

THE UPDATE

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Abbreviations

Jur	:	Jurisdiction
MY	:	Malaysia
SG	:	Singapore
UK	:	United Kingdom
AUS	:	Australia

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A CASE OF OBTAINING CREDIT FACILITIES FRAUDULENTLY IN EMPLOYER'S NAME FROM BANK

Agency, vicarious liability, negligence and restitution were the subjects of elaborate deliberation in the Singapore Court of Appeal decision in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*. An intricate fraud was perpetrated over a four-year period by Chia, the finance manager of the respondent, Asia Pacific Breweries (Singapore) Pte Ltd (APBS), on the appellants which were foreign banks with Singapore branch, Skandinaviska Enskilda Banken AB (Publ) (SEB) and Bayerische Hypo-Und Vereinsbank Aktiengesellschaft (HVB). Chia purportedly acting on APBS's behalf requested SEB and HVB (the Appellants) to offer various credit facilities (the Credit Facilities) to APBS. He then accepted the Credit Facilities in APBS's name and gave the Appellants forged resolutions of APBS's board of directors purportedly documenting APBS's acceptance of the Credit Facilities. After Chia's fraud was uncovered, the Appellants sought to recover from APBS losses occasioned by the fraud as Chia had been convicted and imprisoned for his crimes. The Appellants' position was that they lent the monies to APBS which had authorized (actually or ostensibly) Chia to borrow the same whilst APBS's position was that Chia had no authority whatsoever to borrow money on its behalf. HVB's claim was founded on agency, vicarious liability and negligence while SEB relied on the first two heads in addition to a claim in restitution.

On the agency issue, the court pointed out that Chia was merely a 'finance manager' of APBS, a title which did not connote the possession of any specific authority, unlike corporate titles like 'Finance Director', 'Chief Financial Officer', 'Managing Director', 'Chief Executive Officer' or 'President'. It only connoted that such office-holder carried out managerial rather than executive functions. The Appellants were in fact misled into granting the Credit Facilities to APBS by the fraudulent representations of Chia as to his authority as APBS's finance manager and Chia then misappropriated the proceeds of the Credit Facilities for his own purposes. The unusual features of SEB's dealings with Chia were that Chia was during the entire duration of the banking relationship the sole point of contact although SEB's requests to be introduced to APBS's senior

management were rebuffed by Chia with excuses. Neither had SEB complied with its own verification procedures or checked the authenticity of any of the corporate documents handed over by Chia. All the normal banking documents like credit advices, monthly advices and bank statements were sent to the division headed by Chia who merely instructed his staff to pass the communications to him. Likewise, many of the features in Chia's *modus operandi* in defrauding SEB were also present in HVB's case.

The agency issue was whether APBS had held out Chia as having authority to represent to the Appellants that APBS had accepted the Credit Facilities and that the forged APBS Board resolutions which Chia gave them in connection with the Credit Facilities were genuine. The Appellants' case was not that Chia had actual and/or ostensible authority to obtain credit facilities from banks on APBS's behalf but that Chia as the most senior finance officer in APBS had authority whether actual, usual or ostensible to make representations on behalf of APBS including representations that APBS had accepted the Credit Facilities and that the forged APBS Board resolutions were genuine. It was the Appellants' contention, in heavy reliance on the English Court of Appeal decision in *First Energy (UK) Ltd v Hungarian International Bank Ltd*, that the law recognized that (the Principle in *First Energy*) an agent who had no actual or ostensible authority to conclude a particular transaction on his principal's behalf might nonetheless have ostensible authority to make representations of fact about the transaction, including the representation that his principal had approved the transaction. The appellate court, upon detailed examination of *First Energy* as well as *the Raffaella* caseⁱⁱⁱ, held that the decision in both cases was based on a specific finding of fact that the principal concerned had held out its agent as having authority to make, in relation to the transaction in question, representations of the class or kind of representations that the agent actually made, even though the agent knew he had no actual authority to enter into the transaction itself. On the facts of the present case, however, the court held that the title of 'finance manager' did not connote the possession of any specific authority whilst the senior management of APBS (including its board of directors) was within easy reach of the Appellants. Given these facts, and notwithstanding various factors submitted by the Appellants as amounting to a holding out by APBS, the trial judge was entitled to find that APBS had not held out Chia as having the authority as contended by the Appellants. Since APBS had not make the

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holding out, the Principle in *First Energy* was inapplicable.

On the vicarious liability issue, the test on whether vicarious liability should be imposed on an employer for torts committed by an employee during an unauthorized course of conduct was the ‘close connection’ test^{iv}, ie. whether the tortious conduct of the employee was so closely related to his employment that it was fair and just to hold his employer vicariously liable for such conduct. The test was regardless of whether the wrongful act was intentional or inadvertent and also applied to cases of fraud. What the court had to do in each case was to examine all the relevant circumstances – including policy considerations^v – and determine whether it would be fair and just to impose vicarious liability on the employer. The court held that it was not fair and just to hold APBS vicariously liable for Chia’s fraud because: (a) the fraudulent acts of Chia (in falsely representing to the Appellants that APBS had accepted the Credit Facilities and that the forged APBS Board resolutions were genuine) were not connected with his employment at all, Chia’s position as the finance manager giving him substantial operational authority but only very limited financial authority – to place APBS’s surplus funds in fixed deposits, to forward with the approval of APBS’s general manager requests for credit facilities to Group Treasury for review and to ensure compliance by APBS with covenants and obligations under credit facilities taken out by APBS – which did not confer him authority to even source for credit facilities, let alone borrow money on APBS’s behalf ; (b) it was not reasonable to hold that APBS should have contemplated or foresaw that there was a risk of Chia defrauding third parties whom he had no authority to deal with as APBS’s finance manager; (c) the Appellants, far from being vulnerable victims, had all the means and resources to protect themselves from Chia’s fraud, and were much more to blame than APBS for the successful perpetration of the fraud; (d) the Appellants, being banks, should be held to a higher standard of financial prudence and responsibility (especially apropos fraud prevention) as compared to trading companies such as APBS; and (e) Chia’s fraud did not further APBS’s aims and was not related to anything inherent in APBS’s enterprise.

On the negligence issue, APBS did not owe any common law duty of care to HVB as there was no relationship between APBS and HVB sufficient to create the requisite degree of proximity needed to satisfy the test laid down in *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency*^{vi} ie. a two-stage test premised on proximity and policy considerations

and preceded by a preliminary requirement of factual foreseeability. APBS did not assume any responsibility to HVB in relation to its internal controls and its supervision of Chia. APBS could not have reasonably foreseen that as a consequence of alleged failures in its internal pre-employment procedures and internal controls, an unknown bank in the unknown future would grant in APBS’s name an unauthorized credit facility based on a forged APBS Board resolution and false representations from a finance manager with such limited authority as Chia. Further, the appellate court was of the view that even if APBS did owe HVB a duty of care and had breached this duty, such breach did not cause HVB’s loss. The proximate cause of the loss was HVB’s own negligence in believing the representations made by Chia apropos the Credit Facilities which he sought from HVB ostensibly on APBS’s behalf and in readily accepting as genuine the forged APBS Board resolution which Chia provided without verifying the directors’ signatures on that resolution.

The restitutionary claim for the sum of the S\$29.5m (the S\$29.5m) arose in the context of a series of cross-payments made by Chia between an account which he opened with SEB in APBS’s name for the purposes of his fraudulent “round-tripping” scheme (SEB S\$ Account) and an existing account which APBS had with Oversea-Chinese Banking Corporation Ltd (the OCBC Account). At Chia’s instructions, during a two-year period, S\$45m (the APBS S\$45m) was transferred from the OCBC Account to the SEB S\$ Account, whilst S\$45,347,671 (the SEB S\$45.3m) was transferred from the SEB S\$ Account to the OCBC Account. Part of the APBS S\$45m went towards repaying drawings made by Chia under one of the Credit Facilities (the MM Facility) which drawings formed part of the SEB S\$45.3m paid into the OCBC Account, and the S\$29.5m represented the outstanding balance under the MM Facility. SEB asserted that it had paid the S\$29.5m (together with the rest of the SEB S\$45.5m) into the OCBC Account under a mistake of law induced by Chia’s fraud and sought to recover the S\$29.5m from APBS as money had and received^{vii}. APBS denied liability and had brought a restitutionary counterclaim against SEB for the whole of the APBS S\$45m which it asserted was unjustly received by SEB at its expense.

SEB contended that APBS had been enriched by the S\$29.5m as it had used the money received to pay its debts and dividends, relying on the “adoption of benefit” principle^{viii}. APBS sought to rebut the SEB’s contention by pointing out that in the present case, Chia who was the *de facto*

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borrower under the Credit Facilities did not use the S\$29.5m (or, for that matter, any part of the SEB S\$45.3m) to discharge APBS's liabilities; instead, Chia's intention was to use the money to discharge *his own* liability to APBS in respect of the APBS S\$45m which he had misappropriated from the OCBC Account. In other words, the payment of the SEB S\$45.3m into the OCBC Account merely served to return to APBS money which it had a legal right to recover from Chia and APBS could not therefore be said to have been unjustly enriched by that payment. Both the trial judge and the appellate court agreeing with APBS's argument held that the payment of the SEB S\$45.3m into the OCBC Account went towards discharging Chia's liability to APBS in respect of the APBS S\$45m, and not towards discharging APBS's own liabilities and thus, APBS could not be said to have been enriched at SEB's expense by S\$45m out of the SEB S\$45.3m. APBS also could not be said to have adopted the benefit of the S\$29.5m as the "adoption of benefit" principle was unrealistic, given that: (i) the only effect of APBS's receipt of S\$45m out of the SEB's S\$45.3m was to restore APBS to essentially the same position that it was in before Chia misappropriated the APBS S\$45m; (ii) SEB, although defrauded by Chia into paying the SEB S\$45.3m into the OCBC Account, had itself received the APBS S\$45m; and (iii) APBS never requested for the payment of the SEB S\$45.3m into the OCBC Account, never authorized Chia to procure such payment and, at all material times, never knew of the payment.

Although APBS could not be said to have adopted the benefit of the S\$29.5m, it had, based on the "running account" method of quantifying enrichment, nevertheless been enriched at SEB's expense by S\$0.3m, that being the net amount which APBS retained after all the cross-payments between the OCBC Account and the SEB S\$ Account were set off against each other. APBS's enrichment by the sum of S\$0.3m was unjust because APBS received that sum without providing any consideration and, because SEB paid that sum (and, likewise, the rest of the SEB S\$45.3m) into the OCBC Account under an operative mistake. The evidence did not justify a finding that SEB's officers, in accepting as genuine the forged APBS Board resolutions without first verifying his authority to submit documents on APBS's behalf, voluntarily assumed the risk that Chia might have forged those resolutions. APBS had not succeeded in proving the defence of change of position in terms of both extraordinary change of position and anticipatory change of position. Since APBS had been unjustly enriched by the sum of S\$0.3m at SEB's expense and could

not rely on the defence of change of position, it had to make restitution of that sum to SEB, but it was not liable for the balance of S\$29.5m claimed by SEB in restitution. As APBS had made it clear that the restitutionary counterclaim would be pursued only if SEB succeeded in its restitutionary claim for the S\$29.5m, and since SEB failed, it was not necessary to deal with the restitutionary counterclaim issue.

Last but not least, the decision on the agency issue must not be taken to be an endorsement of the notion of 'self-authorization' agent^{ix}. The appellate court had actually drawn a distinction between authority to make general representations about a certain transaction and authority to make the specific representation that the principal had approved that transaction. Accordingly, if an agent merely had authority to make general representations about a transaction but had no authority to enter into the transaction on the principal's behalf, he could not give himself such authority by falsely representing that the principal had approved the transaction, nor would he have any authority to make the specific representation that the principal had approved the transaction.

ⁱ[2011] 3 SLR 540

ⁱⁱ[1993] 2 Lloyd's Rep 194

ⁱⁱⁱ[1985] 2 Lloyd's Rep 36

^{iv}*Lister v Hesley Hall Ltd* [2002] 1 AC 215

^vTwo of which were highlighted by the Supreme Court of Canada in *John Doe v Bennet* [2004] 1 SCR 436 as effective compensation for the victim and deterrence of future harm by encouraging the employer to take steps to reduce the risk of similar harm in future. See also *Bazley v Curry* [1999] 2 SCR 534, the case which propounded the 'close connection' test, and *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844.

^{vi}[2007] 4 SLR 100

^{vii}See *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 for the four essential elements of a restitutionary claim and the Singapore High Court case of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] 2 SLR 136 at [70].

^{viii}The principle that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts, see *Blackburn Building Society v Cunliffe, Brooks, & Co* (1882) 22 Ch D 61 at 71.

^{ix}The principle that an agent who has no authority, whether actual or ostensible, to perform a certain act cannot confer upon himself authority to do that act by representing that he has such an authority was illustrated by the House of Lords' decision in *Armagas Ltd v Mundogas SA* [1986] AC 717.

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BANK TO DISBURSE LOAN ONLY WHEN ALL SECURITIES ARE IN ORDER

In *EON Bank Berhad v KSU Holdings Bhd*, the plaintiff had granted the term loan facility of RM40,000,000.00 (the Facility) to May Plastic Sdn Bhd (MPI). The letter of offer provided that the Facility was to be secured by the defendant's corporate guarantee and contained a condition precedent that a certified true copy of the defendant's board resolution be given authorizing the defendant to provide its corporate guarantee in consideration of the Facility. The defendant however refused to execute the corporate guarantee. Thus, the Plaintiff applied for specific performance of the corporate guarantee in the sum of RM40,000,000.00 by the Defendant in favour of the Plaintiff to secure the Facility. The Defendant denied that it had at the time of disbursement of the Term Loan Facility represented or undertook that it would execute a corporate guarantee.

The High Court dismissed the plaintiff's claim and held that the plaintiff had failed to prove, on the balance of the probabilities, that the defendant had given such undertaking at the time of disbursement of the loan. Firstly, whilst the plaintiff alleged that the defendant's representatives, OBP and BF attended the meetings at the material times with the plaintiff and had given undertaking to the plaintiff that the defendant would execute the guarantee, the plaintiff did not call them to testify in court. The onus was on the plaintiff who alleged such fact to prove it. No explanation was furnished why both of them were not called to give evidence. An adverse inference was drawn against the plaintiff under s.114(g) of the Evidence Act 1950.

Secondly, even though there was directors' resolution that the defendant undertook to execute the corporate guarantee in favour of the plaintiff to secure the Facility, the Court held that the resolution had not been given to the plaintiff when the loan was disbursed to MPI by the plaintiff. The plaintiff therefore could not have disbursed the loan relying on such resolution. Furthermore, the Court held that the resolution was an internal document of the defendant authorizing and empowering the defendant to do and carry out matters stipulated therein. It did not require or compel the defendant to do or carry out any of the matters stated therein. The Court went on to hold that by law, the resolution had no legal

binding effect vis-à-vis the company, the defendant and a third party, the plaintiff in this case. It did not create any legal relationship between the plaintiff and the defendantⁱⁱ.

Thirdly, even though it was stated in the defendant's prospectus that one of the defendant's contingent liabilities was the corporate guarantee to be provided by the defendant in favour of the lenders, with regrets, the court found that no undertaking or any representation was given by the defendant to the plaintiff in respect of the corporate guarantee in the said prospectus. Finally, the plaintiff had failed to present any evidence to indicate that the terms and conditions of the draft guarantee and indemnity forwarded to the defendant had been accepted and agreed by the defendant. The parties had never reached consensus ad idem.

We wish to state that there are other authorities which ruled that resolutions of a company could have impacted on the relationship between the company and other party, having regard to the context and role it was placedⁱⁱⁱ.



ⁱ [2011] 8 MLJ 498

ⁱⁱ See *Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors* [1994] 3 MLJ 405

ⁱⁱⁱ See *Pembinaan Bumi Gemilang Sdn Bhd v RHB Bank Berhad & Anor* [2009] 1 LNS 1006

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COMMERCIAL TRANSACTION (HIRE PURCHASE)

NO PASSING OF GOOD AND VALID TITLE

If you are looking into purchase of a car, be it new or used, chances are that you will look for a financial institution to finance your purchase. One of the most common financing methods is a hire purchase. Hire purchase (HP) enables one to acquire goods on credit. If you take on HP financing, you become the hirer while the financier financing the vehicle is the owner. The ownership of the goods bought on HP does not pass to the hirer at the time of the HP agreement or upon delivery of the goods to the hirer. The ownership of the goods remains in the financier until the hirer has fully settled all the installments under the HP agreement. Meanwhile, the financier as the owner of the goods has the right to repossess the goods if the hirer fails to fulfill his obligations under the HP agreement eg. failure to pay the installments. What will happen if the owner is unable to transfer to the hirer a good and valid title to the goods?

In *Bumiputra Commerce Finance Berhad v Ponak Timber Sdn Bhd & 2 Orsi*, the plaintiff (owner) had pursuant to a HP agreement entered with the 1st defendant (hirer) financed the purchase by the 1st defendant of a Toyota Landcruiser bearing the registration number WGR 69 (the vehicle) from the 3rd defendant (dealer). The 2nd defendant stood as a guarantor for the 1st defendant. It was subsequently found that the engine and the chassis numbers of the vehicle were different from those as stated in the registration card. It was held that as between the plaintiff and the 1st defendant, the plaintiff could not have passed a good and valid title to the

vehicle to the 1st defendant when such title was to pass as the vehicle sold was not WGR 69. As such, the subject matter of the agreement, i.e. the vehicle was not in fact hired out to the 1st defendant. Consequently, the HP agreement entered into between the parties was null, void and of no effect. The plaintiff's claim for arrears in payment under the HP agreement against the 1st defendant and 2nd defendant thus failed. The plaintiff in turn was liable to repay to the 1st defendant the installment payments and the insurance premium paid in respect of the vehicle, the subject matter of an invalid HP agreement.

As to the plaintiff's alternative claim against the 3rd defendant for the sale price of the vehicle, the 3rd defendant's defence was that it was not the seller of the vehicle but was only acting as a middleman for the sale from one HMH to the 1st defendant. The court found that the 3rd defendant's contention was supported by undisputed and un rebutted evidence. There was no evidence that the 3rd defendant had done anything more than issuing the invoice which was to facilitate payment of commission on the sale. The 3rd defendant was thus not liable to the plaintiff for the amount claimed.

[2011] 2 AMCR 79

to the commencement of the winding up of the company were the bones of contention.

Firstly, the relevant facts. A winding up petition was presented against the company on 17.4.2000 which culminated with a winding up order on 16.8.2000. The six months prior to commencement of the winding up (ie. the 'twilight period') which was calculated from the date of presentation of the petition thus fell on 17.10.1999. The 1st defendant (the bank) had granted several banking facilities to the company in 1997. These facilities were restructured (the 1st supplemental facilities) by a letter of offer dated 22.7.1999 (accepted on 31.7.1999) which were supported by a supplemental agreement dated 21.10.1999 (1st supplemental agreement) and secured by a debenture.

COMPANY LAW / CREDIT AND SECURITY

A NON-MECHANISTIC APPROACH TO FRAUDULENT PREFERENCE IN LIQUIDATION

In the High Court decision in *Tee Siew Kai (as liquidator for Kumpulan Kerjaya Bhd (the receiver and manager appointed))(in liquidation) v Affin Bank (formerly known as BSN Commercial Bank (M) Bhd) & Anor* the legal implications arising from the legal status of a company in liquidation and its effects on the banking documents and charges created during the so-called 'twilight period', namely the six months prior

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Additionally, a second supplemental facility was granted on 24.9.1999 (accepted on 28.9.1999) which was supported by a 2nd supplemental agreement and a supplemental debenture, both dated 28.10.1999. The company subsequently defaulted under the facilities and the bank appointed the 2nd defendant as the receiver and manager (R&M) pursuant to its powers under the debentures. Pursuant to the debt owing to the company by LCE and arising from a restructuring scheme by LCE, the debt of LCE was settled by allocation of shares in Lion Land Berhad (LLB) to the company. The allocation took place sometime in 2002. The dispute was between the liquidator of the company (the Liquidator) and the R&M as to who should be rightfully entitled to the custody of the LLB shares and its sales proceeds.

Of significance is the fact that the date on the 1st and 2nd supplemental agreements and debentures fell within the 'twilight period' (which began from 17.10.1999). By virtue of s.293 of the Companies Act 1965 read with s.53 of the Bankruptcy Act 1967, any conveyance or transfer of property or charge thereon made in favour of any creditor shall be deemed to have given such creditor a preference over other creditors if the person making the same is adjudged bankrupt (or in the case of a company, wound up) on a bankruptcy petition (or in the case of a company, a winding up petition) presented within six months after the date of making the same and every such act shall be deemed fraudulent and void.

Therefore, mechanically, since the date on the face of both debentures (which created the charge over the properties of the company in favour of the bank) was, being a date within the twilight period, within six months prior to the presentation of the winding up petition, the fixed and floating charges created over the assets of the company under the debentures were caught. Thus, both the supplemental agreements and debentures shall be deemed to have given the bank preference over other creditors. The R&M had no right over the LLB shares or its sales proceed. That was essentially the contention of the Liquidator.

The High Court accepted the 'thought-provoking' argument advanced by the counsel of the bank. There was sufficient evidence to prove that the debentures were in fact executed by the company before the commencement of the 'twilight

period' on 17.10.1999, although they bore a date which was within the period. Thus, the debentures were 'made' before the said date. The said s.293 read in conjunction with the said s.53 could not be construed in a mechanistic manner but must be read in its proper context, which was to invalidate attempts at 'fraudulent preference'. It should not be a mere matter of counting dates and determining the 'twilight period' and indulge in mere legal semantics with an indifferent regard to commercial reality and banking practices.

It was necessary to consider the broader basis and consider the purpose of the security documents. In this respect, the Court took the view that the security documents had been created in the course of a normal, genuine commercial transaction. The restructuring of the facilities was a normal and genuine banking transaction which took it out of the scope of any fraudulent preference.

Further, the said s.293 merely created a rebuttable presumption of fraudulent preference where a charge was made within the 'twilight period'. All five elements laid down in *Sime Diamond Leasing (M) Sdn Bhd v JP Precision Moulding Industries Sdn Bhd*ⁱ must be satisfied for the court to set aside payments and transfers made in favour of a particular creditor which was designed to prefer him over other creditors. In this respect, the Liquidator had failed to prove that the company was insolventⁱⁱⁱ when the debentures were created. A company which faced some financial difficulty and required a restructuring of its banking facilities was not necessarily insolvent. It was per se not proof of insolvency.

In conclusion, the Liquidator's claim was dismissed and the R&M's claim of the entitlement to the sales proceeds was allowed.

ⁱ[2011] 4 MLJ 491

ⁱⁱ[1998] 4 MLJ 569

ⁱⁱⁱThe test was one of commercial insolvency, namely the ability of the company to meet its current debts as and when due.

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CONTRACT LAW

PROCURING PROJECT USING POLITICAL AND GOVERNMENT INFLUENCE

Is an agreement to pay for P's services in obtaining a government project through P's political and government influence illegal on the ground that it opposes to public policy? This interesting question was answered in the negative in *Dato' Shazryl Eskay Abdullah v Merong Mahawangsa Sdn Bhd & Anor*ⁱ. However, the High Court dismissed P's claim on other grounds.

In this case, P claimed from D1 payment of agreed remuneration being RM20 million under the letter of undertaking (LU) for services rendered by P to procure and secure from the government of Malaysia the award of the project to build a new bridge to replace the causeway between Johor and Singapore (the original bridge project) in favour of a consortium of which D1 had a 60% equity participation. The LU acknowledged P's services in getting the Economic Planning Unit (EPU) to award in principle the said project to the consortium and provided that in consideration of such services, D1 undertook to pay P RM20 million within four months from the date of the LU. It also provided that should the award be withdrawn and/or terminated for any reasons whatsoever, the said sum shall be refunded without interest immediately.

P contended that he had through his influence and good relationship with the government procured EPU to agree to increase the equity of D1 in the consortium to 60% for the original bridge project, secured for D1 the said project and obtained foreign funds of RM640 million for the said project. D1 on the converse argued that the nature of services rendered by P on account of his close relationship with the government was contrary to the public policyⁱⁱ and the LU was consequently void.

The trial judge held that the defendant had failed to produce any evidence in support of its

CONVEYANCING

REFUND OF STAMP DUTY ON ABORTIVE SALE

The Court of Appeal had the occasion to decide, for the first time, on the interpretation of

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assertion that the nature of the services rendered by P had a tendency to be injurious to the public welfare or interest. Merely having close relationship or contact with government leaders and having assisted to procure the original bridge project through P's influence was not per se opposed to public policy unless the consideration and object was tainted with any illegality as envisaged by s.24(e) of the Contracts Act 1950. P had carried out his obligations as required of him without any illegal means or harmful tendencies to the public welfare. There was no evidence adduced to suggest that the consideration being the agreed remuneration of RM20 million was tainted with any illegal motive or had any tendency to corrupt the government authorities or was injurious to good government, that it had disregarded any other deserving applicant, that there was insistence to award the said project to D1 against other potential applicants or that it was an attempt to sabotage any ongoing tender exercise being conducted. On the facts and evidence presented, the court was not prepared to make any adverse findings of any misconduct against P or the relevant government authorities.

Nonetheless, reading the LU as a whole, P was not entitled to the said remuneration. The original project did not proceed as no agreement was reached between the governments of Malaysia and Singapore. Consequently, the award given in principle for the original bridge project did not materialize. Secondly, even if the subsequent crooked bridge (GSB) project had nexus and causative link to P's services, the GSB project had been called off or terminated due to change of government leaders in Malaysia. Therefore, P was not entitled to the said sum of RM20 million.

ⁱ[2011] 6 CLJ 858

ⁱⁱA contract which has the tendency to injure public interest and public welfare is one against public policy.

the provision concerning refund of stamp duty in *Galaxy Energy Technologies Sdn. Bhd.v Timbalan Pemungut Duti Setem, Malaysia*ⁱ. The Appellant had entered into a sale and purchase agreement (SPA) to purchase a property from the Vendor and had paid the deposit. The Vendor executed a memorandum of transfer in favour of the Appellant (the Transfer) and the Transfer was adjudicated and duly stamped for RM78,600.00. However, the Appellant could not obtain financing despite applications to three different banks to complete the purchase of the said property before

the deadline in the SPA. The Vendor terminated the SPA and forfeited the deposit. Thereafter, the Appellant applied to the Collector of Stamp Duty to revoke the notice of assessment on the stamp duty on the Transfer and sought a refund of the stamp duty pursuant to s 57(f) (iv) of the Stamps Act 1949 (the Act) on the ground that the Transfer was not complete since the Appellant did not have enough funds to pay the balance purchase price. The Collector rejected the application. The Appellant then filed an application for judicial review seeking to quash the decision of the Collector and to direct the Collector to refund the stamp duty. The application was however dismissed at the High Court. Hence the appeal to the Court of Appeal.

The Court of Appeal ruled in favour of the Appellant. Under s 57(f) (iv) of the Act, the Collector shall subject to any rules made thereunder and on the production of such evidence as he may require make allowance for stamps spoiled in the following cases, namely where the instruments executed by any party thereto is:

- (i) by reason of the inability any person to act under it; or
- (ii) by refusal of any person to act under it; or
- (iii)
- (iv) for want of registration within the time required by law.

The Appellant's case did not fall under paragraph (ii) and (iii) above. It is however clear in

COURT PROCEDURE / EMPLOYMENT / CONTRACT LAW

EX-EMPLOYEE INJUNCTED FROM SOLICITING OTHERS TO END EMPLOYMENT & FROM USING CONFIDENTIAL INFORMATION

In *Agensi Pekerjaan Talent2 International Sdn Bhd v Kenneth Yong Fu Loong & Anor*¹, P was a recruiting company dealing principally in provision of outsourcing services while D was a former employee of P. D had tendered his resignation from P and subsequently joined Kelly Services Malaysia (Kelly), a competitor of P. P averred that D had not only resigned but had induced other employees to end their employment with P and join Kelly instead. P also averred that D had made use of confidential information belonging to P in favour of Kelly and thereby breached the terms and conditions of the contract

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the view of the appellate court that the intended purpose of the Transfer to transfer or vest the Property in the Appellant/purchaser had failed due to the Appellant's inability to pay the balance purchase price by reason of his inability to obtain a source of financing. Thus, the Appellant's case fell squarely within s 57(f)(iv) of the Act and was entitled to a full refund of the stamp duty on the Transfer.



ⁱ [2011] 2 AMCR 56

of employment between P and D. P filed for an injunction to restrain D from soliciting or enticing P's present employees to leave their employment with P and from disclosing and using P's confidential information such as information concerning P's clients, candidates or business associates and to require D to deliver up such confidential information.

D through himself and several witnesses categorically denied P's averments. D also contended that the relief sought for amounted to a restraint of trade in violation of s.28 of the Contracts Act 1950. The High Court however held that there were serious issues to be triedⁱⁱ as to whether D's actions were contrary to the duty to be honest and to act in good faith (duty of fidelity) and to use his best endeavours to protect and promote P's business. The significance of the incident where D had handed his letter of resignation together with the other four former employees of P and allegedly informed the director of P that he was taking his entire team with him constituted a serious issue to be tried.

Next, where did the balance of convenience lie? It was held to tilt in favour of P. What P sought to do was to enforce what D had contractually agreed to, or rather, the injunction only sought to restrain D from doing what he had covenanted not to do. Further, P would be financially capable of meeting its financial obligations (undertaking) as to damages. Any damage occasioned to D as a result of the grant of the injunction was quantifiable as he was only an employee of the competing business. Damages on the other hand would not be adequate to P in view of the very nature of breach of contractual prohibition and confidence resulting in

unquantifiable loss of patronage of clients and of business, strategies and competitiveness.ⁱⁱⁱ

ⁱ[2011] 4 AMR 814

ⁱⁱThe first of the three requirements for an interlocutory injunction as set out in *Keet Gerald Francis Noel John v Mohd Noor @ Harun b Abdullah & 2 Ors* [1995] 1 MLJ 193.

ⁱⁱⁱSee *Svenson Hair Centre Sdn Bhd v Irene Chin Zee Ling* [2008] 8 CLJ 386.

COURT PROCEDURE

WHEN DOES CAUSE OF ACTION IN NEGLIGENCE ACCRUE AGAINST LAWYER?

In *Abdul Rahim bin Abd Rahman & Ors v. DMD Industries Sdn Bhd & Ors (Kamariah bt Hamdan & Ors, Third Party)*ⁱ, the plaintiffs were owner of 3 plots of land (the Land). Pursuant to a power of attorney (the PA) granted by the plaintiffs to the 1st defendant, the 1st defendant created a charge of the Land in favour of the 2nd defendant bank which had granted banking facilities to the 1st defendant. The plaintiffs upon discovery of the charge commenced an action against the 1st and 2nd defendants claiming that the Land was charged fraudulently and in breach of the provisions of the PA. The plaintiffs sought to annul and set aside the charge as against the 2nd defendant and succeeded. The 2nd defendant then commenced third party proceedings against their former solicitors (the law firm) in negligence in that it had disbursed the sum of RM8.4m to the 1st defendant upon the alleged negligence of the partners of the law firm in relation to the taking of the charge.

The law firm raised a very simple issue that the 2nd defendant's cause of action was time barred as the cause of action arose when the 2nd defendant disbursed the loan to the 1st defendant on 9.01.1997. Since more than six years had lapsed at the time the third party proceedings were filed in 2006, the 2nd defendant's claim was time-barred pursuant to s.6(1) of the Limitation Act 1953. The 2nd defendant however contended that cause of action only arose when the plaintiff commenced an action against the 2nd defendant on 25.05.2000.

The High Court Judge held that the damage suffered by the 2nd defendant occurred at the time the loan was disbursed to the 1st defendant without a security backing or an indefeasibility of their interest over the land or charge for it was precisely at that point of time that the breach of the duty of care occurred. The 2nd defendant's cause of action against the law firm was complete upon disbursement of the loan and it was not dependent upon the date the 2nd defendant was sued by the plaintiff. Therefore, the 2nd defendant's cause of action was time barred and obviously unsustainable.

ⁱ[2011] 8 MLJ 491

CRIMINAL LAW / LEGAL PROFESSION

LAWYER GUILTY OF CBT FOR MISAPPROPRIATING MONEY IN CLIENTS' ACCOUNT

A lawyer had used up money entrusted to her in violation of the purpose for which the money

was entrusted but sought to justify her act by citing such use was for another 'genuine' purpose which was not for her 'own' use. Is such an explanation acceptable for a charge of criminal breach of trust (CBT) against the lawyer? She also asserted that she had the intention to make restitution as soon as possible. Does this provide her with a defence for the charge of CBT?

These are among the issues surfaced in the High Court case of *Suhani binti Mat Daud v Public Prosecutor*¹ which involved a lawyer

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committing CBT. The accused had used up her clients' money, which was the balance purchase price meant to complete a sale and purchase agreement (the SPA) and which was deposited in the clients' account of her own legal firm, to settle outstanding payments in the conveyancing files of her previous partnership firm. The accounts of this previous firm were frozen by the Bar Council subsequent to the demise of one of the partners. It was her view that it was easier for her to handle the files from the previous firm under her own firm. She however claimed that she intended to return the money as soon as her firm was able to do so.

The Sessions Court convicted her of CBT. The High Court upheld the conviction. The law is that if the essential elements of the offence of CBT had been made out, the fact that at the time of the offence, the accused had intended to make restitution as soon as possible, could not in law constitute a defence because even temporary misappropriation or conversion of money, would amount to CBT within the meaning of s.405 of the Penal Code.

Further, the accused was not legally entitled to the money which had been entrusted to her for another purpose. No evidence was adduced to show that there was any element of urgency involved to deal with the conveyancing files of the previous firm. In any event, even if such altruistic intention was true, she was not entitled to use it for her own purpose and by such usage, she had the intention of causing wrongful

gain to herself and wrongful loss to her clients--- the purchasers under the SPA. The court also viewed her alleged intention to return the money with grave doubts as she had not taken any step to return the money despite police report lodged against her on 7.7.2001, complaint made to the Advocates & Solicitors Disciplinary Board in December 2001, order of the High Court dated 28.3.2002 arising out of a civil suit filed by the purchasers against her which ordered her to pay back the amount and the closure of her own firm on 12.3.2003. It was only in many years later in March 2008 when she was arrested by the police and was about to be charged in court that finally caused her to start to repay the money by instalments. All these told against her in her defence.

The court went on to enhance the custodial sentence from two years to six years. She had betrayed the trust placed in her as an advocate and solicitor. The enhancement would fulfil public interest and act as a deterrent to others in the same profession who may be inclined to commit such an offence.

[2011] 4 AMR 464

months' imprisonment and fined RM8,000 but on appeal, the High Court set aside the imprisonment term and enhanced the fine to RM10,000.

On appeal to the High Court, R contended that in a case involving a principal offender and an abettor, sentence on the abettor should not be higher than that of the principal offender and urged a non-custodial sentence be given. The prosecution crossed appeal on the ground that the punishment was grossly inadequate. The High Court dismissed both the appeal and cross appeal. The Sessions Court had taken into account the gravity of the offence committed by a legal practitioner when imposing a custodial sentence instead of a fine. R must discharge his duty honestly to the court, his client and the society. By abetting and aiding his client in committing the offence of cheating by impersonation, he had not only tarnished the image of the judiciary but also jeopardized the confidence of the public in the legal system in the country.

The primary consideration of sentencing was public interest. The sentence imposed must

CRIMINAL LAW

LAWYER ABETTING CLIENT IN IMPERSONATION

A practising lawyer was convicted of aiding and abetting the offence of cheating by impersonation and was meted a heavier punishment than the impersonator ! This essentially sums up the case of *Pendakwa Raya v Sundarajan a/l Sokalingam*ⁱ. R, a defence counsel, had instructed another person (the principal offender) to stand in for his client during a trial for a robbery case. R did so since the case was called for the purpose of granting DNAAⁱⁱ. Upon being discovered, R was charged for aiding and abetting the offence of cheating by impersonation under s.419 and 109 of the Penal Code and was subsequently convicted and sentenced to six months' imprisonment by the Sessions Court. The principal offender was initially sentenced to four

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serve the public to the effect of not only deterring the offender from committing offences in future but also deterring others from committing the same offence. The consequences of R's conviction on the future prospect of his legal career and sentences meted out on other comparable cases committed by legal practitioners were the factors to be considered. The High Court found that the lower court did not err when she imposed the imprisonment term of six months which was not

manifestly inadequate and was in line with established judicial principles.

[2011] 4 AMR 536

ⁱⁱDischarge Not Amounting to Acquittal.

DIGEST OF EMPLOYMENT LAW CASES

1. PILFERING SPARE PARTS

In *Motorola Malaysia Sdn Bhd v Ng Thien Keong & Anor*ⁱ, R1 was employed by the applicant (A) as a Senior Technical Specialist. Pursuant to complaints made, an investigation was conducted and showed that R1 had ordered and taken some spare parts from the store when he was only a process technician who was not required to repair machines. An internal software system known as Spare Parts & General Store System (SPGS System) which enabled employees of A to order parts and consumable parts for the use of the factory revealed that R1 had ordered many spare parts. Upon being queried, R1 claimed that he was just clearing up the stock on behalf of the storekeepers.

Each user of the SPGS System was given a User ID and a password which was confidential and encrypted. A Badge ID was also given to the user to enable him to place orders in the SPGS system. R1 was a registered user of the SPGS System. A full list of all spare parts ordered by R1 in 2000 and 2001 was extracted from the system.

A issued a show cause letter to R1 requiring explanation on four allegations of misconduct, which constituted acts in violation of the Standard Operating Procedure (SOP) of A. R1 tendered his resignation with immediate effect, although he denied such allegations and proffered explanation. A was dissatisfied with his explanation and proceeded to hold a domestic inquiry. R1 was consequently found guilty of all charges and he was accordingly dismissed. Upon complaint of wrongful dismissal by R1, the Industrial Court ruled that his dismissal was without just cause or excuse.

Upon A's application for judicial review to quash the award of the Industrial Court, the High Court held that the findings of the Industrial Court

were unsupported by evidence. On the first charge that he had used his access facility to the SPGS System to order parts which were not related to his job assignment and were neither given authorization to do so, R1's contention that parts might have been ordered using his access facility without his knowledge or authority was not sustainable as there was no evidence to suggest that R1's User ID, Badge and PIN had been compromised. There was also no proof of R1's assertion on the alleged practice of ordering parts to assist storekeepers to balance inventory (the balancing inventory act) and furthermore, R1 himself admitted that the balancing inventory act was not part of his job scope. R1 had thus committed an act prejudicial and contrary to the key belief of the company, namely 'Uncompromising Integrity' and the SOP.

With regard to the 2nd and 3rd charges of R1 collecting two items ordered through SPGS system and keeping them and several other parts/items that belonged to A as particularized in his personal locker, R1's defence was that these parts were ordered by mistake. He however conceded that he did not take any step to return the parts wrongly ordered or to bring them to the notice of his superior or place orders for the correct parts. Instead he kept them in his locker. His action amounted to unauthorized possession of the company property in breach of the SOP.

On the issue raised by the Industrial Court that the SOP was not produced by A to assist in deciding whether there had been a breach thereof, the High Court pointed out that R1 had never taken issue with the SOP, be it in his letter of explanation, the statement of case or his testimony in court. Furthermore, the non-production of the SOP could not give rise to an adverse presumption against A under s.114(g) of the Evidence Act 1950. To the mind of the learned Judge, such an adverse inference could only be drawn if there was with-holding or suppression of evidence and not merely on account of failure to obtain evidence. If the Industrial Court was of the view that it ought to have sight of the SOP, it should have asked A to produce the SOP. The omission of the court to do so ought not to be held against A.

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The Industrial Court had therefore committed errors of law by failing to consider relevant matters, taking into consideration irrelevant matters and drawing erroneous conclusions or inferences from proved or admitted factsⁱⁱ and its award was accordingly quashed with costs.

2. RELIANCE ON GROUND NOT STATED IN LETTER OF DISMISSAL

There is one noteworthy principle emerging from the Industrial Court case of *Sugunasegari P S Suppiah v SAP Malaysia Sdn Bhd*ⁱⁱⁱ. The Industrial Court Chairman pointed out the erroneous assumption held by some quarters that the Federal Court decision in *Goon Kwee Phoy v J & P Coats (M) Bhd*^v laid down the proposition that the court could not go into another reason not relied on by the employer in its letter of dismissal to its employee or find one for it. This was not so. What the case established was that the court could not go into another ground not relied on by the employer or find one for it in the context of the pleadings, ie. that the pleadings in that case did not advance the ground of termination by due notice, hence the High Court could not consider this ground. The court actually could go into other grounds than those stated in the company's letter of dismissal to determine whether the claimant's dismissal was with or without just cause or excuse. Thus, in the instant case, although the ground of bad quality of the Unitem proposal prepared by the claimant (which had to have 4 drafts before it had finally been submitted to the client) and the fact that the company had been dissatisfied with the claimant's work in this respect was not mentioned in the letter of dismissal, the court accepted the company's testimony on this. It was taken into account when the court decided on the issue of whether the dismissal was with just cause or excuse.

3. DEDUCTION OF WAGES FOR UNAPPROVED SICK LEAVE

R was an equipment technician in A Co. drawing monthly salary of RM600. A Co. had deducted R's wages in February 2003 for 2 days of sick leave taken by R in January 2003 on the ground that the sick certificate for the said two days was issued by a government clinic which was not on the panel of clinics of A Co. and no written explanation was given by R for the treatment by non-panel clinic as required by the rules of A Co^v. R being dissatisfied with the deduction lodged a

complaint with the Labour Office which ruled in favour of R that such requirement was against s.60F of the Employment Act 1955 (EA). On appeal to the High Court reported as *Silverstone Bhd v Ramal Muthusamy*^{vii}, A Co succeeded to overturn the ruling. The High Court held that the requirement for written explanation in accordance with the policy and procedure of A Co was not in contravention of s.60F(1)(b) of EA. The said provision states that an employee shall, after examination at the expense of the employer if no such medical practitioner is appointed or, if having regard to the nature or circumstances of the illness, the services of the medical practitioner so appointed are not obtainable within a reasonable time or distance, by any other registered medical practitioner or by a medical officer, be entitled to paid sick leave. Without written explanation from R, A Co. would not know whether the nature or circumstances of R's illness justified his seeking treatment from non-panel clinic. This had caused A Co. unable to consider payment of wages for the said two days. As A Co. had not approved paid sick leave for the said two days, R was not entitled to wages thereof. The word "wages" means basic wages and all other payments in cash payable to employee for work done in respect of his contract of service. Since there was 'no work done' for the said two days, A Co. was entitled to make deduction to the extent of any overpayment of wages made during the immediately preceding three months from the month in which deductions were to be made by the employer to the employee by the employer's mistake (ie. to recoup) as provided under s.24(2)(a) of EA. It was open to A Co. whether to take the course of requiring R to show cause or to deduct R's wages. The former was more serious than the latter. In any event, A CO. had asked R to provide written explanation but R refused to do so. A Co. should not therefore be penalized.

4. A CASE OF FOREIGNER ENGAGED BY MALAYSIAN COMPANY BUT WORKED OVERSEAS

R1 was an Australian who had commenced employment with A as a QA/QC manager. He was seconded to work for a project for PTT Company Limited which was based in Thailand. His salary, allowance and tax were paid by the Thai company. About a year later, R1 was terminated by notice from A for alleged poor performance. He made a representation to DGIR in Malaysia under s.20 of the Industrial Relations Act 1967 (IRA). Upon reference made to the Industrial Court, A raised illegality as a defence, ie. the contract of employment was void due to

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illegality as R1 had entered Malaysia as a tourist and he had taken up the employment without prior approval from the immigration authorities. A contended that the contract was also illegal and against public policy by virtue of s.5(2) of the Employment (Restriction) Act 1968 which prohibited the employment of non-citizens in Malaysia unless they have been issued with valid employment permits. Heavy emphasis was placed on the leading case pertaining to the employment of foreigner, the Supreme Court decision in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*^{vii}. There, the workman (a non-citizen) was engaged within Malaysia by an employer which was a Malaysian company to work in a country outside Malaysia, namely Singapore. The apex court held that this fact would not by itself place the subsequent dismissal of the workman in the category of extra-territorial disputes. The Industrial Court was therefore held to have jurisdiction to hear the dispute. A's counsel tried to distinguish *Kathiravelu* case on the ground that the claimant in *Kathiravelu* case was already in valid employment with a Malaysian employer and only later when his work permit was not renewed, he was seconded to Singapore to serve the employer's related companies. Here, R1 never was in valid employment as he never had any work permit. The High Court however ruled that the facts here were on all fours with those in *Kathiravelu* case. In a nutshell, the fact that R1, a foreigner, signed a Malaysian contract with A, a Malaysian company, and was mobilized to work in Thailand and later dismissed by A, meant that the Industrial Court had jurisdiction to hear the matter. The Court further held that even if the employment contract was void, R1 was entitled to the protection from unfair dismissal under IRA by virtue of ILO Migrant Workers (Supplementary Provisions) Convention, 143 of 1975, to which Malaysia is a party^{viii}.

5. NON-COMPLIANCE WITH GRIEVANCE PROCEDURE

In *Rajendran Nagappan v Nippon Paint (M) Sdn Bhd*^x, the claimant was issued a show cause letter for the misconduct of making fraudulent medical claims. He responded by denying the charge and lodged a complaint against two colleagues. Upon receiving the response, the company issued a standing order to the claimant to only seek medical treatment from either the company's panel of clinics or government hospitals or clinics. Not being happy with such decision, the claimant then demanded that the company gave him a written apology. This was followed by a demand letter issued by a solicitor on behalf of the claimant for a formal

apology and RM200,000 for compensation. The company replied that the claimant had not complied with the grievance procedure under the collective agreement between the company and the chemical union of Malaya. The claimant then filed a defamation suit against the company. The company felt that the claimant's actions had strained the relationship between the parties and terminated the claimant from its employment. On the claimant's complaint of unlawful dismissal, the Industrial Court ruled in favour of the company. The company was held to have failed to prove the misconduct of making fraudulent medical claims. However, with regard to the misconduct of engaging a lawyer and threatening to sue the company for defamation, issuing a letter of demand on the company and for suing the company in the Sessions Court, it was clear that the claimant had rushed into lodging his complaint to a third party without first exhausting the avenue available in the company's grievance procedure. In doing so, he was guilty of acts subversive of discipline and had unnecessarily exposed the company's internal matters to unconcerned external party to bring disrepute and/or embarrassment to the company. The claimant should have complied with the company's rules and regulations and if he had a grievance, he should have taken it up with the company. The charges involving misconduct in particular insubordination for failure to comply with the grievance procedure had been established. The dismissal was therefore ruled to be with just cause or excuse.



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6. PREMEDITATED ACT TO SACK EMPLOYEE

The claimant in *SE Everlast Sdn Bhd v Tan Ley Hua*^x was charged with certain acts of misconduct including insubordination and dismissed from the company's service. It was argued that the claimant's dismissal had been a premeditated act ie. that at the time of the issuance of the show cause letter, the company had already made up its mind to dismiss her. The company's witness conceded this. Notwithstanding so, the court looked at the totality of the evidence before it. At the time of the issuance of the show cause letter, there was a series of unmitigated acts of insubordination committed by the claimant. Additionally, after the issuance of the show cause letter, more such acts of insubordination had piled on. The company had thus proven that the claimant had committed acts of misconduct.

7. WITHDRAWAL OF RESIGNATION

At a meeting called to discuss the issue of the non-renewal of the licenses from Pusat Khidmat Kontraktor, the Ministry of Finance and Tenaga Nasional Berhad, the claimant alleged that she had been forced to tender her resignation which she duly did. On the next working day, she sought to withdraw her letter of resignation but the company refused to accept her withdrawal. The company claimed that she had been severely negligent in her handling of the said licenses and had voluntarily tendered her resignation. Based on such facts, the Industrial Court in *Zarina Muhammad v Inai Kiara Sdn Bhd*^{kl} reiterated the principle that a workman whose resignation had been tendered to his employer could not

unilaterally revoke such resignation save by mutual consent of the employer. Based on evidence adduced, the court found that it was a voluntary resignation due to her gross negligence in not renewing the licenses and the termination of her employment did not arise out of a forced resignation. There was no evidence of threat or ultimatum by the Chairman of the company that she would be dismissed if she failed to resign.

ⁱ[2011] 5 CLJ 564

ⁱⁱ*Airspace Management Services Sdn Bhd v Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77 at 86.

ⁱⁱⁱ[2011] 2 ILR 629

^{iv}[1981] 1 LNS 30

^v The relevant rule provided that any medical leave from non-panel clinic would only be considered if the employee provided a written explanation or reason as to why he sought such medical attention or treatment from non-panel clinic.

^{vi}[2011] 5 CLJ 696

^{vii}[1997] 3 CLJ 777

^{viii} The relevant provision stated that where laws and regulations which controlled the movement of migrants for employment-eg. the Immigration Act- have not been respected, the migrant worker should nevertheless enjoy equality of treatment in respect of rights arising out of past employment.

^{ix} [2011] 3 ILR 49

^x [2011] 3 ILR 323

^{xi}[2011] 3 ILR 373

EQUITY / FAMILY LAW

BREACH OF CONFIDENCE BETWEEN SPOUSES

Equitable relief for breach of confidence between spouses during marriage was the focal point in the UK Court of Appeal decision in *Imerman v Tchenguiz*^j. In that case, the husband (H) shared the office of his two brothers-in-law as a bare licensee and used their computer system. He had his own password-protected computer and his own e-mail account. The wife (W) petitioned for divorce in December 2008 and on about nine

occasions between January and February 2009, his brothers-in-law accessed the computer server and made electronic copies of documents stored by H on his computer, as they were concerned, in their sister's interests, that H's assets would be concealed in any ancillary relief proceedings in the divorce action (the Proceedings).

The brothers passed the electronic copies to forensic accountants. Relevant material in hard copy was examined by counsel and any documents in respect of which counsel considered that H could claim privilege were removed. The seven remaining files (the 7 files) were copied and passed to W's solicitors, who had already given notice of the initiation of the Proceedings and who then sent copies thereof to H's solicitors.

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H brought proceedings against the brothers (and their solicitor and two information technology managers in a company owned by one of the brothers) for orders precluding them from communicating or disclosing to 3rd parties, including W and her solicitors, any information contained in the documents, restraining them from copying or using any of the documents or the information contained in them, and requiring them to hand over all copies of the documents to H. In the divorce action, H applied for the return of the 7 files from W's solicitors and any copies made and for an order enjoining W and her solicitors from using any of the information obtained.

The Family Proceedings Rules 1991 required the full, frank, clear and accurate disclosure of financial and other relevant circumstances at the appropriate point in ancillary relief proceedings but that point had not yet been reached in the Proceedings between H and W.

It was held that:-

(i) Intentionally obtaining information in respect of which a defendant must have appreciated that the claimant had an expectation of privacy, secretly, and knowing that the claimant reasonably expected it to be private, was a breach of confidence. It would be a breach of confidence for a defendant, without authority of the claimant, to examine, or to make, retain or supply copies to a 3rd party of, a document whose contents were, and had been, or ought to have been, appreciated by the defendant to be, confidential to the claimant.

(ii) A claimant who established a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorized defendant to look at, copy, distribute any copies of, or to communicate, or utilize the contents of the document, or any copy, and also able to enforce the return or destruction of any such document or copy. There was no necessity for misuse of private information before a claim for breach of confidentiality could succeed. An injunction to restrain passing on or using the confidential information and an order to return or destroy the documents (in paper or electronic copies) containing such information were granted.

(iii) The fact that the documents were stored on the server which was owned, as H knew, by his brothers-in-law, who enjoyed physically unrestricted access to it, could not deprive H of the reasonable expectation of privacy, and the consequent right to maintain a claim for breach of

confidence, in respect of the contents of his documents stored on the server.

(iv) Where the confidential information had been passed by the defendant to a 3rd party, the claimant's rights would prevail against that party, unless he was a *bona fide* purchaser without notice of the confidential nature of the information.

(v) English law recognized that there was a sphere in which each spouse had, within and as part of a marriage, a life separate and distinct from the shared matrimonial life. There was no rule that one spouse should have no right of confidentiality enforceable against the other in relation to their separate lives and personalities, more specifically a right in relation to separate financial affairs and private documents. Equitable relief for breach of confidence was available as between spouses.

(vi) The appellate court disapproved the so-called 'Hildebrand rules'ⁱⁱ which had been summarized as: "The family courts will not penalize the taking, copying and immediate return but do not sanction the use of any force to obtain the documents, or the interception of documents or the retention of documents nor...the removal of any hard disk recording documents electronically. The evidence contained in the documents, even those wrongfully taken will be admitted in evidence because there is an overarching duty on the parties to give full and frank disclosure. The wrongful taking of documents may lead to findings of litigation misconduct or orders for costs." The courts ought not to condone the illegality of self-help consisting of breach of confidence or tort, just because it was feared that the other side would itself behave unlawfully and conceal that which should be disclosed. The 'rules' could not be justified on the bases of lawful excuse, self-help, the public interest or any other basis. Neither the spouses who purloined their spouse's confidential documents nor the professional advisors who received them, or copies of them, could plead those 'rules' in answer to a claim for relief for breach of confidence. The family court had ample powers to grant freezing, search and seize, preservation and other similar orders to ensure that assets were not wrongly concealed or dissipated, and that evidence was not wrongly destroyed or concealed and to draw adverse inferences where a spouse had failed to give full and frank disclosure.

(vii) W had not been entitled to the confidential information at the time she had obtained it. She should not be allowed to obtain an advantage over H who might have been honest when the time came for him to be honest, namely at the time

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when the Family Proceedings Rules required him to disclose his assets. The defendant had substantially breached H's rights of confidence in relation to much of the information obtained through accessing the server and there was a substantial possibility that the obtainment was a result of a breach of statutory duty or crime. H was thus entitled to an order against the defendants that all documents so accessed and any copies be delivered to him or destroyed and that the defendants be enjoined from using any information obtained and likewise, against W who had not received the 7 files as a *bona fide* purchaser without notice.

(vii) Information derived from the documents obtained (improperly and unlawfully) from H's computer records was, subject to questions of privilege and relevance, admissible in the Proceedingsⁱⁱⁱ. However, it did not follow that the court was obliged to admit it. The court had the power to exclude such evidence^{iv} whose existence

had only been established by unlawful means. In exercising such power, the court would take into account the importance of the evidence, the conduct of the parties and any other relevant factors.

ⁱ[2011] 1 All ER 555

ⁱⁱoriginated from the decision in *Hildebrand v Hildebrand* [1992] 1 FLR 244

ⁱⁱⁱSubject to certain exceptions, notably information obtained by torture, the common law does not normally concern itself with the way evidence was obtained when considering admissibility: see *R v Sang* [1979] 2 All ER 1222, *Kuruma, Son of Kaniu v R* [1955] 1 All ER 236

^{iv}as in the case where the court is satisfied that it was in the interests of justice to do so, see: *Marcel v Metropolitan Police Comr* [1992] 1 All ER 72 at 89.

EVIDENCE / CONTRACT / EMPLOYMENT LAW

MISREPRESENTED FORGED MBA DEGREE TO GET A JOB !

Unbelievable but true! In *Yew Cheng Lim v Regal Marketing & Trading Sdn Bhd*, R had filed an action for breach of contract of employment and claimed for a refund of payments made to A as the senior general manager of R. It was R's case that A had misrepresented himself by producing an MBA degree from University of Hull that was forged. R produced a letter from the University confirming that the purported degree for A was a fraudulent document and that A had never been awarded an MBA degree as alleged. A contended that the said letter was not admissible under s.73A of the Evidence Act 1950 as the maker (the Assistant Registrar of the University) was not called and conditions stipulated thereinⁱⁱ to allow for dispensation of the maker to be called as a witness had not been satisfied. A also argued that R's claim for a refund was not maintainable under the principle of *restitutio in integrum* as it would require A to restore the services rendered to it during A's employment which was not possible.

The High Court upheld the decision of the lower court which ordered A to pay back R his salary for 4 months, EPF contribution made by R, car allowance for 4 months, hand-phone and petrol bills and car parking charges totaling RM81,660.60. The learned Judicial Commissioner preferred the popular view that under s.73A, the

court had a wide discretionary power to admit the letter, even in the absence of evidence from R that the conditions for dispensation were met. In her view, the circumstances of the case warranted such admission. The witness concerned was from overseas. It would cause undue delay and incur high cost to bring her to court just to confirm that the MBA degree was not genuine. The testimony to be given would not commensurate with the time and expenses incurred to bring her here. The court took it upon itself that the conditions had been satisfied. The letter was adjudged to be admissible. Furthermore, A could have easily rebutted R's allegation of forged MBA degree with the production of documents to prove that he had registered with the University, that he was offered a place thereat and that he had made payments to the University, all of which he did not do.

Since it was A who had wrongfully misrepresented and induced R to employ him, the contract of employment became voidable at the option of R. R had lawfully rescinded the contract. R would not have made the payments to A if it had known of the misrepresentation. R had thus wrongly paid and A had wrongly received the monetary benefits. A must return the money had and received and paid wrongfully. The principle of *restitutio in integrum* was inapplicable to aid A in resisting R's claim.

ⁱ[2011] 5 CLJ 472

ⁱⁱThat the maker is dead or unfit by reason of his bodily or mental condition to attend as a witness or if he is beyond the seas and it is not reasonably practicable to secure his attendance or if all reasonable efforts to find him have been made without success.

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INSOLVENCY LAW

SUSPENSION OF 21-DAY PERIOD TO PAY UP TO AVOID PRESUMPTION OF INSOLVENCY

A creditor was negotiating sharply with a debtor who was completely at its mercy. The harsh and tough stand taken by the creditor did not however bear any fruits of settlement with the protracted negotiations coming to an end when the creditor decided to issue a statutory demand pursuant to the Companies Act for the sums allegedly due. That sums up in a nutshell the events that prompted the debtor to apply for an injunction to restrain the creditor from commencing any winding-up proceedings in the Singapore High Court case of *United Fiber System Ltd v China National Machinery & Equipment Import & Export Corpⁱ*.

In that case, UFS, a public company listed on the Singapore Stock Exchange, executed a performance bond in favour of CMEC to secure sums owed by P's subsidiary, PT MAL to CMEC under a deed of settlement. PT MAL defaulted, resulting in the acceleration of its debt under the deed of settlement which in turn triggered UFS's obligations under the bond. The parties together with a 'white knight' entered into several rounds of negotiations (which lasted from mid-July 2010 to 19.8.2010) to restructure the debt. Certain sums were paid on behalf of UFS to CMEC but no formal agreement was reached. On 20.8.2010, CMEC issued a statutory demand to UFS for US\$19m (the 20 August SD). This prompted UFS to take out the instant action for declaratory relief that there was no debt due and payable to CMEC when it issued the 20 August SD because two collateral agreements had been formed and/or estoppels had arisen in the course of negotiations.

The trial judge went through the evidence comprising numerous e-mails, telephone conversations, meetings and announcements to Stock Exchange with a fine tooth comb and came

INSURANCE LAW

POLICY NOT INVALIDATED BY MATERIAL NON-DISCLOSURE WITHOUT FRAUD

In *Tan Mooi Sim & Anor v United Overseas Bank (M) Bhd & Anorⁱ*, P1 was the wife of H, the deceased and together with P2, were the joint administrators of H's estate. H and P1 had in July 2003 applied for a housing loan from D1 to

to the finding that there was no binding agreement regarding the restructuring and repayment of the debt between UFS and CMEC. Until a written agreement was signed, CMEC could and did drive a hard bargain, forcing UFS to make substantial partial repayments of the debt due and owing to CMEC before CMEC would even contemplate negotiations. The partial repayments did not defer the time for paying the remaining sum still owing under the performance bond. The uncompromising stance eventually caused the negotiations to break down. Upon a thorough analysis, the court concluded that the negotiations gave rise to no agreement, no intention to create legal relations, no representation and no detrimental reliance. There could thus be no collateral agreement or estoppel in relation to the debt due and owing by UFS to CMEC.

The presumption under s.254(2)(a) of the Companies Act arose only if UFS did not comply with a statutory demand for 3 weeks, *ie.* 21 clear days excluding the day of service. A *bona fide* action brought to dispute the debt had to have the effect of suspending the running of time for payment until the dispute was resolved --- non-payment of a disputed debt could not logically give rise to a presumption of insolvency. Since the instant action was brought promptly after the issuance of the 20 August SD, the 21 days for payment would start to run from the date of the judgment therein. However, since there was no evidence that CMEC would not wait for the presumption of insolvency to arise upon expiry of 21 days before taking any action to wind up UFS, the trial judge refused to grant an injunction sought by UFS.

[2011] 2 SLR 1021

purchase a house. D1's officer had advised the deceased and P1 that they were required to purchase MRTA (mortgage reduction term assurance) policy to cover the life of the deceased. It was explained to them that the policy would ensure that in the event of the demise of the deceased during the period of the housing loan, the insurance company would repay the housing loan. The deceased who could not read or write English then signed a blank MRTA form provided by the bank officer. The application in respect of the MRTA policy was subsequently approved and was effective from 20.11.2003. On 30.12.2006, the deceased died of ischemic heart disease. The joint

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administrators wrote to D2 insurer requesting it to pay the sum insured but D2 repudiated liability on the ground that the deceased had failed to declare that he had been diagnosed with or treated for diabetes. The joint administrators thus filed the suit against D2 for failing to pay the insured sum and D1 as D2's agent.

The High Court reaffirmed the settled law that a contract of insurance was a contract *uberrimae fides* or of the utmost good faith and thus, there was a duty on an insured (in this case, the deceased) to disclose voluntarily all that was material to the insurer's decision whether to accept the risk being proposed. Such duty existed independently of any proposal form. Therefore, the fact that D1's officer did not specifically ask the deceased whether he had diabetes did not modify in any degree the duty of disclosure on the part of the deceased. As such, the deceased had failed to disclose a material fact to the defendants.

However, the policy had been in force for more than two years. By virtue of the second limb of s.147(4) of the Insurance Act 1996, D2 would be precluded from contesting the validity of the policy

after the expiry of two years from the date on which it was effected on the ground of non-disclosure of material facts unless fraud on the part of the insured was proven. Based on the totality of the evidence adduced, it was not proven beyond reasonable doubt that the deceased had committed fraud. Although he knew that he was signing an MRTA form, the detailed contents of the form particularly the warning in it was not read and explained to him. Further, it was found that D1's officer had not specifically asked the deceased whether he had diabetes but had instead asked him whether he had any "illness or sickness", which was ambiguous and lacked specifics. Such ambiguity was resolved in favour of the plaintiffs according to the *contra proferentum* rule. Thus, D2 was not entitled to avoid the policy. The plaintiffs' claim against D2 was allowed with costs.

[2011] 8 MLJ 556

PUBLIC UTILITIES

ELECTRICITY "THIEVE" GOT AWAY SCOT FREE !

Tenaga Nasional Berhad had in July announced its move to impose 'retrospective' charges on consumers who had their electricity meters changed or tampered with and such 'adjustment' would be for up to three monthsⁱ. The move had been put on hold due to objections from many quarters. Be that as it may, the High Court decision in *Tenaga Nasional Bhd v Bright Rims Manufacturing Bhd*ⁱⁱ goes to show the potential difficulty faced by the utility provider if it decides to implement such move.

In *Bright Rims Manufacturing Bhd* case, theft of electricity was suspected to have taken place at D's premises. The seal position on the door of the left side of the meter kiosk and the security placard on the door had been found tampered with. All the peculiarity that existed to the meter installation had been recorded and the repair and correction had been done. Evidence was led by P that based on the inspection of the data in the meter, such peculiarity had been ongoing since May 2006. 'Backbilling Summary for

the month of April 2006 up to May 2008' (P4) was done up which showed the amount owed by D as RM2,363,781.10. This amount was obtained from the calculation done based on the load profile data record in the meter (P6) ie. kW data for every 30 minutes which was recorded by the meter at D's premises for the duration that the peculiarity was found. P agreed that the calculation was a mere estimation and confirmed that it did not take into account the public holidays and Sundays when the factory was not in operation or not operating in its full capacity. P then on the suggestion of the court recalculated by deducting the use on those dates and arrived at an amended sum of RM2,031,328.60 (P9). Yet, P admitted that it did not make changes for the dated when the factory was only operating during the day and not during the night. D denied the allegation of tampering and complained that it was never given any notice about the inspection which would be conducted by P's officer.

On the complaint of non-notice, the trial judge held that in a situation where the theft of electricity was suspected to have taken place, it was impossible to require issuance of a notice before the inspection. The inspection would only be effective if it was done by surprise without giving any opportunity for the party being inspected to make preparation or to rectify the situation. D's complaint in this respect was thus rejected.

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P succeeded to prove that the tampering was done--the current circuit had been intercepted and the meter could not record the actual usage. P was therefore entitled to claim from D the total damage suffered by it from such tampering. Where electricity was stolen, it was impossible to expect P to be able to produce concise evidence on the kW amount of the electricity power stolen. In such cases, reasonable and fair estimation of the electricity power stolen was sufficient. This legal position was supported by s.38(4) and (5) of the Electricity Supply Act 1990.

P4 and P9 amounted to *prima facie* proof of the amount to be paid by D. However, there were not conclusive evidence and D could still adduce credible evidence to disprove the basis of the calculation and the amount claimed as incorrect or inaccurate. Evidence led showed that there were many days when the factory was not in operation at all for the night shift. There were days when only one section was operating night shift and two other sections were closed. In the light of such evidence, P4, P6 and P9 were incorrect. D had thus proven that there were manifest errors. The trial judge held that the court could and should not be involved and try to calculate the usage of the electricity power which was not billed to D. P thus failed to prove its case on the balance of

probability against D and its claim was dismissed. The only saving grace for the utility provider was that no costs were awarded against them, since there was in fact tampering of meter by D but P's case failed only because it could not prove the quantum.



ⁱPage 28 of the Nation section, The STAR, 22 July 2011.
ⁱⁱ[2011] 8 MLJ 455

SECURITIES LAW

DIRECTOR'S ROLE UNDER LISTING REQUIREMENTS ON APPOINTMENT OF PROVISIONAL LIQUIDATOR

In *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v Bursa Malaysia Securities Bhd*, the respondent's both Listing Committee and Appeals Committee found (the said decision) that the applicant had failed to provide a reasonable explanation or demonstrate adequate efforts taken to discharge his obligations to ensure timely submission of annual audited accounts, annual report and quarterly reports of Golden Plus Holdings Bhd, a company listed on the stock exchange (the company) to the respondent as required under the respondent's Listing Requirements (LR). The applicant was imposed with a penalty of public remand and fine. The applicant applied for judicial review for an order of *certiorari* to quash the said decision. Basically, the applicant contended that upon the appointment of the PL, the office of director ceased to exist, that the directors were *functus officio*, incapacitated and had no powers

with the appointment of a provisional liquidator (PL) and that the appointment of the PL had frustrated the directors from discharging their obligation to ensure timely submission of the accounts.

It was held that the appointment of the PL could not by itself, in the absence of any provision within the Capital Markets and Services Act 2007 or any other Act, absolve the directors from the obligations under the LR. Notwithstanding the appointment of the PL, the board of directors might retain some residuary powers indicating that the office of director was not rendered *functus officio*. The test was that: if the power of the board was power which the PL could be said to have assumed, then to that extent that power was lost; if the power could not be assumed by the PL, then the board still retained that power. The applicant itself had acknowledged that the statutory obligations of the directors in relation to the LR and the Companies Act 1965 remained intact and that those statutory duties of the directors could not be subrogated and/or assigned to the PL. The applicant had also confirmed with the respondent that the directors shall continue to act to ensure compliance of the LR. The PI had indicated that the financial reports would be the responsibility of

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the board. Thus, the PL had not assumed the responsibility of ensuring timely submission. The undertaking to ensure compliance with the LR was given by the applicant in his capacity as a director of the company pursuant to the LR and could not be assigned to the PL.

The Appeals Committee had not committed any error of law in making the said

SUCCESSION

CUTTING OUT OF INHERITANCE

The subject of dispute in *Randolph Yap Pow Kong & Anor v Yvonne Yap Yoke Sum (f) & Ors*ⁱ was the validity of a will allegedly executed by a testator who had been diagnosed with Parkinson disease and mild dementia. The plaintiffs in the case were the two sons of the testator (the deceased) from his first marriage. The 1st, 2nd and 4th defendants were the deceased's children from his second marriage with the 3rd defendant (D3). The plaintiffs did not receive any bequests under the said will which was executed on 18.1.2005. The sole beneficiary of the said will was his widow, D3.

The deceased fell ill in 2003 and was hospitalized. That was when he was diagnosed with Parkinson disease and mild dementia. He was also reported by the attending neurologist to have suffered hallucination and delusion as a result of adverse reaction to medication in 2004. He recovered when another drug to counter the side effect was given. He died in July of 2006, presumably from the progression of his illness. The plaintiffs' case was that the deceased lacked testamentary capacity, that he was subjected to influence of the defendants, that the said will was a forgery and that D2 upon whom the wheel-chair bound deceased completely depended for his everyday needs had exerted undue influence on the deceased. The defendants called as witnesses, among others, two doctors (one who had examined the deceased just before he signed the said will and the other was the neurologist who attended to the deceased from 2003 until his death), the solicitor who prepared the said will and the other attesting witness who was also a family friend whilst the plaintiffs were the only witnesses on their own behalf. Evidence led revealed that the said will was professionally drafted by a solicitor who had called a doctor to be present. The solicitor had personally called on the deceased to receive instructions, prepared a draft will and the next day, attended to the deceased who made some spelling corrections on the will. The doctor had examined the deceased's vital

decision. The application was dismissed with costs.

ⁱ[2011] 7 CLJ 215

signs and having held a brief conversation with him, was satisfied that the deceased was mentally alert although his voice was slurred and he was slow to respond due to Parkinson's disease. These two professionals had no interest in the outcome of the litigation and their impartiality was not challenged. As to the neurologist, he testified that on the last three occasions that he saw the deceased on 20 August, 3 September and 28 December 2004, there was no evidence that the deceased's cognitive ability had been impaired. He thus did not perform the abbreviated mental test (AMT) which was a structured tool to test for dementia on the deceased. He was not able to communicate with the deceased only in November 2005.

The relevant point of time to determine testamentary capacity was the time when the deceased signed the said will. He might have been lacking such capacity prior to the signing of the said will or thereafter but that was irrelevant for purpose of determining the validity of the said will. Did the deceased possess a sound disposing mind on 18.1.2005 --- that was the proper question. While there was no judicial pronouncement that only mental disorder or insanity would vitiate testamentary capacity, ailing memory and weak mental power could not be the vitiating factor either. The court answered the question in the affirmative as the defendants had discharged the burden of proving that the deceased was of sound disposing mind on that day. There was no evidence at all to suggest that the thumbprint of the deceased was rolled over the said will by coercion or force. Neither was there any evidence that D2 had exerted undue influence over the deceased. Further, the facts showed that the plaintiffs were not as close to the deceased as they wanted the court to believe. Additionally, a previous will executed in 2003 also named D3 as the sole beneficiary. Therefore, there was nothing irrational, suspicious or improbable about the impugned will that cut them out of any inheritance. The said will was ruled as valid and the suit was dismissed with costs.

ⁱ[2011] 3 MLJ 556

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TORT (NEGLIGENCE)

CARREFOUR LIABLE FOR DEFECTIVE PRODUCT

Carrefour, a major worldwide hypermarket, was the 'wrongdoer' in *Sundram Veeriah v Magnificent Diagraph Sdn Bhd*. P had seen an advertisement taken out by D offering for sale several items at its store, Carrefour including an impact drill (the said product). It was represented that the said product was SIRIM approved and imported with the approval of Energy Commission. While attempting to use the said product by drilling a hole for curtain railings, P was injured as the drill had vibrated and hit P on the side of his face.

D admitted that there was no SIRIM approval for the said product and neither was there approval for the importing of the said product. It was found that the said product was imported from the manufacturer in China through a company known as SHHH S/B (the supplier) and thereafter by virtue of arrangements between D and the supplier, it was placed on the shelves of D's hypermarket. A defective or underperforming product would cause injury that was caused to P. Under such circumstances, it was just and fair that a duty of care was imposed on D to P to at least ensure that the product had SIRIM approval and

was imported with approval of the Energy Commission.

D admitted that they only did random checking on some of the boxes but not a complete check before the products were placed on the shelves, relying purely on the representation of the supplier. Any damage suffered by P was reasonably foreseeable. D had therefore committed a breach of its duty of care. As to the issue of contributory negligence, *ie.* that P had applied excessive pressure in the use of the said product which caused it to be defective, evidence showed that P had been trained in the use of a drill like the said product. At any rate, since the instruction manual was missing from the box, it would be difficult for P to know the level of pressure to be applied when using the said product. P had behaved reasonably and any plea of contributory negligence was negated. An award of RM10,000 as general damages was made in favour of P.

[2011] 5 CLJ 821

TORT / CONTRACT LAW

BREACHES OF DMC

The extent to which the court would go to enforce provisions in deeds of mutual covenant entered by the house purchasers with the housing developer came into focus in two decisions of the High Court. The first concerns complaint of frequent open burning of prayer items by residents while the other is on failure of the housing developer to provide sufficient security measures.

In *Tunku Norella Suriani bt Tunku Yusoff & Ors v Kumpulan Sierramas (M) Sdn Bhd & Anor*¹, the plaintiffs and 2nd defendant were residents of the Sierramas West housing estate which was developed by the 1st defendant. All the house purchasers had signed deeds of mutual covenants (DMC) with the 1st defendant. The plaintiffs claimed that the 2nd defendant had committed breaches of the DMC and property development and construction guidelines (the Guidelines) and committed private nuisance by interfering with their quiet enjoyment of their land by (i) regular and frequent open burning of prayer offerings that caused ash and smoke to be blown into

neighbouring houses; (ii) creating loud, sharp sounds akin to letting off of firecrackers; (iii) allowing his premises to be used other than for single family residential purpose; (iv) allowing vehicles of visitors to be parked in such a way that it obstructed free flow of traffic; and (v) constructing a prayer altar in an obtrusive location. Plaintiffs complained to the 1st defendant about the 2nd defendant's breaches but it was alleged that the 1st defendant failed to act on the complaints. The DMC provided that the 1st defendant had the right to take whatever action it deemed fit to enforce the terms thereof including power to enter onto any property to rectify defaults.

The plaintiffs were held to have proven that the 2nd defendant had breached clause 3.1(e) of the DMC and committed the tort of private nuisance by openly burning prayer offerings twice a month that caused annoyance and nuisance to the neighbours. He had also breached clause 7.5(k) of the Guidelines by having an altar in an obtrusive position. The other complaints were however not proven. On the other hand, the 1st defendant was held to have contravened the DMC and guidelines by failing to enforce the terms of both on the 2nd defendant. The discretion to enforce the DMC and guidelines in a just, fair and equitable manner lay entirely with the 1st defendant but its investigations on the plaintiffs'

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complaints were poor, incomprehensive, partial and unjust. The 1st defendant was also negligent when it decided, wrongly and without due enquiry, that the 2nd defendant did not breach the DMC. In so doing, the 1st defendant failed to exercise its discretion in a fair, honest and reasonable manner in the interests of all residents at Sierramas West. In the circumstances, the plaintiff's claim against both defendants was allowed.

In *Ng Chooi Foong v Dynaura Mutiara Sdn Bhd & Anor*ⁱⁱ, P alleged that the defendants had breach contractual duty of care which resulted in an armed robbery being committed at the plaintiff's residence. P had purchased a housing lot in D1's housing project (Pinggiran Golf) in the belief of oral representations regarding special security measures ie. 'enhanced security surveillance' to safeguard and ensure security of the residents at all times. D2 owned an adjacent property sharing a common boundary and within the vicinity of Pinggiran Golf. P also relied upon the DMC with D1 and contended that D1 failed in their duty of care in allowing unauthorized persons to enter the adjacent property to P's residence. Based on clause 3.1 of the DMC, D1 was obligated to provide maintenance service including the security service to the proprietors of Pinggiran Golf.

D1's failure to detect the occurrence of the robbery until it was informed by P proved the wanting and poor security service in that neighbourhood. The nightly mobile patrolling of two security guards on motorcycles was inadequate and ineffective due to the wide coverage of the resort comprising three developments which was too expansive for effective patrolling. Despite the occurrences of attempted break-ins and burglary within the Pinggiran Golf neighbourhood, D1 clearly failed to

take remedial measures to improve and enhance the security service at the said neighbourhood. The number of security guards engaged by D1 remained at two and they were not given adequate or suitable job training. Therefore, the damage and losses suffered by P due to the robbery were directly attributed to the negligence and fundamental breach by D1 to provide reasonable and sufficient security to P's residence consistent with the security expected of a luxurious and prestigious gated development. However, P's claim against D2 failed. D2 owed no contractual duty of care to P to prevent unauthorized entry from a third party into the premise of a neighbouring development.



ⁱ[2011] 9 MLJ 1
ⁱⁱ[2011] 7 CLJ 145

TORT (NEGLIGENT MISREPRESENTATION)

PROMOTING A PRODUCT IN WHICH DEFENDANT HAD AN INTEREST --- NEGLIGENT MISREPRESENTATIONⁱ

Representations and efforts to procure financing for a customer with a view of obtaining 'kick-back' that went awry was the story in the case of *Tegas Baiduri Sdn Bhd v BIMB Trust Ltd & Ors*ⁱⁱ. P was introduced by its property broker to D2 and D3 for the purpose of sourcing finance for P's land project. D2 and D3 were the chief executive officer and customer relationship manager respectively of D1, a subsidiary of Bank

Islam Malaysia Berhad and a company which was formed under the Labuan Trust Companies Act 1990. At a meeting, D2 and D3 gave a presentation regarding the corporate structure of D1 and the financing facilities that D1 could provide to P. D2 and D3 had also provided a briefing on financing facility offered by a company called Buckingham Consultants League Sdn Bhd (BCL). Thereafter P applied for the said offshore financing facility offered by BCL, with all follow-ups in terms of filling in the appropriate forms for the package and correspondences done through D2 and D3. An initial payment of RM164,000 was made to BCL. However, there were repeated delays and no progress in the financing facility. P thus commenced the instant action against the defendants, D1 to D3, for damages suffered due to the defendants' negligent and fraudulent

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representation in respect of the financing facility by BCL.

It was P's case that it had relied on the advice of the defendants and that D2 and D3 who had held themselves out to be experts in terms of promoting the financing facility offered by BCL owed P a duty of care which they breached. The defendants denied that D1's corporate profile ever state that it was in the business of offering any advice on financial packages or that it was in the business of providing and securing financing packages. The corporate profile stated, among others, that D1 pioneered in the development of wealth management that was resourceful, strategic and effective and that being within the Labuan International Offshore Financial Centre, it provided a platform of solutions that required constructive proficiency in offshore company incorporation, offshore asset protection and preservation as well as offshore investments. D2 and D3 denied assuming responsibility for what was purportedly said by them to P and instead contended that they had specifically informed P that the financing facility was offered by BCL and not D1 and advised P to deal directly with the CEO of BCL.

The trial judge allowed P's claim with costs. The fact that the parties were introduced to each other by P's property broker showed that the defendants were in the business of sourcing finance for clients. As such, based on how the relationship between the parties started and from evidence adduced on the alleged misrepresentations, the defendants had assumed responsibility for what they had said and represented to P. Further, D2 had admitted that D1 stood to gain 1% from BCL as commission for successfully introducing customers to BCL. Thus, common sense dictated that since it was in the interests of the defendants to ensure that the deal with BCL was successful, they had to assume responsibility for their action.

The trial judge found it unbelievable that D1 had not given a written disclaimer P if indeed, as claimed by D2 and D3, they had orally made clear to P that the facility offered by BCL was not their product and that independent investigation should be conducted by P. In any case, the defendants had taken proactive steps (and not purely taking on a 'post-office' role) in promoting the deal for Buckingham and in the circumstances, it was a reasonable inference for P to believe that there was no necessity for it to investigate the matter.

The defendants attempted to rely on exclusion of liability clause so that neither D1 nor

its nominees would be liable to P in respect of anything done or omitted or declined to be done by them. However, the trial judge pointed out correctly that this clause was not able to aid the defendants because it was stated clearly that it did not apply in cases of gross negligence such as the instant case.

The 'golden package' which P took up included the service of "assistance in getting trade financing facility" and the manner in which the defendants had promoted the facility offered by BCL created a contract between P and D1 to assist in procuring trade financing facility. Further, P had paid a sum of RM20,900 to D1 for the services provided. Evidentially, P had also relied on the advice of the defendants in making the payment of RM164,000 and therefore, the loss of the said sum was reasonably foreseeable if the defendants had breached their duty of care.

As the defendants were promoting a product in which they had an interest, they ought to have checked on the background of BCL, Overseas Trust Bank Ltd (the offeror of the financing facility), its financial package as well as the viability of the said package --- whether a credit facility amount which was seven times more than the deposited amount was legitimate and common in offshore credit facility market. This most basic duty of care, the defendants had failed miserably to observe and thus, they were negligent. What had happened was that the Buckingham package had turned out to be a scam and P had paid a heavy price. Overseas Trust Bank Ltd appeared to be non-existent and the principal of BCL had since disappeared from the face of the earth. All these would not have happened if the defendants were to be more diligent and prudent in carrying out its duty of care of investigation.

The only saving grace for them was that the trial judge held that there was no fraud involved and the defendants had not been reckless since they had actually held an honest (albeit erroneous) view that the financing facility by BCL was not so far-fetched that it was beyond reason.

Lastly, since the representation made by D2 and D3 were in the course of employment, D1 was vicariously liable for their negligent acts. All three defendants were adjudged to be jointly and severally liable for P's loss of RM164,000.

ⁱA doctrine that was developed in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465.

ⁱⁱ[2011] 8 MLJ 210

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TORT (NEGLIGENCE)

EXTENT OF DUTY OF CARE IN INSTANCES OF JOINT ILLEGAL ENTERPRISE

Early one morning, Danelle aged 16 years who had been drinking wanted to go from Northbridge, a Perth suburb, to her home in Maddington, another Perth suburb. The last train had left and she did not have money to pay for a taxi. So, she decided to steal a car. Having started a car in the car park near a nightclub, Danelle asked her older sister, Narelle who had also been drinking and did not hold a driver's licence to drive her home. R, aged 27 years, who was Danelle's uncle was at a cab rank when he saw the car leaving the car park. He asked Narelle to let him drive. Some of R's friends also got into the car. R initially drove sensibly but later began to speed and drive through red lights. Danelle asked him to slow down and then to stop and let her and Narelle out. But R drove on, saying that they were "all right". Near Maddington, R slowed the car down and Danelle again asked to be let out. R laughed off her concerns. Shortly afterwards, he lost control of the car which struck a pole. The collision caused serious injury to Danelle who became a tetraplegic. She sued R claiming damages for negligence.

On the aforesaid facts, the issue in *Miller v Miller*^j was whether Danelle could recover damages for negligence from R. Did her theft of the car or her subsequent use of the car or combination of both defeat her claim? Both parties agreed that the only live issue was whether R owed Danelle a duty of care. If he did, Danelle should be found guilty of contributory negligence and her responsibility for her injuries should be assessed at 50%. The trial judge and the Court of Appeal came to different findings, the former holding that R owed Danelle a duty of care and the latter holding otherwise. The denial of the existence of a duty of care rested entirely upon the assertion that R and Danelle had engaged in a joint illegal enterprise of illegally using a motor car without the consent of the owner contrary to s.371A of the Criminal Code (WA).

The High Court of Australia held that by the time the accident happened, R and Danelle were no longer engaged in a joint illegal enterprise. Danelle had stolen the car and together with R and some, perhaps all, of the other passengers became parties to a joint illegal enterprise when they agreed to R driving them in what they knew to be a stolen car. However, Danelle withdrew from that joint enterprise when she asked to be allowed to get out of it. Because she had withdrawn from, and was no longer participating in, the crime of illegally using the car when the accident happened, it could no longer be said that R owed her no duty of care. That he owed her no duty earlier in the journey was not to the point. When he ran off the road, he owed a passenger who was not then complicit in the crime which he was then committing a duty to take reasonable care. The appeal was thus allowed.

Certain principles laid down by the Australian apex in arriving at the decision are noteworthy. It was recognized that there were cases where the parties' joint participation in illegal conduct should preclude a plaintiff recovering damages for negligence from the defendant. Different bases have been said to found the denial of recovery in some (but not all) cases of joint illegal enterprise: no duty of care should be found to exist; a standard of care cannot or should not be fixed; the plaintiff assumed the risk of negligence. The different bases for denial of liability all rested on a policy judgment. That policy judgment has sometimes been expressed in terms that the courts could not regulate the activities of wrongdoers and sometimes in terms that the courts should not do so. The proposition that courts could not regulate the activities of wrongdoers has however been rejected. In a case of illegal use of a motor vehicle, there was a readily identified standard of care that could be engaged; the standard of care which road users other than the driver's criminal confederates were entitled to expect the driver to observe.

^j[2011] 275 ALR 611, (2011) 85 ALJR 480

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REVISITING UNCONSCIONABILITY AGAINST CALL ON BG

In the previous issue Q2 of 2011, we featured, under the heading "Unconscionability as a Ground to Restrain Call on Performance Bond", the judicial approach in both Malaysia and Singapore jurisdictions concerning injunction payment out of bank guarantee or performance bond on the ground of unconscionability. Two High Court decisions were featured, one of which was *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd*ⁱ. On further appeal, the Malaysian Court of Appeal set aside the High Court decision and allowed Sumatec (the appellant/defendant) to set aside the injunction obtained by MRC (the respondent/plaintiff)ⁱⁱ. In doing so, the appellate court firstly ruled that the demand made by MRC was good and valid for the purpose of the bank guarantee (BG) as it had substantially complied with the terms of the BG even though it did not specify the amount demanded. Then, the court held that 'unconscionability' must be clearly established and proven by evidence in the circumstances of the case. As in the case of fraud, there must be placed before the court a manifest or strong evidence in respect of the alleged unconscionable conduct complained of, not a bare assertion. Basically, it meant establishing a strong prima facie case (though not necessarily beyond reasonable doubt) and this additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct were of such degree such as to

prick the conscience of a reasonable and sensible man. The court did not see it fit to define 'unconscionability' other than to give some broad indications such as lack of *bona fides*. It is fact-sensitive, it depended on the facts of each case. Based on such considerations, the court went on to consider each and every ground which purportedly established 'unconscionability' as found by the High Court and came to the conclusion that Sumatec had failed to adduce sufficient evidence of unconscionable conduct on the part of MRC in making a call on the BG. One of the principal grounds relied by Sumatec was that MRC had demanded for the full 10% of the original contract value when evidence showed that there was an agreed reduction in the scope of the works of Sumatec at some stage of the contractual relationship. The demand on the BG was equivalent to 40% of the value of the reduced works and thereby was wholly disproportionate since the BG specifically set the limit of the guaranteed sum at 10% of the contract value. The appellate court took a rather simplistic approach by holding that the BG being an irrevocable undertaking by the bank to pay on demand made by the beneficiary (MRC), the bank was not concerned with the underlying contract be it reduced or varied. So long as the BG was still valid, MRC was entitled to demand the amount stipulated in the BG.

ⁱ[2011] 1 AMCR 603

ⁱⁱ*Malaysian Refining Company Sdn Bhd v Sumatec Engineering and Construction Sdn Bhd* [2011] 4 AMR 489

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

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