

THE UPDATE



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Abbreviations

| | | |
|-----|---|----------------|
| Jur | : | Jurisdiction |
| MY | : | Malaysia |
| SG | : | Singapore |
| UK | : | United Kingdom |

CONCLUSIVE EVIDENCE CLAUSE IN CASES OF FRAUD OF BANK'S EMPLOYEES

Conclusive evidence or verification clauses, commonly found in banking documentation, have consistently been upheld by the courts, *inter alia*, on the premise that banks who insert them "are known to be honest and reliable men of business who are most unlikely to make a mistake". These were the opening words of the judgment of the recent High Court of Singapore case of *Jiang Ou v EFG Bank AG*¹. Will such a clause be upheld to exonerate a bank from liability of the fraud of its own employees engaging in unauthorized trades carried out in the absence of instructions of its customer? This was the principal issue to be decided for, perhaps, the first time in commonwealth jurisdictions.

In *Jiang Ou* case, the plaintiff who was the customer of EFG Bank had opened a *non-discretionary* account with the bank. Between August 2008 and April 2009, in the absence of any instruction, an employee of EFG Bank executed a series of 160 high risk leveraged foreign exchange and securities transactions purportedly on behalf of the plaintiff. As a result of the transactions, the plaintiff suffered losses in her account. The plaintiff claimed that she did not receive any of the 160 transaction confirmation slips or bank statements (transaction documents) save for the 18 documents she had received from 29.7.2008 to 5.1.2009. EFG Bank denied liability for the loss on the premise that the plaintiff was precluded from challenging the correctness of the transaction documents by reason of the conclusive evidence clauses in the bank's documentation.

The bank relied on cl 4 of the General Conditions of the account opening documents which provided as follows:-

- "4 All statements, confirmations and other communications from the bank as well as correspondence or notifications received from third parties relating to the Account, including any documents which may have legal consequences to the Client...shall be deemed to have been validly given to the Client upon actual delivery by hand or by mailing [them] by ordinary mail to the last address supplied by the Client for this purpose or by sending it in any other manner (including fax) as the

The court held that upon discharge of the burden of proof of posting, the said cl 4 gave rise to a presumption of delivery of the transaction documents to the plaintiff. However, on the evidence before the court, the bank was found to have failed to discharge its burden of proof that the transaction documents were sent by ordinary mail to the plaintiff. The presumption of delivery did not arise. Since the bank's defence which was premised on the legal effect of the conclusive evidence clauses was entirely dependent on establishing proof of posting under the said cl 4, such finding effectively disposed of the bank's defence. On this ground alone, the plaintiff's claim was allowed.

The trial judge nonetheless proceeded to consider the applicability of the conclusive evidence clauses. The clauses read as follows:-

- "3.1 Subject to paragraph 3.2, the Bank shall send the client *periodic* confirmations or advices of all Transactions *carried out by the Client and/or the Authorized Representative* and all deposits placed with, and cleared by, the bank for the account of the Client, and period statements reflecting such Transactions and balances in the Account. The Client undertakes to carefully examine and verify the correctness of each confirmation, advice and statement of account...the Client further undertakes to inform the Bank promptly in writing and in any event within fourteen (14) days from the date of any such confirmation or advice, and within thirty (30) days from the date of such statements of account, of any *discrepancies, omissions, incorrect or inaccurate entries* in the Account or the contents of any confirmation, advice or statement of account or the *execution or non-execution of any order*, failing which the bank may deem the Client to have approved the original confirmations, advices or statements of accounts as sent by the bank to the Client, in which case they shall be conclusive and binding upon the Client without any further proof that the Account is and all entries therein and the execution of all Transactions

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are correct, and *the Client shall be deemed to have waived all Claims against the Bank in respect of the Account and all such Transactions, even if the Bank had not exercised the usual diligence in relation thereto.*

- 3.2 A *Transaction Confirmation* in respect of each Transaction concluded shall be sent to the Client in the same manner as any other confirmation no later than the end of the next Business day after the date upon which the relevant Transaction is entered into....The Client must notify the bank in writing within fourteen (14) Business Days after the date of the relevant Transaction of *any claimed discrepancy between the Instructions and the Transaction Confirmation*. The Bank may deal with the matter in such manner as the bank may in its sole and absolute discretion consider appropriate, and if no such notification is received by the Bank in writing within the time stipulated, the Client will be deemed to have waived all further rights to raise any objection or query thereto, and to have waived all Claims against the Bank in respect of the relevant Transaction, *even if the Bank had not exercised the usual diligence in relation thereto.* “ (emphasis added)

The trial judge held that the conclusive evidence clauses imposed two concurrent duties on customers of the bank. Firstly, it placed the onus on the customers to verify their bank statements and secondly, it required the customers to notify the bank if there was any discrepancy. If the customer failed to do so within the stipulated time, he would be precluded from challenging the correctness of the statement. The court was of the view that whether a particular risk of loss due to error, discrepancy, forgery or just plain unauthorized transaction was shifted onto the customer was a question of construction of the

relevant clause. If a bank sought to contractually allocate the burden and responsibility of the duty to inform of any forgery or unauthorized drawing or instruction on the customer, no less than *clear and unambiguous* reference would suffice. Sufficiently wide language ascertainable by a reasonable person to include the specific liability borne by the customer would also, in theory, suffice.



In this case, the court ruled that because the relevant conclusive evidence clauses expressly used the word “instruction”, it was clear that the Agreement did not intend for unauthorized transactions executed in the absence of any instructions from the customer to be included within the ambit of the clauses. The clauses would only protect the bank from liability against “discrepancies” and/or “omissions” in the execution of the customer’s instructions. The clear and unambiguous wordings of cll 3.1 and 3.2 excluded from the scope of its protection transactions carried out *without* any instructions from the customer. The court went on to hold that conclusive evidence clauses which purported to exclude liability for the fraud of bank’s employees would be contrary to public policy considerations and in the context of statutory law in Singapore, would run foul of the reasonableness test under s11 of the Unfair Contract Terms Act.

[2011] SGHC 149

in *Primus (M) Sdn Bhd v EON Capital Bhd*. The company convened an extraordinary general meeting (EGM) in relation to the proposed disposal of the entire assets and liabilities of the company to Hong Leong Bank Bhd and the proposed distribution of the cash proceeds arising from the proposed disposal to all entitled shareholders of the company. At the outset of the EGM, PNASB, a registered shareholder of the company, moved a motion to adjourn the EGM. The corporate representative of P, a registered shareholder of the

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COMPANY LAW

POWERS TO REFUSE TO PUT MOTION TO A VOTE

The extent of the powers vested in the chairman of a meeting was the bone of contention

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defendant, seconded the said motion. The chairman of the EGM refused to put the said motion for adjournment by contending that he had discretion whether or not to do so. As a result of the chairman's refusal, PNASB moved a motion to remove him as the chairman, which was again seconded by the corporate representative of P. Again, the chairman refused to put the said motion, for his removal, to a vote. The corporate representative of PNASB and P respectively then left the EGM. The EGM then proceeded as scheduled and the resolutions pursuant to the notice were passed.

On the issue whether the chairman of the EGM had contravened article 63 of the articles of association (AA) of the defendant by refusing to put the motion for adjournment to vote, it was held that the chairman had no discretion when confronted with a properly seconded motion for the adjournment of the meeting pursuant to article 63. Article 63 provided as follows:

"The Chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting except business which might lawfully have been transacted at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an annual general meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting."

The chairman's common law right to adjourn only availed the chairman if there was disorder at the meeting so as to render article 63 to be inoperable. In the circumstances, the court allowed P's application for a declaratory order that the chairman of the EGM ought to have put the

properly seconded motion for adjournment to the vote.

However, the court disagreed with P's contention on the motion for the removal of the chairman that the chairman was obliged to put the motion to vote. Unlike article 63, article 110 stipulated the manner in which a chairman of the meeting was elected and by article 62, it was this person elected according to article 110 who was entitled to be the chairman of the meeting. There was no specific provision in the AA for the removal of a chairman at the general meeting. Given the mechanism for the appointment of the chairman and the absence of any specific provision for the removal of the chairman at the general meeting, the court held that the chairman's refusal to put the motion to replace him as chairman was justified.

Did the chairman's refusal to comply with article 63 render the EGM a nullity and the resolutions passed thereat void? The court ruled that the validity of the business conducted following any irregularity in the conduct of the meeting by the chairman would depend on whether the proprietary rights of the members had been compromised so as to affect the integrity of the business conducted at the meeting. On the facts of the case, the rights of the members were not compromised as the representatives of P opted of their own volition to leave the EGM when the chairman refused to put their motions to the vote. Thus, the answer to the question was in the negative. P thus failed in its attempt to invalidate the business conducted at the EGM.

[2011] 9 MLJ 828

CONTRACT / BANKING LAW

LOAN SYNDICATION GONE WRONG

Loan syndication facilityⁱ was the focus in *Shencourt Sdn Bhd v Aseambankers Malaysia Bhd*ⁱⁱ. The plaintiff (P), a developer, had approached the 1st defendant (D) to arrange a refinancing of its loans for purposes of completing a development and construction project (the Project). In view of the large amount of monies involved, D arranged for syndicated lending with

the participation of other defendant banks (the co-lenders). D assumed the lead bank role of the loan facility which was made up of a revolving credit facility of RM4m and a bridging loan of RM58m which was formalized by the execution of a facility agreement dated 27.6.96 (the FA). Pursuant to the FA, D as agent was paid agency fees to manage and monitor the facilities for and on behalf of P. The loan facility was to be disbursed in three tranches. When P had completed about 80% of Phase 1 of the Project, it on its own volition cancelled the third tranche disbursement and approached D to restructure the loan facility so as to enable it to complete Phase 1 of the Project and to provide additional facility to complete the new

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Phase 2. After much exertion by P and in view of a Bank Negara directive, D and the co-lenders agreed to provide the additional facilities to P but P was required to place RM2m in fixed deposits, which it did. This restructuring was embodied in a supplementary agreement dated 17.12.99 (the SA).

On or about July 2000, when P requested D to drawdown RM359,096.33, D refused on the ground that the condition precedent for the release of the loan had not been met by P. D and the other co-lenders contended that the breach occurred when P failed to service the monthly interest payments due to them under the SA and also failed to maintain six months worth of interest in the Debt Service Reserve Account (DSRA) at all times. P contended that this and other subsequent acts of D and the co-lenders had caused work on the Project to cease causing it to suffer irreparable loss and damage. P thus claimed against D for various breaches of D's duty to act in good faith in the conduct of the facilities granted to P. In all these instances of breaches, it was P's case that it had borrowed money in good faith from a syndicate of banks managed by D, where P had relied on the reasonable belief that D would manage the loan in good faith with the highest possible standards of the banking industry but the tardiness of D had directly caused delay in the completion of the Project and denied P the opportunity to limit its exposure for liquidated and ascertainable damages (LAD) for late delivery of the individual properties for the Project to RM10m. P thus sought damages against D for breaches of contractual, tortious and professional duties. D and co-lenders in turn filed a suit against P for repayment of the amounts drawn by P under the facilities granted to it. Both suits were consolidated and heard together.

The trial judge found that though the transaction between P and D and co-lenders could be said to be arms-length, there were elements of 'undertaking', 'vulnerability', 'trust and confidence' and D offering business advice to P which acted upon it to its detriment, all of which were indicative of the existence of a fiduciary relationship. D and co-lenders were thus in a fiduciary relationship with P and they had not only not shown a heightened standard of care, but had manifested bad faith and unfairness in the exercise of their duties as lenders towards P.

It was found that D had misapplied the monies received from the end purchasers/financiers and that because of such misapplication, P was in default of the payment of

interest which prompted refusal in further drawdown. Such purported arrears in interest could have been easily settled by taking from DSRA account held by D and by uplifting P's fixed deposit of RM2m. Further, the alleged non-compliance of the DSRA could have easily been resolved by P, had D and co-lenders allowed the drawdown of the facilities. This was because the revenue generated from the Project as a result of the continuation of the construction would have been sufficient for the requisites of the DSRA to be complied with.

D and co-lenders had allowed the first drawdown of RM7.7m but refused the next drawdown. The trial judge found that D and co-lenders had wrongfully refused drawdown even though P had complied with the conditions precedent of the SA. It was also found that D's delay in issuing a redemption statement for the loan facility even though D was aware that P had secured fresh financing from a white knight and then finally granting it with onerous conditions imposed on it had directly caused delay in the completion of the Project and denied P the opportunity to limit its exposure for LAD.

From the evidence (D and co-lenders' over exposure in the broad property sector and D's proposal to P to allow them to participate in the development of the Project on a profit-sharing basis), D had ulterior motives in not providing financing to P. It was D and co-lenders' deliberate and malicious mismanagement of the facilities that had caused P's dire financial position. Interestingly, the trial judge drew inspiration from American common law to establish contractual duty of good faith and fair dealing in the sphere of lender's liability litigation. The unlawful acts by D and co-lenders was a breach of P's legitimate contractual expectation that the facilities would be administered and managed by D and co-lenders in a proper and bona fide manner.

As a result of D and co-lenders' breaches in contract, tort and as a banker to P, they were disentitled to recover any part of the loans. They were also ordered to pay damages in the sum of RM115.5m which included the end purchasers' LAD.

ⁱLoan syndication is an arrangement whereby two or more banks constituting a consortium of banks or financial institutions get together to contribute a percentage share towards the syndicated loan.
[2011] 6 MLJ 236

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CONTRACT LAW

AGREEMENT TO PAY UPON SUCCESSFUL IPO NOT A WAGERING CONTRACT

In *John Lo Thau Fah v FACB Resorts Berhad*, the defendant had offered the plaintiff 1 million FACB's shares in Karambunai Resorts Sdn Bhd (KRSB), its subsidiary at the total consideration of RM1. The offer was accepted and acknowledged by the plaintiff. The KRSB shares, being accepted, were to be made available to the plaintiff within 30 days from the date of submission of an initial public offer (IPO) exercise by DBS Merchant Bank of Singapore to the Stock Exchange of Singapore. Should the IPO exercise be unsuccessful or not implemented for whatsoever reason before the end of 2000, the defendant must pay the plaintiff a sum of S\$1,000,000 in cash, in lieu of the said KRSB shares. The defendant failed to make available to the plaintiff the 1 million shares it held in KRSB and the IPO exercise was not implemented before the end of 2000. It was the contention of the plaintiff that the offer was an inducement by the defendant to the plaintiff to join KRSB as its executive deputy chairman which was accepted by the plaintiff who had resigned from all posts he held with the Kuok Group of Companies and joined KRSB.

The Court of Appeal disagreed with the finding of the trial judge that the contract was a wagering contract. Guided by the definition of 'wagering contract' as 'one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake', the defendant in this case had neither pleaded nor adduced any evidence to the effect that the plaintiff and the defendant held two

COURT PROCEDURE

A CASE OF MULTIPLE DEMANDS IN DEMAND-GUARANTEE CLAIM

The case of *Public Bank Berhad v Tan Sri Datuk Yacob bin Hitam & Anor*¹ demonstrated the importance of issuing a letter of demand properly right at the outset against a guarantor in a situation where prior demand is a pre-requisite to a claim under a demand-guarantee against the guarantor. In the instant case, the facility was recalled by the plaintiff in 1985, vide a letter of demand in 1985.

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opposite views on the success/implementation of the IPO exercise (assuming for a moment that the success/implementation of the IPO exercise was a future uncertain event). On the contrary, it was in evidence that both parties had an interest in the IPO exercise: they both had desired the IPO exercise to be successfully implemented. The fact that the IPO exercise was not implemented could not be a sufficient basis for the defendant to contend that the IPO exercise was a future uncertain event. Further, apart from the S\$1,000,000 consideration payable to the plaintiff by the defendant in lieu of the KRSB shares, there was also the other real consideration in the making of the contract: the plaintiff's joining KRSB as its executive deputy chairman.



It was to be appreciated that the payment of S\$1,000,000 was not solely because of the non-implementation of the IPO exercise; it was meant to be in lieu of the 1 million FACB's KRSB shares which the plaintiff was entitled to have anyway under the contract, having earlier paid the defendant the agreed consideration of RM1. The sum had been carefully worked out by the parties and it co-related to their estimation of the value of the KRSB shares. The appeal was allowed and judgment was accordingly entered in favour of the plaintiff.

[2011] 6 AMR 595

However, this letter of demand was not taken as a basis for the legal position of the parties. Instead, the plaintiff issued another letter of demand dated 30.5.1986. A writ of summons was filed in July 1986 (the earlier suit) against several parties including the borrower, the chargor and four guarantors who included the 2nd defendant in the instant case (as the fifth defendant therein). The 2nd defendant (as the fifth defendant) pleaded non-receipt of the letter of demand dated 30.5.1986 and that this letter did not constitute a valid and proper demand against him, even if this letter could be deemed to have been served, since it claimed for a sum in excess of the guarantee limit. On the day of the trial on 4.5.1998, the plaintiff decided to withdraw the earlier suit against, among

others, the 2nd defendant (as the fifth defendant) with liberty to file afresh and the suit was accordingly struck out.

The plaintiff subsequently issued another letter of demand on 11.6.1998 against the 2nd defendant. This was followed by the commencement of the instant case on 26.8.1998. The 2nd defendant argued that limitation had set in on 30.5.1992, namely six years calculated from the date of the demand against him, which was 30.5.1986. The latter date was arguably a proper date to take for the purpose of calculating the limitation period, being 'the earliest date on which the creditor could have brought an action', on the strength of the Court of Appeal's decision in *Nik Chee Kok @ Nik Soo Kok v Public Bank*ⁱⁱ.

On the other hand, the plaintiff urged the court to apply the rule that there must be a proper and effective demand under a demand-guarantee before any cause of action could be said to accrue, on the strength of the line of authorities following the rule as laid down in *Bradford Old Bank Ltd v Sutcliffe*ⁱⁱⁱ. It was the case of the plaintiff that the 1986 demand was invalid and of no effect, since there was no proof of it being sent and further it claimed for a sum in excess of the guarantee limit. On that basis, the earlier suit was withdrawn and struck out with liberty. The plaintiff also argued that by the limitation defence, the 2nd defendant was approbating and reprobating and was using the limitation statute as an engine of fraud.

The learned Judge subjected both *Nik Chee Kok* and *Bradford Old Bank Ltd* to in depth analysis and came to the conclusion that there was no necessary or inherent conflict between the general principle in *Bradford Old Bank Ltd* line of authorities and that postulated in *Nik Chee Kok*. Both lines of authority laid emphasis on 'the time when the plaintiff could first have brought the action and proved sufficient facts to sustain it'. In the instant case, where there existed multiple demands and a previous suit against the guarantor which was withdrawn and struck out with liberty, the issue was when was the real demand made and correspondingly, when was the earliest time the creditor could have brought the action against the guarantor?

In his considered view, the real demand and the earliest time the plaintiff could have brought the action against the 2nd defendant was on 30.5.1986. Limitation had set in on 30.5.1992.

The instant case being filed in 1998, it was thus time-barred under s.6(1)(a) of the Limitation Act 1953.

In our opinion, the decision meant that the letter of demand dated 30.5.1986 was ruled as effective. The learned Judge held that it was posted. By virtue of the deeming provision in clause 8 of the guarantee, it was deemed to have been served upon posting. It was also no answer to argue that the letter of demand was invalid for demanding an amount in excess of the guarantee limit since such a mistake was not necessarily fatal. It was trite law that it was not necessary for the demand to state with precision the amount being claimed, since the function of the demand was essentially for the purpose of bringing home to the debtor that the creditor was demanding its money.

As for the issue of approbation and reprobation, it was necessary to ask whether the concerned party should be held bound to the position he had earlier taken. Estoppel by convention rested on the existence of some agreed statement of facts, the truth of which had been assumed by convention of the parties. These elements were absent on the facts of this case. Essentially, the 2nd defendant was taking a legal position in the earlier suit, which he was perfectly entitled to, and there was nothing unconscionable or unjust, if he changed his legal position now since there was no assumed understanding of the parties from his conduct that he would not. Therefore, it could not be said that the 2nd defendant was using the Limitation Act 1953 as an engine of fraud.

By way of *obiter dicta*, the learned Judge also held that a demand could be made even where the claim against the principal debtor was time barred. That was in response to the submission advanced by the 2nd defendant that where the claim against the principal debtor was barred by limitation, no claim could be instituted against a guarantor based on authorities from India and United States.

ⁱ[2011] 6 AMR 364

ⁱⁱ[2001] 2 AMR 1620

ⁱⁱⁱ[1918] 2 KB 833

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RECOMMENDATIONS IN BREACH OF SECURITY INDUSTRIES ACT

In *Wong Lai Yoke & Ors v Mayban Investment Management Sdn Bhd & Anor*ⁱ, IHMB underwent a restructuring exercise in 2001 which involved a reverse take-over by IUB and the issuance of renounceable rights issues of new IUB shares. Upon completion of the exercise, IUB assumed the listing status of IHMB and offered its shares for sale to the public. D2, a licensed stockbroker company, was a subscriber of the IUB shares for sale to its clients whereas D1, a company carrying on the business as an investment adviser, was a client of D2. D1 had obtained the IUB shares from D2 for placement to its own clients. The plaintiffs were share investors having an account each with D1 and were also the purchasers of the IUB shares. The recommendations made by D1's Chief Executive Officer, one Amin, to the plaintiffs before the purchase of the said shares were, *inter alia*, that (i) the offer price for IUB shares was RM1.65 per share and that this would be the 'reference price' quoted for IUB shares on the listing day; (ii) the information with respect to the price of IUB shares were reliable as D2 was in close touch with the management of IUB; (iii) it would be a sound investment as the plaintiffs would be able to recoup their initial capital investment and the balance for medium to long term capital growth or appreciation; and (iv) the management of IUB had indicated their intention to pay a minimum dividend of 3% by 2003. A copy of D2's publication entitled 'Equity Focus' and 'Company Update' which contained a disclaimer were each handed to the plaintiffs. Upon Amin's recommendation and assurance, the plaintiffs had purchased the IUB shares. The IUB shares were listed at RM1.49 and closed for the day at RM1.09. Since then, the value of the shares dropped drastically which had resulted in the plaintiffs selling their shares at a loss. The plaintiffs claimed against the defendants for the losses suffered.

Under s.40A of the Securities Industry Act 1983ⁱⁱ (SIA), an adviser shall not make a recommendation with respect to securities to a person who may reasonably be expected to rely

on the recommendation without having a reasonable basis for making the recommendation to the person. The plaintiffs' complaint was that D1 did not have a reasonable basis for making the recommendation as it had not given such consideration to, and conducted such investigation of, the IUB shares as may be reasonable in all the circumstances and that the recommendation was not based on such consideration and investigation in violation of s.40A(2)(b) and (c) of SIA.

The trial judge held that in making his recommendation to the plaintiffs, Amin had presented only the upsides of IUB but had ignored some crucial downsides which should have been conveyed to the plaintiffs. He had also failed to address three risk factors listed in the abridged prospectus. They were material and crucial factors which a prudent investor would have to seriously consider in deciding whether to make the purchase. An omission on the part of D1 on this point therefore constituted a failure to give such consideration to the recommendation as may be reasonable in all circumstances under s.40A(2)(b) of SIA. Further, the term 'reference price' was clear wherein a reasonably competent adviser would have known. Informing the plaintiffs that the 'reference price' meant the price at which the shares would be quoted on listing was clearly a serious misrepresentation. Failure on the part of Amin to have ascertained its exact meaning before proceeding to have recommended the purchase of the shares to the plaintiffs could have only meant that the adviser had failed to adequately give 'such consideration to, and conducted such investigation of the subject-matter of the recommendation as may be reasonable in all the circumstances'. Amin had also made certain representations, on declaration of dividends and profit forecasts, which were clearly misleading. In the circumstances, D1 was held liable under s.40A of SIA. The plaintiffs' claim on the tort of negligence however failed.

ⁱ[2011] 8 CLJ 718

ⁱⁱThis Act has been repealed by the Capital Markets and Services Act 2007.

DIGEST OF EMPLOYMENT CASES

1. LUCKY CLAIMANT

Unlike the usual cases of wrongful termination of employment decided by Industrial

Courts tribunal and emanated from representation lodged with the Director of Industrial Relations, the case of *Yasuyuki Kayashima v Dato' Seri F Konishi & Anor* is a claim by an employee in the High Court of Penang for a declaration that the termination of his employment by his employer was null and void and damages for wrongful breach of the employment agreement. The plaintiff (P) was employed by the second

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defendant (D2) as an executive director. P was found to have committed two acts of insubordination, namely, going to Songkla, Thailand to visit a competitor of D2 without the CEO(D1)'s permission and when there were specific instructions given to P to stay in the factory and attend to factory operations; and meeting with one Mr U, the president of a fishmeal company without informing the CEO of the said meeting.

On the first allegation, it was found that D2's minutes of meeting recorded that P was to act as advisor for all factory related matters (excluding local & export sale and finance department) and report to the acting GM. However, an e-mail from the P to Mr U for his help to develop their network for their future business appeared to be in tandem with P's anticipation of being terminated by D1. This created doubt as to the intent and purpose of P's visit to the competitor. In addition, there was no evidence to substantiate P's contention that his visit was related to factory matters. The court was therefore satisfied that P's visit to Thailand was not factory related matter, rather it was to negotiate business on his own. D had established the first act of insubordination in that P had failed to obtain permission to go to Thailand although there was specific instruction for him to stay in the factory to attend to the operations. On the second allegation, there was no evidence that D1 had instructed P to inform him of any private meeting with Mr U or any party who had dealings with D2 in advance and obtain his consent before P could meet the party. In the absence of such evidence, there could not be said to be any disobedience of D1's order or instruction to constitute insubordination. In the trial judge's view, employers could not impose on the employee the implied obligation that he ought to seek the employer's prior consent before meeting an acquaintance with whom the employer may have some dealings, when such meeting was a personal one that had no relations with the employer. D had therefore failed to prove this second act of insubordination.

However, the acts of insubordination were not cited in the alternative but conjunctively. Thus, the onus is on D to justify not one but both the said acts. If D deemed both acts as adequately constitute their ground to terminate P, it was not for the court to substitute its viewsⁱⁱ by saying that only one of the two would suffice to justify P's termination. Since D had failed to prove the second act of insubordination, the termination of P was unjustified and wrongful. To that extent, the trial judge remarked that if D had cited the two acts in the alternative or independent of each other, P

might not be as lucky to succeed in his claim as the court viewed any disobedience of a lawful order or instruction to be a serious indiscipline which might attract a severe sanction such as termination of the contract of service. Nonetheless, P's remedy only lay in damages for wrongful breach of the employment agreement but not the relief of declaration that the dismissal was null and voidⁱⁱⁱ. Such declaration was in effect a reinstatement which P was not entitled to. Such relief was only available in Industrial Court pursuant to the Industrial Relations Act 1967 (IRA)^{iv}, but not in ordinary civil courts. The trial judge ordered nominal damages in the sum of RM30,000.

2. REQUEST FOR RESIGNATION

In *VP Nathan & Partners v Subramaniam s/o Govindan Nair & Anor*^v, A was a firm of solicitors whilst R were formerly employed as legal assistants. One of the firm's main clients, Kurnia informed the firm that it did not want R to handle their files. The firm's managing partner then had a meeting with R on the subject. During the meeting, R asked about their prospects in the firm in view of Kurnia's instructions. The managing partner told them their future increments, bonuses and prospects of getting partnership in the firm would be adversely affected. R said if that was the case, they would want to leave the firm. The managing partner informed them that they need not leave immediately as they would have to give three months' notice of resignation. R agreed with his suggestion that they could leave on 31.7.1997. R then submitted to the firm their letters dated 31.7.1997 and captioned 'Request for Resignation' with immediate effect. The managing partner replied by confirming that R had 'agreed to resign by 31.7.1997'. However, R made a claim for reinstatement under s.20 of IRA. The Industrial Court ruled in favour of R that the dismissal was without just cause or excuse. The High Court refused to interfere with what it regarded as a finding of facts by the Industrial Court. On A's appeal to the Court of Appeal, the court held that the impugned dismissal award of the Industrial Court revolved around a question of law which, unlike a finding of facts, was amenable to a judicial review. R's letters which expressly stated their request for resignation left no doubt that the employees themselves had requested to resign. They were not forced to resign, unlike the facts in *Stanley Ng Peng Hon v AAF Pte Ltd*^{vi}. They were on the material dates advocates and solicitors of some 7 years standing and were senior members of the Bar who had expressed their request for resignation explicitly. In law, R had voluntarily

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resigned and were not dismissed. The dismissal award was thus quashed with costs.

3. NEGOTIATED TERMINATION CLAUSE

Ordinarily, 'termination *simpliciter*' ie. a termination by contractual notice and for no other reason and making payment pursuant to the contract would still be regarded by Industrial Court as a dismissal without just cause or excuse^{vii}. This general principle was however not applied in the High Court case of *Chin Chun Yean v Mahkamah Perusahaan Malaysia & Anor*^{viii} given the peculiar facts therein. The applicant had a five-year fixed term employment contract with the company with a monthly salary of RM50,000. The contract had a termination of service clause (Cl. 8) that provided for a compensation scheme in meticulous detail according to the varying stages of termination in the event the applicant's employment was terminated before the expiry of the fixed term. The company subsequently underwent an integration process pursuant to a merger exercise with Celcom Mobile Sdn Bhd as a result of which the company re-evaluated the applicant's remuneration package to ensure conformity to like package provided to its employees. The company then issued a letter to the applicant setting out proposals to review the terms and conditions of his employment which were not agreed by the applicant. The applicant put on record his discussion with the Group CEO that he was advised that arrangements would be made for the termination of his employment if he did not accept the proposals. The company subsequently issued a letter terminating the applicant's employment with compensation for the balance 38.5 months (at 70% of such balance), RM4 million, prorated contractual bonus and annual leave balance. The Industrial Court upheld the termination as an exercise of a contractual right mutually agreed upon as per Cl. 8. The High Court affirmed this decision. It held that the early (premature) termination was contemplated at the time the parties entered into the contract. Cl. 8 was referred to as a 'safety clause' by the applicant. It was not a termination clause *simpliciter*. It was a negotiated

LAND LAW

STATE EXCO VS DIRECTOR OF SURVEY & MAPPING IN LAND BOUNDARY DISPUTE

The issue in *Associated Pan Malaysia Cement Sdn Bhd v Westwood Development Sdn Bhd*ⁱ boils down to which approved plan ought to

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termination clause with a financial compensation worked on an agreed formulae. The termination was therefore lawful and in accordance with the contract.

4. REPORTING WRONGDOING OF FELLOW EMPLOYEE

All the three claimants in *Sahli Zaini & Ors v Cotra Enterprise Sendirian Berhad*^x had been employed by the company as an Assistant Store Keeper, a Store Clerk and a Supervisor respectively. Their employment was terminated by the company for their failure to report their colleague's wrongdoing of removing stock without following the proper procedures. It was not disputed that at all material times, the claimants had been fully aware of the fraudulent practices. The Industrial Court ruled for the company. The company was justified in dismissing the claimants. On the question of whether the claimants could rely on the fact that they had not disclosed the wrongdoings as they had been afraid of their colleague, it was answered in the negative as they had not been obliged to follow the unlawful order or instructions given by their immediate superior at the material time. An employee was under an obligation to report the matter since he had heard about the malpractices from the district sales agents.

ⁱ[2011] 9 MLJ 369

ⁱⁱ*Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153

ⁱⁱⁱ*Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361

^{iv}*Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295

^v[2011] 5 MLJ 765

^{vi}[1979] 1 MLJ 57

^{vii}*Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, *Goon Kwee Phoy v J&P Coats (M) Sdn Bhd* [1981] 1 LNS 30

^{viii}[2011] 7 CLJ 840

^{ix}[2011] 4 ILR 145

prevail in a contest between two parties over boundary of a land. The plaintiff contended that the new southern boundary of the plaintiff's quarry land was as per the plaintiff's demarcation survey plan approved by the Director of Survey and Mapping on 28.6.2005 (CB1 p3). On the other hand, the defendant urged the court to accept the plan submitted by the defendant for the purpose of a land application which had been approved by the Majlis Mesyuarat Kerajaan Selangor (MMKN, the State Exco) on 13.10.2009 (CB2 p1). There was a

difference between the boundary in CB1 p3 and CB2 p1.

The court ruled for the plaintiff. In the light of s.396 of the National Land Code 1965 particularly subsection (2) which stated that any plan approved by the Director of Survey and mapping under paragraph (e) of sub-section (1) "shall be conclusive evidence" of the boundaries, boundary marks and area of the land to which it referred and prima facie evidence of the lot number thereof, the court was constrained to find that notwithstanding the fact that MMKN might have approved the defendant's land application, the said approval would not have the effect of

changing the boundaries of the quarry land as had been approved by the Director of Survey and Mapping. In the circumstances, any development by the defendant that encroached into the southern boundary of the plaintiff's demarcation survey plan as approved by the Director of Survey and mapping would constitute an encroachment into the boundary of the plaintiff's quarry land.

[2011] 6 AMR 316

LAND LAW

ENCOURAGEMENT TO BUILD

In *TG Choong Yuan Sdn Bhd v Yeap Geok Kee Sdn Bhd*, D was the registered owner of a land. Upon encouragement by D, P had constructed 13 shop lots and a toilet (the said buildings) on the said land at its own costs and expenses. The construction of the said buildings was completed prior to the approval of the local authority. P had asserted that the directors of D were aware of this and had not objected to or stopped P from proceeding with the construction. D had been collecting the monthly ground rent for the said buildings from P. Meanwhile, the local authority disapproved the plans submitted for the construction of the said buildings. Subsequently, the directors of D refused to sign those plans for re-submission to the local authority for approval. The local authority had afterwards charged D for erecting the said buildings without approval, to which D had pleaded guilty. Consequently, a 'mandatory order' to demolish the buildings was issued by the magistrate's court. The proceeding in the magistrate's court was in the absence of P and thus, P contended that it was denied the right of being heard and the said mandatory order was invalid and of no effect in law.

The High Court of Penang held that it was clear that P had been induced to expend monies to build the said buildings under the expectation that P could use and/or let out the premises until such time that they could jointly develop the said land. The equitable principle of proprietary estoppel would operate to protect P and to do justice to the case. Further, a lease had indeed existed between P and D over that portion of the said land where the said buildings were erected. Both parties were bound by such a lease for the period as stipulated in s.221(3)(b) of the National

Land Code 1965, i.e. 30 years. In fact, the fact that D had offered to rent that portion of the said land to P to build upon payment of ground rental and P had accepted by building and paying the agreed rental established a concluded contract. Since D did not stipulate the duration of the tenancy, pursuant to the said s.221(3)(b), it had created a lease of 30 years when it involved part of the alienated land.



As to the mandatory order, legally, the said buildings were illegal structures and the order would seem to be in line with s.70(15) of the Street, Drainage and Building Act 1974. However, in the absence of reconsideration of the building plans by the local authority as a result of the refusal or failure of D to sign those plans, it was inequitable to allow this order to stand to defeat the doctrine of proprietary estoppel that was in favour of P. In the circumstances, it was only just and equitable that this order ought to be suspended until the resubmission and final consideration of the building plans. The said order could only be suspended pending final consideration by the local authority but the court could not compel the local authority to grant approval of the same set of plans which was the sole administrative power of the said local authority.

[2011] 5 AMR 663

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TORT (DEFAMATION)

LIBEL IN REPORT ON CREDIT STANDING

In *Hj Salleh Hj Janan v Financial Information Services Sdn Bhd*, P was adjudged a bankrupt in 1981 and 1991 and discharged as a bankrupt in 1995 and 1997. P claimed that D had published defamatory enquiry reports about him to two financial institutions on his credit and financial standing. The enquiry reports contained the information on his adjudication as a bankrupt but omitted the information on his discharge. That led to the impression that he was still a bankrupt as at the date the enquiry reports were published on 13.3.2000. As a result, his loan applications were rejected.

The law was clear that it was defamatory to allege someone a bankrupt when that person was not one. Thus, the contents of the enquiry reports were defamatory of P. The defence of justification was not accepted. Although it was true that P was adjudged a bankrupt in 1981 and 1991, P on the publication date of the enquiry reports was no longer a bankrupt. D had failed to point out his discharge as a bankrupt in the enquiry reports. By reason of the material omission that P was discharged as a bankrupt, the reports gave a reasonable person reading them the impression that the bankruptcies were still in force. Such an impression was highly probable by the fact that the

reports had a section on "Discharge" which meant that any particulars of a discharge of bankruptcy must be furnished. However, that section was left blank. Thus, any normal person reading the reports would reasonably assume that P was still a bankrupt on the publication date.

D had advanced defence of qualified privilege, contending that to share information about the creditworthiness of a person was privilege. The Court of Appeal held that such defence was not available to D. D was a credit agency which acted for reward. The information given to a subscriber by such an agency was not privilege. In any event, D had not acted *bona fide*. P was discharged twice as a bankrupt and since 1997 was no longer one. D did not take the simple but necessary effort of finding out from the office of the Director General of Insolvency the current and actual status of P. Instead it allowed its reports to remain incomplete and contain half-truths. Thus, there was an element of dishonesty and malice in the reports. P succeeded in his claim for damages for libel.

ⁱ [2011] 7 CLJ 287

TORT (NEGLIGENCE)

SECURITY GUARD NEGLIGENTLY DISCHARGING FIREARM

D1 was a security guard at a shopping complex, namely Carrefour, Wangsa maju whilst D2 was the security company which employed D1. In 1998, a robbery took place whilst P was shopping at the complex. At that point of time, D1 gave a chase after the robbery suspect and had discharged his firearm. The bullet had missed the target and instead hit P in the leg and foot. As a result, P had suffered severe injuries from the gunshot wound.

The above were the facts in *Chow Kim Ying v Abdul Hamid bin Mat Yasin & Anor*. Was there any element of negligence on the part of D1 and D2? The learned Judge rejected the notion that because the security guard allegedly discharged his firearm in self-defence towards the

suspect who was 15 feet away, he did not owe any duty to P. A gun is a lethal weapon, calling for exercise of extra care, skill and vigilance. Where a gun is discharged in a crowded public area such as a supermarket, that extra care, skill and vigilance will be in even greater need. There had to be an appreciation that the protection of human safety should properly and proportionately be balanced against the need to protect property and commerce.

All the three ingredients --- whether the damage suffered by P was reasonably foreseeable; whether there was a relationship of proximity or neighbourhood between P and D and whether it was fair, just and reasonable that D should owe P a duty of care --- were present so as to conclude there was liability for negligence on the part of D to P. D 1 and D2 were accordingly held liable to P.

ⁱ [2011] 5 AMR 544

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TORT (NEGLIGENCE)

HIGHWAY AUTHORITY'S DUTY OF CARE

The extent of duty owed by highway authority to road users was in focus in the UK Court of Appeal decision in *Yetkin v Mahmood and another*¹. In that case, the claimant was crossing a six-lane dual carriageway by a designated pedestrian crossing controlled by traffic lights which allowed a pedestrian who had operated the lights sufficient time to cross three lanes to a central reservation. Once there the pedestrian had to operate another set of lights to allow safe passage across the remaining three lanes of the carriageway. The claimant crossed to the central reservation where the highway authority had planted shrubs and plants. She stepped out into traffic and was hit by a car and suffered injury. She brought proceedings against the highway authority, alleging that it had breached its common law duty to her as a road user by planting and/or failing to maintain properly the shrubbery on the central reservation which had obscured her view of incoming traffic.

The trial judge found that the claimant had stepped out into the road before the traffic lights had changed in her favour, that the shrubs had seriously interfered with the claimant's view on the crossing and played a significant part in the events leading to the accident. He nevertheless dismissed the claim on the ground that the highway authority did not owe a duty of care to pedestrians like the claimant.

On appeal, it was held that the common law recognized a duty on any person, including a highway authority, not to create a hazard on the highway which would affect the safety of road

users. When the highway authority planted shrubs which grew so large as to obscure the claimant's view from the crossing, it negligently exercised its powers in breach of its duty to the claimant. It was not necessary to consider whether the danger created by the bushes amounted to a trap or enticement as in a common law action, where it was alleged that the highway authority had created a danger, it did not have to be shown that the danger amounted to an enticement or that the claimant had been trapped into danger. Nevertheless, since the claimant had decided to cross the carriageway without waiting for the lights to change in her favour, she had accepted a high degree of responsibility to ensure it was safe to do so. The judge's assessment of the contributory negligence at 75% was appropriate. Therefore, the highway authority was liable to compensate the claimant for 25% of the damage caused in the accident.



[2011] QB 827

TORT (DEFAMATION AND NEGLIGENCE)

CTOS LIABLE FOR PUBLISHING OUTDATED INFORMATION

In *Shafie Abdul Rahman v CTOS Sdn Bhd*¹, the plaintiff filed a suit against the defendant for defamation and negligence. Between March till January 2005, the defendant, a company which compiled data and sold credit information, published and printed words concerning the plaintiff from its database. A bankruptcy notice was stated to have been issued at the instance of RHB Bank Berhad against the plaintiff. As a result of such publication to Affin Bank Berhad and Bumiputra Commerce Bank Berhad, the

defendant's application for loan to finance purchase of a unit of service apartment was rejected. The plaintiff approached the defendant in April 2005 to show that his case with RHB Bank Berhad had been settled in December 2003 but the defendant refused to update its database on the ground that the defendant did not deal with individuals.

The court held that the published words in its ordinary and natural meaning showed that from 1.7.2002 till May 2005 the bankruptcy notice in the plaintiff's name still existed, that he was unable to pay his debts, that he was almost bankrupt, that his financial position was not strong, that he was not a person to be trusted when dealing with him and that he was not creditworthy to be given a loan. Such imputation was defamatory. The defendant relied on the 'header' which read:-

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The court held that the said ‘header’ was between the defendant and third parties namely the defendant’s clients including the banks which paid the defendant for the information. It was to

protect the defendant from any liability for the information provided to its client. It did not protect the defendant from liability to the plaintiff.

The court also ruled that the defendant was negligent in omitting to update its data efficiently and publishing outdated information concerning the plaintiff. Economic loss suffered by the plaintiff (in having his loan application rejected by the two banks) was reasonably foreseeable and recoverable. The court awarded damages in the sum of RM200,000 to the plaintiff.

[2011] 9 CLJ 439

APPEAL UPDATE

1. RESCISSION OF SPA OF PROPERTY FOR INNOCENT MISREPRESENTATION

In issue Q3 of 2010 (Jul-Sep 2010), we featured the decision of the Court of Appeal in *Balakrishnan Devaraj & Anor v Admiral Cove Development Sdn Bhd*. That was a case where the appellate court held that there was misrepresentation on the part of the defendant that the property came with direct access to the sandy beach which induced the plaintiffs to purchase the property. That representation turned out to be false due to the presence of a wall and rocks, stone and boulders all along the front of sea side outside the property. On final appeal to the Federal Court, the defendant succeeded to overturn the decision. In *Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor*ⁱⁱ, the apex court ruled that the representation was an innocent representation since it was never pleaded that the false representation was made fraudulently or negligently. Generally, a representee who had been induced by an innocent representation might sue for rescission and consequent restitution if the contract was still executory and if parties could be restored to their original position. Such remedy was however not available so far as dealings in land were concerned where the conveyance had been properly executed by both vendor and purchaser. The sale and purchase agreement in this case could not be set aside for innocent misrepresentation after it had been completed by

conveyance and payment of the purchase price. There could be no rescission of an executed contract for innocent misrepresentation unless it rendered the subject of the sale different from what was contracted for. The property here did not differ so completely in substance from what the plaintiffs intended to acquire. Further, the conduct of the plaintiffs after accepting the keys to the property and the long lapse of time (of more than four years) without complaint showed an election to affirm the agreement.

2. RIGHT TO IMPOSE INTEREST VIS-À-VIS GUARANTOR BEYOND DATE OF RECEIVING ORDER

In issue Q4 of 2010 (Oct-Dec 2010), we featured, under the heading “Statutory Clamp of Interest Post Date of Bankruptcy or Winding Up Order”, the High Court decision in *In United Overseas Bank (Malaysia) Berhad v Mok Hue Huan & Anor*ⁱⁱⁱ and we expressed our reservation on the correctness of that decision. Our views have now been proven to be correct by the Court of Appeal overturning that decision in *United Overseas Bank (Malaysia) Berhad v Andrew Lee Siew Ling*^{iv}. To recap, the bank had granted a loan to the borrower which was secured by a charge over two pieces of land and a guarantee and indemnity executed by the 1st defendant and the respondent. The borrower defaulted and was wound up vide a separate action. The bank then commenced the suit against the respondent whilst the 1st defendant was adjudged bankrupt in Singapore. The bank had also obtained the order for sale of the charged lands subsequent to the winding-up order. The bank applied for summary

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judgment against the respondent. The respondent contested the application with regard to the amount due to the bank.

The High Court ruled that s 8(2A) of the Bankruptcy Act 1967 (the Act) acted as a 'statutory clamp' on secured creditors prohibiting them from claiming any further interest on the debt after the winding-up of a company if the secured creditors failed to realize their securities within a period of six months after the company had been wound-up. S 24 of the Contracts Act 1950 was invoked to hold that the provisions in the letter of guarantee and indemnity which made guarantors liable for interest after the period prescribed by s 8(2A) of the Act were void and unenforceable as it defeated the purpose and intent of s 8(2A) of the Act.

The Court of Appeal disagreed with the High Court decision. The letter of guarantee and indemnity contained several clauses which clearly showed the intention of both guarantors to undertake the liability for the repayment of the loan and interest thereon not merely as sureties, but also as principal debtors as well as indemnifiers, notwithstanding the incapacity of the borrower. It was clear from the terms that the contract entered into between the bank and the respondent was a separate and independent contract and that contract was a contract of indemnity. As such, s 81 of the Contracts Act 1950 (that the liability of a surety is co-extensive with that of the principal debtor) did not apply to enable the respondent to take advantage of the provisions of s 8(2A) of the Act to limit his liability in the same manner as the borrower would be able to, namely to limit his liability to pay interest on the outstanding amount of the loan to the date the borrower was wound up and not beyond that. It was not the intention of the Parliament in enacting s 8(2A) of the Act to affect the interest of the secured creditor vis-à-vis any guarantor or indemnifier. Thus, the issue of 'contracting out' of the statutory prohibition of s 8(2A) of the Act by the terms of the letter of guarantee and indemnity and the issue of illegality of those terms did not arise. In other words, s 8(2A) of the Act merely limits the secured creditor's right to continue to impose interest on the amount outstanding to him vis-à-vis the bankrupt or wound-up debtor and the property of that debtor. It does not affect his right vis-à-vis any guarantor or indemnifier.

3. UPHOLDING DECISION ON MARKET RIGGING

The ground-breaking decision of the Singapore High Court in *Monetary Authority of*

Singapore v Tan Chong Koay & Anor^v as featured in issue Q1 of 2011 (Jan-Mar 2011) was recently affirmed on appeal by the pinnacle court of Singapore in *Tan Chong Koay & Anor v Monetary Authority of Singapore*^v. In brief, the appellate court held the pattern of Pheim Malaysia's purchases during the Material Period showed the appellants(defendants)' intention to set the price of UET shares for year-end 2004. The appellants' primary purpose was to bolster the year-end valuation of certain funds holding UET shares managed by Pheim Group and thereby meet the performance benchmark for those funds. The court went further to hold that the fact that the appellants accepted genuine "sell" offers made by independent investors did not mean that their purchases reflected genuine demand done for legitimate investment purposes. The prices at which Pheim Malaysia purchased UET shares during the Material period were chosen for the extraneous purpose of 'setting or maintaining the market price' so as to increase the NAV of the funds. Applying the majority reasoning in *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd*^{vii} a decision of New South Wales Court of Appeal on identical provision in the Australian legislation, the purchases were intended to create a false or misleading appearance with respect to the price of UET shares during the Material Period in violation of the second limb of s 197(1)(b) of the Securities and Futures Act. The High Court's decision on the quantum of civil penalty imposed on the appellants was upheld in view of the aggravating factors which included the deliberate nature of the breach, the benefits experienced by the Pheim Group as a result of the breach and the significant earnings of the Pheim Group.

4. IMPOSITION OF A DUTY TO EXERCISE SKILL AND CARE IN CONTRACT AND TORT

In issue Q4 of 2010 (Oct-Dec 2010), we featured the Singapore High Court decision of *Go Dante Yap v Bank of Austria Creditanstalt AG*^{viii} under the heading "When is a private bank acting as a trusted advisor of its client and when it is not?". The said decision had since been affirmed on appeal by the Singapore Court of Appeal in *Go Dante Yap v Bank of Austria Creditanstalt AG*^{ix}. The main focus of the appeal was however on the Advisory Claim. The appellate court did not entirely agree with the reasoning of the High Court judge on the Advisory Claim. They opined that the court ought not to merely consider duty to give investment advice in contract or tort. It was also necessary to enquire whether there was a contractual duty of skill and care on the part of the respondent in discharging the appellant's

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instructions as well as whether there was a duty of care in the tort of negligence applying the test in *Spandek Engineering (S) Pte v Defence Science & Technology Agency*^x. The appellate court held that the respondent did owe to the appellant under the Account-Opening Documents an implied contractual duty of *skill and care* in carrying out the appellant's instructions. The respondent also owed the appellant a duty of care in the tort of negligence because there was a sufficient degree of legal proximity between the parties to give rise to a *prima facie* duty of care, and there were no policy considerations militating against the imposition of a duty of care in tort. The respondent however did not commit any breach of its duty of care in contract or in tort. The standard of care imposed on the respondent, given the prevailing circumstances, the appellant's commercial experience and the contractual framework, was not a high one. The respondent had discharged such duty by virtue of the monthly meetings between the respondent's VP and the appellant where the former consistently recommended suitable investments to the latter, advised the latter of the pros and cons of those investments, as well as reviewed the performance of investments already entered into on his behalf.

several indications to an objective observer that they had not intended to be contractually bound until a formal sale and purchase agreement was negotiated and executed. Any objective reading of the relevant documents, such as the Information Memorandum, the letters that Newport sent to the Liquidator concerning the offer price of the Shares, and the Acceptance Letter, would have led to the inference that the parties had intended to negotiate the terms and conditions of a sale and purchase agreement under which Newport's obligation to pay the purchase price would be fulfilled. Interestingly, the court remarked that even if the essential terms of a contract had been agreed upon and thus needed no further negotiation regarding those terms, parties who entered into an agreement expressly "subject to contract" might be taken to have intended for legal relations to be deferred until the execution of a formal contract, unless there was strong and exceptional evidence to the contrary. The circumstances of the case did not constitute a strong and exceptional context sufficient to override the plain meaning of the "subject to contract" provisions contained in the relevant documents. There was thus no binding contract between the parties and Newport was under no obligation to complete the purchase of the Shares.

5. SUBJECT TO CONTRACT

The featured decision of *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd*^{xi} in issue Q3 of 2010 (Jul-Sep 2010) was recently affirmed on appeal by the Singapore Court of Appeal in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal*^{xii}. However, the appellate court differed in terms of the reasoning. It was decided that there was no binding contract between Norwest and Newport. The meaning of the phrase "subject to contract" was given effect. The documentary evidence of the communication between the parties contained

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- ⁱ[2010] 7 CLJ 152
 - ⁱⁱ[2011] 5 MLJ 309
 - ⁱⁱⁱ[2010] 9 CLJ 764
 - ^{iv}[2011] 6 AMR 51
 - ^v[2011] 1 SLR 348
 - ^{vi}[2011] 4 SLR 348
 - ^{vii}(1998) 28 ACSR 58
 - ^{viii}[2010] 4 SLR 916
 - ^{ix}[2011] 4 SLR 559
 - ^x[2007] 4 SLR (R) 100
 - ^{xi}[2010] 3 SLR 956
 - ^{xii}[2011] 4 SLR 617

COMPANY LAW

GENUINE CORPORATE RESTRUCTURING THAT INFRINGED S.132E

The High Court adopted a very strict literal approach in interpreting the amended s.132E of the Companies Act 1965 (the Act) in *Foo Fatt Chuen v Axis Identity Group International Sdn Bhd & 7 Ors*^j. In that case, P was at all material times a director and substantial shareholder of the D1 and D2 companies. D2 was the ultimate holding company for all the companies within the original Axis group of companies. By way of corporate restructuring, D1 became the new holding company for the entire Axis group of companies. Briefly, the manner the restructuring was carried out was aptly summarized by the learned Judge and reproduced herein.

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As at 5.1.2010, the shareholding structure of D2 was as follows:

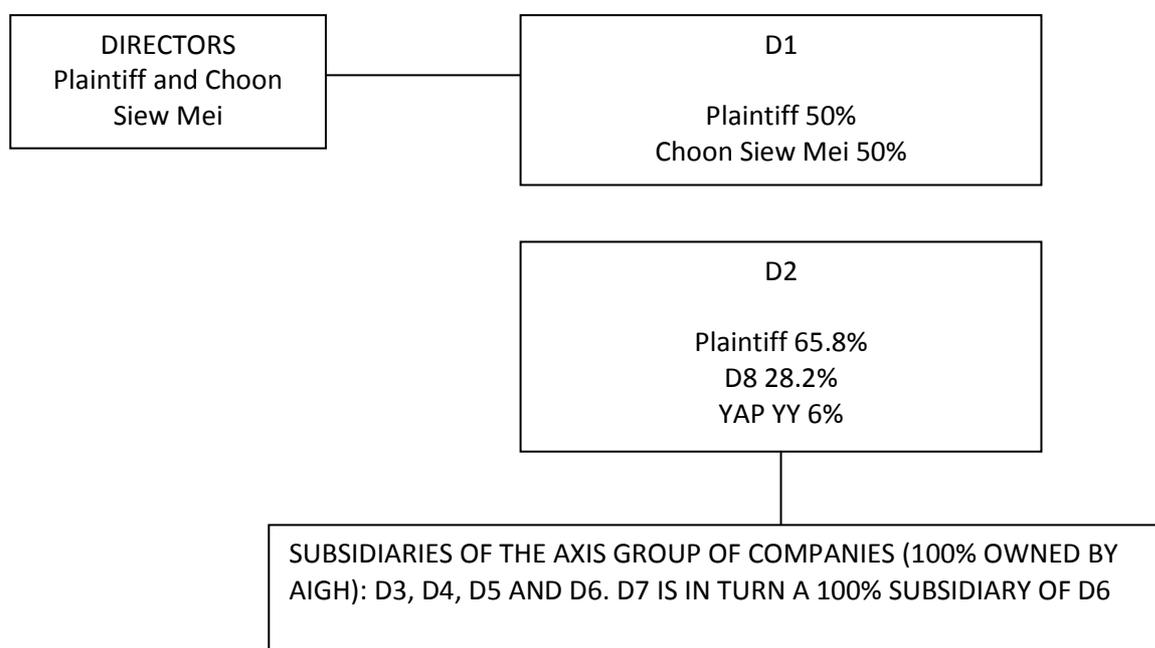
| <u>Shareholders</u> | <u>Percentage</u> |
|---------------------|-------------------|
| P | 65.8% |
| Lai Siew Hong | 28.2% |
| Yap Yan Yoke | 6% |

The shareholding structure of D1 which was a separate company out of the original Axis group of companies was as follows:

| <u>Shareholders</u> | <u>Percentage</u> |
|---------------------------|-------------------|
| P | 50% |
| Choon Siew Mei (P's wife) | 50% |

The structure of both companies can be depicted in graphical form as follows:

Diagram 1- Structure prior to corporate restructuring



On 6.1.2010, the corporate restructuring was effectively carried under the advice of the company secretary of D1 by way of “sidestep mechanism”. Firstly, on 5.1.2010, P’s direct shareholding (65.8%) in D2 was transferred to two persons, namely Koh Siew Boon and Kan Yik Ho, with each being transferred with 32.9% of the shareholding in D2. Then, on 6.1.2010, Koh and Kan respectively transferred their shares in D2 to D1. The result was D1 became the holding company of D2 and thus, ultimate holding company of the Axis group of companies. The first step transfer was supported by a board resolution of D2. The transfer to Kan and Koh and subsequently the transfer from Kan and Koh to D1 were done without any consideration passing from Koh and Kan to P or from D1 to Koh and Kan. The “step mechanism” and the resultant corporate structure can be illustrated as follows:

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Diagram 2 – The “step mechanism”

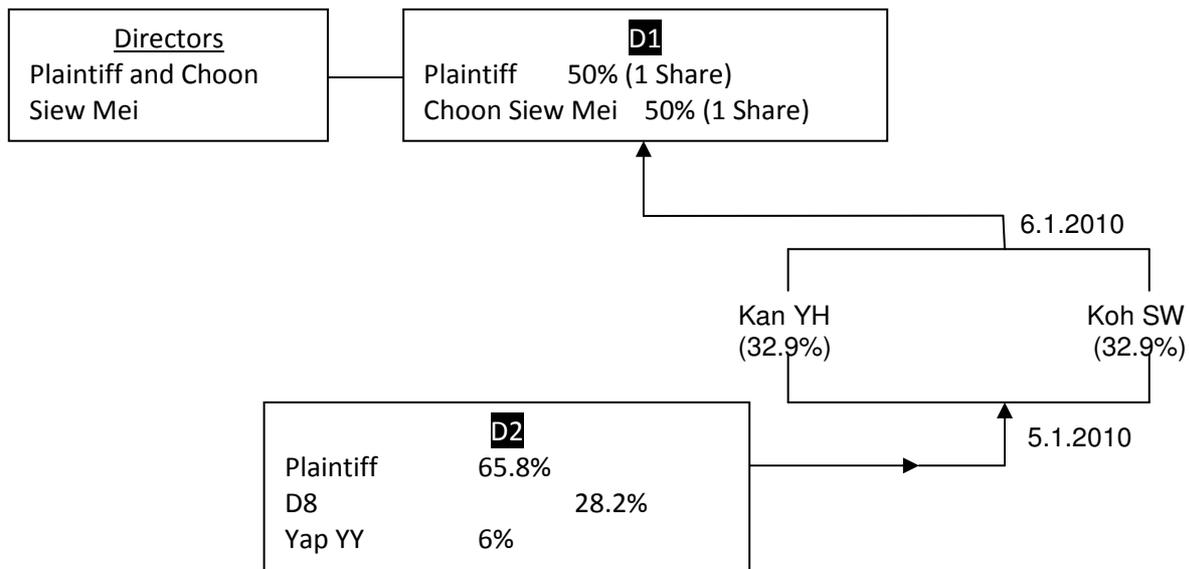
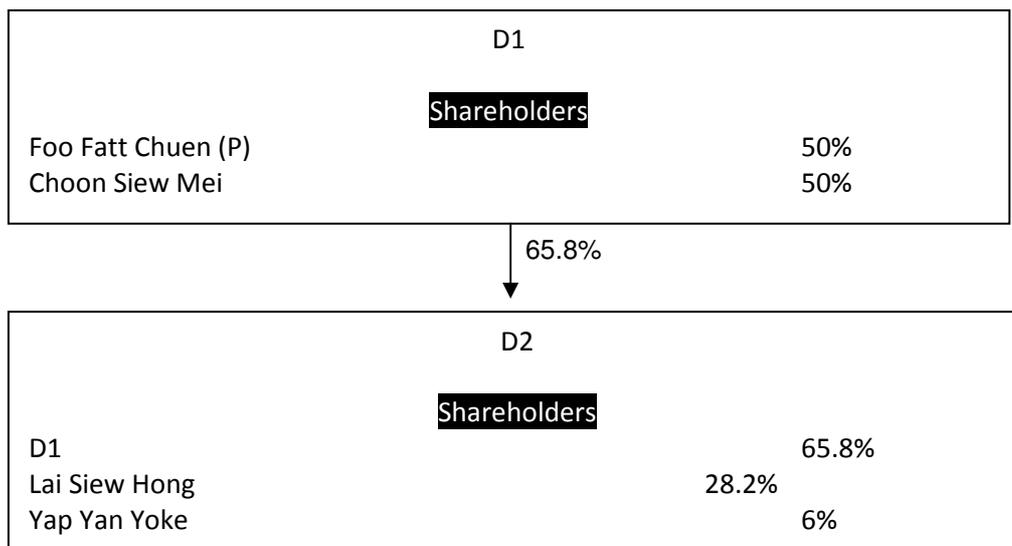


Diagram 3- The resultant structure

Axis Group as at 6 January 2010
(Foo Fatt Chuen's transfer of his 65.8% shareholding in AIGH to AIGI)

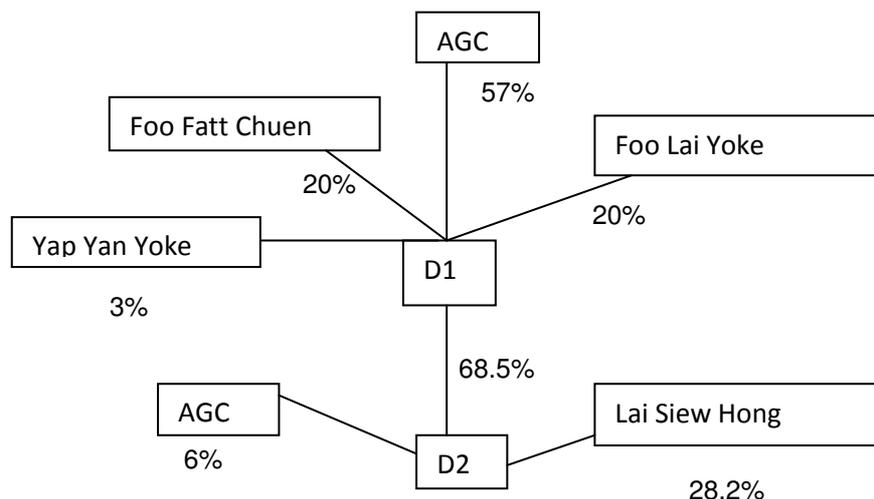


Subsequently, there was share swap and a further issue of ordinary shares by D1 to another company named AGC, resulting in AGC holding 57% of the shares in D1 and another shareholder named Foo Lai Yoke holding 20%. P ended up holding 20% of the shares in D1, whereas at the date of the second sidestep mechanism, he held 100% through his own shareholding and through his wife's shareholding as his nominee. These changes resulted in P having a minority shareholding in the Axis group of companies as illustrated below:

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Diagram 4- The resultant broad corporate structure



Upon parties' agreement, the issue of whether there was any breach of s.132E of the Act and consequently, the validity of the transfer of shares was heard first. In this respect, s.132E reads:

132E. (1) *Substantial Property Transaction in Company*

Subject to subsection (1) and section 132F, the company shall not carry into effect any arrangement or transaction where a director or a substantial shareholder of the company or its holding company, or a person connected with such a director or substantial shareholder –

- (a) Acquired or is to acquire shares or non-cash assets of the requisite value, from the company; or
- (b) Disposes of or is to dispose of shares or non-cash assets of the requisite value, to the company.

(2) *Void Transaction*

An arrangement or transaction which is carried into effect in contravention of subsection (1) shall be void, unless there is prior approval of the arrangement or transaction –

- (a) By a resolution of the company at a general meeting; or

By a resolution of the holding company at a general meeting, if the arrangement or transaction is in favour of a director or substantial shareholder of its holding company or person connected with such director or substantial shareholder.

(3) *Company Resolution*

The resolution of the company or its holding company at the general meeting of the company or its holding company to consider the arrangement or transaction shall be subject to the director, substantial shareholder or person connected with such director or substantial shareholder, as the case may be, abstaining from voting on the resolution whether or not to approve the arrangement or transaction.

The facts of the instant case were considered against the seven ingredients under s.132E as restated by the learned Judge in his judgment. The relevant company was D1, being the company in which P's shares were transferred through the sidestep mechanism. There was no issue on 'the requisite value' since the value of the shares far exceeded RM250,000 or even 10% of the company's asset value. On evidence, Koh and Kan were admittedly nominees for P, each holding the shares on trust for P to effectuate the transfer to D1. Next, the problem of a valid and proper 'prior approval of the shareholders' of D1. P and his wife could

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not have voted on a resolution of the company since the Act required them to abstain from voting on the resolution. In other words, given the shareholding structure of the company (D1) where P and his wife were the only two shareholders, it would be impossible to satisfy the requirement of a disinterested shareholders' resolution to approve the transaction! The learned Judge recognized that he was dealing with a genuine corporate restructuring agreed to by P and the company and factually, there was no element of any commercial gain to P or detriment to D1 or self-dealing in the sense that it might benefit director or substantial shareholder to the detriment of the company. Whilst the defendants had urged the learned Judge to interpret s.132E purposively so that s.132E would not be applicable to a genuine corporate restructuring, the learned Judge opined that the literal meaning was 'too strong' for him to ignore. The wordings of s.132E as it presently stood were clear. The exceptions provided were exhaustive and thus, full effect must be given to it. It would be improper for the court to add another exception that was not sanctioned by the clear wordings of the said provision. In the circumstances, the court allowed P's claim in relation to the issue of validity under s.132E of the Act, namely a declaration that the purported transfers of shares in D2 by Kan and Koh to D1 on 6.1.2010 were null and void in breach of s.132E of the Act.

[2011] 6 MLJ 218

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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