of a fundamental term of a contract of employment which was objective [following *Western Excavating (ECC) Ltd v Sharp*^{xii} as reiterated in *Mahmud v Bank of Credit and Commerce International SA*^{xiii}] to one which was "whether the employer's conduct lay within the range of reasonable responses open to it in the situation confronting it at that time". Instead, the court regarded reasonableness on the part of employer as

merely a measure which might be used in determining whether there had in fact been a fundamental breach of contract.

ⁱ [2011] 1 ILR 121

ⁱⁱ [2011] 1 CLJ 1047

ⁱⁱⁱ Certiorari is a writ directed to an inferior tribunal commanding it to certify to the High Court of Justice some matter of a judicial character.

^{iv} [2011] 2 CLJ 238

^v [2011] 1 HKLRD 10

^{vi} [2011] 1 HKLRD 470

^{vii} [2007] ICR 932

^{viii} [1988] IRLR 388. The case was cited for the proposition that a contract which contained an unenforceable provision nevertheless remained effective after the removal or severance of that provision if three conditions were satisfied.

^{ix} [2011] 1 ILR 375

^x [2010] 3 WLR 1664

^{xi} That is, not a merely anticipatory breach. An anticipatory breach of contract can be withdrawn at any time up to the moment of acceptance, but no further. See *Stocznia Gdanska SA v Latvian Shipping Co Ltd (No 3)* [2002] 2 Lloyd's Rep 436, para 87.

^{xii} [1978] QB 761

^{xiii} [1998] AC 20

GUARANTEE / CONTRACT LAW

INTERPRETATION BY VIEWING FACTUAL MATRIX

In interpreting an agreement, the court must first look at the words in the agreement itself to decipher its true meaning and import. Whilst doing so, the court is entitled to look at the factual matrix forming the background to the transaction. It is required to take an objective approach in interpreting a private contract and to disregard any part of the background that is declaratory of subjective intentⁱ. Any interpretation which frustrates the commercial or business object of the transaction must not be accepted over one that does notⁱⁱ.

The above approach was adopted by the High Court in the case of *Kaysen Construction Sdn Bhd v Kong Wha Housing Development Sdn Bhd & Anor*ⁱⁱⁱ. In that case, the 1st Defendant, the developer had awarded the contract for the construction and completion of a project to the Plaintiff. By the bank guarantee dated 17.11.1993, the 2nd Defendant guaranteed the Plaintiff the payment of the full contract price of RM3,762,077. Clause 4 of the bank guarantee reads as follows:-

"The payment obligation of the Issuer hereunder shall not arise until such time the Certificate of Practical Completion ("CPC") in respect of the Project shall have been duly issued by the Project Architect and is subject to you making as demand on the Issuer on or before the expiry of *six (6) months from this date hereof*. This Guarantee shall remain valid and in full force and effect from

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the 2nd day of July 1993. This Guarantee shall, unless a demand is made within the validity period as aforesaid, then expire and be returned to us for cancellation.” (emphasis added)

As it turned out, the CPC was only issued by the project architect on 8.6.1994. The Plaintiff subsequently made a demand on the bank guarantee from the 2nd Defendant vide their letter dated 15.6.1994. The issue was whether the bank guarantee was valid for 6 months from the date of the bank guarantee itself or from the date of the CPC. If the construction was the former, which appeared to be so on a literal interpretation, the last day to make the demand would have been 16.5.1994 which meant the Plaintiff was out of time to claim under the bank guarantee.

The Court held that the words “six (6) months from this date hereof” meant six months from the date of issuance of the CPC. Looking at the totality of the whole guarantee agreement, the payment obligation of the 2nd Defendant would not arise until the contract sum was payable by the 1st Defendant and this in turn would be after the CPC

was issued by the project architect. Therefore, the entire agreement would be rendered absurd if the words “from this date hereof” were to be interpreted as the date of the guarantee for it would have required the Plaintiff to make a demand from the 2nd Defendant even before the 1st Defendant’s obligation to pay the contract sum arose. Such interpretation would have frustrated the very intention behind the guarantee agreement. Indeed, following such interpretation, the bank guarantee would have expired even before the effective date of the coverage !

ⁱ *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2010] 2 AMR 205

ⁱⁱ *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab Malaysian Prima Realty Sdn Bhd & 7 Ors* [2003] 3 CLJ 349

ⁱⁱⁱ [2011] 1 AMCR 114

INSURANCE / COURT PROCEDURE / COMPANY LAW

INSURER STATUTORILY OBLIGED TO SATISFY JUDGMENT AGAINST INSURED

The respondent in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy*ⁱ collided with a motorcyclist (the insured) in a road accident and filed an action against the latter which resulted in a judgment for RM89k in damages against the latter. The appellant, as the insurer of the motorcycle, did not make payment of the judgment sum and appealed to the Court of Appeal. Its application for a stay of execution of the judgment pending appeal was dismissed whilst similar application at the Court of Appeal was pending. Meanwhile, the respondent served a notice under s.218(1)(e) of the Companies Act 1965 on the appellant which prompted the latter to apply for an injunction to restrain the respondent from proceeding with the presentation of a winding-up petition pursuant to the said s.218 notice. The High

Court dismissed the injunction application and this decision was upheld by the appellate court.

The appellant’s main contention was that the respondent had not obtained any judgment against the appellant personally but merely against the insured and the respondent ought to have filed recovery proceedings under s.96(1) of the Road Transport Act 1987 (RTA87) before taking any step to wind-up the appellant. The proper construction of s.96(1) of RTA87 which relates to the duty of the insurer to satisfy judgment against person insured in respect of third party risks was thus in issue. The appellate court held that this statutory provision imposed upon the insurer (ie. the appellant) the obligation of paying to the person who had obtained a judgment against the insured (ie. the respondent), after a certificate of insurance had been duly delivered to the person by whom the policy was effected in respect of any third party risk covered under the policy. The appellant was obliged statutorily to pay the respondent the judgment sum. Nowhere did s.96(1) state that the respondent must first obtain another judgment against the appellant before she could proceed to enforce the said judgment against the insured. There was no question of the respondent having to file recovery proceedings against the appellant. In short, the judgment debt of the insured became judgment debt

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of the appellant by virtue of s.96(1) of RTA87. The respondent could therefore recover the said judgment sum from the appellant by serving the said s.218 notice.

An injunction to restrain an intended winding-up petition against a company known as “Fortuna Injunction”ⁱⁱⁱ may be granted only upon satisfaction of two requirements: (i) the intended petition has no chance of success as a matter of law and fact; and (ii) the presentation of such petition might produce irreparable damage to the company. In this case, the intended petition based on a valid and enforceable judgment if filed was not bound to fail but conversely, had a good chance to succeed. The court ruled that in such circumstances, whether or not the intended petition could cause irreparable damage was of no consequence. Limb (ii) was only applicable to a disputed debt but did not apply to cases where the debt in question was undisputed. Thus, the injunction as prayed for by the appellant stood dismissed.

Since execution was a natural process after obtaining a judgment and a winding-up was one of themⁱⁱⁱ, the respondent was at liberty to exercise her choice in enforcing the judgment debt by initiating a winding-up proceedings and such exercise did not amount to an abuse of process.

What is of interest is the *obiter dicta* laid down by the Court of Appeal. It is this. Without a doubt, failure on the part of a debtor to pay the

particular debt claimed in a s.218 notice within the stipulated three-week period will give rise to a statutory rebuttable presumption that the company is insolvent or unable to pay all its existing debts owed to all creditors. The court, however, remarked that paying the particular debt after the expiry of the three-week period (as was done by the appellant in this case) was still insufficient to rebut the said presumption which remained and the winding-up court was empowered to wind-up the company^{iv}. Corporate judgment debtor should pay heed to such *dicta* in opting not to satisfy a judgment debt at the risk of being slapped with a winding-up petition. In the words as cited in the judgment, ‘rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them.’^v

ⁱ [2011] 1 CLJ 947

ⁱⁱ As derived from the case of *Fortuna Holdings PTY Ltd v The Deputy Commissioner of Taxation* [1978] VC 83

ⁱⁱⁱ *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 CLJ 360

^{iv} *Hotel Royal Ltd Bhd v Tina Travel Agencies Sdn Bhd* [1989] 1 LNS 170, *Eurolplus Corp Sdn Bhd v Lim Wai Leong* [2003] 4 MLJ 1, *Mann v Goldstein* [1968] 1 WLR 1091, *Re Lymph Investments Ltd* [1972] 1 All ER 385, *Cornhill Insurance Ple v Improvement Services Ltd & Ors* [1986] WLR 114.

^v per Vaisey J. in *In re a Company* [1950] 94 SJ 369.

REMEDIES / CONTRACT LAW

ASSESSING DAMAGES AS AN INEXACT SCIENCE

Assessment of damages is of great concern to a plaintiff as it provides the remedy in monetary terms consequent upon a breach (be it under contract or tort or other causes of action) established against the wrongdoer. Whilst a plaintiff claiming damages must prove his damage, the law does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Where precise evidence is obtainable, the court naturally expects to have it but where it is not, the court must do the best it can.ⁱ

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With these principles in mind, let us look at the recent Singapore Court of Appeal decision in *MFM Restaurants Pte Ltd & Anor v Fish & Co Restaurants Pte Ltd*ⁱⁱ. The respondent (R) was the

owner of a chain of seafood restaurants called “Fish & Co” whereas the 1st appellant (A1) was the owner of another chain of seafood restaurants called “The Manhattan Fish Market” (MFM) and the 2nd appellant (A2) was a former employee of R. R had earlier sued A2 for breaching the non-competition obligations in his contract of employment which culminated in a settlement deed that included A1.

Subsequently, the appellants breached the settlement deed and a consent judgment was entered with damages to be assessed. R claimed damages for two time periods, *ie.* the period when the breaches occurred (the Breach Period) and the period thereafter when the breaches had ceased but its effect continued to result in losses to R (the Post-Breach Period). At the initial hearing before the assistant registrar (the AR) and appeal at the High Court, three methods of calculations were put forward:

- Method A involved a comparison of the sales figures for Fish & Co restaurants affected by the appellants’ actions with the sales figures of Fish & Co restaurants which were not affected by the same actions.
- Method B assumed that part of the revenue earned by MFM was a result of the appellants’ breaches and sought to calculate Fish & Co’s loss of profits by multiplying the revenue earned by MFM as a result of the breaches by the profit margin that Fish & Co would have made on that revenue.ⁱⁱⁱ
- Method C modified Method A in that only the Glass House outlet was affected by the appellants’ breaches and comprised 60% of the losses caused to R during the Breach Period and 12 months thereafter.

Method C as used by the AR was rejected by the High Court. Instead, the Judge based her quantification of damages on Method B, finding that if the appellants had not committed the breaches, Fish & Co’s sales would at least have been in line with the industry’s trend. For Glass House’s sales to be in line with the industry, its sales would have to be increased by 16%. Thus, she awarded damages based on 16% of MFM’s sales during the Breach

Period. As for the Post-Breach Period loss of profits, she reduced the period from 12 to 6 months.

On appeal, the Court of Appeal reiterated that an award of compensatory damages in contract law should be based on the plaintiff’s own loss rather than measuring it by reference to the defendant’s gains or profits^{iv}. Method B was, in the view of the appellate court, not necessary as there was sufficient evidence on an adequate and reasoned basis to ascertain R’s own loss. Based on R’s evidence, there was an upward trend on the actual gross sale by Glass House^v. For the period between February 2006 and January 2007, based on a predicted percentage change of –0.38%, the difference between the actual and predicted gross sales of Glass House was \$121,738.55. Accepting R’s expert evidence that Fish & Co’s variable profit margin was 52.38%, Glass House’s loss of profits in this 12-month period would amount to \$63,766.65. For the period between August 2005 and January 2006, the same rate of profits was assumed and the predicted loss of profits for that period could be estimated to be half of the predicted loss of profits for the period between February 2006 and January 2007, *ie.* \$31,883.33. Thus, the amount of damages in respect of the appellants’ breaches during the Breach Period would be \$95,649.98^{vi}.

As to the losses in the Post-Breach Period, it was illogical and unrealistic to expect losses to cease immediately after the breaches had stopped. The Judge was thus correct to take into account the trailing-off effect when assessing damages to account for the fact that, with the passage of time, more and more consumers would become aware of the changes and that the after-effects of the breaches would (as a consequence) decrease accordingly. The appellants were held to be liable for the post-breach losses but the period was restored to 12 months. Adopting the same methodology, for the Post-Breach Period, based on a predicted percentage change of 2.31%, the difference between the actual and predicted gross sales of Glass House was \$375,400.53 and the predicted loss of profits (adjusted by half to take into account allowance made for a gradual decrease in the effect of the appellants’ breaches) was \$98,317.40. The total amount of damages awarded to R for both periods was \$193,967.38.

Quantification of damages aside, there was also issue on causation, *ie.* whether R had discharged its burden of proving that the breaches of

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the settlement deed resulted in losses to R. In this respect, the appellants contended that the fact that Fish & Co had already been making losses before the Breach Period showed that its alleged losses during the Breach Period were not caused by MFM and that the fact that losses continued to be experienced by Fish & Co after the breaches had ceased indicated the lack of causation.

To these contentions, the Court held that even if Fish & Co's performance during the Pre-Breach Period was not optimal, this did not mean that it could not have done better during the Breach Period but for the appellants' breaches under the settlement deed. Given the proximity between Glass House and the MFM outlet in Plaza Singapura as well as the similarities between MFM and Fish & Co, it was reasonable that the business attracted by MFM was partly drawn from Fish & Co's potential clientele. Although generally the fact that the appellants made financial gains was irrelevant to establishing the issue of causation, in the context of the present proceedings, where there were two similar rivals in the same market, financial gains made by one could reasonably be translated as losses to the other.

There are two other notable points that emerged in the case. First, arguments could have been, but indeed not, made in relation to the award of punitive damages in contract law or the award of "restitutionary damages" as set out in the House of Lords decision in *Attorney General v Blake (Jonathan Cape Ltd Third Party)*^{vii}. The former is still controversial and remains unsettled in Singapore^{viii}. As to the latter, which permits the court in exceptional cases to award damages to the plaintiff (in a situation relating to the breach of a contract) on the basis of the gains or profits made by the defendant even though the plaintiff could not otherwise be awarded any damages based on the traditional contractual principles (which center on expectation loss), its precise contours have yet to be fully worked out.

Second, the issue on whether R was entitled to claim for losses suffered during the Post-Breach Period concerned remoteness of damage. The principle of remoteness of damage in the law of contract originated from the landmark English decision of *Hadley v Baxendale*^{ix} (*Hadley*) and has two limbs: (1) damage flowing "naturally" from the breach of contract; and (2) "unusual" damage which (by its very definition) does not flow naturally from

the breach of contract but, rather, is due to special circumstances.^x The English House of Lords in its relatively recent (and highly debatable) decision in *Transfield Shipping Inc v Mercator Shipping Inc*^{xi} (*The Achilles*) seemed to have introduced (at least vide the judgments of Lord Hoffmann and Lord Hope of Craighead) an apparently new legal criterion to the existing law, viz, whether or not the defendant concerned had assumed responsibility for the loss which had occurred as a result of its breach. Put simply, if this additional criterion is not satisfied, the loss concerned would be considered to be too remote and not recoverable by the plaintiff. In a lengthy and highly analytical judgment, the Singapore apex court decided, on six grounds, that Singapore courts would not follow the approach advocated by Lord Hoffmann in *The Achilles*^{xii} and the two limbs in *Hadley* continued to be the governing principles in relation to the doctrine of remoteness of damage in contract law. In their view, the existing distinction drawn between imputed knowledge (under limb (1) in *Hadley*) and actual knowledge (under limb (2) in *Hadley*)^{xiii} provided the court with a sufficiently nuanced approach towards dealing (in a practical manner) with whether or not the defendant concerned had assumed responsibility with respect to natural or ordinary loss and extraordinary loss, respectively.

Whether and if so, how, our Malaysian courts will apply the concept of punitive or "restitutionary" damages in the context of remedies available for breaches of contract and the test for remoteness based on "assumption of responsibility" remains to be seen.

ⁱ Observations of the Singapore Court of Appeal on certainty of damages in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 citing *McGregor on Damages* and *Biggin & Co Ltd v Permanite, Ltd* [1951] 1 KB 422

ⁱⁱ [2011] 1 SLR 150

ⁱⁱⁱ Method B was held not to be relating to an account of profits but still a loss-based approach. It did not purport to transfer MFM's profits to Fish & Co, but, instead, utilized MFM's sales to estimate Fish & Co's loss of profits.

^{iv} An award of damages in contract law based on the profits that have been made by the defendant should only be done in exceptional situations where there is no sufficient evidence to ascertain the plaintiff's own loss, see paragraph [66].

^v The evidence that Glass House had reversed the general trend of declining gross sales was based on the gross sales for three periods between February 2003 and

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January 2004, February 2004 and January 2005 and February 2005 and January 2006.

^{vi} See the detailed workings in paragraph [68] to [71].

^{vii} [2001] 1 AC 268

^{viii} *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR (R) 202
^{ix} 165 ER 145

^x A summary of the legal position in Singapore in this aspect can be found in *Robertson Quay* case, *supra*.

^{xi} [2009] 1 AC 61

^{xii} The approach was further explained by Lord Hoffman in “*The Achilles* : Custom and Practice or Foreseeability?” (2010) 14 Edin LR 47.

^{xiii} For an instructive elaboration of these two kinds of knowledge in the context of remoteness of damage, see *Robertson Quay*, *supra*. See also *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, *Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350, *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] 3 WLR 354 at [215], *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377.

TORTS (NEGLIGENCE)

LOSS OF CHANCE OF BETTER MEDICAL OUTCOME IS NOT COMPENSABLE DAMAGE

In *Tabet v Gett*, a doctor was negligent in failing to order a scan earlier than he did on a patient that would have revealed she had a brain tumour. The patient's condition subsequently deteriorated and she suffered irreversible brain damage. The trial judge attributed 25% of the deterioration to a neurological event which occurred between when the scan should have been ordered (13.1.1991) and when it was actually ordered (14.1.1991). However, he was not persuaded that earlier discovery of the tumour would have led to treatment that would have avoided that part of deterioration.

He found on the balance of probabilities that there was a 40% chance that an earlier scan would have avoided some of the brain damage and awarded damages for the loss of that chance. He assessed the patient's damages referable to her brain damage at \$6,092,586. Her decline on 13.1.1991 contributed 25% representing \$1,523,146, the lost chance of avoiding that decline being 40%, damages for \$610,000 was ordered. On appeal, the Court of Appeal of the Supreme Court of New South Wales allowed the doctor's appeal and set aside the judgment. It was the opinion of the appellate court that recovery for the claim for the loss of the chance would revolutionize proof of causation of injury which they were not prepared to do. The patient appealed to the High Court of Australia.

In actions involving medical negligence, the loss or damage claimed to have been suffered is ordinarily physical or mental injury or harm. The question is whether such injury or harm has been caused by the negligent act or omission, such as a failure to diagnose or treat the disease or condition from which the plaintiff suffered. The difficulty faced by the patient in the instant case was that the expert medical evidence did not establish the link between the omission of the doctor (with the consequent delay in treatment) and the brain damage which occurred on 14.1.2004, which was necessary for a finding of causation. In other words, there was no evidence as to what harm might have been caused by the delay. The probability was that the tumour would have caused brain damage in any eventⁱ. It could not therefore be demonstrated that the doctor's negligence was probably a cause of the patient's brain damage.

The basic question for determination was whether the lost chance of a better outcome was recognized as actionable damage for the purposes of the tort of medical negligence. This question has divided courts throughout the worldⁱⁱⁱ. Analogy was drawn to the recognition of the loss of a commercial opportunity as actionable damage. However, the High Court pointed out that in such cases, the commercial interest lost might be readily be seen to be of value itself and the chance itself could be regarded as an item of property^{iv}, whereas a loss of a chance of better medical outcome could not be regarded in this way. The High Court was also not prepared to treat loss of a chance of a better outcome as a kind of harm independent of the physical harm occasioned.

The “chance” in the instant case was the “possibility”, to put it at the highest, that no brain damage would occur or that it would not be so severe. They were the “better medical outcomes” involved in the chance. Expressing the alleged loss

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or damage as a “chance” of a better outcome recognized that what was involved were mere possibilities (but not probabilities) and that the general standard of proof of causation (on the balance of probabilities) could not be met. To allow a claim based on “loss of a chance” would require lowering the standard of proof which would in turn necessitate a fundamental change of the law of negligence but circumstances of the instant case did not provide a strong ground for considering such change.

ⁱ[2010] 240 CLR 537

ⁱⁱExtract from the judgment of Kiefel J at paragraph 114.

ⁱⁱⁱArguably, the loss of chance of a better outcome was recognized as damage in some common law countries

notably USA and some civil countries particularly France whilst UK, Canada and Australia have resisted the approach. See *Matsuyama v Birnbaum* (2008) 890 NE (2d) 819, *Gregg v Scott* [2005] 2 AC 176 (HL), *Lafferrière v Lawson* [1991] 1 SCR 541.

^{iv}See *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (opportunities to acquire commercial benefits are frequently valuable in themselves and loss of such opportunities could be regarded as loss or damage, thereby the necessary causal link between fault and damage), *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

TORTS (NEGLIGENCE)

WHETHER HOSPITAL IS RESPONSIBLE FOR LABORATORY'S FAILURES

In *Farraj v King's Healthcare NHS Trust*ⁱ, the claimants who were husband and wife were carriers of a gene which could cause beta thalassaemia major (BTM), a blood disorder giving rise to reduced life expectancy. When the wife was pregnant with her third child, they decided to undergo DNA testing with the intention of terminating the pregnancy if the test result for BTM was positive. A purported sample of the foetus was taken and sent by their consultant obstetrician in Amman to D1 in London for analysis. The sample was very small and bloodstained and in order to achieve any result, it had to be cleaned and foetal tissue identified and cultured to increase the quantity. D1 did not have that facility and sent the sample to a laboratory to provide a cultured sample.

The laboratory's technician was doubtful whether the cleaned sample included any foetal tissue which would affect the reliability of the test but he did not convey those doubts to D1. The sample was returned to D1 which tested it to be normal. In due course, the wife gave birth to a son who was found to be suffering from BTM. The claimants claimed for damages in negligence against D1 and the laboratory.

The claimants did not criticize D1 for having delegated the task of cleaning and culturing the sample to the laboratory but contended that D1 had been negligent in failing to make a positive inquiry of the laboratory as to whether the sample contained foetal tissue suitable for culturing and genetic testing.

The Court of Appeal in United Kingdom found as a fact that there was a clearly understood though informal working arrangement as to the respective roles and responsibilities of D1 and the laboratory under which D1 was entitled to assume, unless it heard from the laboratory to the contrary, that the sample had provided some foetal material suitable for culture and that when the cultured cells were returned to D1, they could be relied on as comprising foetal cells. The trial judge was held to have erred in holding that D1 had a duty to ask for information about any sample it was sending for culture.

The court went on to draw a distinction between hospital carrying out tests on a patient who had been admitted to hospital for treatment and hospital carrying out tests on samples which were provided by a non-patient. The special duty which existed between a patient and a hospital arose because the hospital undertook the care, supervision and control of persons who, as patients, were in special need of care. However, if the hospital had been providing diagnosis and interpretative services for sampling and had undertaken no special responsibility to a non-patient, there was no basis for finding that it owed him a

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special non-delegable duty of careⁱ. Therefore, the laboratory was entirely responsible for the damages.

ⁱ[2010] 1 WLR 2139

ⁱⁱThe concept of a personal non-delegable duty is a departure from the basic principles of liability in negligence

TORTS (VICARIOUS LIABILITY)

CHURCH VICARIOUSLY LIABLE FOR SEXUAL ABUSE COMMITTED BY PRIEST

The decision of the Court of Appeal in United Kingdom in *Maga v Archbishop of Birmingham & Anor*^j seemed to have expanded the coverage for responsibility owed by an employer in general and a religious institution in particular to a person for the acts of sexual abuse committed by its employee.

Prior to *Maga*, the law on vicarious liability in a case of sexually abusing pupil by an employee was laid down by the House of Lords in *Lister v Hesley Hall Ltd*^k where a company which owned and ran a school was held vicariously liable to a pupil in a boarding house who was sexually abused by the person employed by the company as the warden of the house. The test was stated to be “whether the warden’s torts were so closely connected with his employment that it would be fair and just to hold the employer vicariously liable”. The focus was on “the closeness of the connection between the employee(tortfeasor)’s duties and his wrongdoing”.

In *Maga*, however, the tortfeasor was a Roman Catholic priest (the Priest) but the claimant was not a Roman Catholic and at no time had anything to do with the church itself. The claimant had learning difficulties and epilepsy and had met the Priest who had special responsibility for youth work through church discos which were open to all youths and had done job for the Priest including in the presbytery where the Priest had lived and where some of the alleged abuse had taken place. The claimant also alleged that one year before he had been abused, the father of another boy had complained to the priest in charge of the church that his son had been sexually abused by the same

by substituting for the duty to take reasonable care a more stringent duty, namely a duty to ensure that reasonable care is taken.

Priest but that the complaint had not been fully investigated or passed on to the police. The claimant brought a claim against the Roman Catholic archdiocese (D) for damages for personal injuries consequent on assaults by the Priest caused and/or contributed to by reason of D’s negligence and/or for which D was vicariously liable.



More onerous supervisory duty on churches

The Court of Appeal allowed the claimant’s appeal on the finding of vicarious liability. Although D had no direct responsibility for the claimant as a non-Catholic, a number of factors taken together established a sufficiently close connection between the Priest’s employment as a priest at the church and the abuse which he had inflicted on the claimant to render it fair and just to impose vicarious liability for the abuse on D as the Priest’s employer. (1) The Priest had had by virtue of his employment as a priest a special role of trust and responsibility and a degree of moral authority. (2) Given the Priest’s special responsibility for youth work at the church, he was ostensibly carrying out his work when getting to know the claimant. (3) The Priest’s youth work at the church helped to develop his relationship with the claimant which led to the claimant’s work for the Priest on and off the church premises. Such work coupled with his role provided him with the status and opportunity to spend time alone with the claimant without supervision. It was more than mere

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opportunity afforded to the Priest to commit abuse arising due to the employment in D.

By way of obiter statement, the court also held D, through the priest in charge, to be negligent in being inappropriately casual in its supervision of the Priest following the allegation that the Priest had sexually abused another boy and that negligence was causative of C's loss. The law would impose on the priest in charge, after a complaint that the Priest had sexually abused a boy, a duty of care to look out

for and to protect young boys with whom the Priest was associating. D would be vicariously liable for the breach of such duty.

ⁱ[2010] 1 WLR 1441

ⁱⁱ[2002] 1 AC 215

TORTS (NEGLIGENCE)

BLASTS TO LIABILITY

In *Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor*^j, the 1st defendant operated a quarry on a limestone hill (the hill) situated on land owned by the 2nd defendant (the quarry land) which was adjacent to the plaintiff's plant nursery. On 29.12.1987, following a severe thunderstorm, a large piece of the hill collapsed, causing limestone rock debris to fall onto the plaintiff's land and virtually destroying his nursery. This took place six days after the quarry was shut down for the New Year holidays.

The plaintiff filed an action against the defendants for negligence and nuisance. The High Court found that although secondary causes such as incessant rain and vibrations caused by quarrying operations could have hastened the collapse, the *causa causans*ⁱⁱ was not the vibrations from quarrying operations, a decision which was affirmed by the Court of Appeal. On final appeal to the Federal Court, the question was posed as to whether in a negligence action, where there were overlapping factors causing harm to a plaintiff, the test to be employed was that as pronounced by the House of Lords in *Bonnington Casting Ltd v Wardlaw*ⁱⁱⁱ referred to by the Federal Court in *Lembaga Letrik Negara, Malaysia v Ramakrishnan*^{iv} and not the 'but for' test^v.

In a negligence claim, there must be a link between the wrongdoing and the damage caused. In establishing this link, there can be other causes. The 'but for' test does not identify all of the possible causes of a particular incident but focuses on the effective cause of damage in order to assign responsibility for the damage caused. Where combined or several causes contribute to the harm,

the 'but for' test is not suitable. The test in such circumstances is to determine which of those acts, events or factors materially contributed to the plaintiff's injury. What is material contribution is a question of degree for the court to decide upon. Trifling contributions or contributions which come within the exception of *de minimis non curat lex*^{vi} are not material. The answer to the question posed was in the positive.

In the instant case, although a combination of material factors contributed to the plaintiff's injury, the vibrations caused by the 1st defendant's quarrying operations (which included regular blasting of the rocks from the hill) constituted a material factor. They were not the primary cause but they materially contributed to the rockfall which caused the plaintiff's injury. Thus, the final appellate court ruled that there was causation by the 1st defendant to the plaintiff's injury.

Having established the causal link, the court moved on to consider the existence of a duty of care upon the 1st defendant to the plaintiff to prevent such injury and if there was, whether the 1st defendant committed any breach of such duty. On the facts, the plaintiff was so closely and directly affected by the 1st defendant's operations that the 1st defendant ought reasonably to have had the plaintiff in contemplation when operating the quarry. The 1st defendant thus owed the plaintiff a duty of care.

Next, the final appellate court held that the trial judge had wrongly applied the standard of care required of a professional quarry operator by applying the *Bolam* test^{vii} when the evidence showed that the person who operated the 1st defendant's quarry (DW3) possessed no technical qualification whatsoever. In the view of the court, the work carried out by DW3 was substantially a manual one which could be acquired by anyone after receiving some instructions. The trial judge therefore erred in regarding the 1st defendant as a professional and in ruling against the plaintiff for not adducing evidence of what a reasonably competent operator would have done under the circumstances in order to

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enable the court to reach a finding whether the 1st defendant had breached his duty of care. The 1st defendant not being a professional, the standard of care required of it had to be objectively considered in relation to the type of activities it was engaged in rather than the category of actor which the 1st defendant belonged. The apex court then drew guidance from the principle in *Blyth v Birmingham Waterworks*^{viii} that “negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or do something which a prudent and reasonable man would not do”. On the facts, although the 1st defendant had used minimal explosives for blasting and adopted certain safety blasting methods, it neglected to ensure that the resultant strength of the ground was adequate to prevent the collapse of the hill and to take reasonable steps to remove hazards on the hill when it was aware of them. The 1st defendant was thus liable for negligence.

Both the orders of the High Court and the Court of Appeal were set aside and an order for

assessment of damages to be paid by the 1st defendant was made.

ⁱ[2011] 1 CLJ 409

ⁱⁱEffective factor.

ⁱⁱⁱ[1956] All ER 615

^{iv}[1982] 2 MLJ 128

^vThe test as explained in the authoritative text of *Clerk & Lindsell on Tort*: “Would the damage of which the plaintiff complains have occurred ‘but for’ the negligence (or wrong doing) of the defendant? Or to put it more accurately, can the plaintiff adduce evidence to show that it is more likely than not, more than 50 per cent probable, ‘but for’ the defendant’s wrongdoing the relevant damage would not have occurred?”

^{vi}The law does not concern itself with trifles.

^{vii}See *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 which laid down the test as not the test of a man on the top of the Clapham omnibus but the standard of the ordinary skilled man exercising and professing to have that special skill.

^{viii}[1856] 11 Ex. 781

APPEAL UPDATE

NO DEAL ON THE ARRANGEMENT FOR 500,000 SPECIAL RIGHTS BUMIPUTRA SHARES

In issue Q3 of 2007 (July-Sep) of the Law Update, we featured, under the heading “Illegal to Assist in Purchasing Bumiputra Shares”, the decision of the Court of Appeal in *Tuan Syed Azahari bin Noh Shahabudin & Anor v Ming Holdings (M) Sdn Bhd*. Readers are advised that the Federal Court had recently overturned that decision.

In *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor*ⁱ, the Federal Court held that the Court of Appeal was wrong to hold that the trial judge had acted improperly in cautioning a witness against self-incrimination and to afford him an opportunity to re-think whether to proceed with the line of evidence that he proposed to give. The evidence on the existence of a ‘pool account’ allegedly created by the directors of X Coⁱⁱⁱ for the purpose of trading in shares in X Co could associate the witness with insider trading and the trial judge was justified in issuing a caution to the witness. The impugned evidence was not withdrawn at the insistence or intimidation by the trial judge but was withdrawn voluntarily by the witness. Once this impugned evidence was deleted, such evidence

could no longer be considered by the Court of Appeal to support its decision that since there was a pool account, there must be a likelihood of a sale or arrangement of the 500,000 special rights bumiputra shares. The Court of Appeal had fallen into the error of receiving evidence without complying with the procedure designed to test the probative value of evidence adduced by a witness in court.

Further, it is trite that unless the trial judge was ‘plainly wrong’ in his finding and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, the appellate court should not simply reverse a finding of fact by the trial judge. In the instant case, the apex court was not convinced that the trial judge was plainly wrong in concluding that there was no sale or arrangement of the said 500,000 shares. The Court of Appeal was thus not justified to disturb the trial judge’s finding in this regard. The appeal was allowed and the order of the High Court was restored. The defendants were ordered to return a total of 2,195,000 shares of X Co or alternatively, pay the value of these shares.

ⁱ[2007] 4 AMR 133

ⁱⁱ[2011] 1 AMCR 1

ⁱⁱⁱWe adopted the same terminology used in the earlier write-up.

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OF MARKET RIGGING, WINDOW DRESSING, PORTFOLIO PUMPING, MISLEADING APPEARANCE, MANIPULATION OF ILLIQUID COUNTER...

The recent decision of the High Court of Singapore in *Monetary Authority of Singapore v Tan Chong Koay & Anor*ⁱ, possibly the first known case on false trading in Singapore (and perhaps in Malaysia too) that ended up in the corridors of courts, should studiously be read by those dealing in securities traded on stock exchange.

The plaintiff (MAS) was the Central Bank of Singapore. The 1st defendant was the chief executive officer and chairman of the investment committee for the 2nd defendant, Pheim Asset Management Sdn Bhd (Pheim Malaysia). Pheim Malaysia managed various funds which generally recorded stellar results over the years. Pheim Malaysia purchased shares in United EnviroTech (UET) for its funds known as Accounts 89, 90 and 91 during UET's initial public offering (at \$0.47 per share) in April 2004 and continued to do so. There were limits on the amount of equities and foreign equities that each of these funds could hold at any one time. On 15.12.2004, the said investment committee decided to increase Accounts 89, 90 and 91's exposure to UET shares in anticipation of better results. On 28.12.2004, Pheim Malaysia sold shares in Azeus Systems Holdings Ltd in the three Accounts. Between 14 and 28 December 2004, UET shares traded between \$0.355 and \$0.39 per share. Between 29 and 31 December 2004 (the Material Period), Pheim Malaysia bought 360,000 shares for the three Accounts at weighted average price of \$0.424 per share. The closing price of UET on 31.12.2004 was \$0.445 which allowed 15 funds within the Pheim Group to record an increase of more than \$1m in their net asset values. This resulted the three Accounts to outperform their benchmark returns for 2004 and enabled Pheim Singapore to earn an additional \$50,000 in out-performance fees. Pheim Malaysia's next purchase of UET shares took place on 19.1.2005. Subsequently, some nine months after the Material Period, Pheim Malaysia sold all its UET shares for a profit.

MAS instituted civil proceedings against both the defendants under s.232(3) read with s.197(1)(b) of the Securities and Futures Act (Cap 289) (the SFA) for creating a false or misleading appearance with respect to the price of UET shares at the Material Period. S.197(1) of the SFA reads:

"False trading and market rigging transactions

197.--- (1) No person shall create, or do anything that is intended or likely to create a false or misleading appearance ---

- (a) of active trading in any securities on a securities market; or
- (b) with respect to the market for, or the price of, such securities."ⁱⁱⁱ

MAS sought payment of a civil penalty of \$1m per defendant under s.232(3) of the SFAⁱⁱⁱ. Among the defences advanced, Pheim Malaysia contended that its purchases at the Material Period were *bona fide* commercial transactions, that they had thought the UET shares were trading at an undervalue and that the UET shares were purchased to replace the Azeus shares.

The trial judge subjected the evidence adduced by MAS to a meticulous evaluation. The transactions in the UET shares from 15.12.2004 (the day Pheim Malaysia's investment committee decided to increase its exposure in UET shares) to 28.12.2004 were as follows:

Date (2004)	Last traded price	Intra-day high	Intra-day low	Volume
15 Dec	NIL			
16 Dec	NIL			
17 Dec	\$0.375	\$0.39	\$0.375	2,000
18 Dec	\$0.355	\$0.355	\$0.355	1,000
19 Dec	NIL			
20 Dec	\$0.37	\$0.37	\$0.37	30,000
21 Dec	\$0.36	\$0.36	\$0.36	145,000
22 Dec	\$0.385	\$0.385	\$0.355	98,000
23Dec	\$0.38	\$0.39	\$0.37	50,000
24 Dec	NIL			

The trades that took place from 25.12.2004 till 31.12.2004 were as follows:

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Date (2004)	Time	Call From	Call To	Length of Call (Remarks)	Purchase Price	Volume
29 Dec	0804	D1	Tang	39s		
	0914	Pheim MY	Tang	1m 39s		
	0915			(Matched sell order at 0905 - Not by Pheim MY)	\$0.37	20,000
	0937	Pheim MY	Tang	1m 1s		
	0950	Pheim MY	Tang	24s		
	1228	Pheim MY	Tang	2m 2s		
	1635			(Seller-initiated trade - Not by Pheim MY)	\$0.37	25,000
	1641	Unknown	D1	3m 32s		
	1644:49				\$0.38	14,000
	1650:18				\$0.385	25,000
	1654:53				\$0.385	20,000
	1658	Unknown	D1	2m 8s		
	1658:23				\$0.385	5,000
	1659:32				\$0.41	1,000
	1708	Tang	Pheim MY	1m 9s		
30 Dec	0900	Tang	Pheim MY	1m 43s		
	0945	Tang	D1	(message)		
	0954	D1	Tang	1m 24s		
	0956	Tang	Pheim MY	1m 26s		
	1003	Tang	Pheim MY	2m		
	1124	D1	Tang	28s		
	1158	D1	Tang	1m 52s		
	1423	Tang	D1	38s		
	1423:47		Pheim MY		\$0.40	30,000
	1428	Tang	Pheim MY	1m 9s		
	1433	D1	Tang	1m 58s		
	1438	Tang	Pheim MY	34s		
	1623	D1	Tang	1m 33s		
	1625:02				\$0.405	12,000
	1632:23				\$0.42	10,000
	1639:10				\$0.42	9,000
	1640:34				\$0.425	20,000
	1643:45				\$0.425	5,000
	1645:49				\$0.43	25,000
	1650	Tang	D1	1m 1s		
	1650:24				\$0.435	20,000
	1651:26				\$0.435	6,000
	1652:20				\$0.44	5,000
	1653:29				\$0.44	10,000
	1656:29				\$0.44	10,000
	1657	Tang	D1	43s		
	1657:05				\$0.45	40,000
	1659:56				\$0.455	8,000
	1721	D1	Tang	1m 19s		
	7 other calls	Bet. D1, Tang & Pheim MY				
31 Dec	0859	D1	Tang	55s		
	0905	Tang	Pheim MY			

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	0906:55			(Seller-initiated trade - Not by Pheim MY)	\$0.35	1,000
	<i>0922</i>	<i>Tang</i>	<i>D1</i>	<i>18s</i>		
	1016:55			(Seller-initiated trade - Not by Pheim MY)	\$0.39	1,000
	<i>1133</i>	<i>Tang</i>	<i>D1</i>	<i>12s</i>		
	1218	Tang	D1	1m 47s		
	1220:41				\$0.435	10,000
	1222:18				\$0.435	10,000
	1225:11				\$0.44	40,000
	1228:19				\$0.44	20,000
	1229:57				\$0.445	5,000
	1237	Tang	Pheim MY	51s		

[Abbreviations--- m: minutes, s: seconds, D1: 1st Defendant, Tang: the broker for Pheim Malaysia, Pheim MY : Pheim Malaysia]

The trial judge made a finding that the telephone records, when considered together with the timing of the trades, led to an irresistible inference that it was the 1st defendant who had given the broker, Tang the orders at the Material Period to carry out the trades. The trial judge first looked at the pattern of telephone calls and trades carried on 30.12.2004 and 31.12.2004. Emphasis was placed on the telephone calls marked as **bold** in the above table which coincided with the trades executed at higher prices thereafter to arrive at the conclusion that the 1st defendant had given Tang the permission to purchase UET shares at higher prices. This conclusion was supported by the fact that updates were given by Tang to D1 on trades executed instead of a fund manager at Pheim Malaysia. A broker would logically provide regular updates to the person in a position to give instructions and to provide further business. It was also highlighted that when other parties had purchased UET shares at lower prices, Tang would call the 1st defendant directly instead of updating the fund managers at Pheim Malaysia (see the calls marked in *italics*). Given how the trade was contemporaneous with the telephone calls, the trial judge held that the unknown person for the two calls on 29.12.2004 were very likely to be Tang and the order to purchase was given by D1 during these two calls.

Next, on the issue as to whether the UET shares were purchased for legitimate commercial purposes, it was found that Pheim Malaysia could have but did not purchase UET shares at lower prices before and after the Material Period, and the strategy it employed at the Material Period was inconsistent with that of an investor seeking to purchase at the lowest price. There was also no basis for saying that the UET shares were undervalued^{iv}. The fact that the purchases were at prices below its IPO price did not assist the defendants for the reasonableness of the share purchases at the Material Period could not be measured against the IPO price more than eight months earlier. Likewise, the mere fact that a profit was eventually made some nine months down the road did not mean that no market rigging could have taken place. There was also no need to wait for the Azeus shares to be sold (as contended by the defendants) before purchasing the UET shares as the foreign equities limit or equities limit would not have prevented it from purchasing the UET shares at lower prices before the Material Period. In the premises, the trial judge held that the purchases were not for legitimate commercial reasons.

S.197(1) has three limbs: (i) where a person in fact *creates*; (ii) where a person does anything that is *intended to create* ; (iii) where a person does anything that is *likely to create*, a false or misleading appearance. For the prosecution to succeed under limb (ii), it had to be shown that **the sole or dominant intention** of the party charged was to set or maintain a certain price of a security. To defeat the charge, it would not be sufficient for the defendant to show that there was one legitimate commercial purpose for entering into the transaction^v.

The trial judge found that the defendants' primary purpose behind the UET trades at the Material Period was for window-dressing, to raise and set UET's share price to maintain the Pheim Group's near-perfect record of outperforming their benchmarks over the past years. UET, being an illiquid counter, was easier to manipulate. The trades took place during the last three trading days of the year, mostly within the last half an hour of trading each day, with its last purchases for each day being entered and filled during the last minute of trading. Year-end closing prices being traditionally used to determine portfolio performance, Pheim Malaysia's trades had caused UET shares to rise by 17% which in turn caused the Pheim Group's funds to rise by more than \$1m over the short

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span of three days. The prices at which Pheim Malaysia purchased the UET shares at the Material Period were not seen again for the next six months, suggesting that the market regarded the spike in UET's share price at the material time as an aberration. For these reasons, the court held that MAS had established, on a balance of probabilities, that the defendants had, by entering into the UET trades at the Material Period, intended to create a false or misleading appearance with respect to the market for and price of UET shares. The defendants' conduct was deliberate, calculated and intentional although the financial advantages obtained were not significant^{vi} and their reputation would have been affected by the adverse publicity and possible regulatory actions. A civil penalty of \$250,000 each for the defendants was ordered.

ⁱ[2011] 1 SLR 348

ⁱⁱExcept minor variations, s.197 of the Singapore Securities and Futures Act is in pari material with s.175(1) of the Malaysian Capital Markets and Services Act 2007 (Act 671) (CMSA). The court also pointed out that this provision was borrowed from Australian legislation (see s.998 of the Australian Corporations Act (No 50, 2001)).

ⁱⁱⁱSee s.200(2) of CMSA.

^{iv}No evidence was adduced to support the price-earnings ratio of 12 to 15 times and valuation of the shares at \$0.55 to \$0.69.

^vThis principle was supported by s.197(4) of the SFA (s.175(4) of CMSA) which requires the defendant to establish that the purposes for entering into the transaction did not include that of creating a false or misleading appearance of active trading in securities on a securities market.

^{vi}The monetary gains, if any and if realized, would have been belonged to the clients of Pheim Malaysia.

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