

THE UPDATE



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Abbreviations

Jur	:	Jurisdiction
MY	:	Malaysia
SG	:	Singapore
UK	:	United Kingdom
CA	:	Canada

SOME ADVERSE DECISIONS AGAINST BANKS

It is not usual that you will find decisions made against banks, not because of any tendency of bias in their favour or due to their might or influence but are more attributable to their generally prudent measures and better corporate governance. In the last quarter, however, there are at least five decisions made against banks which are highlighted below.

1. NO INDEMNITY IF BANK WAS NEGLIGENT OR ACTED WITHOUT MANDATE

In *MOL Logistics (Malaysia) Sdn Bhd v Bank of Tokyo-Mitsubishi (Malaysia) Berhad*ⁱ, P, a current account holder of D bank, had issued a mandate to D to honour all cheques drawn on its account and to issue P with a cashier's order provided that the cheques and application for the cashier's order to be signed only by its MD, PW1 and Assistant GM, PW2. Four cashier's orders were purportedly issued at the request of P and debited to P's account. P contended that they did not apply for such cashier orders and the signatures thereon were forged. Expert evidence was adduced to show the forgeries which was accepted by the court. It was also shown that D had not followed diligently the arrangement had with P that cashier's orders be collected by the authorized personnel of P. D had not made any verification with P when someone other than the usual personnel of P went to collect the impugned cashier's order. At common law which has been codified under the Bills of Exchange Act 1949 (s.24), the liability of a banker is founded on the tort of conversion, a tort of strict liability, whereby the banker will be liable absolutely to make good the loss resulted from payment out on a forged instrument. D however attempted to rely on the letter of indemnity issued by P in favour of D to argue that P was liable to bear the losses notwithstanding the forged signatures. Such argument was rejected by the learned Judge who ruled that the indemnity was only effective if D was not negligent and had complied with the mandate. P's claim was allowed with costs.

2. FABRICATIONS FOR NON-EXISTENT LOANS

Yes, that is how a bank was found to have fraudulently manipulated the loan accounts of its customers in the case of *CIMB Bank Berhad v Ng Lee Lian & Others*ⁱⁱ. P granted a term loan, T/L1 to D1 secured by a charge over Land X and another

term loan, T/L2 to D2 secured by a charge over Land Y. Upon failures of D1 and D2 (the Defendants) to settle overdue instalments, two separate notices of demand were issued against them followed by withdrawal of the term loan facilities and issuance of writs.

The original designated account numbers for T/L1 and T/L2 were respectively "1609" and "1670". The crux of the defence was that the change of account numbers to new numbers "1858" and "1877" respectively were by fraudulent design to show balance still owing by the defendants whereas in truth and in fact the original accounts showed "0" balance. Whilst the existing T/L accounts (1609 and 1670) showed payments in full settlement of the amounts, P was unable to produce any documentary proof of the disbursement of the two loans for the two new accounts. Adverse inference under s.114(g) and (h) of the Evidence Act 1950 was thus drawn against P. P had also failed to prove that notice of reassignment of account numbers had been correctly addressed and served on the defendants. P had also not produced the necessary officers who had personal knowledge of the designated accounts and the transactions at the relevant point of time. The sole witness produced by P had absolutely no personal knowledge of essential facts relevant to the dispute and was merely testifying from documents and records that had never been handled by him.

The trial judge therefore held that the term loans had been extinguished by full settlement and that the defendants were entitled to a discharge of the charges. The defendants' claim for damages for breach of contract and malicious prosecution was dismissed as no evidence was adduced to substantiate it.

3. USING CCRIS REPORT TO CHALLENGE CERTIFICATE OF INDEBTEDNESS

In *Noresah binti Lani v RHB Bank Berhad*ⁱⁱⁱ, P obtained a housing loan from D in May 1991 for the purchase of a property and in return, P assigned her rights, title and interest in the property to D as security. P had on February 2003 enquired with D on the status of her loan. Despite promises to revert to her, D failed to do so. Instead, D sent a letter of demand to P. Efforts to obtain clarification on the sum demanded were futile. P continued servicing the monthly installments. A notice of recall of the loan was however issued by D in November 2004 (the recall notice) and P was subsequently prevented from

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servicing her monthly installments (due to blocking of her purported “non-performing” account by D). D then commenced proceedings to auction off the property, relying on certificate of indebtedness as conclusive proof of P’s indebtedness. P denied having defaulted in repayments and filed a suit for declaration that the recall notice and D’s claim were wrong and invalid together with other ancillary reliefs whilst D counterclaimed for the alleged outstanding sum.



At the trial, P on her own accord obtained and tendered a credit report as issued by the Central Credit Reference Information System (CCRIS), a system set up by Bank Negara which collects information on borrowers from the financial institutions and uses that information to establish a view of the credit history of existing or potential borrowers. The information contained in the CCRIS report concerning P was evidently provided by D. D was however unable to explain the discrepancy between the figures in the CCRIS report and the certificate of indebtedness issued by D. D’s witness, who was the head of a team of officers handling non-performing loan accounts of D, when asked during cross examination to explain the amount in the letter of demand and in the statements of account generated by D’s computer, could only state that they were taken from the

computer system but could not otherwise explain some of the entries or amounts. She could not confirm if the input into the said system was correct. She was also unable to explain other discrepancies except to indicate whatever it was, the result of the system was correct. Further, based on the CCRIS report, there was no default by P when the loan was recalled.

In the circumstances, the trial judge held that D had failed to rebut the evidence tendered by P, testimony of D’s witness was unreliable and the certificate of indebtedness could not be regarded as conclusive evidence of P’s indebtedness. P’s claim was allowed with costs whilst D’s counterclaim was dismissed with costs.

4. FATAL TO STATE INCORRECT INTEREST IN AFFIDAVIT FILED UNDER O 83 R 3(3) OF RHC

In *Suresh Emmanuel Abishegam & Anor v RHB Bank Bhd*^v, upon the defendants’ default on the repayment of the housing loan granted by the plaintiff, the plaintiff served on the defendants a notice of recall followed by the issuance of statutory demand in Form 16D and upon their failure to comply, commenced a charge action for an order for sale under s 256 of the National Land Code (NLC). At the High Court, the defendants contended that the plaintiff had failed to give written notice of variation of interest rate from 10.25% pa to 9.5% at a certain period of the currency of the loan as required under cl 4 of the loan agreement. The judicial commissioner however ruled that the plaintiff’s omission had not in any way prejudiced the defendants as in the ordinary course of business, the defendants would have had notice of such a change from the monthly statements of account. Such omission did not constitute “a cause to the contrary” so as not to grant an order for sale within the three categories of situations as laid down in *Low Lee Lian v Ban Hin Lee Bank Bhd*^v.

On appeal, the defendants maintained that such omission to serve the notice pursuant to cl 4 constituted a non-compliance of O 83 r 3(3) read with r 3(6) of the Rules of the High Court 1980 (RHC) which warranted dismissal of the plaintiff’s application. However, the Court of Appeal detected a more serious irregularity in the plaintiff’s application than the mere failure of issuing notice of variation of interest rate. The notice of recall and the statutory notice Form 16D stated that the interest due on the loan was based on the Base Lending Rate (BLR) of 6% + 3.5%pa. This was contrary to the loan agreement which provided the interest chargeable was the flat rate

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of 10.25%pa. The agreement did not make BLR as the base from which the rate of interest was to be added to, subtracted from or varied as was commonly found in loan agreements of financial institutions. The claiming of interest due based on the BLR of 6%+3.5%pa contrary to the terms of the loan agreement constituted an incorrect and unlawful claim and could not, under the circumstances, constitute a valid statement of the amount of interest legally due and owing as at the date the originating summons was filed as required under O 83 r 3(3) of the RHC. The failure on the part of the plaintiff to state correctly the interest charged in its supporting affidavit in accordance with the term of the loan agreement under the circumstances was a failure to meet the condition precedent for the making of an application for an order for sale under category (ii) of *Low Lee Lian*. Therefore, an order for sale ought not to have been granted which resulted in the appeal being allowed with costs.

The appellate court however added a rider to remind the parties that where, as in the instant case, an order for sale was refused only because a condition precedent to O 83 r 3(3) of RHC was not met, the application could not be treated as having been heard on merits. The chargee could file afresh originating summons to be supported by a proper affidavit alluding correctly to the particulars required under O 83 r 3(3) of RHC.

5. “ALL MONEY” CHARGE V. VESTING ORDER PURSUANT TO MERGER OF BANKS

In *ASM Metal Sdn Bhd v Malayan Banking Bhd*^{vi}, Pacific Bank Berhad (PBB) granted a revolving credit facility to Kai Peng Bhd (Kai Peng) which was secured by a 3rd party charge dated 9.12.1999 created over the property owned by the appellant (the Charge). Under a vesting order made under s 50 of the Banking & Financial Institutions Act 1989, all assets and liabilities of PBB including the revolving credit facility and the Charge became vested in Malayan Banking Bhd (MBB) with effect from 1.1.2001. Earlier, Kai Peng had executed a corporate guarantee dated 9.8.1994 (the corporate guarantee) in favour of MBB to secure repayment of an overdraft facility granted by MBB to its wholly owned subsidiary, Kai Peng Vessels Sdn Bhd.

Kai Peng defaulted in the repayment of the revolving credit facility and the corporate guarantee. In June 2007, MBB demanded from the appellant payment of the amount due and owing by Kai Peng under both the revolving credit facility and the corporate guarantee. The appellant failed,

neglected and/or refused to pay the sum demanded. MBB pursuant to s.254 of the NLC served a notice in Form 16D to require the appellant to remedy the default under the Charge. Again, the appellant did not comply with such demand whereupon MBB took out an originating summons for an order for sale of the property.

The appellant's sole contention was that MBB was only entitled to claim under the Charge the amount due by Kai Peng under the revolving credit facility and that it was never the intention of the parties that the appellant be held responsible for the indebtedness of Kai Peng under the corporate guarantee. The High Court however invoked clause 7 of the Charge which provided that the Charge was to be a continuing security for all moneys owing to PBB (which was subsequently vested in MBB) by Kai Peng and/or the appellant as principal or surety. The appellant was precluded from contending that the charge was only intended to secure Kai Peng's indebtedness under the revolving credit facility but not Kai Peng's indebtedness under the corporate guarantee.

At the Court of Appeal, the appellant submitted that it was not open for MBB to amalgamate both the facilities and make the appellant liable under the terms of the Charge as well for the indebtedness of Kai Peng under the corporate guarantee. It was contended that the Form 16D issued by MBB was defective as MBB had combined the amounts due under the two facilities. On clause 7, it was argued that the security created by the Charge must be restricted to the facility granted by PBB only.

By a majority, the appeal was allowed. The 2-1 majority gave weight to the fact that there were two loan facilities made by two different banks^{vii} --- the Charge to secure the revolving credit facility given by PBB to Kai Peng and the corporate guarantee to secure the overdraft facility given to MBB to Kai Peng Vessels Sdn Bhd. Cases involving “all money” charge with clauses similar to clause 7 cited by counsel of MBB such as *Cambridge Credit Corp v Lombard Australia Ltd*^{viii}, *Re Tararone Investments Pte Ltd*^{ix} and *James Pledge v White*^x were distinguishable as the loans were made by one bank only in those cases. In the instant case, there were two different banks involved. There was nothing in the vesting order to say that MBB might amalgamate their rights and the rights of PBB. The Charge was to secure only the loan given by PBB to Kai Peng. Clause 7 had to be viewed in that context. So, although clause 7 was wide enough to secure the revolving credit facility granted by PBB to Kai Peng, it was not the intention of the parties that the

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Charge would cover the indebtedness of Kai Peng under the corporate guarantee arising from the overdraft facility granted by MBB. Form 16D issued by MBB was invalid and ineffective because MBB had wrongly combined the sums owing under the two facilities which exceeded the actual sum owed under the revolving credit facility. The appellant had shown cause to the contrary within s 256(3) of NLC to resist the making of an order for sale of the property.

With due respect, it is opined that the majority judgment had given undue emphasis to the apparent fact that the loans were made by two banks. Insufficient weight had been given to the vesting order which transferred rights and liabilities of PBB to MBB pursuant to the merger exercise of the two banks under which MBB shall have the same rights, powers and remedies as if it had at all times been a right or liability of MBB. There is

plenty of room for argument that the minority view of the Court of Appeal or the High Court decision is to be preferred.

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- ⁱ[2011] 1 AMCR 836
 - ⁱⁱ[2011] 1 AMCR 800
 - ⁱⁱⁱ[2011] 1 AMCR 767
 - ^{iv}[2011] 3 MLJ 171
 - ^v[1997] 1 MLJ 77
 - ^{vi}[2011] 3 MLJ 317
 - ^{vii}Para [22] on page 326
 - ^{viii}(1977) 136 CLR 608
 - ^{ix}[2001] 4 SLR 167
 - ^x[1896] AC 187
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BANKING LAW / CONTRACT LAW

NO NON EST FACTUM

Do not think that you can fool the court by pretending to be ignorant or stupid. Judges with their wealth of judicial experience are not easily “conned”. The defendant (D) in *CIMB Bank Berhad v Tan Leong Heng*ⁱ found this out the hard way when the learned Judge decided against him and in the process, made some unflattering remarks against him.

D applied for a housing loan facility from the plaintiff (P), obtained it, made some repayment, then defaulted and when he was sued by P, claimed that he could not read and write in English or national language and thus, did not know or understand the contents of the documents signed by him. In essence, D relied on the defence of *non est factum* --- that he had signed the loan documents containing contract that was fundamentally different in character or effect from that which he contemplated, a plea that was propounded by the House of Lords in *Saunders v Anglia Building Society*ⁱⁱ.

After a lengthy trial, the learned Judge observed that D was not as illiterate as he attempted to make himself out to be. It might well be the truth that in signing the loan documents, D merely signed at places “where a girl attending to him at the office of the solicitors handling the loan documentation pointed to him” or that nobody had

explained the contents or implication of the documents signed by him. However, it was not enough for D to merely say that he could not read or write in English or the national language. He had failed to show that the documents he had signed were radically, fundamentally, essentially and very substantially different from those he believed he was signing.

The fact was that D was aware that the documents he signed were for a loan of the highest amount he could secure. He was aware that the terms of the loan on material matters such as the amount of the loan and the terms of repayment could be found on the documents that he was signing. It was not necessary that D must know and understand all the contents of the said documents.

His act of being interested in borrowing but yet uncaring as to the related details was not the conduct of a prudent and reasonable businessman embarking on a substantial project and who was borrowing money to enable him to develop his properties. From the totality of the evidence, there was a want of care on D's part. As stated in *Chai Then Song v Malaysian United Finance Bhd*ⁱⁱⁱ and *UMW Industries [1985] Sdn Bhd v Kamaruddin Abdullah & Anor*^{iv}, “careless persons” who unsuccessfully raised *non est factum* “have only” themselves to blame if they were shown to be negligent or careless and must accept “full responsibility” for their actions!

The learned Judge also pointed out that D had never at any time while he was at the solicitors’ office made known his purported ‘handicap’ (of not able to read the loan documents) to any of the persons present; he did not ask for

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the assistance of his 'friend' who had accompanied him there; neither did he ask to take the documents away for a day or two with a view to have someone explain to him before he signed and there was no suggestion that he could not have done so or that such latitude was denied to him. Importantly, D had made total payments of RM105,938.21 before he defaulted, unlike the facts in *Nallammal a/p Muthusamy (MW) & Anor*.

Therefore, in the totality of the circumstances, D could not avail himself of the defence of *non est factum*. The other two defences, ie. on the validity of the loan by reason of the discrepant valuation report on the real status of the D's properties and entitlement to interest,

were also rejected by the trial judge. P's claim was therefore allowed with costs.

ⁱ[2011] 1 AMCR 825

ⁱⁱ[1970] 3 All ER 961

ⁱⁱⁱ[1993] 1 AMR 907

^{iv}[1989] 2 CLJ (Rep) 619

BANKRUPTCY / COURT PROCEDURE

DISCRETION OF OFFICIAL ASSIGNEE IN GRANTING SANCTION TO BANKRUPT TO PROCEED WITH LEGAL SUIT

How the official assignee should exercise his discretion whether to grant sanction for a bankrupt to pursue a legal suit and the importance of complying with the conditions imposed upon giving of sanction were the focus in the decision of the Kuala Lumpur High Court in *Ketua Pengarah Insolvensi v Dato' Dr Chen Lip Keong & Ors*¹.

In this case, the applicants were suing as well as being sued by one, Dato' Mohd Fathi who was subsequently adjudicated a bankrupt upon application by a judgment creditor (JC) applied to set aside the official assignee (OA)'s sanction to the bankrupt. It is the law that once a person has been adjudicated a bankrupt, he is required to obtain sanction of the OA in order to proceed with any legal suit --- s.38 of the Bankruptcy Act 1967 (BA).

The High Court held that the OA must be fully satisfied of the grounds of the application before exercising his discretion to grant the sanction and must be in a position to give his reasons for granting the sanction. It was insufficient for the OA to merely state that "the bankrupt had an interest in the shares of the company (subject matter of the suit) and the OA has exercised his discretion to grant sanction" without saying more.

His quasi-judicial decision could be challenged by the bankrupt, creditor and/or an

aggrieved person, hence the need for the OA to give reasons to support his decision and to inform a party who was not only interested in but aggrieved by the decision.

The OA should have carried out an in depth study of the merits of the suit to satisfy himself on the chances of success or to seek legal opinion on the strength of the case. Without satisfying himself on the merits of the case, it was insufficient for the OA to merely declare that the bankrupt possessed an interest in the shares and thereby grant his sanction. He was also not in a position to determine meaningfully whether the estate of the bankrupt would really benefit from the continuance of the suit.

In giving the sanction, the OA had imposed several conditions, including that the bankrupt must furnish a competent guarantor who must sign a letter of undertaking and security bond and to deposit RM3,000 as security for costs, the guarantor must give an undertaking that any costs, payment or expenses arising in consequence of the suit would be borne by the guarantor and the guarantor would not make any claim on the DG of Insolvency Department or estate of the bankrupt and the DG of Insolvency Department would not be responsible for any failure, loss or costs incurred against any party in the suit.

The bankrupt did not comply fully with the conditions within the stipulated period.

The OA should not have granted the sanction as the interest of the applicants had not been safeguarded. The OA had also failed to address the fears of the applicants in not being able to recover the costs in the suit or to show that the estate of the bankrupt would have the funds to meet the costs of the suit.

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The fact that the estate of the bankrupt did not have the funds in the sum of RM300,000 as demanded by the applicants as security for costs meant that the estate would not be in a position to settle the judgment debt of RM9 million to the JC. In short, the OA's decision to grant sanction must be on an informed basis and not be made purely as an administrative decision. In the circumstances, the OA's appeal against the

decision of the Registrar to allow the applicants' application was dismissed with costs.

[2011] 3 CLJ 946

COMPANY LAW

CAUGHT BY "CHINAMAN"'S WAY OF DOING BUSINESS

The liquidator of the wound-up plaintiff company in *CTI Leather Sdn Bhd (in liquidation) v Hoe Joo Leong @ Khoo Hock Tat & 3 Ors*¹ brought an action against the directors of the company to recover losses suffered by the company due to their breach of fiduciary duties in three instances. The company was wound up on just and equitable ground under s.218(1)(i) of the Companies Act 1965 as a consequence of shareholders' disputes.

Firstly, D1 had allowed the company's premises to be tenanted at an undervalue (evidence was adduced to show that the market value of the rental was approximately seven times the rental levied on the two tenants) and as such, he had failed to protect or safeguard the interests of the company. The damage suffered was the loss in rental that the company would have enjoyed if it had been tenanted out at the then prevailing rental rates. D3 had directly benefited from the rental of the premises to the detriment of the company as the tenants were companies related to him.

Although he had resigned as a director of the company, D3 was still the managing director of the company at the time the tenancy agreements were entered into. The conflict of interest as well as the breach of fiduciary duty was clearly present. In fact, evidence showed that D3 had continued to remain as a *de facto* director of the company within the context of s 4(1) of the Companies Act 1965 despite his resignation and D1 had carried out instructions at the behest of D3. The notable facts were, among others, D3 remained the sole signatory of cheques on behalf of the company until the appointment of a provisional liquidator and the deferential attitude of D1 to D3.

The defendants attempted to argue that the liquidator's issuance of letters to the tenants to collect rental and the acceptance of rental at a slightly increased rate amounted to a ratification of the tenancies, thereby precluding him from claiming any loss of rental from the defendants. The trial judge however held that the action of the liquidator in the interim in ensuring that all rentals were collected did not amount to a ratification of the tenancies. The loss suffered as a consequence of renting out its premises at an undervalue was not 'waived' by the liquidator. Further, a breach of fiduciary duties could not be ratified. In the circumstances, the plaintiff's claim of RM174,240 being the loss of rental was allowed against D1 and D3 jointly and severally.

Secondly, D1 and D3 had failed to provide any plausible explanation regarding the stock known as "Dream Tex" which was purchased for a value of RM454,000 from the company in which D3 was the sole proprietor and sold to unknown third parties at a gross undervalue (for a total sum of RM18,750). This stock formed a significant portion of the entire stock of the company and in allowing it to be sold at an undervalue, D1 and D3 had failed to safeguard the assets of the company adequately or at all. Both D1 and D3 were ordered to jointly and severally pay the sum of RM435,750 to the plaintiff company to account for the losses suffered from the disposal.

However, with regard to the third instance of alleged breach of fiduciary duties, the trial judge accepted the version of D1 and D3 with regard to the sale of the stock of "prayer mats" in that they were sold to a third party who had not paid for such stocks and against whom legal action had been instituted which culminated with a winding-up order. There was no basis for the liquidator to allege any breach of fiduciary duties by the directors in this instance.

This case to a large extent brings to the fore the way in which "Chinamen" do their business, particularly the manner D3 acted. He brushed off clear conflict of interest between his

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functioning as a director of the plaintiff and his ownership of and his role in the companies related to him. He accorded D1 a shareholding in the plaintiff company in which D1 had been working and in return, D1 continued to act entirely at the direction and behest of D3, not being able to function independently. There was no clear delineation between the plaintiff as a corporate entity, D3's role in the plaintiff company and D3's interests in the sole proprietorship company and

the other companies in which he was the managing director.

[2011] 2 AMR 411

CONTRACT LAW

WHAT IS SAUCE FOR THE GOOSE IS "NOT" SAUCE FOR THE GANDER !

The scenario in the recent Federal Court decision in *Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd*¹ aptly illustrates the above modified proverb. In the instant case, the appellant (A) was the main contractor for the renovation and extension of the Merlin Hotel, Subang (the project) whilst the respondent (R) was the nominated sub-contractor of A for the installation of air-conditioning and ventilation in the project. After completion of all the works, the owner became insolvent. Under a scheme of arrangement, a proportionate number of loan stocks of the owner and its associated companies (FGB ICULS) were issued to A as full and final settlement of the debt due by the owner to A which included the amount due by A to R under the sub-contract. A wrote to R informing them of this and proposed to settle the amount due to R in a similar form, manner and proportion as the moneys payable to A under the scheme. R disagreed and issued a notice pursuant to s 218 of the Companies Act 1965 to demand for the outstanding sum due under the sub-contract.

In an action filed by A against R, the Federal Court subjected the sub-contract between the parties to a proper construction and arrived at the finding that there was no other form of payment or settlement with R except by money "upon receipt of main contract payment from the employer (owner)" which A did when they accepted the FGB ICULS. The existence of the "pay when paid" clause which meant that the sub-contractor would only be paid when the main contractor got paid by the employer could not assist A's case. The main contractor, after having been paid by the employer in the form of stocks rather than money, was not at liberty to unilaterally settle in turn with the sub-contractor in the same form he obtained from the employer.

Having accepted the payment in the form of FGB ICULS stock from the employer as payment for the main contract debt, under the terms of the sub-contract, A had no option except to pay R in the form as stipulated and agreed upon in the sub-contract, ie. money rather than by the stock described. R was not obliged to accept the form of the payment received by A from the employer in respect of the sub-contract works in full and final settlement of A's outstanding debt to R.

[2011] 3 AMR 93

CONTRACT LAW / LAND LAW

IS AN AGREEMENT VITIATABLE BY ECONOMIC DURESS OR UNCONSCIONABILITY? IS SPECIFIC PERFORMANCE AS OF RIGHT TO ENFORCE SALE OF LAND?

The doctrines of economic duress and unconscionability to vitiate a contract were extensively discussed by the Singapore High Court

in *E C Investment Holdings Pte Ltd v Ridout Residence Pte Ltd*. The full facts of the case are at some length and only the condensed facts relevant to the application of the doctrines are presented herein. In addition, we also highlight the relatively novel position of not granting specific performance to a purchaser of landed property as a matter of right.

D1 was the registered proprietor of the Property located in a good class bungalow area. AA, an experienced businessman, was the sole shareholder of D1. D2 was a registered mortgagee of the Property having provided credit facilities of

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\$30m to AA. In May 2008, D2 recalled the loan. AA was in financial difficulties due to the global financial crisis. D2 pressed AA to reduce the outstanding sum or face foreclosure. AA was desperate for funding and put the word out in the market that he was looking for a loan. No one was interested in giving AA a loan although a few were interested to purchase the Property.

On 5 June 2009, AA entered into an agreement on D1's behalf with P which contained an option (the 1st Option) and a "Deed of Settlement" which provided that, in exchange for a \$1.5m option fee, P was granted an option to purchase the Property for \$20m (which was lower than the forced-sale value of RM23.3m) with completion within 12 weeks from the date of acceptance of the option. The 1st option could be cancelled by D1 within 60 days of the Deed of Settlement by payment of a cancellation fee of \$180,000 and refund of the option fee. On 11 August 2009, P's lawyer rejected a purported cancellation by D1 as being out of time and non-compliance with the mode of payment, but nothing was mentioned about proceeding to complete the sale and purchase of the Property.

Subsequently, P and D1 reached an agreement to allow AA to find another buyer provided that AA paid to P \$3.5m as "compensation" in exchange for P relinquishing its rights under the 1st Option. One buyer, the 2nd Intervener, was ultimately found and a 2nd option was entered into. Dispute arose between P, 2nd Intervener and D1 regarding the payment of the "compensation" sum and the 2nd Option whereupon both P and the 2nd Intervener sought specific performance of the sale of the Property under the 1st Option and the 2nd Option respectively.

A party may be able to avoid a contract for duress where he entered it because of a wrongful or illegitimate threat or pressure by the other party, normally because the threat left him with no practical alternativeⁱⁱ. The traditional categories of illegitimate pressure or threats founded on having one's will overborne or acting involuntarily or not having a free choice have given way to the more flexible and realistic concept of not having no choice at all, but leaving the party with a choice between two evils or choosing unwillingly in circumstances which prevents the law from accepting what has happened as a valid contract in law.

This change led to the question whether economic duress was a possible vitiating factor in contracts. In this respect, in England, the doctrine

of economic duress was first recognized as a ground to avoid a contract in *Occidental Worldwide Investment Corp v Skibs A/S Avanti*ⁱⁱⁱ. The Privy Council subsequently in *Pao On v Lau Yin Long*^{iv} emphasized that commercial pressure was insufficient and laid down four factors in determining whether there was a coercion of will which vitiated consent. The House of Lords then in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*^v stated the rationale for the doctrine but declined to elaborate on what would amount to legitimate commercial pressure which did not give rise to duress.

Having reviewed the earlier authorities of the Singapore courts, the learned Judge reiterated the two elements to constitute economic duress: (i) pressure amounting to compulsion of the will of the victim; (ii) the illegitimacy of the pressure exerted. This did not mean that lawful pressure could never amount to duress but it would be very rare for a contract to be set aside for duress when only lawful means or pressure was used. Lawful commercial pressure must never be mistaken for "duress" capable of avoiding a contract^{vi}. Contracts should not be set aside on the basis that the terms secured as a result of threat of lawful action by one party were so manifestly disadvantageous that it would be unconscionable for him to retain the benefit of it. Such proposition would lead to uncertainty.

The 1st Option was not vitiated by economic duress. AA was a seasoned businessman who was facing pressure to reduce his loan and had been unable to obtain funding. AA clearly understood that the 1st Option and the Deed of Settlement evidenced a sale of the Property. When the purchase price was reduced from \$22m to \$20m, AA's lawyer and CFO had asked if he was sure of what he was doing and he answered affirmatively. They did not protest or suggest any illegitimate pressure had been exerted or that some understanding had been breached. The fact that AA was very desperate for funds and that fact was known to P only meant that P had the upper hand in the negotiations. That was a legitimate commercial advantage and was not exerting illegitimate pressure or unlawful exploitation^{vii}.

Unconscionability as a vitiating factor did not form part of Singapore contract law. Whilst there exists a broad doctrine of unconscionability in Commonwealth jurisdictions like Canada^{viii}, Australia^{ix} and New Zealand^x and in the USA^{xi}, and Megarry J had in *Cresswell v Potter*^{xii} laid down three requirements that had to be met to set aside a contract on the ground of unconscionability^{xiii},

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apart from other circumstances of oppression or abuse of confidence which would invoke the aid of equity, the learned Judge refused to import the doctrine without a comprehensive and rational basis. In his view, to do so would inject unacceptable uncertainty in commercial contracts. There were existing doctrines in law and equity such as doctrines of undue influence, constructive fraud in equity and *non est factum* for the protection of the weak, the elderly, the very young and the ignorant. The common law was clear; inequality of bargaining power as between parties was not in itself sufficient to subsequently set aside disadvantageous agreements freely entered into. In any event, AA could not be said to be “poor and ignorant” and he had entered into the agreement with P having had the benefit of legal advice and with his CFO present. AA failed in two of Megarry J’s three criteria. The 1st Option and the Deed of Settlement were therefore not susceptible to being set aside on both counts.

The learned Judge proceeded to ascertain the true nature and purport of the transactions and came to the finding that it was in truth a loan transaction. P never intended to purchase the Property when it entered into the agreement and thereafter manoeuvred to maximize their profits from the security. Having failed to obtain a quick windfall, it sought specific performance due to the sharp rise in property value. Further, P concealed material facts and were not forthcoming in their conduct of the proceedings. P’s inequitable conduct precluded it from the discretionary equitable remedy of specific performance.

In addition, the learned Judge debunked the perceived principle that a contract for the purchase of land, land being property with unique qualities, damages would not provide an adequate remedy for the innocent party and it has generally been accepted that specific performance, apart from equitable defences^{xiv}, is available as a matter of right. He preferred the position in New Zealand^{xv} and Canada^{xvi} to that in Australia^{xvii} and England^{xviii}. He held that specific performance did not follow as a matter of right just because the agreement involved land. The court needed to look at all the facts and circumstances, including importantly, the nature and function of the property in relation to the purchaser. If all that mattered was the profit that the purchaser could make upon a resale, damages must be an adequate remedy, even if the object in question was unique. The traditional bases of personal enjoyment and that no two pieces of land were identical did not

necessarily hold true for all purchases and in all cases. On the facts of the case, P was happy not to proceed with the completion of the purchase and was seeking some kind of quick turnaround and large payout. Damages would clearly be an adequate remedy and there was no element of personal enjoyment. P’s rebuttal that even if damages were an adequate remedy, D1 was in no position to pay any damages to P, which meant P would be left without any substantial relief, did not find favour with the learned Judge. He found that P knew of AA’s financial position, used the fact that there were many actions taken against AA as a credit risk and took the risk to lend money to AA for a handsome reward and windfall. Having chosen the risk of non-payment by AA and D1, P had to face the consequences of the risk mater

ⁱ[2011] 2 SLR 232

ⁱⁱ*Chitty on Contracts* vol 1, 13th Ed at para 7-001.

ⁱⁱⁱ[1976] 1 Lloyd’s Rep 293

^{iv}[1980] AC 614

^v[1983] 1 AC 366

^{vi}The distinction between mere “commercial pressure” and “unfair exploitation” set out in *Traitel, The Law of Contract*, 12th Ed, 2007 at para 10-005.

^{vii}See *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714

^{viii}*Morrison v Coast Finances Ltd* (1965) 55 DLR(3d) 231

^{ix}*Blomley v Ryan* (1956) 99 CLR 362, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

^x*Hart v O’Connor* [1985] 2 All ER 880

^{xi}Section 2-302 Uniform Commercial Code

^{xii}[1978] 1 WLR 255

^{xiii}whether the plaintiff was poor and ignorant; whether the sale was at a considerable undervalue; and whether the vendor had independent advice.

^{xiv}E.g. exceptional hardship, inadequacy of consideration as a result of one party taking unfair advantage of his superior knowledge or bargaining position, not coming to equity with clean hands.

^{xv}*Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 NZLR 174

^{xvi}*Semelhago v Paramadevan* [1996] 136 DLR (4th) 1, Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, Looseleaf Ed, Dec 2009 release), 8,60-8,90.

^{xvii}*Pianta v National Finance of Trustees Ltd* (1964) 180 CLR 146, 151

^{xviii}*Adderley v Dixon* 57 ER 239, *Hall v Warren* (1804) 9 Ves Jun 605 at 608

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FORCE MAJEURE

In yet another case in the series of cases arising from the Indonesia sand ban exports to Singapore in 2007 (the Sand Ban), the Singapore Court of Appeal in an illuminating judgment interpreted a *force majeure* clauseⁱ and in the process, laid down several general principles that could furnish guidance for future drafting of such “boilerplate”ⁱⁱⁱ clause.

In *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd*ⁱⁱ, A relied upon a *force majeure* clause as a defence for its failure to supply ready-mixed concrete (RMC) to R pursuant to a contract entered before the Sand Ban (the Contract). The clause read: “The Purchaser must provide sufficient advance notice in confirming each order. The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and shortage of material, Acts of God or any other factors arising through circumstances beyond the control of the Supplier.” The Sand Ban created a shortage of sand and aggregates (which constituted materials required for the manufacture of RMC). A’s position was that as a consequence of the Sand Ban, it could no longer supply RMC at pre-Sand Ban prices. R’s case was that A had breached the Contract by evincing an intention not to supply concrete at the prices stipulated in the Contract.

Unlike *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd*^v which was featured in issue Q2 of 2009 Law Update, A in this case did not plead the defence that the Contract had been frustrated and its attempt before the final appeal court to include such defence was refused. Thus, A had only the *force majeure* clause as defence to R’s claim. The apex court reiterated the governing principle relating to the construction and interpretation of *force majeure* clauses as stated in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*^v which “entails, simultaneously, a rather specific factual inquiry: the *precise construction* of the clause is paramount as it would define the *precise scope and ambit* of the clause itself.” The interpretation of the clause raised two sub-issues: (i) it had to be shown that the events stated in the clause had *disrupted* the supply of RMC; (ii) the supervening event had to be shown to be *beyond the control* of A.

The words “hinder” and “disrupt” suggested a datum measure of difficulty that

interfered with the successful performance of a contract. However, both words connoted a lower threshold of negativity compared to the word “prevent”. Unlike a situation involving “prevention”, situations involving “disruption” or “hindrance” did not render performance of the contract *impossible*. Having said that, the difficulty that manifested itself in the form of an increase in costs or prices was, in and of itself, insufficient to constitute a “disruption” or a “hindrance”. Where a commercial transaction was involved, the determination of whether the difficulty constituted a “hindrance” or “disruption” within the meaning of the *force majeure* clause ought to be informed by considerations of commercial practicability. Thus, events that did not prevent the *literal* performance of a contract but would render its continued performance commercially impracticable would generally constitute a “disruption” or “hindrance” within the meaning of the clause. On the facts and evidence, the circumstances did present genuine and considerable difficulties for A so as to constitute a “disruption” within the scope of the *force majeure* clause^{vi}.

Next to consider was the second sub-issue. The court agreed with the recent Hong Kong Court of Final Appeal decision in *Goldlion Properties Limited v Regent National Enterprises Limited*^{vii} that there could not be a blanket legal principle to the effect that there was a requirement to take all reasonable steps before a *force majeure* clause could be relied upon. Whether the affected party had to have taken all reasonable steps before he could rely on the clause depended, in the final analysis, on the precise language of the clause concerned. Nevertheless, where the *force majeure* clause related to events that had to be beyond the control of one or more of the parties, then the party or parties concerned ought to take reasonable steps to avoid the event(s) stipulated in the clause. In the opinion of the court, there was sufficient evidence to demonstrate that A had, on the balance of probabilities, taken reasonable steps to avoid the operation of the *force majeure* clause^{viii}. The *force majeure* clause applied and A was held not to be in breach of the Contract as the said clause discharged A from its obligation to supply RMC to R. It is noteworthy that by way of obiter dicta, while a *mere* increase in prices of source materials was generally insufficient, in and of itself, to constitute a “hindrance” or “prevention” that could invoke a *force majeure* clause, an increase that was so extreme as to be “astronomical” (such as 100 times as much as the contract price) might constitute a possible ground for frustration.

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ⁱForce majeure clause is defined in Black's Law Dictionary (7th Ed.) as "a contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled. It includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes and wars)."

ⁱⁱReady-made or all-purpose language that will fit in a variety of documents, standardized contractual language.

ⁱⁱⁱ[2011] 2 SLR 106

CONTRACT LAW / PARTNERSHIP LAW

A VERY LIMITED RESTRAINT OF TRADE AGAINST RETIRING PARTNER

The decision of the Court of Appeal in *Nagadevan Mahalingam v Millennium Medicare Services*ⁱ is important to persons carrying on business as partnership as it defines the limit within which a retiring partner may be restrained from carrying on a business similar to that of the partnership.

In that case, the appellant, a registered medical practitioner, was admitted as a partner of the respondent firm pursuant to a partnership agreement (the agreement) which contained a restrictive covenant that no partner shall without written consent of the managing partner set up any medical practice within 3 years after ceasing to be a partner within a radius of 15 km from the partnership clinic as a medical practitioner either by himself or as a partner or employee of any person or company (the restrictive covenant). The appellant left the respondent within 3 years to practice at another clinic within 15 km radius of the

^{iv}[2009] 2 SLR 193

^v[2007] 4 SLR 413

^{vi}See [60] to [64] for the detailed findings.

^{vii}[2009] HKCFA 58

^{viii}See [73] to [99] for the detailed findings.

respondent. The respondent brought an action against the appellant who applied to strike out its claim.

The appellate court held that the restrictive covenant was a restraint of trade clause within s.28 of the Contracts Act 1950 (the Act). Whilst exception 2 of s.28 of the Act allows partners to agree that some or all of them will not carry on business similar to the partnership within such local limits are reasonable, regard being had to the nature of the business, this exception only applies to an agreement made between partners upon or in anticipation of the dissolution of the partnership. In the present case, the appellant was not a partner of the respondent firm at the time the agreement was made but he was admitted as a partner 'pursuant' to the agreement. Viewing it in this light, it could not be said that the agreement was made in anticipation of the dissolution of the partnership. The respondent's case was untenable, the restrictive covenant was a covenant in restraint of trade in violation of s.28 of the Act and the appellant's action was struck out.

ⁱ[2011] 3 CLJ 529

COURT PROCEDURE

ANTON PILLER SEARCH ORDERS IN ACTION...

The utility of search orders to aid a litigant in pursuit of his claims, commonly known as *Anton Piller* orders, was amply demonstrated in the Singapore High Court decision in *BP Singapore Pte Ltd v Quek Chin Thean & others*ⁱ. The six defendants in the instant case had resigned in mass from the plaintiff company (P) to join a

competitor, Brightoil Petroleum (Brightoil). P claimed that the defendants had prior to their departures copied its confidential information for the benefit of Brightoil. P thus sued the defendants for numerous breaches of fiduciary duty and employment contracts and misuse of confidential information. P applied for and obtained *ex parte* injunctions and search orders against all the defendants, the former restraining them from using or disclosing P's confidential information while the latter compelling them to allow P to enter their homes to seize and make copies/images of their e-mails, computers, other electronic devices like mobile phones and thumb drives and documents (in hard or soft copy) relating to the trade secrets, confidential or proprietary information of P. The

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defendants moved the court to set aside the orders (after they had been executed). The four elements guide as laid down in *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)*ⁱ was referred to in adjudicating the defendants' application.

The first element, namely that P had an extremely strong *prima facie* case, was fulfilled. Affidavit evidence revealed that the defendants had been coordinating the mass departure of P's employees and their subsequent recruitment by Brightoil as well as copying many of its files (pertaining to human resource policies, storage tanks, P's five-year plan and delegations of authority chart) for the competitor's benefit (with a view to jump start the new competing business).

On the second element that the damage suffered by P would have been very serious, the objective of the search orders therein was to preserve evidence in the defendants' possession for trial and therefore, P had to show that P would not be able to prove its case (the so called procedural damage) if such evidence was destroyed. In relation to its allegations that D had orchestrated the mass exodus, P already had other evidence available in the form of fragments of documents incriminating the defendants, hence no serious damage would have been caused to P by any destruction of evidence. However, in relation to its allegations on misuse of confidential information, P would not be able to prove such allegations if the evidence in the defendants' possession was destroyed, hence irreparable "procedural damage" would have been suffered by P in this respect.

Thirdly, it must be shown that there was a real possibility that the defendants would destroy relevant documents. The court found that the conduct of the defendants other than the 3rd defendant was not nefarious enough to show a real possibility to destroy relevant documents. The mere fact that a defendant had been acting surreptitiously could not lead to the inexorable

conclusion that he would destroy relevant evidence to frustrate P's claim. The 3rd defendant had however deleted certain files before and after the search orders were executed. His was an example of a defendant's propensity to destroy relevant evidence.

Fourthly, the effect of the search orders must not be disproportionate to their legitimate object. Here, it was necessary for P to seize all the electronic devices of the defendants and there were safeguards in place to protect the defendants' privacy if the copies and images thereof were reviewed. However, P had also unnecessarily seized items belonging to the defendants' spouses, children and maids when executing the search orders. The terms of the search orders indeed did not permit P to seize items that were not owned or controlled by the defendants.

In conclusion, P had only satisfied all the four elements for a search order as against the 3rd defendant. The search orders against the other defendants were therefore set aside and in any event, the images of electronic devices seized from all six defendants' spouses, children and maids were ordered to be returned to them. The issue of damages arising from the grant or execution of the search orders was reserved to the trial judge hearing the substantive claim subsequently who would be in a better position to decide if and to what extent P ought to be ordered to pay damages to the defendants (including the 3rd defendant) by virtue of P's undertaking in the search orders to comply with any order the court might make if it was subsequently found that the search orders or their execution had caused losses to the defendants.

ⁱ[2011] 2 SLR 541

ⁱⁱ[2006] 1 SLR 901

COURT PROCEDURE

REVISITED LEAVE TO APPEAL TO FEDERAL COURT

In a landmark decision by way of test case, the Federal Court in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor*^j clarified and re-stated the principles relating to an application for leave to appeal to the

Federal Court, following the inconsistencies in the judgments in *Datuk Syed Kechik b Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors*^k and *Joceline Tan Poh Choo & Ors v V Muthusamy*^l concerning the interpretation of s.96 of the Courts of Judicature Act 1964 (s.96).

S.96(a) reads:

"96. Conditions of Appeal

Subject to any rules regulating the proceedings of the Federal Court

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in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court -

- (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction *involving questions of general principle decided for the first time (first limb) or a question of importance upon which further argument and decision of the Federal Court would be to public advantage (second limb).*"

Joceline Tan imposed additional conditions that in so far as the first limb of s.96(a) was concerned, the question of general principle decided for the first time must necessarily be that of the Court of Appeal's since the word "decided" (in the past tense) was used and therefore the word could not refer to a future decision from the Federal Court. Further, there has to be two or more previous decisions of the Court of Appeal on the same issue which were, for example, in conflict or were wrong or made in ignorance of a binding precedent or made in following a decision of the Federal Court which was vague or wrong.

The five-member panel held the guidelines set by *Joceline Tan* too strict which might defeat the objective of s.96(a). The apex court decided that there need not be two inconsistent judgments of the Court of Appeal or two or more previous decisions of the Court of Appeal on the same issue before leave could be given. Further, the phrase "*involving questions of general principle decided for the first time*" meant a

question to be decided for the first time by the Federal Court.

It is interesting to note that a few principles were set out that will be useful for any intended application for leave to appeal to the Federal Court. As a rule, leave will normally not be granted in interlocutory appeals. Leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance. Likewise, leave will not be granted if questions are relevant only to the particular fact situation. Leave will not normally be given too where it merely involves interpretation of an agreement unless the Federal Court is satisfied that it is for the benefit of the trade or industry concerned. The court will consider whether on first impression^{iv} the appeal may or may not be successful; if it will inevitably fail, leave will not be granted. Leave will also not be given on an abstract, academic or hypothetical question of law. An allegation of injustice by itself or grave error of law is not a sufficient reason for leave to be granted. Grounds of judgment of the Court of Appeal are not necessary to an application for leave. And the apex court expressed their reluctance to interfere with interlocutory orders such as Order 14 or Order 18 rule 19 (for example refusal of such applications), which in their opinion, should just go on trial and parties insisting to seek leave in such instances should be prepared to be heavily penalized with costs if they fail to obtain leave.

ⁱ[2011] 3 AMR 102

ⁱⁱ[1999] 1 AMR 833

ⁱⁱⁱ[2009] 2 AMR 569

^{iv}It would appear to be adopted from the decision in *Datuk Syed Kechik* that the applicant needs to show that he has a good prospect of success should leave be given, ie. a *first impression view* that the appeal *might* succeed.

CREDIT & SECURITY

UNCONSCIONABILITY AS A GROUND TO RESTRAIN CALL ON PERFORMANCE BOND

Singapore

In a rather incisive judgment in *JBE Properties Pte Ltd v Gammon Pte Ltd*, the apex court of our neighbouring country, Singapore developed its own jurisprudence in the field of

performance bond, departing from the traditional English position as laid down in *Edward Owen Engineering Ltd v Barclays Bank International Ltd*ⁱ. The English position requires fraud to be clearly proved before a call on a performance bond could be restrained. Such position was influenced by the well-established autonomy principle applicable to letters of credit which were a form of payment by the obligor for goods shipped to it by the beneficiary and has been accepted as the lifeblood of international trade for hundreds of years. Interfering with it is tantamount to interfering with the primary obligation of the obligor to make

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payment under its contract with the beneficiary, hence the very narrow exception of clear evidence of fraud in order to stop payment thereof.

The Singapore courts justified the novel approach on the difference between a performance bond and a letter of credit. A performance bond is merely security for the secondary obligation of the obligor to pay damages if it breached its primary obligations to the beneficiary. It is not the lifeblood of commerce. Thus, a less stringent standard could justifiably be adopted in restraining a call on a performance bond. Unconscionability is, in Singapore, a separate and independent ground to grant an interim injunction restraining a beneficiary from making a call on a performance bond. That has been the approach propounded in *Bocotra Construction Pte Ltd v AG*ⁱⁱⁱ.

In the instant case, the appellant developer (JBE) awarded the construction of a building to R in a contract valued at \$11.515m (the Building Contract). R's obligations under the Building Contract were secured by a performance bond (the Bond) granted by BNP Paribas Singapore (the Bank) in favour of JBE for \$1.1515m. Clause 1 of the Bond provided that the Bank was obliged to indemnify JBE only against "all losses, damages, costs, expenses or otherwise sustained by JBE" as a result of R's breach of the Building Contract. Clause 5 provided that the Bank "shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for a claim on the Bond...and shall be entitled to rely upon any written notice thereof received by it...as final and conclusive".

The cladding of the Building turned out to be defective. The cladding defects were described in the completion certificate issued by the superintending officer as "minor". JBE solicited bids from other contractors to rectify the cladding defects, ranging from \$2.2m and \$2.7m, on the basis of replacing the existing cladding and installing new cladding. JBE accepted the lowest bid and on this and other bases made a call on the Bond.

R applied to restrain JBE's call on the Bond. As directed by the trial judge, R obtained bids for rectifying the cladding defects, the highest quotation being \$0.56m. The High Court held that the Bond was an on-demand performance bond and granted an interim injunction restraining the call on the ground of unconscionability bordering on fraud. On appeal, the Bond by virtue of clause 1 was construed to be a true indemnity performance bond. Given the cladding defects were described as minor and not proven to be

otherwise, it was incongruous for JBE to rely on quotations for replacing the cladding of the whole of the Building. Even if this was necessary, the appellate court viewed the costs to be *prima facie* grossly inflated in light of the quotations obtained by R.

The appeal was therefore dismissed on the alternative ground that the Bond was a true indemnity performance bond and JBE had failed to prove an actual loss that was necessary to recover under such a bond. Even if the Bond was an on-demand performance bond, JBE's call on it was unconscionable given the grossly inflated costs given by it.

Malaysia

Back home, our High Court has drawn inspiration from the earlier approach taken by the Singapore courts in *Bocotra Construction Pte Ltd* (supra) and adopted it in the recently reported decision of *Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor*^{iv}. In describing the views expressed in Singapore to be in accordance with good commercial sense, Mohamed Ariff J summed up and held that the issue to be ultimately considered was whether there has been shown sufficient evidence of fraud or unconscionability to grant the injunctive reliefs prayed for. The learned Judge stressed the test as whether it was "seriously arguable" on the available material that the only realistic inference was fraud (or unconscionability), a test that was not so high as to stultify the equitable jurisdiction of the court.

It is interesting to examine the route used by the learned Judge to arrive at his conclusion. At the outset, he gave due recognition to the well-established principle of autonomy of the document which must be kept separate from the underlying contract. The rule on payment upon a call in cases of a demand guarantee or unconditional performance bond was strict, subject to the clear fraud exception --- similar to the position in England. Yet, as between the immediate parties, namely the principal (or, obligor using the terminology in the above *JBE Properties Pte Ltd* case) and the beneficiary, the law allowed an extended exception to the autonomy principle. If there was clear evidence of (i) fraud in the underlying contract; or (ii) unconscionability, the court could and would interfere. In these two situations, the integrity and autonomy of the document would still be preserved and not be compromised, since the paying bank would not be directly prevented from acting on the document. However, the beneficiary would be prevented from making a call on the document on these grounds. Thus, the learned Judge has very cleverly upheld

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the well trodden autonomy/integrity of document principle and at the same time, introduced the two exceptions so as to restrain a beneficiary from calling on the bond or guarantee in appropriate (and very limited) circumstances.

Granted that the relief sought for was in an interlocutory application, the learned Judge rejected the normal standard of “*prima facie* serious question to be tried” (the *American Cyanamid* approach) in the context of the fraud exception. Neither was the court concerned with the question of balance of convenience or justice or the issue whether damages would be an adequate remedy in the event an interlocutory injunction was granted.

On the facts, P was the purchaser of shares in certain “target companies” vide a share sale agreement (the SPA) and the disputed sum was an amount allegedly due under the SPA which was in part secured by an unconditional or demand bank guarantee for the sum of RM10 million (the BG) procured by P in favour of D1, the vendor. P applied for an interlocutory injunction under s.11(1) of the Arbitration Act 2005^v to restrain D1 from calling upon or receiving the sum of RM10 million under the BG until the disposal of the suit. It was P’s case that P had been induced into entering the SPA through fraudulent representations made by D1 relating, *inter alia*, to the value of two vessels owned by the target companies and the net tangible assets of the target companies and concealment of the negative shareholders’ funds in the balance sheets of the target companies. As the argument went, D1 should thus be prevented from exercising a contract or right to call on and receive payments under the BG. On the other hand, D1 denied having defrauded or deceived P and contended that the suit was an attempt by P to rewrite the SPA, that there was no evidence that she had committed fraud and that the matter involved not fraud but disputes arising from different interpretations of accounting standards and methods.

The learned Judge agreed with D1’s argument that the real subject matter of the claim was an adjustment of the contract price. In his view, the issues raised by P did not extend beyond arguments on accounting treatment or representations based on an accounting standard applied, particularly in relation to the values of the tankers. D1 contended that the representation was on the net book value without any representations made as to their market value. The learned Judge pointed out that P could have but did not conduct a due diligence before signing the SPA. P’s failure

accorded a flimsy ground to plead fraud or, for that matter, unconscionable conduct. Further, P had failed to show that its legal rights were threatened by D1’s fraud. On the converse, P was in a position of control in the target companies and over the tankers and P had actually ventilated its legal rights in arbitration proceedings commenced.

Very recently, in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd*^{vi}, Varghese George JC followed *Focal Asia Sdn Bhd*. Indeed, the learned Judicial Commissioner went one step further to banish any doubts that may be had in recognizing “unconscionability” as a separate ground (as distinct from fraud) for seeking injunctive relief in the context of a demand on an “on demand unconditional guarantee or bond” (the unconscionable exception). He took the bull by the horn and regarded the one sentence in the judgment of the Court of Appeal in *LEC Contractors (M) Sdn Bhd v Castle Inn Sdn Bhd & Anor*^{vii} which read: “Bad faith or unconscionable conduct by itself is not fraud” to have been unduly taken out of context which resulted in resistance by some judges^{viii} to import the unconscionable exception to our Malaysian common law. He held the view rightly that the focus of the appellate judges in *LEC Contractors* was on what constituted “fraud” and whether it was pleaded. “Fraud” undoubtedly encompassed some element of “criminality” or deceit whereas “unconscionability” would not necessarily amount to “criminal” acts, hence unconscionability was not to be equated with “fraud”. However, that did not and ought not to withheld protection to a party who complained of “unconscionability” or mala fide acts on the part of the beneficiary, which if refused, could result in similar or more severe damage or loss to the aggrieved party (obligor or principal) as would happen in a “fraud” context.

In *Sumatec* case, the plaintiff and the defendant entered into a bill of quantities contract for structural steel works. The plaintiff provided a bank guarantee from BIMB for the due performance of the contract for 10% of the contract value. However, the plaintiff complained that their works were obstructed by the delay of the defendant in supplying certain drawings; that there were no specific milestones set for the completion of parts of the works; that the defendant reduced the work scope of the plaintiff which affected the value of the project from RM47 million to RM13 million; and that the defendant introduced a claim for back charges without any notice of defects or opportunity for the plaintiff to rectify such defects, if at all. The defendant made a demand for payment or encashment of the bank guarantee whereupon

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the plaintiff applied for an injunction to restrain the defendant from calling upon the bank guarantee and alternatively, for the defendant to be restrained from receiving or from utilizing or dealing with the sum guaranteed if demand was made by it.

On proper construction of the wordings of the bank guarantee [*shall pay to MRC on first notice without proof and conditions the sum...*], and despite the absence of conventional words such as “*shall pay without contest or protestations*”, it was held to be an on demand unconditional guarantee. However, the demand made by the defendant on the bank guarantee was defective. Firstly, The defendant did not follow the terms of the bank guarantee itself. Whilst the bank guarantee expressly stated the amount as RM4,784,668.80, the demand was for a lower sum of RM4,535,255.67. In the absence of words like “not exceeding” or “up to the limit of” in the bank guarantee itself, the defendant’s demand had to be for the exact sum stipulated in the bank guarantee, nothing more and nothing less. Secondly, the amount guaranteed was limited to 10% of the “contract price”. This was a specific condition and the sum of RM4,784,668.80 stated in the bank guaranteed was in fact equivalent to 10% of the original contract price. However, evidence showed that there was agreement of the parties for a reduction in the scope of the works of the plaintiff at some stage of the contractual relationship and for a reduction of the limit of the guarantee or for substituting the same. The defendant’s haste to encash the bank guarantee for the full 10% of the original contract value prompted the learned JC to draw an adverse

inference against the defendant. Even if he was wrong in holding that the demand by the defendant was invalid, the plaintiff had made out a case that the defendant’s conduct in issuing the demand on the bank guarantee amounted to a *mala fide* and/or an unconscionable act. Much guidance was drawn by the learned JC from the Singapore Court of Appeal case of *GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Anor*^{ix} which involved an almost similar factual scenario where there was a drastic revision downwards of the contract sum and the employer was attempting to cash in on a guarantee for the original value. Equitable intervention was warranted to meet the ends of justice which required the status quo be maintained until the disputes between the parties were fully adjudicated.

ⁱ [2011] 2 SLR 47, delivered on 3 December 2010.

ⁱⁱ [1978] QB 159

ⁱⁱⁱ [1995] 2 SLR 733

^{iv} [2011] 2 AMR 515, delivered on 13 August 2009.

^v Which empowers the court to make any order for securing an amount in dispute before or during arbitral proceedings as an interim measure.

^{vi} [2011] 1 AMCR 603, delivered on 29 November 2010.

^{vii} [2000] 3 CLJ 473

^{viii} for example, Hishamudin Mohd Yunus J (as he then was) in the High Court case of *Pasukhas Construction Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd & Anor* [2009] 6 CLJ 480.

^{ix} [1999] 4 SLR 604

DIGEST OF EMPLOYMENT LAW

1. RETIREMENT BENEFITS NOT CLAIMABLE

In *Hicom Holdings Bhd v Mahkamah Perusahaan Malaysia & Anor*ⁱ, the applicant was ordered by the Industrial Court to pay the 2nd respondent retirement benefits in addition to backwages and compensation *in lieu* of reinstatement for dismissing the latter in August 1996 without just cause or excuse. The applicant applied for judicial review for an order of certiorari to quash part of the award on the ground that 2nd respondent was not entitled to claim loss of future earnings. On the other hand, the 2nd respondent contended that had he not been dismissed, he would have been entitled to the benefits under the retirement benefit scheme up to the year 2004

when the scheme was dissolved by the applicant. The High Court applied decisions of the Court of Appeal in *Telekom Malaysia Bhd v Ramli bin Akim*ⁱⁱ and *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sanah & Anor*ⁱⁱⁱ and held that in industrial law involving compensation for unfair dismissal, there were only two types of compensation, viz. backwages and compensation *in lieu* of reinstatement. Future loss of earnings is not an established and recognized head of damages. The award of future loss of earnings by the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor*^{iv} was peculiar to the facts of that case and was not intended to be of general application in all Industrial Court cases.

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2. SOME POINTERS ON CONSTRUCTIVE DISMISSAL CLAIM

Three points emerged from the High Court judicial review decision in *Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor*^v. The first is that an employee who complains of constructive dismissal must act with promptness. It is fatal to a constructive dismissal claim if there is undue delay in responding to the changes that are imposed by the employer or generally, in reacting to the repudiatory conduct of the employer. In the instant case, the complainant did not repudiate the contract in October 1997 when the variation took place. He affirmed and accepted it for five months. The letter in February 1998 from the applicant (employer) merely formalized the practice over the past five months of paying salary on an hourly rated basis. The complainant had therefore elected to accept the variation and could not complain.

Secondly, an employee who considers himself as having been constructively dismissed is obliged to give notice to his employer before she can make a representation under s.20(1) of the Industrial Relations Act 1967 (IRA)^{vi}.

Thirdly, the court has always respected a company's exercise of its prerogative to devise means to improve its operations, with as much latitude as our laws will allow. Management is free to regulate, according to its own discretion and judgment, all aspects of employment, including hiring, work assignments, working methods, time, place and manner of work, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, lay off of employees and change of working hours. The applicant was in the view of the learned Judge justified in the conversion of salary, which was brought about by the complainant's poor performance and the economic crisis. In any event, the hourly rate amendment would have returned a salary in excess of the complainant's previously expressed contractual monthly salary if he had attended work. It was his own erratic attendance that his performance became questionable. The final decision was an order of *certiorari* was made to quash the award of constructive dismissal made by the Industrial Court.

3. BREACH OF COMPANY RULES, CIRCULARS AND DIRECTIVES

Coincidentally, two decisions of the Industrial Court decided about the same time involved the same employer, Maybank Berhad and

concerned issues relatively similar. Firstly, the case of *Khairuddin Ismail v Maybank Berhad*^{vii}, where the claimant was a marketing officer attached to Maybank Auto Finance whose main function had been to recommend or reject hire purchase loans. According to the standard practice instructions (SPI) of the bank, the claimant was responsible for the genuineness of the supporting documents submitted and to verify applicant's employment or business and his financial status by doing a systems check. Though other employees had assisted the claimant in the processing of applications, the ultimate responsibility had rested with him and he could not put the blame on others for any misleading information given or for non-compliance of SPI. In the instant case, the claimant had not verified the genuineness of the six applications in question.



The applicants had not given truthful information, yet they had been accepted by the claimant without proper verification. The applicants had not met the financial criteria, yet the claimant had recommended them and as soon as the loans had been disbursed, they became non-performing which resulted a huge financial loss to the bank. The report of the audit investigator of the bank was acted upon by the bank to issue a show cause notice to the claimant whose reply was regarded as without merit. The bank decided not to hold a domestic inquiry and dismissed the claimant

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summarily as they viewed his misconduct as serious. The Industrial Court upheld this decision.

Secondly, *Idris Tahir v Malayan banking Berhad*^{viii}, where the claimant was the Branch Manager of one of the Business Centres of the bank. The bank received a letter from an anonymous party which tipped off the bank on the non-existence of a borrower company to whom the bank had released an overdraft facility. Ensuing investigation carried by the bank revealed that several overdraft facilities approved by the claimant had contained irregularities.

A domestic inquiry (DI) was held but the claimant elected not to testify. The claimant was found guilty of 3 of the 6 charges brought against him and was dismissed. In the Industrial Court, the claimant contended that he had been prejudiced as the allegations leveled against him were made by an anonymous party. This contention was rejected by the court which ruled that the bank as custodian of public funds had the duty to investigate the complaint or remark whether or not it was from anonymous party. On the 1st charge that he had failed to appoint a bank panel's valuer to provide valuation on the properties proffered as collateral for the overdraft facilities subject of complaint and instead accepted valuation report prepared at the instruction of customer/3rd party, he had admittedly breached the relevant circular. It was unbecoming of a Branch Manager with vast experience in credit matters to merely defend himself by alleging that such non-compliance had been happening everywhere. Incidentally, the claimant was cleared of this charge by the DI but the Industrial Court decided against him.

On the 2nd charge, he had admitted to have processed and approved 10 applications submitted by two close friends of his on behalf of customers. Credit officers had merely checked and countersigned on the credit memos and A/As which were in fact prepared by the claimant himself. The claimant had thus breached the management directive which stated that there should be a check and balance between processing officer and approving authority who could not approve a loan that had been processed by him.

On the 3rd charge that he had failed to exercise due care and prudence by failing to raise queries and further checks on the valuation given by valuer, TD Aziz on the property proffered as collateral for facilities despite four "disturbing" facts which might compromise the integrity and credibility of the valuation carried out, there was evidence that he had been aware that the

valuation reports submitted had been on the high side and/or had been grossly inflated. Yet, he had done nothing to check further and had merely assumed that they had been correct as they had been panel valuers of the bank. His conduct and/or omissions had fallen below the standard of an experienced and prudent banker.

On the 4th charge, he was found guilty of failing to exercise due care and prudence in approving the facility for a customer when the valuation report for the property proffered as collateral conducted based on comparison method did not provide evidence of value of the transactions of similar properties sold recently and currently offered for sale in the vicinity or other comparable localities.

On the 5th charge, he was found guilty by the court (though not be the DI) of failing to exercise due care and prudence in accepting copies of bank statement favouring two customers without verifying them against the original documents. Likewise, on the 6th charge, the court (though not the DI), he had been wrong to have accepted copies of financial statements favoring numerous customers alleged to have been audited by public accounting firms in support of their overdraft applications without verifying them against the originals which turned out to be false documents.

All in all, the claimant had been guilty of misconducts for numerous breaches and non-compliances of established regulations, circulars and/or directives and/or code of ethics of the bank and breach of implied duty to act in the best interests of the bank. The importance of bank employees to be of unimpeachable integrity and trust and absolute honesty and impeccability^x and to exercise caution and prudence^x was highlighted by the court. Unsurprisingly, the punishment of dismissal meted out to the claimant was endorsed by the court.

4. FAILURE TO PAY SALARY --- CONSTRUCTIVE DISMISSAL

The firm in *S Santhi v Tetuan Devan Hussin*^{xi} failed to pay salary for the months of January to March 2007 to the claimant who was a legal assistant. The claimant walked out claiming constructive dismissal. Then, the firm issued a letter alleging that her performance had been unsatisfactory. The Industrial Court found that the allegation had been baseless.

There had been no show cause letter to warn the claimant about her performance. On the

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issue that the firm had not paid her salary as she had failed to secure her practising certificate (PC) during her employment which caused her not to be able to go to court, her letter of appointment had not stated that having a PC was one of the conditions of employment. Further, this issue was raised 5 months after she started employment. It was thus only an excuse to avoid paying the claimant her outstanding salaries. It is trite that failure to pay salary when it had fallen due was a serious breach that had entitled an employee to leave her employment.

5. MISREPRESENTED INTO ACCEPTING VSS OFFER

In *PPG Coatings (Malaysia) Sdn Bhd v Kesatuan Kebangsaan Pekerja-pekerja Perusahaan Kimia & 5 Ors*^{xii}, the applicant had offered its interested employees a voluntary separation scheme (VSS) as it was restructuring and downsizing its operations. The respondents consulted the applicant's human resources department and were informed that the benefits under the VSS would be better than any other scheme that would be offered in the future. The respondents therefore accepted the VSS offer which offered one month salary for each year of service. However, it was subsequently discovered that had they resorted to clause 34 of the collective agreement, they would have been entitled to a minimum of two months wages for every year of service.

The respondents filed their action in the Industrial Court wherein the Industrial Court ordered the applicant to comply with the provisions of clause 34 of the collective agreement and pay the respondents the difference between the amount of compensation that would have been paid to them had they resorted to clause 34. The High Court refused to upset the decision of the Industrial Court and held that the respondents were indeed misrepresented into accepting the VSS scheme.

6. NO OBLIGATION TO WARN OR CONSULT BEFORE RETRENCHING

The applicant (A) in *Pook Li Ping v Mahkamah Perusahaan Malaysia & Anor*^{xiii} was working as commercial director of R2 to manage, direct and coordinate R2's commercial and finance functions in India, Hong Kong, Malaysia and Singapore. On 2.9.2002, R2 announced major changes which affected all aspects of its business in Asia as a result of which A's reporting line was changed. On 11.11.2002, changes in its leadership team were announced and on

27.2.2003, a memo was issued stating, *inter alia*, changes in R2's business structure and that the role of commercial director would be eliminated. A received a notice of termination of employment and was informed of her last day of service and payment of redundancy benefits.

A brought a claim for unfair dismissal to the Industrial Court (R1) which found in favour of R2. A applied to the High Court for an order of *certiorari* to quash the award. It was held that the evidence in totality supported R1's findings that R2 had successfully proved existence of a situation which supported the retrenchment of A. The review and reorganization conducted by R2 was not carried out with the ulterior motive of getting rid of A as alleged. All employees of R2 were notified to expect that the review might result in a number of additional positions created or re-aligned and some positions would be discontinued. It was the prerogative of the management to decide on the strength of its work-force necessary for efficiency in its undertaking. R2 was also not obliged to give A any prior notice of her termination and/or to warn or consult her and to offer her an alternate position. R1's decision thus did not suffer from the infirmities of illegality, irrationality or procedural impropriety so as to merit curial intervention.

7. IMPLIED RIGHT TO TRANSFER

In *Maybank v Cheo Ai Mee & Anor*^{xiv}, R1 was involved in a case of manipulation of two saving accounts in the applicant bank (A). A issued show cause letter to R1 and those involved. No further action was taken against R1 but the audit team of A recommended that A should reshuffle the officers and staff of the branch concerned particularly those involved. R1 was then issued with a transfer directive. R1 alleged that the transfer was an act of constructive dismissal to victimize her due to suspicion and allegations of fraud arising from the case and lodged representation of wrongful dismissal. The Industrial Court (R2) found for R1 and ordered that she be reinstated. Upon application for order of *certiorari*, the High Court quashed R2's award. It was held that a transfer was a managerial prerogative and the refusal to proceed upon being issued with a transfer order would tantamount to insubordination which warranted a dismissal.

On the authorities^{xv}, an employer always had the implied right to transfer its employees and no express term in the contract of service was necessary. R2 had erred in not considering the fact that the transfer was a recommendation by the audit team. Furthermore, the right to transfer was provided for in R2's terms and conditions of

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service even without consent but subject to “sympathetic consideration”. A had shown such consideration by agreeing to defer her transfer to a later date. All in all, R2 was held to have erred in failing to consider relevant matters and giving undue weight to irrelevant matters in arriving at its conclusion that A’s conduct was a fundamental breach of R1’s contract of employment.

ⁱ[2011] 7 MLJ 757

ⁱⁱ[2008] 1 MLJ 770

ⁱⁱⁱ[2000] 4 MLJ 87

^{iv}[1997] 1 MLJ 145

^v[2011] 3 CLJ 929

^{vi}See also *Southern Bank Bhd v Ng Keng Lian & Anor* [2002] 2 CLJ 514

^{vii}[2011] 2 ILR 282

^{viii}[2011] 2 ILR 395

EVIDENCE

THE INTERPRETATION EXCEPTION TO “WITHOUT PREJUDICE RULE”

The “without prejudice rule” was the focus in the recent decision of the Supreme Court of United Kingdom in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*. For the benefit of our readers particularly non-lawyers, this rule excludes all statements or offers made in the course of negotiations for settlement whether oral or written from being given in evidence in the court of trial as admissions of liability. It is founded partly on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish, so that parties are not discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedingsⁱ. Thus, it is usual that any negotiation for settlement will be qualified or preceded with the label “without prejudice” so that whatever statement made during the course of negotiation will not subsequently be used against the maker in the legal suit.

However, it must be cautioned that one should not discriminately use the label “without prejudice” on any sort of documents, for the “without prejudice rule” which excludes documents marked “without prejudice” has no application unless some person is in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiationⁱⁱⁱ. Further, there are at least eight exceptions to the rule^{iv}.

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^{ix}*ABN Amro Bank Bhd v Gurmit Singh Charan Singh* [2001] 3 ILR 536 at p.555, *Perwira Habib Bank (M) Bhd v Tan Teng Seng @ Lim Teng Ho* [1997] 2 ILR 839, *Southern Bank Bhd v Azmi Ali* [2003] 1 ILR 614

^x*BSNC Corporation Berhad & Anor v Bahari Idris* [2008] 2 LNS 1730

^{xi}[2011] 2 ILR 383

^{xii}[2011] 2 AMR 455

^{xiii}[2011] 3 AMR 817

^{xiv}[2011] 3 AMR 807

^{xv}*Ladang Holyrood v Ayasamy Manikam & Ors* [2004] 4 AMR 621, *Chong Lee Fah v The New Straits Times Press (M) Bhd & Anor* [2005] 4 CLJ 605

Among them, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible^v; evidence of the negotiations is also admissible to show that an agreement apparently concluded during negotiations should be set aside on the ground of misrepresentations, fraud or undue influence^{vi}; even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel^{vii}; and evidence of negotiations may be given in order to explain delay or apparent acquiescence^{viii}.

In *Oceanbulk*, the defendant sought to extend the ambit of the exception to cover interpretation of a compromise agreement. There, a dispute arose between the parties over the meaning of a compromise agreement made after parties had entered into without prejudice negotiations.

The defendant sought to rely, as an aid to interpreting the agreement, on certain representations that had allegedly been made during the negotiations. It was submitted that facts which were communicated between the parties in the course of without prejudice negotiations formed part of the factual matrix or surrounding circumstances and ought to be admissible in evidence by way of exception to the “without prejudice rule” because the agreement could not otherwise be properly construed in accordance with the well recognized principles of contractual interpretation.

The claimant objected on the ground that the representations were made in the course of without prejudice negotiations and that the general principle that one party should not be permitted to cross-examine the other party on matters disclosed or discussed in without prejudice negotiations should be applied in its full rigour.

Ordinarily, in construing or interpreting an agreement, evidence of the factual matrix or surrounding circumstances is admissible as an aid^{ix}. The Supreme Court could not see any reason why the ordinary principles governing the interpretation of a settlement agreement should be any different depending on whether the negotiations were or were not without prejudice. In their view, the parties entering into such negotiations would expect the agreement to mean the same in both cases. Such a conclusion did not offend against the principle underlying the “without prejudice rule”, namely to encourage parties to speak frankly and to promote settlement.

On the contrary, settlement was likely to be encouraged if a party to negotiations knew that, in the event of a dispute about the meaning of a settlement contract, objective facts which emerged during negotiations would be admitted to assist the court to interpret the agreement in accordance with the parties’ true intentions. Thus, the interpretation

exception should be recognized as an exception to the “without prejudice rule”. The appeal was accordingly allowed. Evidence in support of certain representations was admissible as part of the factual matrix or surrounding circumstances on the true construction of the compromise agreement.

ⁱ[2010] 4 All ER 1011

ⁱⁱ*Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737

ⁱⁱⁱ*Re Daintrey, ex p Holt* [1891-4] All ER Rep 209

^{iv}*Unilever plc, The Procter & Gamble Co* [2001] 1 All ER 783

^v*Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201

^{vi}*Underwood v Cox* (1919) 4 DLR 66

^{vii}*Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178

^{viii}*Walker v Wilsher* (1889) 23 QBD 335

^{ix}*Prenn v Simmonds* [1971] 3 All ER 237, 240-241, *Reardon Smith Line Ltd v Hansan-Tangen* [1976] 3 All ER 570, 574, *Investors Compensation Scheme Ltd v Hopkins & Sons (a firm)* [1998] 1 All ER 98, 114-115, *R v National Asylum Support Service* [2002] 4 All ER 654, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 4 All ER 677.

EVIDENCE / COURT PROCEDURE

DON'T SIMPLY ANSWER A REQUEST OR SEEK CONFIRMATION FOR AUDIT PURPOSE !

An inquiry for ‘audit’ purpose may be taken against the debtor. That is the costly lesson learnt by the defendant in *Hasrat Usaha Sdn Bhd v Pati Sdn Bhd*. By an undated letter, D requested a confirmation from P on the balance due to P as at December 31, 2004 and P was requested to advise D’s auditors “of the correctness of the balances as stated below” which according to D’s records, stood at RM1,310,806.02. P replied that according to its records, the correct amount was RM2,040,586.38.

P filed the suit to claim for the works under the sub-contract duly completed by them and sought to enter judgment for RM2,040,586.38 against D. P applied for judgment by admission pursuant to O.27 R.3 of the Rules of the High Court 1980 by reliance upon the said letter from D

seeking confirmation. D however submitted that the wording taken as a whole did not constitute an admission of debt but was merely an enquiry and request for confirmation. Since P disputed that amount, there was a real dispute and it could not be said that D’s letter amounted to an unequivocal admission of a debt.

By a majority, the Court of Appeal ruled for P. Although P disputed the correctness of the amount stated in D’s letter and claimed that a bigger amount was due and owing from D, on the facts, there was a clear and unequivocal admission by D that there was a balance due and owing to P to the tune of RM1,310,806.02. Up to that amount, D was under obligation to pay to P and therefore, the High Court was right to uphold the Senior Assistant Registrar’s decision which allowed P’s application to enter judgment for the amount of RM1,310,806.02.

ⁱ[2011] 3 AMR 501

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USE OF PHOTOS FOR GAINFUL ENDEAVOUR WITHOUT PRIOR CONSENT

Photographs were taken of a woman when she participated in several beauty pageants in the state of Sabah. Years later, she discovered that her photographs and image appeared on the packaging of D's numerous products which were sold widely in the city. Her photographs and image also appeared on a large billboard along a street. The woman claimed that she was the rightful owner of the copyright of her own photographs and image. She contended that D had infringed the copyright by reproducing, publishing and advertising her photos and image for gainful and commercial purposes without her prior consent. It was also claimed that D had violated her rights to privacy which had greatly injured her credit, character and reputation.

The above were the facts in gist in *Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd*. The woman filed a suit for an injunction and damages for RM1 million. Unfortunately, she lost on all counts. On copyright claim, whilst "artistic work" under s.3 of the Copyright Act 1987 includes a graphic work, photographs, sculpture or collage, the person who created the same is the author and the owner of the copyright in the piece

of work. The woman had not shown that she was either the photographer or the author of the said photographs or image used by D on its products. Not being the owner of the copyright in the photographs or image used by D, she has no locus standi to sue D for the infringements of the copyright.

Neither had D intruded onto the private property or taken the photographs of the woman without her consent. The said photographs had been taken years ago by someone else in public and at beauty pageants which the woman was a willing contestant and had also been published in one of the publications of the Sabah Tourism Board. As such photographs were in the public domain, there could not amount to an invasion of her privacy. It was not a private affair on a private property. The photographs were also not offensive and did not humiliate, ridicule or scandalize her. Likewise, her action on this ground was summarily dismissed.

[2011] 1 AMCR 905

LIMITATION

TAKING ADVANTAGE OF BEING WOUND-UP TO DEFEAT CLAIM

In *Tasja Sdn Bhd v Golden Approach Sdn Bhd*, P was engaged by D to carry out certain construction works. Under the construction contract, D had to pay P within 30 days after the consultant issued an interim valuation certificate. There were five such certificates dated 20.3.1997, 29.4.1997, 10.9.1997, 6.11.1997 and 12.2.1998. These claims were not paid by D which was wound up on 12.6.2000. It was only in 2005 that the Court of Appeal allowed D's appeal for a permanent stay of the winding-up order. P was only able to file the action on 31.5.2005 which was more than 6 years after the claims accrued. D applied to strike out P's action on the ground that P's claim was statute-barred under s.6(1)(a) of the Limitation Act 1953 (the Act). P replied that D was not entitled to assert limitation since the limitation period was postponed whilst D was being wound-up.

The Federal Court recognized the prejudice suffered by P. With a winding-up order against the company, P's right as a creditor was restricted to filing a proof of debt and the right to file a suit against the company could only be possible with the leave of the court [s.226(3) of the Companies Act 1965 (CA)]. When the winding-up order was stayed (which amounted to a total discontinuance or termination of the winding-up proceedings, unless with terms) which were years later and before the liquidator has distributed any payment out of the assets of D to creditors, P found its action statute-barred. D thus took advantage of being wound-up to defeat its creditor(s) with limitation and subsequently applied for a stay after this objective was achieved. Unfortunately, in the opinion of the apex court, there was no provision to allow the court to disregard time from running or to suspend time under the Act. The court instead pointed out what P or creditors could do in such situation. They could voice their concern or objection during the application for a stay of the winding-up order and require conditions to be imposed in the stay order. They could also seek leave of the court to determine the issue of liability between them and the wound up company. They could or rather, should, have applied for leave under s.226(3) of

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CA to institute an action against D rather than leaving it to a later date.

The question “whether the limitation period to bring a civil claim against a company for monetary debt is postponed whilst the company is being wound up pursuant to a court order under CA” was answered in the negative. However, on procedural ground, P succeeded in the appeal as D had not pleaded the defence of limitation under s.4 of the Act which was a pre-requisite before a claim could be struck out on the ground that it was time-barred. The court made a distinction between cases where the application to strike out the claim was grounded on s.2(a) of the Public Authorities Protection Act 1948 or s.7(5) of the Civil Law Act where the period of limitation was absolute and

cases under the Act where limitation was not absolute. In the former case, such application should be granted without having to plead such a defence whereas in the latter, limitation must be pleaded.

[2011] 3 CLJ 751

**PUBLIC UTILITIES / EQUITY / LIMITATION /
CONTRACT LAW**

**RECOVERY OF OVERPAID ELECTRICITY
CHARGES**

P’s premises to which TNB supplied electricity was a wood-based furniture factory. When P applied for the electricity supply, P had stated that the type of business for the premises was ‘factory’ and the tariff required was D ie. industrial tariff. The contract entered into between P and TNB however stated that the tariff used was B tariff, ie commercial tariff. TNB had supplied the electricity to P from 1994 to June 2004 based on B tariff. The B tariff was of higher payment rate than D tariff. Since December 1995, P had been given the licence of licensed manufacturer. P had applied to TNB to change the tariff imposed on P from B tariff to D tariff which was allowed by TNB. Since July 2004, the tariff imposed by TNB had been D tariff. However, the payment for the electricity supply before July 2004 had been based on the B tariff. P therefore commenced action to claim for the refund of the monies overpaid for the electricity supply before July 2004 which had been based on the B tariff when the actual tariff should have been D tariff. P’s action was based on the common law obligation in furtherance to mistake of facts, s 73 of the Contracts Act 1950 and alternatively, restitution based on the principles of money had and received and unjust enrichment. TNB raised defence of limitation and laches.

On the above set of facts, the High Court allowed P’s claim in *Green Continental Furniture (M) Sdn Bhd v Tenaga Nasional Berhad*¹. The

usage of B tariff was a mistake and hence, the difference between the amounts of money based on the actual B tariff had been paid by P and the money that ought to be paid based on D tariff was the money overpaid by P due to the mistake. The applicable tariff was not dependent on the contract but must follow the rate and category of the tariff set by the government. It was thus not open to TNB to rely on the stipulated tariff in the contract to deny that there was a mistake in the tariff imposed on P.



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Under s 73, the question which needed to be considered in determining whether there was mistake or payment of money out of the mistake was whether the payment was legally due. If what was stated in the contract was not according to the law, then it could amount to mistake which attracted the application of s 73. Thus, pursuant to s 73, the money overpaid ought to be returned to P. S 73 was applicable regardless whether the mistake was TNB's mistake, P's mistake or both parties' mistake. So too, TNB's allegation that P had been negligent in failing to present the manufacturing licence was not relevant as the claim for the refund of the money overpaid under s 73 could not be defeated by such allegation of negligence.

The essence of the cause of action 'money had and received' was based on the circumstances of a case that relied on the requirement of natural justice and equity, rendering TNB having the obligation to refund the money received. It was unjust or unconscionable for TNB not to refund the money overpaid. Instead, by holding the overpaid money, TNB had gained unjust enrichment. In such situation, TNB had the obligation to refund the excess money received, unless TNB had changed its position based on the excess money received which made it unjust to compel TNB to refund the money. The exception was inapplicable in the instant case as TNB did not plead or adduce evidence that it had changed its position. Therefore, there was no prejudice or

TORT (DEFAMATION) / BANKING LAW

NO DEFAMATION IN REPORTING LOAN DEFAULTER TO CCRIS

In *AmFinance Berhad v Varusai Mohd bin Zainal Abidin*ⁱ, the defendant defaulted in paying the instalments under a loan facilities taken from the plaintiff which resulted in the suit. The defendant counterclaimed for damages for defamation, alleging that the plaintiff had acted maliciously in lodging the defendant as a defaulter into the Central Credit Referencing and Information System (CCRIS) which was set up by the Bank Negara Malaysia (BNM).

The High Court dismissed the counterclaim. It was held that the information released by the plaintiff to CCRIS could not be defamatory as the information, being confidential

injustice if TNB was ordered to refund the money overpaid.

P's action, either under s 73 or common law 'money had and received' was for the relief out of mistake which was only realized by P in the month of June 2004. There was no allegation by TNB that P could with reasonable diligence be aware of the mistake earlier. Thus, P's action which was filed in June 2006 was before the expiry of the limitation period of six years. In order to consider laches, the relevant time was June 2004 when P became aware of the mistake in the tariff category which was imposed. Based on this date, there was no unreasonable delay or laches.

Regulation 11(5) of the Electricity Regulations 1994 was not applicable here as it merely prevented TNB from making the adjustment retrospectively. It did not stop P from claiming for refund of the money overpaid. The amount of RM307,485.45 being the overpaid amount in the period from June 1997 till June 2004 was ordered against TNB while an order to assess the overpaid amount for the period from January 1997 till May 1997 was made.

ⁱ[2011] 8 MLJ 394

in nature, was only accessible by other participating institutions. Besides, the plaintiff was duty bound under s.30(1)(m)(i) of the Central Bank Act 1958 to furnish BNM with such information as may be required by BNM in the credit bureau that it had established. The defence of qualified privilege was applicable to the plaintiff, no malice having been shown on the part of the plaintiff. Further, upon an examination of the letter of offer for the loan, it was provided that if required, the plaintiff would make known the information regarding the loan to the central credit bureau. All in all, there was no basis for the defendant to complain that he had been defamed.

ⁱ[2011] 2 AMR 607

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TORT (MALICIOUS FALSEHOOD)

SINGLE MEANING RULE IN DEFAMATION NOT APPLICABLE TO MALICIOUS FALSEHOOD

Libel is an injury to reputation and thus a personal tort. Malicious falsehood is an injury to property (or rather reputation of propertyⁱ) and thus an economic tort. In libel cases, there is a rule that the question libel or no libel is to be answered in respect of a single meaning (the single meaning rule). It originated from a fiction which assumes that the reasonable man will understand a particular statement in only one way---its supposed single natural and ordinary meaning. The question is whether the single meaning rule in defamation is applicable to a malicious falsehood claim as well.

That question arose before the English Court of Appeal in *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd*ⁱⁱ. The facts are fairly simple and straight-forward. The claimant was a producer and supplier of aspartame, a lawful sugar substitute but one which had attracted a measure of controversy. The defendant was a supermarket chain which sold its own brand of health foods. On some of those foods, the packaging included the words "No hidden Nasties", "No artificial colours or flavours and no aspartame". In a suit for malicious falsehood, four possible meanings were ascribed to such packaging: A: That aspartame is harmful or unhealthy; B: That there is a risk that aspartame is harmful or unhealthy; C: That aspartame was to be avoided; D: That these foods were for customers who found aspartame objectionable.

The trial judge found, on the preliminary issue of meaning, that a substantial number of consumers would derive meaning B as well as meaning D from the packaging. However, he applied to meanings B and D the single meaning rule and held that the single meaning was the innocuous one (meaning D) and thereby ended the claim of the aspartame producer without going to trial. The claimant appealed to the Court of Appeal.

The appellate court rejected import of the single meaning rule into the tort of malicious falsehood. They held that once a judge had held that the meanings which reasonable customers might put on the words included both the damaging and the innocuous, there was no reason why the law should not move on to proof of malice in relation to the damaging meaning and (if malice were proved) the consequential damage, without artificially pruning the facts so as to presume the very thing---a single meaning---that the judge had found not to be the case.

By doing so, instead of denying any remedy to a claimant whose business had been injured in the eyes of some consumers on the illogical ground that it had not been injured in the eyes of others, or alternatively giving such a claimant a clear run to judgment when in the eyes of many customers the words had done it no harm, trial of plural meanings permitted the damaging effect of the words to be put in perspective, and both malice and damage to be more realistically gauged. In other words, by not having to apply the single meaning rule, the judge did not have to decide which was the single "natural and ordinary meaning" that was right. The case would be allowed to go to trial where the claimant could prove that the meaning in the eyes of a substantial body of consumers (in this case, meaning B) was false, uttered with malice and calculated to damage the claimant.

The court appeared to be unhappy with the fiction accompanying the single meaning rule which was described as an anomaly and highly artificial but regarded it as too embedded in the law of defamation to be disturbed. The court was however very firm that such anomalous, frequently otiose and unjust rule ought not to be extended to the tort of malicious falsehood.

ⁱTypically in the form of the goodwill of a business.

ⁱⁱ[2010] 4 All ER 1029

TORT (DEFAMATION)

A STORY OF DEFAMATION CARTOONS

Defamation via the medium of cartoon was the focal point in the Canadian case of *Ross v N.B.T.A.*ⁱ. The New Brunswick Teachers' Association (NBTA) had organized workshops for

a professional development seminar on Jewish history, traditions and culture with a focus on the Holocaust and Semitism. The defendant, Beutel, was the cartoonist who contributed several cartoons and made a presentation, with some cartoons referring to the plaintiff (P, Ross), a non-teaching member of the NBTA. P had earlier been removed from teaching, having published works about an alleged Jewish international conspiracy. P took issue on six cartoons, one of which

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depicted the views of P as being indistinguishable from those of Josef Goebbels which is reproduced below (Goebbels cartoon):



The trial judge allowed P's claim on defamation by reason of the above Goebbels cartoon, drawing the inference that the defendant cartoonist depicted P as a Nazi in the said cartoon and related commentary but dismissed P's claim on the other five cartoons. The cartoonist appealed.

The New Brunswick Court of Appeal allowed the appeal, holding that the trial judge erred in finding that the Goebbels cartoon and related commentary would be understood by an ordinary and reasonable viewer and listener as imputing that P was a Nazi who would advocate the extermination of Jewish people. In the judges' view, the teachers at the workshop would in all probability understand that the message or inference to be drawn was that P and Goebbels held substantially the same views on the issue of conspiracy. Nonetheless, they held that the trial judge was correct in finding that the cartoonist's presentation in the totality was defamatory of P, in that the Goebbels cartoon's inevitable effect of conveying to the teachers that P held views comparable to those of Goebbels on Jewish conspiracy theory would adversely reflect on P's reputation among his fellow members of NBTA and in the eyes of right-thinking members of his community. The defendant cartoonist however succeeded in his defence of fair comment. This defence protects defamatory statements if they are comments based on true facts made honestly without malice on a matter of public interest. More precisely, the requirements to satisfy that defence are: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognizable as comment; (d) the comment must satisfy the following objective test: could any man honestly express that opinion on

the proved facts?; and (e) even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

In the instant case, the defamatory inference was a comment rather than a bare assertion of facts, and an ordinary reasonable viewer could recognize it as such. It was the cartoonist's value judgment based on the facts clearly indicated in the cartoon, namely the reference to the published views of P in the two books identified in P's hands in the said cartoon ('Web of Deceit and 'Spectre of Power'). The factual information on which the comments was based was identified with sufficient clarity. The teachers would no doubt have had general knowledge of P's published views, the subject matter of the comment. The trial judge had misapplied the defence of fair comment by requiring the cartoonist to prove that the comment was true rather than that the facts upon which he relied in making the comment were true. Had the proper test been applied, the question should have been whether the cartoonist honestly held the view which he expressed in the cartoon based on the facts indicated in the cartoon or facts pleaded and relied on at trial. In the circumstances, the appeal was allowed and the trial's judge's order for damages was set aside.

For the benefit and information of our readers, the nature and interpretation of a cartoon was subjected to a detailed discussion in the judgment of the court. Whilst it was reiterated that the ordinary rules of law relating to defamation equally applied to a cartoon as they did to other form of communication, the court recognized that it was in the nature of a cartoon not to speak directly. Thus, for the purposes of defamation, cartoons ought not to be interpreted literally. A reasonable person of intelligence would understand a cartoon was to be considered as rhetorically making a point by symbolism, allegory, satire and exaggeration. After all, the word 'cartoon' has been defined in *Encyclopaedia Britannica* as "a pictorial parody which by devices of caricature, analogy and ludicrous juxtaposition sharpens the public view of a contemporary event, folkway, or political or social trend. It is normally humorous but may be positively savage", whilst *Webster's New Unabridged Twentieth Century Dictionary of English Language* defines a 'caricature' as "the deliberately distorted picturing or imitating of a person, literary style etc. by exaggerating features or mannerisms for satirical effect". Therefore, for the purpose of determining the natural and ordinary meaning of a cartoon, it is necessary to consider the totality of the

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circumstances surrounding the alleged tortfeasor's presentation including the time, place, context and the mode of publication as well as the audience to whom it was addressedⁱⁱ.

Looking at the Goebbels cartoon itself, the subject matter of the message was clearly indicated by the rhetorical question written at the top: "What's the difference between the views of Josef Goebbels and Malcom Ross?" The word CONSPIRACY conspicuously written across the whole width of the cartoon was significant and would be seen as particularizing that the views put in issue were those Ross and Goebbels held on the conspiracy theory. The fact that the purpose of the cartoon was to make the conspiracy views of the persons depicted in the cartoon questionable to the audience was further supported by the depiction of Ross clutching his books in his hands --- his published views. The answer to the question about the difference between the views saying allegorically that the language was the difference ('This one writes in English --- This one wrote in German') was not to be taken in a literal sense. Rather, it pointed to no significant difference and could only lead to the inference that their views on the conspiracy theory were substantially similar. Thus, the only clear inference to be drawn from the cartoon was the statement about the similarity of views between Ross and Goebbels on the conspiracy theory. It should be noted that the word 'Nazi' did not at all appear in the Goebbels cartoon and that Ross was not depicted in a Nazi uniform. The soldiers depicted as stereotyped Nazis in the left frame below the words 'Goebbels' identified Goebbels as a Nazi. The appellate court therefore

concluded that the trial judge's finding of the particular meaning (that P was a Nazi who would advocate the extermination of Jewish people) was too close to the literal meaning, namely that Ross was a Nazi or a member of the Nazi party whose only difference with Goebbels was that he wrote in English while Goebbels wrote in German. Such finding ignored the very nature and essence of editorial cartoons and the fact that they were based on allegory, caricature, analogy and ludicrous juxtaposition.

However, as aforesaid, the Goebbels cartoon and the accompanying commentary, considered in the context of the entire presentation, did convey the inferential meaning that Ross and Goebbels held substantially the same view on the issue of the Jewish conspiracy. That would tend to lower Ross in the estimation of right-thinking members of society generally and exposed him to hatred, contempt or ridicule and would adversely reflect on his reputation among his fellow members of NBTA and in the eyes of right-thinking members of his community. Fortunately for the defendants, the appellate court held that the defamatory imputation (the Goebbels cartoon and collateral dialogue) was a fair comment upon facts, that the impugned presentation concerned a matter of public interest and was made honestly and without malice.

ⁱ [2001] 6 C.C.L.T (3d) 171

ⁱⁱ *Baxter v Canadian Broadcasting Corp.* (1979) 28 N.B.R.(2d) 114 (N.B. Q.B.)

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