

THE UPDATE



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Abbreviations

Jur	:	Jurisdiction
BRN	:	Brunei Darussalam
HKG	:	Hong Kong
MY	:	Malaysia
SG	:	Singapore
UK	:	United Kingdom
ZA	:	South Africa

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ADMINISTRATIVE LAW

COMPELLING THE POLICE TO INVESTIGATE

A police report has been lodged about a wrongful act. The police however refused to investigate on the ground that it was a civil dispute. What is the avenue open to the complainant? This scenario presents itself for determination in *Gu Kien Lee v Ketua Polis Daerah Kota Kinabalu & Anor*ⁱ. A 31-foot yacht belonging to the applicant had been detained by DT since April 2010 based on the allegation that the applicant owed to DT an amount of RM52,000, which was disputed by the applicant. The applicant had lodged two police reports but had not received any news from the police regarding the yacht. The applicant filed an application to seek for an order of *mandamus*ⁱⁱ to direct the respondents to detain, secure and return the yacht to her.

The High Court did not grant the order. The judge held the view that if the police had the reasons to believe that a criminal offence had been committed in respect of the yacht, the procedure was for the police to refer the matter to the Magistrate for the appropriate order under s.413 of the Criminal Procedure Code (CPC).

However, the judge ordered the respondents to carry out a full and proper

AGENCY / PROPERTY LAW

LIABLE TO PAY TWO AGENTS FOR A SALE

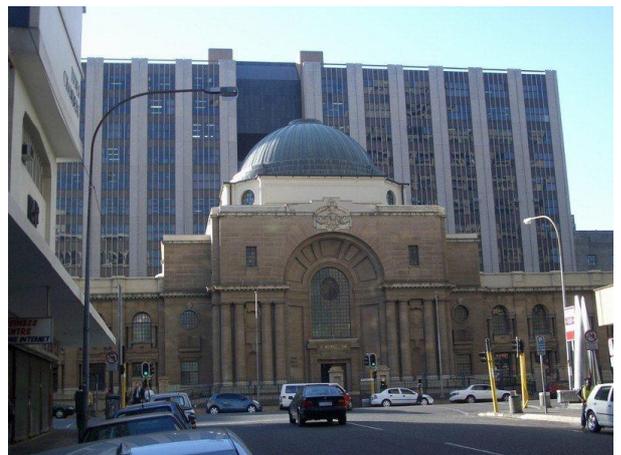
W, an estate agent, took H to view a house owned by the As. H and her husband liked it, but the price was too high. Shortly afterwards, H by chance ran into another estate agent, D. H described the house to D. About 5 weeks passed. Then R another estate agent persuaded the As to lower the price which they did. Mr A did inform D of the new price. D then arranged a visit for H to view the house. D also drafted an offer to purchase and agreed to a reduced commission which effectively lowered the price further. H eventually concluded the sale with the As. The As paid commission to D. The issue was whether W was entitled to commission and that depended on which agent was effective cause (*causa causans*) of the sale that eventuated.

investigation without further delay and to report the result to the Public Prosecutor pursuant to s.120(1) of CPC. In this respect, there had been no investigation carried out at all, although the two police reports showed a possible offence of criminal misappropriation of property. The judge held that it was the duty of the police to act where a crime had been committed, irrespective whether a civil remedy was available to the victim or otherwise. Where the detention of property involved a criminal element, the fact that the victim could pursue a civil suit to recover the property did not disentitle him to the remedy under s.44(1) of the Specific Relief Act 1950, *ie.* for an order to require any specific act to be done by any person holding a public office. Thus, although it was not a fit and proper case to order the respondents to seize and return the yacht to the applicant, the respondents were ordered to carry out a full investigation and to report the result to the Public Prosecutor.

ⁱ[2012] 2 CLJ 317

ⁱⁱ A command issued by court asking an authority to perform a public duty imposed upon it by law.

On the above facts, the High Court in Durban, South Africa in *Wakefields Real Estate (Pty) Ltd v Attree and Others*ⁱ ruled that D was the effective cause of the sale. The initial introduction by W had been outweighed by intervening cumulative factors. However, on appeal to the Supreme Court of Appeal, the decision was overturned. It was held that but for W's introduction of the house to H, H would not have been aware of the existence of the house.



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It was W's 'wisdom and business acumen' that made her take H to the house. D on the other hand learned about H's interest in the house quite fortuitously. She did nothing about it until phoned by Mr A. The effort D put in amounted to no more than making a phone call to H, arranging for H to see the house again, drawing up the offer to purchase and accepting a reduced commission. Had W not shown H the house first, the house would not have been sold to H. But for that introduction D would not have known that H was interested in the house. Thus, despite D's intervention, W's introduction was the effective cause of the sale. W was entitled to commission to be paid by the As.

It was unfortunate, as the court remarked, that the As found themselves liable to pay more than one agent. This is exactly the situation described in an earlier caseⁱ that a 'principal may owe commission to both agents and that he has only himself to blame for his predicament; for he should protect himself against that risk.'

ⁱ2011 (6) SA 557

ⁱⁱ*Webranchek v LK Jacobs & Co, Ltd* 1948 (4) SA 671 (A)

rent payments together with other charges, interest and costs.

The trial judge dismissed P's claim. He held that the ownership of the mill equipment had passed to R1. For a lessor to lease the mill equipment, it must be seised with ownership but that evidence was lacking. The full sum of RM2.3m was disbursed to R1 on the same date the said lease agreement was executed and not to the seller. Invoice was issued to R1, not P. The monies that were released by P on 20.3.1997 could not qualify as 'reimbursement' as the payment to the seller was only effected on 25.3.1997. Therefore, the trial judge concluded that the said lease agreement was a loan on the security of the mill equipment, that it was a sham to cloak and disguise the money lending transaction and that it was a bill of sale which by reason of it not being registered under s.4 of the Bills of Sale Act 1950 made the transaction void. On appeal, the Court of Appeal appeared to have focused on the fact that R1 had purchased the mill equipment by the time the LO was issued and no amount of 'deeming' would change that fact. The said lease agreement was simply held to be a loan agreement.

The Federal Court made references to several sources for an understanding of equipment leasing. It then expressed difficulty, if not impossibility, to affirm the judgments of both the lower courts which had misappreciated the whole matter from a different perspective. The apex court categorically stated that neither statute nor public policy was against an equipment lease. It noted that the LO clearly stated that R1 (lessee) shall be the agent for placing the order for the mill equipment and any payments to the seller shall be deemed to have been paid on behalf of P (lessor). With regards to ownership, R1 had in the said

BANKING / CONTRACT LAW

A BONA FIDE EQUIPMENT LEASE TRANSACTION

In a strong-worded judgment, the Federal Court in *Ambank (M) Berhad v KT Steel Sdn Bhd & 3 Ors*^j over-turned both the High Court and Court of Appeal decisions and upheld the legality of an equipment leasing agreement. In the case, the 1st respondent (R1) had purchased a used piece of machinery (the mill equipment) from a seller based in Sheffield via a 'contract of sale' dated 1.9.1996. R1 then applied for a leasing loan on 27.9.1996 in the sum of RM2.5m from the appellant (P) for a proposed period of 60 months to finance the purchase of the mill equipment. By a letter of offer dated 12.10.1996 (LO), P approved the application for the leasing loan which was referred to as "equipment leasing facility". It was stated in the LO that P would purchase the equipment and thereafter lease/hire it to R1; that R1 (lessee) shall be the agent for P for the purpose of placing the order for the equipment and the invoice was to be sent direct to P for payment; and that if the lessee makes payments to the dealer/manufacturee such payments shall be deemed to have been made on behalf of P and reimbursement shall be made to the lessee for the purpose of the lease. An "equipment lease agreement" was entered into between P and R1 on 20.3.1997. The second to fourth respondents executed a "letter of guarantee" to guarantee all sums owing by R1 under the said lease agreement. R1 paid only 21 monthly rent payments and thereafter defaulted. P filed the suit against the respondents to claim the outstanding

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lease agreement clearly acknowledged that the ownership and title to the mill equipment shall remain vested in P and that R1 shall have no right or interest therein otherwise than as bailee thereof. The transaction fit into a genuine lease arrangement. It was preposterous to label it as 'a sham to cloak and disguise the money lending transaction'. As to the Bills of Sale Act 1950, the trial judge did not explain how the said lease agreement could be said to be a bill of sale. A bill of sale "in its ordinary meaning is a document which is given where the legal property in goods passes to the person who lends money on them, but possession does not pass"ⁱⁱ. R1 never sold the mill equipment to P, was not the owner of the mill equipment and had acknowledged that P was the

owner. The court could not see how the said lease agreement could be regarded as a bill of sale.

The upshot was that the said lease agreement was a *bona fide* transaction and was not prohibited by any Act of Parliament nor void by reason of some principle of law.

ⁱ [2012] 2 AMR 381, [2012] 3 MLJ 23

ⁱⁱ *Mills v Charlesworth* (1890) 25 QBD 421

BANKRUPTCY LAW

MISCALCULATION OF PROVABLE DEBT

The computation of provable debt and interest after a person has been adjudged bankrupt was the subject matter in *Omega Securities Sdn Bhd v Gabriel Ng Seong Kit*ⁱ. The various relevant dates and events are set out below:

5.6.1998	Date of default
14.3.2001	Judgment in default obtained against the judgment debtor (JD)
1.5.2001	Part payment by JD
27.5.2008	Adjudication and receiving orders (AORO) granted
11.12.2009	Proof of debt (POD) filed by judgment creditor (JC) for RM100,445.24

The DG of Insolvency (DGI) refused to admit the POD for the full sum but only to the extent of RM34,449.89 which comprised of the interest element for the period from the date of default until the date the judgment was entered. The JC claimed interest at 12.8% p.a. (the rate as stipulated in the judgment) on the judgment sum for the period from the date of default to the date of part payment and thereafter on the balance from 1.5.2001 to the date of AORO. The DGI allowed claim for interest at 6% p.a. on the balance from

2.5.2001 to 4.6.2004 (which was six years from the date of default).

Under s.6(3) of the Limitation Act 1953, an action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after 6 years from the date on which the interest became due. The High Court held that the bankruptcy proceedings were founded on the judgment in default and the POD filed as a result of the grant of the AORO was sequentially another step in the bankruptcy proceedings premised on the judgment in default. The filing of the POD was thus an 'action upon a judgment' within the said s.6(3).

On the period applicable for the calculation of interest, the court reiterated the merger principle that when interest has accrued at an earlier date (in our case, 5.6.1998) and a judgment was obtained thereafter (in our case, 14.3.2001), the interest was merged into the judgment sum and therefore, the date the interest became due was the date of judgment and not the earlier date. On the facts of the case, interest was allowed for the period from 6.6.1998 (the day after default of payment by JD) as per the judgment to 14.3.2001 (date of judgment) to merge into the judgment debt and consequently the date the interest became due was the date of the judgment (14.3.2001). The DGI was thus wrong to calculate 6 years from the date of default of payment. The DGI was also wrong to exclude interest from the date of default till 1.5.2001. The correct computation was interest at the rate of 12.8% p.a. on the judgment sum from 6.6.1998 (the day after the default of payment) till 14.3.2001 (the date of judgment), interest at the rate of 12.8% from 15.3.2001 till 30.4.2001 (the day before the part payment) and thereafter, on the balance at the rate of 12.8% from 1.5.2001 till

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14.3.2007 (the six year limit) except the period from 1.10.2003 to 14.3.2007 (the post-amendment period) in which the interest rate was 6% p.a.

On the rate of interest chargeable, the DGI only allowed 6% p.a. based on s.43(6) of the Bankruptcy Act 1967 which provides that: "Where a debt has been proved upon a debtor's estate and such debt includes interest...such interest shall for the purposes of dividend be calculated at a rate not exceeding 6% p.a. *up to the date the receiving order is granted by the court.*" The words in italics were as a result of the amendment which came into force on 1.10.2003. Prior to that, the words were "*, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full.*" The court agreed that the amendment to the rate of interest chargeable under s.43(6) was an amendment to a substantive law and did not take effect retrospectively but prospectively. The right to

claim interest at a specified rate pursuant to the judgment was a substantive right and the amendment ought not to be applied retrospectively. Thus, for the post-amendment period, ie. from 1.10.2003 till the six year limit, the rate of interest chargeable was 6% p.a..

The JC's application to challenge the DGI's computation and decision to reject the POD was allowed with costs.

[2012] 3 AMR 2012

had not been obtained pursuant to s 132C of the Actⁱⁱ since the JDA entailed a disposal of the land to PH.

The JDA expressly provided for, *inter alia*:
(i) PH to entirely fund the development of the land;
(ii) BJ to get about RM425m from the gross development value and a minimum guaranteed RM265m from the development; (iii) BJ to retain the legal and beneficial ownership of the land; and
(iv) Ho Hup to endorse the JDA and undertake not to interfere with its performance. Ho Hup's contention was that the terms of the JDA read with the Power of Attorney was tantamount to a disposal of the land by BJ within the meaning of s 132C of the Act.

The Court of Appeal ruled that the JDA contemplated a development of the land by PH and a division of the profits derived therefore between PH as developer and BJ as the land owner. The JDA was a joint venture between PH and BJ and was not a sale of the land. A joint venture where the developer was only entitled to sale proceeds did not create an interest in land. There was no 'transfer of or change in beneficial ownership' to the land to amount to a disposal as envisaged under s 132C of the Act. As to Ho Hup's argument that BJ had ceded *de facto* control over the land to PH, the court held that the mere fact that PH had control over the development of the land was in itself insufficient to be considered as a 'disposal' of the land within s 132C of the Act. As the JDA did not amount to a disposal, Ho Hup was not entitled to sue pursuant to the said s 132C.

COMPANY LAW

HO HUP TUSSLING OVER SUBSIDIARY'S LAND

S 132C of the Companies Act 1965 (the Act) was recently in the limelight in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals*ⁱ. There were, in the words of the Court of Appeal, multifarious issues but we shall just focus on the two, the right plaintiff rule and the meaning of 'disposal' under the provision.

Let's begin with an abridged version of the facts. Ho Hup Construction Bhd (Ho Hup) was a public-listed company which owned 70% of the issued and paid-up capital of Bukit Jalil Development Sdn Bhd (BJ). BJ owned a 60-acre piece of land. On the eve of an EGM called by certain parties to remove the bulk of Ho Hup's then existing directors, a board meeting of BJ resolved that BJ entered into a joint development agreement (JDA) with Pioneer Haven Sdn Bhd (PH) to jointly develop the land. That proposal was supported by a resolution taken at a Board meeting of Ho Hup later in the day. The JDA was executed on the same day. Ho Hup at the EGM removed those of its directors who had supported the JDA whilst those who had voted for it in BJ were removed at its shareholders' meeting. The new Board of Ho Hup filed a claim to have the JDA avoided on the grounds, among others, that prior approval of the shareholders of both companies

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The court went further to rule that Ho Hup was also not entitled to sue in its own right pursuant to 132C because Ho Hup did not come within the purview of that section. Even assuming the JDA was invalid, any loss or injury would have been suffered by the contracting party, *ie.* BJ. Ho Hup as a shareholder under 'the proper plaintiff rule' has no right to sue for such loss suffered by BJ. Even if Ho Hup took the position that entering into the JDA had diminished the market value of its shares, this could not overcome the 'proper plaintiff' rule. Such a loss was merely a reflection of the loss suffered by the company and the shareholder did not suffer any personal lossⁱⁱⁱ. Ho Hup had also not shown that the defendants had done actionable wrong to it and it had suffered loss as a result which would have entitled Ho Hup to have a personal right of action^{iv}.

There were also the issues of Ho Hup instituting the action as a derivative action, the 'wrongdoer control' and the directors' fiduciary duties and duty of care at common law and their 'business judgment'. The appellate court was not in favour of Ho Hup's case on all counts. The JDA

was valid and enforceable and the defendant directors and PH bore no accessory liability in respect of the alleged breaches of duty.

ⁱ[2012] 3 MLJ 616, [2012] 3 AMR 297

ⁱⁱ S 132C provides that the directors shall not carry into effect any arrangement or transaction for the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

ⁱⁱⁱ *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204

^{iv} *Johnson v Gore Wood and Co* [2001] 1 All ER 481

first shares sale to Dato' See was however aborted in June 2007. The liquidators again put up the KJCFB shares for sale by open public tender in August 2008.

Several offers were received and upon request to submit improved offers, Can-One submitted offer at RM1.65 per share whilst Dato' See through his private vehicle, Gold Pomelo Sdn Bhd (Gold Pomelo) offered RM1.48 per share. A few meetings were held between the liquidators and Dato' See and his son with the latter claiming that the liquidators were soliciting gratification from Dato' See to sell the shares to Gold Pomelo, which allegation was denied by the former. The liquidators finally accepted Can-One's offer being the highest to purchase the KJCF shares.

COMPANY LAW / LIQUIDATION

SALE OF KIAN JOO TO CAN-ONE UPHELD

The well known prolonged tussle among the See family, the founders of Kian Joo can factory, took a different twist when both factions, one headed by Dato' See Teow Chuan (Dato' See) and the other headed by Dato' Anthony See Teow Guan (Dato' Anthony), combined force to seek to set aside the sale of 32.7% stake in Kian Joo Can Factory Berhad (KJCFB) to Can-One International Sdn Bhd (Can-One). This stake was owned by Kian Joo Holdings Sdn Bhd (the company) in which the faction headed by Dato' See held 52% whilst the faction headed by Dato' Anthony held 48%¹. On the petition of Dato' Anthony's faction, the company was ordered to be wound up by the High Court in January 1996 and liquidators were appointed. Two methods of distributing the assets of the company, namely the sale of the shares that the company owned in KJCFB (KJCFB shares) or a pro-rated distribution of the KJCFB shares among the 27 contributories of the company. Dato' See's faction voted in favour of the sale whilst Dato' Anthony's faction voted for pro-rated distribution. Legal proceedings ensued which culminated in 2007 in the majority's favour. The



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The contributories filed suits to challenge the sale, which ended up at the Federal Court. The application by Dato' See's faction for leave to proceed with legal proceedings against the liquidators for alleged misconduct in a tender of the assets and eventual award to Can-One (the Leave Application) was dismissed. The liquidators were directed to proceed with and complete the Can-One agreement. All the orders of the Court of Appeal were set aside, the High Court orders were restored and the decision of the pinnacle court is reported in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors*ⁱⁱ.

The Leave Application was dismissed on the ground that no pecuniary loss (a pre-requisite to obtain leave to sue a liquidator for breach of duty) had been shown by the acceptance of the Can-One offer which was RM34.5m higher than Gold Pomelo's offer. More significantly, it was filed by the wrong party. If the sale of the company's shares was improperly conducted, the person who suffered the loss was the company which was the proper plaintiff. There was no cause of action vested in the majority contributories.

On merits, one of the grounds put forward to mount the challenge was that the acceptance of the Can-One's offer was tainted with fraud and corrupt practice and was thus illegal and void. The apex court held that no bribe was paid. It was observed that the complaint of the illegal gratification was only made after the announcement that Can-One was awarded the sale. In any event, the solicitation to Gold Pomelo had no nexus on the acceptance of the highest bid by Can-One and caused no loss to the company. It could have no effect on the validity of the Can-One agreement.

The contributories' complaint of conflict of interest on the part of the liquidators, who were partners of KPMG (a firm of accountants), for accepting an offer from Can-One, an audit client of KPMG, was without merit. The guiding principle was that the liquidator must be independent and be seen to be independent. KPMG only acted on the audit of Can-One which did not involve advising in the opposite interest on the sale by the liquidators. There was no connection between the sale and the audit. There was no actual conflict. As to apparent conflict, the limited connection

between the liquidators who were partners in KPMG's KL branch and the auditors in KPMG's Penang branch did not give rise to a reasonable apprehension of lack of impartiality on the liquidator's part. Commercial reality was that large accounting practices would give rise to associations with persons whom insolvency practitioners would sell assets to. The existence of an audit relationship by itself should not disqualify liquidators or their audit clients.

As to whether KPMG (in which the liquidators were partners) owed a fiduciary duty to the contributories, the High Court was held to be correct in ruling that the liquidators' appointment was personal under the Companies Act 1965 (the Act). Whilst a liquidator was entitled to appoint servants and/or agentsⁱⁱⁱ to assist in the liquidation and they were frequently the employees of the firm, the Court of Appeal had erred in finding that KPMG was a vehicle used by the liquidators so as to be liable for the alleged unlawful acts of the liquidators.

The Court of Appeal had decided that the liquidators as officers of the court were expected to abide by the same standards as judges and as such, they could not hold meetings in connection with a bid outside their offices. The Federal Court over-turned this decision and ruled that the liquidators in exercising a power of sale did not exercise judicial or quasi-judicial functions. Instead, the liquidators were required to make business decisions on the benefits and burdens of the sale and to obtain the highest possible price. It would be to ignore commercial reality to impose upon a liquidator the standards of a judge when selling assets.

In short, no *prima facie* case had been made out by the majority contributories to support the Leave Application which was dismissed with costs. Direction given by the High Court under s.237(3) of the Act to the liquidators to complete the sale to Can-One was restored.

ⁱ Page 12, The *EDGE*, issue January 18 to January 24 2012

ⁱⁱ [2012] 2 MLJ 713, [2012] 2 CLJ 501

ⁱⁱⁱ S.236(2)(i) of Companies Act 1965

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CONTRACT LAW

ASSESSING DAMAGES IN A CASE OF NON-CONSTRUCTION OF HOUSES UNDER JV

The assessment of damages payable upon a successful claim for breach of a development agreement by which the defendant was to develop shophouses on the land owned by the plaintiff was in issue in the decision of the Court of Appeal of Brunei Darulssalam in *Yapp Pow Khin & Anor v Hjh Jamilah bt Udin*ⁱ. Under the agreement, the plaintiff landowner would be entitled to 14 of the 40 shophouses to be developed on the land by the defendant and the defendant to the rest for a term of 60 years. The defendant was required to begin construction of the shophouses within 3 months of receiving all necessary approvals and plans and the buildings were to be completed within 2 years. However, by the time the completion date arrived, development work had not even commenced. The plaintiff sued the defendant for damages for repudiation of the agreement.

The court reiterated the ruling principle behind an award of damages at common law for breach of contract, *ie.* where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performedⁱⁱ. The court went on to hold that the *prima facie* measure of damages for the defendant's repudiation was the value by which the plaintiff's interest in her land would have been enhanced by her completed shophouses at the time she accepted the defendant's repudiation, less the value of what she would have parted with, in money or kind, under the agreement by that date.

The starting point for determining what would place the plaintiff in the same situation as if the contract had been performed was the valuation of the completed shophouses at the date of the plaintiff's acceptance of the defendant's repudiation (the Repudiation Date). By the Repudiation Date, the time for completion had passed, hence the plaintiff would then have had 14 completed shophouses capable of sale and valuation if the contract had been performed. The court rejected the defendant's contention that the starting point was the cost of constructing the

plaintiff's shophouses on the Repudiation Date (the Cost of Completion). The Cost of Completion method was relevant in two scenarios: where the defendant had partly performed the work but, before the time for completion, had ceased work and the plaintiff had then sued for damages; or where the defendant had repudiated the agreement at a time (say, one year) earlier than the scheduled completion date and the plaintiff had then accepted that repudiation. In both scenarios, the Cost of Completion was relevant because at the time the cause of action arose, the plaintiff would not have been entitled to completed shophouses, capable of sale, but to have the construction of them completed. Thus, the starting point to ascertain what was needed to place the plaintiff in the same position as if the contract had been performed was the cost of completing it.

Back to the present case, evidence tendered valued the plaintiff's completed shophouses at \$4,045,900. This value was to be reduced by the value of the land which the plaintiff would have contributed to that completion, to arrive at the amount by which the value of her land had been enhanced by the construction on it of her shophouses (the Enhanced Value of 14 shophouses). As to the part of the plaintiff's land which would have been occupied by the defendant's 26 shophouses if the agreement was to be performed, this land would have suffered a reduction in value because of a 60 year lease. At the same time, it would have been enhanced by the prospect that, at the end of 60 years, the land would return to her enhanced by the construction of 26 shophouses.

The former valuation was \$1.522m; the latter was \$1.356m. On these valuations, if the contract had been performed, the plaintiff would have retained her land reduced in value by \$166,000. This was the value of the consideration which the plaintiff would have passed under the agreement and was to be subtracted from the Enhanced Value of 14 shophouses to arrive at the damages payable to the plaintiff.

ⁱ [2012] 2 MLJ 234

ⁱⁱ *Robinson v Harmon* [1848] 1 Exch 850, 855; 154 ER 363, 365.

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RESTORING PREMISES TO ORIGINAL STATE AND CONDITION

In *Hong Leong Bank Berhad & Anor v MPC Properties Sdn Bhd*, the plaintiffs were the tenants of several units at various floors of Wisma MPL which was owned by the defendant. Dispute arose upon determination of the tenancies as to how the premises were to be restored, with the plaintiffs contending that they were to be restored to bare units while the defendant arguing that they were to be reinstated to a typical office with fittings and partitions.

The provisions of the tenancy agreements required the tenant 'to peaceably surrender and yield up to the landlord the whole of the demised premises and to restore the demised premises to its original state and condition as at the commencement of the tenancy with all the fixtures and fittings in good state of repair and tenantable and with all keys complete'. The letters of offer required the tenant 'to remove all of the tenant's fixtures, fittings and partitions and restore the premises to its original condition prior to the renovation being made by the tenant (including the fixtures, fittings and partitions taken over by the tenant from the previous tenant, if any)'. The court noted that there was no mention of reinstatement to a typical office layout plan. The tenancy agreements, letters of offer, correspondence between the parties, contemporaneous actions

and reactions of the parties showed that the plaintiffs were only obliged to restore the premises into bare units.

The plaintiffs succeeded in proving on a balance of probabilities that the layout plans attached to the letters of offer or the tenancy agreements were of bare units and were not of a typical office layout plan. Further, no inventory was taken before each tenancy to determine the condition of the premises at the commencement of the tenancies. Thus, on a proper construction of the tenancy agreements and letters of offer, the plaintiffs were only required to reinstate the premises into bare units.

The plaintiffs' contractors were prevented from entering the premises to proceed with the reinstatement to bare units. That made it impossible for the plaintiffs to complete their work by the date of expiry of the tenancies. As such, the defendant was not entitled to double rental for the plaintiffs' continued occupation after expiry of the tenancies.

[2012] 1 AMCR 625

work. Four months later, D sent an "Audit Confirmation" to P, acknowledging that there was a sum owing from D to P. That figure was reduced to \$323k. About 2 months later, P sued D for \$323k.

On an application for summary judgment, P relied upon the Audit Confirmation as an effective admission of P's claim. The law is that an audit confirmation, while not conclusive, constitutes strong *prima facie* evidence of a debtⁱⁱ. D sought to distinguish two other earlier authoritiesⁱⁱⁱ on the same principle on the basis that in both cases, it was decided that the audit confirmation amounted to a clear admission only after the trial and not during an application for summary judgment. The judge disagreed and stated that although in an application for summary judgment – unlike a trial - it was not appropriate for the court to delve into a precise evaluation of the merits of the rival contentions or to assess the relative probabilities, it was nevertheless obliged to look at the totality of the evidence to examine whether the defence raised by the defendant was credible. In the instant case, there was nothing to

COURT PROCEDURE / EVIDENCE

AUDIT CONFIRMATION AS ADMISSION OF DEBT

What is the value of an 'audit confirmation'? Does it amount to an admission of a certain sum if it were to be sent by the debtor to its creditor which acknowledges that the certain sum is owing from the debtor to the creditor? That question was one of the questions that fell to be decided in the Singapore case of *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)*ⁱ. P was involved in the supply of labour while D was a Korean company involved in building and construction work. The parties entered into an agreement for P to supply labour for a project undertaken by D. D failed to pay on some of the invoices issued by P. P removed their workers from the construction site and stopped

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argue against the strong *prima facie* evidence of the Audit Confirmation being an admission of a debt.

The obiter by the court can well be adopted in our Malaysian courts. It is this. The court has to be wary of defendants who seek to evade summary liability by raising spurious allegations, assertions and afterthoughts as a convenient smoke screens, which they neatly label as *bona fide* defences raising triable issues. Such defendants not only waste precious court resources, but more importantly, could potentially cause serious hardship and irreparable loss to plaintiffs, for some of whom time is of the essence. Courts should therefore take a robust approach in summary proceedings in order to resolve disputes at this stage^{iv}. This is particularly so in commercial

CREDIT & SECURITY / CONTRACT LAW

AN UNFRIENDLY FRIENDLY LOAN

In *Leong Chooi Peng v Dato' Tee Yam*ⁱ, P had lent a sum of RM2 million as a friendly loan to D. A promissory note was signed on the day the loan was given whereby D agreed to repay the amount at the expiry of six month with interest of RM1. P contended that the next day, D volunteered to pay interest and gave P a cheque of RM40,000 together with five monthly payments of RM40,000 each on different dates.

On the other hand, D contended that the payment of RM40,000 was a repayment towards the principal loan amount. D argued that he would not have agreed to an amount of interest which worked out to 2% per month. All in all, D had paid RM1.39 million to P. The issue was thus whether the said amount was towards the reduction of the loan of RM2 million or the sum of RM240,000 was interest with the balance RM1.15 million applied towards the principal.

The trial judge held that P was trying to improve her position as a lender by claiming that it was D himself who had volunteered the interest payment. Even if there was such a payment as interest, it was imposed unilaterally on D and not freely volunteered by D, more so when the promissory note was silent on such monthly interest payment. Further, the fact that the parties

and construction cases where cash flow is the lifeblood.

ⁱ[2012] 2 SLR 601

ⁱⁱ*Camillo Tank SS Co Ltd v Alexandria Engineering Works* (1923) 38 TLR 134

ⁱⁱⁱ*Gobind Lalwani v Basco Enterprises Pte Ltd* [1999] 3 SLR 354, *Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 4 SLR 548

^{iv}See also *MP-Bilt Pte Ltd v Oey Widarto* [1999] 3 SLR 592

had described the loan as friendly loan, it would mean on the authority of the Court of Appeal case of *Tan Aik Teck v Tang Soon Chye*ⁱⁱ that no interest was chargeable. Thus, the amount of RM240,000 was regarded by the court as payment towards reduction of the principal loan sum.

The trial judge also examined the major changes made to the Moneylenders Act 1951 vide the Moneylenders (Amendment) Act 2003 and pointed out the vast difference in the legal position prior to and post November 2003. He concluded that effective 1.11.2003, no one can charge any interest at all on a friendly loan.

The trial judge relied on s.66 of the Contracts Act 1950 which provides that where an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it or make compensation for it to the person from whom he received it. He held that both parties did not appear to be *in pari delicto*ⁱⁱⁱ. If it were otherwise, he would have no compunction in declaring the whole amount under the agreement unenforceable being illegal as prohibited by law. In the premises, D should not take advantage of but should instead restore the balance of RM610,000 pursuant to the said s.66. An order was thus made accordingly in favour of P for the said balance.

ⁱ[2012] 3 AMR 627

ⁱⁱ[2007] 5 CLJ 441

ⁱⁱⁱEqually at fault. The doctrine of *in pari delicto* means that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing (Black's Law Dictionary, 7th Ed.).

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DIGEST OF EMPLOYMENT CASES

1. DUAL ROLE OF INVESTIGATOR AND MEMBER OF INQUIRY PANEL

Impartial panel of domestic inquiry is an essential part of the due process when conducting an inquiry into allegations of misconduct against an employee. In *Cheng Beng Kwee Iwn ST Microelectronics Sdn Bhd*^d, a member of the panel of domestic inquiry who was a personnel of the Human Resource Department of the company was the investigating officer of the sexual harassment allegations against the claimant. It is trite law that every administrative body (of which a domestic inquiry is one) is the master of its own procedure and need not assume the trappings of a courtⁱⁱ. At the same time, the rules of natural justice must be observed in the conduct of inquiryⁱⁱⁱ. There are two essential rules of natural justice, namely rule against biasness (*nemo iudex in causa sua*) and right to be heard (*audi alteram partem*)^{iv}.

Ideally and in general, the members of an inquiry panel ought to be independent so as not to offend the principle of *nemo iudex in causa sua* (no one should be judge of his own cause). Practical considerations sometimes are taken into account, such as in small places of employment consisting of a handful of staffs where there can hardly be enough personnel to wear various hats of complainant, investigator, witness, prosecutor and judge. Therefore, some official may have to wear two hats *ex necessitate*^v. In this case, however, there was no evidence to show that if the person concerned did not become a member of the inquiry panel, no other personnel could take her place. In the circumstances, the findings of the panel could not be sustained and all evidence adduced in the inquiry was not considered by the court in determining whether the dismissal of the claimant was with just cause or excuse.

The defect in holding a proper domestic inquiry was not fatal to the employer as the court proceeded to evaluate afresh the evidence produced in court consistent with the law set out in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal*^{vi}.

2. SLEEPING IN OFFICE

The claimant in *Sahlan Sakial v Dan Kaffe (Malaysia) Sdn Bhd*^{vii} was caught napping during office hour in lying down position in a sudden check was conducted by the company. Indeed, three workers including the claimant were caught sleeping on the day in question. The other two

workers were in sitting position. A domestic inquiry found all three guilty but only the claimant was sacked with the other two suspended for work. The claimant challenged the dismissal on the ground that it had been capricious, subjective, harsh and without just cause. The company's contention was that sleeping on duty was a serious offence as compared to dozing which was regarded as an act of negligence^{viii} but it was rejected on the facts of the case.

The defence of the claimant that he fell asleep because he had taken the asthma medication on that morning was taken into account. Further, the company had practiced double standard in meting out the punishment to the three workers. The court held the view that the excuse of taking medication ought to be given more emphasis to the position of sleeping. Thus, though an industrial court would not normally substitute its own conclusion on penalty, the court would interfere if punishment imposed by the disciplinary authority shocked the conscience of the court^{ix}. The court set aside the punishment and substituted it with a global sum of RM40,000 as compensation.

3. EMPLOYEE MAKING SECRET PROFIT

In *Boustead Rimba Nilai Sdn Bhd v Mohed bin Suratman*^x, the plaintiff was the owner of a palm oil mill while the defendant was its senior mill manager who was responsible for the running, direction and supervision of the mill. The plaintiff's claim against the defendant was for breach of fiduciary duty and/or breach of trust. It was the plaintiff's case that the defendant had instructed the weightbridge clerks to amend the weightbridge tickets by increasing the weight of the fresh fruit bunches (FFB) that were delivered and sold (by CSM and STL) to the plaintiff (FFB fraud) and reducing the weight of the scrap iron sold by the plaintiff to one TT (scrap iron fraud). Evidence showed that CSM and STL had allowed the defendant to 'tumpang' (utilize) their MPOB's licences to sell the defendant's FFB to the plaintiff, so that after the plaintiff had paid to CSM and STL, they would pay to the defendant for his share.

As to scrap iron fraud, TT would pay a lower price for the scrap iron and pay the defendant the difference of the 'amended' lower weight and the actual higher weight. The defendant had therefore benefited from the payments made by STL, CSM and TT to him. The defendant had breached his contract of employment by failing to act responsibly with care and skill but had instead acted in conflict of interest

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and taken advantage of his position to make secret profits. He had committed equitable fraud. Apart from damages, the court also awarded punitive and exemplary damages to the plaintiff due to the defendant's conduct and blatant breach of his fiduciary duty to his employer.

4. UNREASONABLE TARGET AS COLOURABLE DEVICE TO SACK CLAIMANT

Two important principles emerged from the High Court decision in *Takaful Nasional Berhad v Nooraizan bte Mohd Tahir & Anor*^{xi}. First, the employer complained that the employee claimant did not seek reinstatement as evident from her testimony in the Industrial Court. She only applied for compensation. That went against s.20 of the Industrial Relations Act 1967 (the IR Act) which allowed for one remedy only *i.e.* reinstatement and thus, the court was no longer vested with jurisdiction to hear the claim. There appears to be two conflicting line of High Court decisions.

The court opted to follow the view expressed in *Borneo Post Sdn Bhd n Margaret Wong*^{xii} that the (threshold) jurisdiction of the Industrial Court derived from the order of reference made by the Minister. Reference was also made to s.30(6) of the IR Act which does not restrict the court to the specific relief claimed but allows it to include in the award any matter which it thinks necessary or expedient to settle the trade dispute.

The second complaint was that the court had transgressed into the sphere of management prerogative when it held that the target set for the employee was unreasonable, unrealistic and a colourable exercise to remove her. It was 264% higher than the actual budget for the previous year instead of the usual 15%-20% increase. The employee was sacked when she failed to achieve the set target.

However, when her successor took over, the target set was immediately reduced by 50%. The court held that target setting was the employer's prerogative but when challenged on ground of unreasonableness, the employer must justify it. The court was correct to inquire how the target was set and in coming to his conclusion.

5. RECEIVING ANG-POW OR CONTRIBUTION FROM SUPPLIER --- A MISCONDUCT ?

The short answer is "yes". In *Toh Kam Wah v Berjaya Golf Resorts Bhd*^{xiii}, evidence

showed that the claimant who was an Executive Sous Chef of the company was given a hamper as a Chinese New Year gift by a supplier of the company. He however requested for cash instead and gave his personal bank account number. A sum of RM150 was subsequently banked into the account. The company had issued a circular on 'Purchasing Ethics' which stipulated that employees directly or indirectly involved in the purchasing of materials must not use their authority for personal gain and must maintain an unimpeachable standard of integrity. This circular clearly forbade the claimant from receiving RM150 from the supplier to avoid a conflict of interest. He was thus guilty of the charge.



On the other hand, in *Hydro Aluminium Malaysia Sdn Bhd v Zainal Abidin Pari*^{xiv}, the claimant accepted a sum of RM800 from a business associate of the company (HPM) to purchase jerseys and shoes for the company's interdepartmental soccer competition. The sum was banked into the claimant's personal bank account. HPM had also confirmed that it had offered to sponsor the jerseys and shoes. The claimant was the manager of the company's soccer team and following contribution from players and staff, it was still short of RM883 to buy new jerseys, hence the HPM's contribution and claimant's own money.

It was held that the claimant accepted the RM800 with a sincere intention to assist his soccer team and it was not for his personal benefit. It was a misconduct but it did not warrant the harsh punishment of dismissal. The dismissal was without just cause or excuse and backwages and compensation *in lieu* of reinstatement were awarded but 80% was deducted from the total

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award by reason of the contributory misconduct of the claimant.

6. AN APPOINTED DIRECTOR IS NOT NECESSARILY A WORKMAN

A person who is appointed director of a company does not become an employee of the company. That was stated very clearly by the Court of Appeal in *Chong Kim Sang v Metatrade Sdn Bhd*^{xv}. Recently, two decisions of the Industrial Court further illustrate the principle. In *Kuan Shin v Chin Foh Trading Sdn Bhd*^{xvi}, the claimant started to work in a company known as Chop Chin Foh since 1961 as a salaried Executive Director. In 1978, the Company took over the business of Chop Chin Foh and the claimant continued with his job and was appointed as a director. As executive director, he managed the daily operations of the Company such as sales, purchases, employment and administration. On 24.11.2005, the claimant received a memorandum that his salary would be taken out of the list of salaries from 21.11.2005 without any valid reason. He was drawing a monthly salary of RM22,000 at that time. On 12.12.2005, the Company passed a resolution at an extraordinary general meeting to remove him as a director. The Company never issued any letter of appointment to him. There was no contribution made to EPF or SOCSO. The claimant was not subject to the retirement age fixed by the Company at 55 years old. He paid income tax as an employee as evident from EA Form. On such facts, the Industrial Court chairman ruled that the claimant was not a workman within the ambit of the IR Act. The Chairman applied an earlier case of *Chew Yoon Fook v Keen Component Industries Sdn Bhd*^{xvii} which was also decided by him. There, the claimant was one of the founders of the company. He was appointed as the first director of the company. When he reached 63 years old which was the retirement age under the articles of association of the company, he retired and was not re-elected. He was managing the company, empowered to appoint and sack workers and to decide on their promotion and salary. He was therefore the 'mind and brain' of the company. He did not receive monthly salary but director's fees as resolved by the company in AGM. He was registered under EPF as a contributor on his election. On these facts, he was held not to be a workman and his claim of wrongful dismissal was dismissed.

7. VIOLATION OF LIFO

In *Adam Abdullah v Malaysian Oxygen Bhd*^{xviii}, the company reorganized its business and replaced its AS400 computer system with the SAP system. It then terminated the claimant's services on the ground of redundancy. The claimant had been with the company for 25 years with an unblemished record. He pioneered the IT Department in the company and introduced four systems into the company. At the time of his dismissal, he was the IM Operations Manager. He claimed that he could not have been redundant as his subordinates had not been retrenched and had been asked to report to CKM. CKM joined the company 16 years after the claimant. He was the IM Systems Development Manager. The court held that the company by preferring CKM over the claimant and failing to prove the claimant's lack of skill or expertise to work in the company violated the Last In First Out (LIFO) principle. LIFO would require CKM to be phased out first unless he was found to be more suitable and qualified to operate the SAP system. No evidence to that effect had been adduced. Further, the claimant's job functions still existed and there was no evidence tendered by the company to show otherwise or allege it was diminished or ceased to exist. The company did not establish whether the claimant was incompetent in handling that system. Judging from the claimant's principal functions as the IM Operations Manager of the company, it was wide ranging and continued to exist even with the implementation of the new system. The retrenchment of the claimant was bad in law.

ⁱ[2012] 1 ILR 473

ⁱⁱ*Lembaga Jurutera Malaysia v Leong Pui Kun* [2008] 6 CLJ 93

ⁱⁱⁱ*Kenneth Merall Fox v GMC* [1060] 1 WLR 1017

^{iv}*B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169

^v*Poon Kam Yoong v Tew Lai Eng* [2009] 1 LNS 477

^{vi}[1995] 3 CLJ 344

^{vii}[2012] 1 ILR 509

^{viii}*Manik Chowk and Ahmedabad Mfg. Co Ltd v IT, Ahmedabab*, 32 FJR 34 (GUJHC)

^{ix}*Dev Singh v Punjab Tourism Development Corporation Ltd. & Anor* AIR 2003 SC 3712

^x[2012] 1 AMCR 614

^{xi}[2012] 2 AMR 764

^{xii}[2001] 8 CLJ 758

^{xiii}[2012] 2 ILR 27

^{xiv}[2012] 2 ILR 110

^{xv}[2004] 2 CLJ 439

^{xvi}[2012] 2 ILR 145

^{xvii}[2011] 2 LNS 1009

^{xviii}[2012] 2 ILR 416

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EMPLOYMENT LAW

SETTLEMENT AGREEMENT AFTER CONSTRUCTIVE DISMISSAL

It is not often that our courts make reference to decisions of other commonwealth countries on industrial or employment dispute. One reason may be that the work culture and environment of different countries differs greatly apart from specific statutory provisions having been enacted to govern this area of law. However, the recent decision of the Court of First Instance of Hong Kong High Court in *Kwan Hung Sang Francis v Hong Kong Exchanges and Clearing Ltd* is quite relevant to the question of constructive dismissal. The facts are simple. P worked as the Senior VP and head of D's Group Risk Management Division under a contract which provided for termination by four months' notice or payment *in lieu*. On 3.3.2004, when faced with a 'threat' by D to resign or be dismissed, P verbally resigned at the meeting but 'reserved all his rights'. On the next day, P submitted to D a letter stating that he would like to resign (the Resignation Letter). He discussed the terms of his resignation with D's Head of Human Resources (Y) and then signed a letter accepting the terms of his termination by payment in lieu (the Acknowledgment Letter), which included an extension of his employment period beyond his last working day until 31.3.2004 and (b) an *ex gratia* payment of \$340,000, as "full and final settlement of all claims [P] may have against [D]...". P subsequently claimed against D for constructive dismissal on 3.3.2004. It was contended that the Acknowledgment Letter was not enforceable for total failure of consideration.

It was reiterated that if an employee was threatened that he would be dismissed unless he resigned, the court may hold such 'resignation' to be constructive dismissal. However, if such 'resignation' was motivated by other facts, such as

financial benefits or a reference letter, the termination might be a voluntary resignation notwithstanding that the employee was told either to resign or be dismissedⁱ. In the instant case, the terms of settlement were communicated only after the Resignation Letter was handed in and hence, there was no motivation for resignation given at the meeting. When D was discussing with Y as to the terms of resignation, he was merely trying his best to salvage what he could bearing in mind that he had already been dismissed.

However, on the totality of circumstances, P was not constructively dismissed. The Resignation and the Acknowledgment Letters indicated that P had resigned and there was no evidence of any complaint by P that he had been threatened or forced to resign; or to accept the benefits which D was not obliged to offer him. Further, even if P had been constructively dismissed and reserved his rights on 3.3.2004, given the subsequent negotiations and a compromise which he had accepted the following day, there was termination by mutual agreement. In any event, the Acknowledgment Letter was a binding settlement to settle existing and potential disputes regarding P's employment. There were benefits in the form of extension of employment period and the *ex gratia* payment. Sufficiency of consideration is not an issue. And P's action against D was a "future" claim covered by the phrase 'all claims that I may have'. It was a plain and obvious case to strike out the P's claim which the court did.

ⁱ[2012] 1 HKLRD 546

ⁱⁱFollowing *Sheffield v Oxford Controls* [1979] ICR 396

FAMILY LAW

PUTATIVE FATHER DENIED ACCESS TO ILLEGITIMATE CHILD

Access to an illegitimate child was the issue in *Lai Meng v Toh Chew Lian*ⁱ. The plaintiff (P) and defendant (D) were respectively married to their own spouses when they met each other and started an intimate relationship in 2002. In 2003, D divorced her husband. The relationship between P

and D continued but later turned sour. In May 2006, P and D signed a settlement agreement whereby P agreed to pay D RM1.4m by instalments with the last instalment in January 2011. The illegitimate child was born in April 2009. P had been paying RM3,000 per month for the child's maintenance. P further made the child a 50% beneficiary of his EPF account whilst his two legitimate sons shared the balance. From the time the child was born, P had been seeing her daily except Sundays. In February 2011, P was denied access to the child by D. In April 2011, P gate-crashed into the child's birthday party to see the child. P applied that he be granted access to the illegitimate child pursuant to s.24(d) of the Court of

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Judicature Act 1964 (CJA) and s.27 of the Civil Law Act 1956 (CLA).

It is noteworthy that P did not apply for custody and access. He only applied for access. In addition, Guardianship of Infants Act 1961 (GIA) was not cited in the intitlement of the suit and thus, GIA which provides for the equality of parental rights over a child could not be invoked.

Firstly, the High Court ruled that the wordings in s.24(d) of CJA were wide enough to confer power on the court to decide on access to a child. Secondly, the words 'custody and control of infants' in s.27 of CLA include access to an infant. Thus, the position regarding custody and access to illegitimate children is according to the English common law as at the date of coming into force of CLA *ie* 7.4.1956 in Peninsular Malaysia. Under English common law, the putative father has no legal rights over an illegitimate child. Only the natural mother has such legal rights over the illegitimate child.

The learned Judge laid down two main considerations to decide whether the putative father ought to be given access to the illegitimate child: (a) the wishes of the mother; and (b) the welfare and interests of the child. The learned Judge accepted D's wishes to have a clean break from P and to bring up the child on her own, considering that P had never thought it fit to marry D but merely kept her as his mistress. The larger issue of public policy was also considered. In doing so, the court refused to lay down a blanket ruling that a putative father must necessarily be given rights of access to an illegitimate child if the

mother of such child wanted a clean break from the putative father and wished to bring up such child on her own. On the contrary, the court held that it should only be in exceptional circumstances that a putative father be given the privilege of access to an illegitimate child.

It was not for the welfare and best interests of the child that access be granted to P. The child had no contact with the putative father since February 2011. Therefore, the child was unlikely to be traumatized or in any way adversely affected by the total denial of access to her putative father. Indeed, the child had not been accessed regularly by the putative father from the time she was 22 months old. Further, considering the acrimonious relationship between P and D, it would not be for the best interests of the child to be accessed by the putative father on a regular basis. P had not made any offer to marry D and to legitimize the child. The monthly payment and making the child a 50% beneficiary of his EPF money could never make up for the fact that it was through P's affair with D that the child was rendered illegitimate. It was therefore best that D be allowed to move on with her life with the child without P. P's application for liberal access was thus dismissed with costs.

ⁱ [2012] 8 MLJ 180

FAMILY LAW

IMMORAL MOTHER DENIED RIGHT OF CARE AND CONTROL OF ILLEGITIMATE CHILDREN

Unlike the earlier case of *Lai Meng v Toh Chew Lian*, the plaintiff (P) and his three children moved out of the house they stayed with the defendant (D) and P applied for guardianship, custody, care and control of the children in *Teoh Hock Soon v Chan Peng Yee*ⁱ. Both P and D were divorced in 1998 but subsequently reconciled and went through a Chinese customary marriage in 2000 which was not registered under the Law Reform (Marriage and Divorce) Act 1976. Three children were born out of the marriage. Later, D had a married boyfriend in Australia and had an intimate cyber relationship with him.

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Following the Federal Court decision in *Sean O'casey Patterson v Chan Hoong Poh & Ors*ⁱⁱ, the learned Judge held that Guardianship of Infants Act 1961 (GIA) was applicable to illegitimate children. S.5 of GIA provides for the equality of parental rights over a child. The judge repeated the general English common law principle that she stated in *Lai Meng's* case *ie* the natural mother has full legal rights over an illegitimate child, but laid down an exception, which was that if it was proven that the natural mother was an unfit mother or was immoral, then such right might be taken away from the natural mother. In determining this, the welfare of the children must be taken into account.

The learned Judge drew guidance from the meaning of welfare of a child as laid down in the Singapore case of *Tan Siew Kee v Chua Ah Boey*ⁱⁱⁱ and adopted in *Sean O'casey Patterson* --- the general well-being of the child and all aspects of his upbringing, religious, moral as well as

physical, his happiness, comfort and security. She then focused on two main factors: (a) whether D was a fit mother and (b) if not, whether P was able to safeguard the welfare and best interests of the children. On (a), D's parenting skills and the morals of D as a mother were considered. The evidence and the interview with the children showed that D had abused the children physically, verbally and emotionally. D lacked proper parenting skills and it would not be for the welfare of the children to force them to live with D when they were so fearful of her beatings. On the morals as a mother, it was immoral for D to hold herself out to her children as P's wife and yet have an intimate cyber relationship with her married boyfriend. To the judge's mind, D was implanting in the innocent minds of her children the wrong moral and religious values by her affair. D had the wrong moral values which were harmful to the proper upbringing and welfare of the three young children.

On (b), there was clear evidence that P was able to take care of the children, meet their needs, manage the home and safeguard the welfare and best interests of the children. P was a

fit and proper person to take care of the children on daily basis. The court thus granted P the right of care and control of the children. Equality of guardianship and joint custody was granted to P and D. Access was given to D on alternate weekends from 6pm Saturdays to 8pm Sundays, first half of the school holidays, alternate public holidays from 10am to 8pm, child's birthday on an alternate basis at least 5 hours, D's birthday at least 5 hours, Christmas on an alternate basis from 4pm on Christmas eve until 8pm on Christmas day, Chinese New Year (CNY) on an alternate basis from 4pm on the eve until 12 noon on the second day of CNY.

ⁱ [2012] 2 CLJ 960

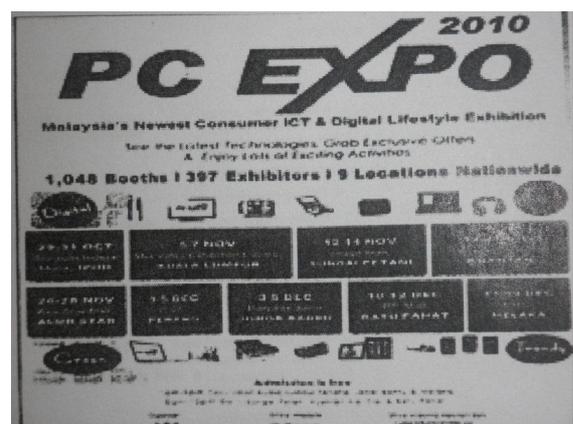
ⁱⁱ [2011] 3 CLJ 722

ⁱⁱⁱ [1987] 1 LNS 77

INTELLECTUAL PROPERTY / EMPLOYMENT LAW

PC FAIR V PC EXPO

In *Shaifubahrim bin Mohd (as President and Council Member of Persatuan Industri Komputer dan Multimedia Malaysia (PIKOM) and representing all Members of PIKOM) v EM Exhibitions (M) Sdn Bhd & Anor*ⁱ, P was the president of Persatuan Industri Komputer dan Multimedia Malaysia (PIKOM) which was an association representing the information and communication technology (ICT) industry in Malaysia. PIKOM advertised, promoted and organized ICT exhibitions under its registered trade mark PC FAIR. D1 similarly organized ICT exhibitions although under its mark, PC EXPO. D2 who was P's former employee was D1's director. As the project executive, D2 was to assist in organizing and marketing P's functions, projects and activities including P's "PC FAIR" exhibition. P claimed against the defendants for infringement of trade marks, passing off and breach of confidential information by D2.



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The trial judge held that the words 'PC FAIR' were common descriptive terms and were used by numerous traders in the computer industry. These words were not invented words but generic and common words.ⁱⁱ Thus, such words could not be monopolized by P. To grant such a monopoly to P would be to deprive the public from using words that were part of the English vocabulary and the IT industry. Indeed, evidence prompted the court to hold that P's goodwill and distinctiveness would only reside with the name 'PIKOM PC FAIR' and not the words 'PC FAIR'. Thus, P's trade mark could not be distinctive and did not fulfill the requirement of s 10(1)(e) of the Trade Marks Act 1976. There was no infringement of P's registered trade mark.

As to passing off, the words "PC FAIR" and "PC EXPO" were visually and aurally different. They differed in get-up. The word "PC" for the former was in white placed against a small, squarish, black background and was of a plain block font whilst the word "PC" for the latter was in plain black and consisted of a semi-italicised font. Further, the "PC EXPO" logo contained the tagline "IT's MY Choice" whilst P's "PC FAIR" logo did not contain any tagline. The words fonts and get-up of the words "FAIR" and "EXPO" were also different and very distinguishable. Thus, there was no danger of confusion or misrepresentation by D. As to P's claim of misrepresentation based on the advertising layout, floor layouts, booking forms, balloting procedures and venues, P had failed to establish that it had any goodwill and reputation in any of these functional elements or that these were well known in connection with P's trade. The defendants had not passed off the "PC EXPO" to the public as that of P's "PC FAIR".

However, P succeeded in its claim on misuse of confidential information by D2. P claimed confidentiality over the "exhibitors database", pricing information, balloting procedures and lay out plans. The "exhibitors database" contained the names of the participating exhibitors of the "PC FAIR" exhibitions over the years, the names of two direct contact persons for each exhibitor and their contact particulars, all of which had been collated by PIKOM through numerous "leads generation" exercises over many years and were not available in the public domain. Although D2's defence was that she only used her personal skill and knowledge in the industry, the trial judge held that such information remained proprietary and confidential to PIKOM unless it was freely accessible by public and fell within the public domain. This data base was only accessible to a limited group of personnel in PIKOM. It was akin to a customer list. Thus, D2 was not at liberty to use the "exhibitors database" beyond the scope of use permitted by P. P however failed to establish confidentiality over the other items. P therefore succeeded in part of its claim.

ⁱ[2012] 1 AMCR 988

ⁱⁱTo be an invented word, it must not only be newly coined in the sense of not being already current in the English language, but must be such as not to convey any meaning, or, at any rate, any obvious meaning until one has been assigned to it, see *Bata Ltd v Sim Ah Ba @ Sim Teng Khor & 2 Ors* [2006] 3 CLJ 393.

INTELLECTUAL PROPERTY / CONTRACT LAW

WHICH KAYU NASI KANDAR IS ORIGINAL

Food lovers in Klang Valley and Penang, especially *nasi kandar* fans, will have come across a number of *nasi kandar* (a type of Indian Muslim food) restaurants calling themselves '*kayu nasi kandar*'. Are these restaurants owned by the same original proprietor? Or are they merely 'copycats'? And who actually started and made famous '*kayu nasi kandar*'? Are restaurant '*kayu nasi kandar*' and restaurant '*original kayu nasi kandar*' one and the same?

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The answers can be found in the recent judgment in *Burukan bin Mohamed & 2 Ors v Sirajudin bin Mohamed Mydin & 3 Ors*ⁱ. The operators of the existing '*Restauran Kayu Nasi Kandar*' outlets are the descendants of the original proprietor of '*Restoran Kayu Nasi Kandar Sdn Bhd*'. By a confirmation and acknowledgment agreement dated 30.11.2004, the 1st plaintiff and the 1st defendant had agreed that the 1st plaintiff shall have full control and management of the *nasi kandar* business outlets at SS2 Petaling Jaya and Bukit Jambul Pulau Pinang whilst the 1st defendant shall have control and management of the remaining outlets of *Restoran Kayu Nasi Kandar Sdn Bhd*. It was also provided that both shall continue to be entitled to use the expression '*Restoran Kayu Nasi Kandar*' in each party's continuing business. What then took place was that the 1st plaintiff continued his business in the name of '*Original Penang Kayu Nasi Kandar*' (the

2nd plaintiff) whereas the 1st defendant used either 'Di Kayu Nasi Kandar' (the 2nd defendant) and/or 'Restoran Pulau Pinang Nasi Kandar (the 3rd defendant)'.



The plaintiffs claimed that the 2nd defendant's USJ branch had modified the sign bearing resemblance of the plaintiff's trade sign which resulted confusion to the public and calculated to interfere with the plaintiffs' business and goodwill. On the other hand, the defendants as the proprietors of a registered trade mark consisting of the trade name 'Kayu Nasi Kandar' and the logo depicting a man attired in traditional Malay outfit and carrying the traditional food baskets at both ends of a pole balanced on his shoulder counter-claimed that the plaintiffs had infringed the trade mark.

The first issue was whether on a proper construction of the agreement, the words "continuing business" was restricted to the two outlets given to the 1st plaintiff so that the 1st plaintiff was not allowed to use the expression "Restoran Kayu Nasi Kandar" for other outlets. The judge remarked that if the parties' intention was to limit the expression to the existing outlets, they would have used the phrase "existing outlets". Thus, the phrase "continuing business" related to the respective outlets that the parties continued to operate and also future business in relation to selling *nasi kandar*. The answer was in negative.

On the defendants' counterclaim, whilst the design of the word "Kayu" in both emblems is similar, the emblem used by the 2nd plaintiff is totally different from the defendants' trade mark. The former has the phrase "KAYU NASI KANDAR" on the top and "ORIGINAL PENANG" at the bottom with a ribbon across the emblem saying "SINCE 1974". It features a man in traditional Malay outfit holding the hand of a young boy who is also attired in traditional Malay outfit. The colours on the emblem are green, yellow and white. The latter has no ribbon, the man is alone and the colours are in red and purple. The counterclaim was thus dismissed.

[2012] 1 AMCR 743

LAND / CONTRACT LAW

ORDERING PARTIES TO MUTUALLY AGREE ON A LEASE AGREEMENT

The relief ordered by the trial judge in the case of *Bukit Kiara Resort Bhd v Dato Bandar Kuala Lumpur*¹ is, in our opinion, strange. In a dispute over a lease of land which forms part of the Bukit Kiara Club, the defendant (DBKL) had with the agreement of the plaintiff applied for the land adjoining the existing lot (which had been leased to the plaintiff from DBKL for 70 years) for the development of a polo field and grandstand. The land office approved the defendant's application for the second lot. The premium

chargeable on the second lot was billed to DBKL but paid by the plaintiff which went on to develop the second lot and incurred cost of estimated RM22.5m. Both parties held several discussions and exchanged draft agreements for the lease of the second lot but no agreement was formalized.

DBKL then informed the plaintiff that it intended to surrender the second lot to the Federal Government for the development of a large scale public park and issued notice to quit and deliver vacant possession. The plaintiff objected and contended that there was a concluded oral agreement between the parties for a 70 year lease of the second lot. DBKL denied and argued that there was no evidence as to the specific persons who had entered into the oral agreement, the date, place, or the terms of the oral agreement.

The trial judge however looked at the actions of the parties prior to and after the

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alienation of the second lot and held that they were more consistent with there being an oral agreement that the subject lot was to be leased to the plaintiff as additional land for the running of Bukit Kiara Equestrian and Country Resort. In the learned judge's view, there was an oral agreement for a lease or else DBKL would not have required the plaintiff to pay the premium, quit rent and other dues and charges, allowed the plaintiff to be in occupation or approved its plans to develop the second lot. Neither would the plaintiff have agreed to pay the premium on the property. DBKL had also allowed the plaintiff to act on the purported oral lease by expending considerable sums of monies to develop the property.

The existence of an oral lease was also consistent with the minutes of a meeting at the Federal Territory Ministry which noted that DBKL had approved the lease for the second lot to the plaintiff for 70 years from 1993 although no lease agreement had been signed. In its pleadings, DBKL had further admitted to the plaintiff being a lessee.

Having found that there was an oral agreement to lease the second lot to the plaintiff, the trial judge could have 'moulded' the relief (as approved in *Sinar Wang Sdn Bhd v Ng Kee Seng*ⁱⁱ

), such as that the oral lease was for 70 years commencing from 1994 upon the consideration of the premium and quit rent that had been paid, the continued payment of the quit rent and assessment and monthly lease rental. However, she decided to order the parties, within 30 days or such longer period as was mutually agreed between them, to enter into a formal and written lease agreement incorporating both the moulded relief as well as other relevant provisions of the earlier agreement in respect of the existing lot as was agreeable between the parties. One wonders the efficacy of such order. The question that immediately springs to mind is that what if the parties are unable to 'mutually' agree on the terms and conditions to be incorporated into the lease agreement. It appears that the parties may need to return to the court for further directions or order. In other words, the suit has not effectively come to a closure. That, to us, is an undesirable outcome.

ⁱ [2012] 2 MLJ 783

ⁱⁱ [2005] 2 MLJ 42

LAND LAW

PRIVATE TREATY SALE BY CHARGOR IN LIQUIDATION

Can a charged property be allowed to sold by a private treaty for an amount that is lower than the amount due by the chargor (in liquidation) to the chargee bank? That is the crux issue faced by the High Court in *Malaysia Building Society Bhd v Merit Aim Sdn Bhd & Anor*ⁱ.

The facts are fairly simple. The chargor charged its land in Cameron Highland to the chargee, MBSB for a loan. Due to default, MBSB obtained an order for sale of the land in 2002. The chargor was subsequently wound up in 2003. There were two unsuccessful public auctions with the last reserved price at RM17.3m. CM negotiated directly with MBSB which agreed to a redemption sum of RM12m subject to consent of DG of Insolvency (DGI) as the liquidator of the chargor. Meanwhile, another company, AR negotiated directly with DGI who had agreed to a purchase price of RM13m, of which RM12m would

be MBSB's redemption sum and the surplus would be for liquidator's fees and sharing amongst the creditors. A sale and purchase agreement was entered into between the DGI as liquidator of the chargor and AR regarding the land (AR's SPA) which was subject to the consent of MBSB with respect to the redemption sum. Both CM and AR applied to the court for reliefs.

Based on the facts of the case, the amount due to MSBS under the order for sale was RM35m. Under s.266(1) of the National Land Code (NLC), unless such an amount was tendered prior to the auction sale, the chargee would have to proceed with the auction sale. The High Court drew much guidance from the principle propounded in the Supreme Court's decision in *Kimlin Housing Development Sdn Bhd v Bank Bumiputra Malaysia Bhd & Ors*ⁱⁱ that the provisions of ss. 254 to 265 of NLC (which dealt with enforcement of charge) were designed to protect chargor and they could not be waived or contracted out. By accepting RM12m for redemption, MBSB was entering into a compromise or arrangement to the detriment of other creditors and contributories. Acceptance of a smaller sum to discharge the chargor's liability under the charge would leave a bigger amount falling into the unsecured portion of the debt, leaving the other unsecured creditors with even

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less to take home when whatever balance was divided *pari passu*. Further, being a compromise or arrangement between the liquidator and MBSB, any failure to obtain leave of court under s.236(1)(c) of the Companies Act 1965 would render the sale void. The court thus set aside the AR's SPA and did not grant any order in favour of CM with regard to its purchase.

There are a few other principles that can be culled from the decision and the earlier High Court case of *United Malayan Banking Corp. Bhd v Chong Bun Sun @ Chang Bun Sun & Anor*ⁱⁱ. Once an order for sale has been granted, the charged land must be sold by judicial sale according to the procedure prescribed in the NLC. The court is no longer empowered to make a subsequent order to vary or set aside the earlier order and to make a new order for the charged property to be sold by way of private treaty. However, from *Chong Bun Sun* case, it would appear that a sale of charged property by way of private treaty is permissible at the instance of the chargor regardless before or after an order for sale. This is due to s.266 of the NLC under which the chargor, until the sale of the charged property at a public auction is concluded, retains the right to discharge the charge by selling the charged property and pay off the chargee. Thus, the

chargor may sell the charged property as long as the chargee's interest is not adversely affected. If one were to apply this *obiter dicta* to the facts of *Merit Aim's* case, then the AR's SPA by virtue of being a chargor's sale should have been allowed provided MBSB consented to the redemption sum at RM12m. The only explanation which can justify the Judge's decision not to affirm the AR's SPA is that the redemption was in the nature of a compromise or arrangement which did not obtain prior approval of the court as required under s.236(1)(c) of the Companies Act 1965.

It must be pointed out that *Merit Aim's* case departed from an earlier High Court decision in *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd*^v. We will have to wait for the appellate court to come up in the future with a decision as to which view is to be preferred.

ⁱ[2012] 4 CLJ 269

ⁱⁱ[1997] 3 CLJ 274

ⁱⁱⁱ[1994] 2 CLJ 673

^{iv}[2007] 7 CLJ 516

PROPERTY / CONTRACT LAW

DEVELOPER CANCELLED PROJECT DUE TO POOR SALES---IS THE SPA FRUSTRATED?

A married couple (the plaintiffs) purchased a service suite (the Property) from the defendant, the developer of a project known as Berjaya Central Park Suites (the Project) in September 2005 at the price of RM446,500. A deposit sum of 10% of the price was paid. A loan was obtained to finance the balance purchase price. The Project which was launched in November 2004 however did not get encouraging response from buyers despite aggressive campaign undertaken by the defendant to promote the Project locally and overseas. Only 2.95% or 49 units were sold after 2 ½ years. The defendant decided to cancel the Project. Negotiations were held. The defendant offered to refund to the purchasers the deposit plus an *ex gratia* additional sum of 100% of the amount paid. The plaintiffs however demanded for additional compensation sum of RM150,000 and incidental costs, in view of the appreciation in value of properties in the locality. The defendant

disagreed and informed them that the SPA had been rescinded due to supervening and unforeseen events and refunded the deposit. The plaintiffs accepted the refund but two months later, notified the defendant through their solicitors that the sum was being held by the solicitors as stakeholder. The defendant replied that the sum was paid as full and final settlement which had been accepted without any reservation. The plaintiffs filed a suit for a declaration that the defendant had breached the SPA and for damages.

The above were the facts in *Cheng Seng Hup & Ors v Wangsa Tegap Sdn Bhd*. The defendant relied on the doctrine of frustration under s.57 of the Contracts Act 1950: *a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful*. The trial judge said that the fact that there were poor sales to the Project did not fall within the category of contract which was "difficult to perform" or made the contract "frustrated". However, she held that there had been a radical change from the original circumstances when the original obligation was undertaken, which were (i) the original concept was not viable based on a Rational Study Report prepared by an independent firm; (ii) the poor sales despite

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aggressive marketing. It would also be unjust to both the defendant and the plaintiffs to proceed with the Project. In her view, the purchasers would not want to stay in a building where there was hardly any resident and this would have effect on the value of the Property for investment purposes. The change in the circumstances was beyond the control of the defendant. The defence of frustration thus succeeded. The SPA was lawfully rescinded by the defendant and the plaintiffs' claim was dismissed with costs. In addition, the deposit sum had been accepted by the plaintiffs without

reservation and no further remedy was available to the plaintiffs.

ⁱ [2012] 8 MLJ 425, [2012] 3 CLJ 459

REVENUE LAW

STAMP DUTY PAYABLE ON SALE OF SHARES

The quantum of stamp duty payable on the sale of shares was in issue in *Pemungut Duti Setem, Pulau Pinang v Malaysian Smelting Corporation Berhad*. Rahman Hydraulic Tin Sdn Bhd (the company) is a public limited company with a paid up capital of RM97,232,142 comprising 97,232,142 ordinary shares of RM1 each which were held by the vendor. Pursuant to an open tender sale, the respondent submitted a tender to purchase the said shares at RM15,000,000. The respondent then submitted a share transfer form (Form 32A) to the collector of stamp duty transferring the said shares at the consideration sum of RM15m. The collector however assessed the stamp duty payable under Form 32A based on the par value of the said shares to arrive at RM291,699. The respondent contended that the assessment should actually be RM45,000 based on the consideration of RM15m.

The High Court agreed with the collector while the Court of Appeal agreed with the respondent. On final appeal, the Federal Court confirmed the Court of Appeal's decision. It was held that the par value of RM1 as stated in Form 32A (ordinary shares of RM1 each) was not indicative of the actual value of the shares for the purpose of ascertaining stamp duty but was merely a description of the securities. The par value was also not the actual value of the said shares at the date of transfer because par value was only a face value while the value of the company waxed and waned *inter alia* according to its performance and outlook. The par value might have represented the actual value or true value of the said shares on the date the said shares were first issued but once the

company started carrying on business, the par value no longer reflected the actual value of the said shares as the company might have made profits or incurred losses or the assets of the company might have appreciated or depreciated. On the facts, the par value of RM1 per share did not represent the actual value of the said shares at the date of transfer because by then, the company had accumulated huge losses and its net tangible asset was in a deficit of RM311,683,000. Further, the phrase 'par value' has not been used in both items 32(b) of the First Schedule of the Stamp Act 1949ⁱⁱ (under which the stamp duty payable on Form 32A was assessed) and s 13(1)(b) of the Act.

In applying the method of valuation of the shares, the figures from the company's balance sheet for financial year ended December 2003 was relevant as the tender and the subsequent sale of the said shares was based on the said balance sheet. Based on such method, the value of the said shares would be nil as the total liabilities of the company exceeded the total assets. There being no evidence that the value of the said shares at the date of transfer was more than at the time of purchase, and given that there was no dispute raised whether the open tender sale was at arm's length or not, the best available evidence of the value of the said shares on the date of transfer was the purchase price of RM15m. As the purchase price of RM15m was higher than the value of the said shares based on the balance sheet, pursuant to item 32(b), the stamp duty would be correctly assessed on the purchase price.

ⁱ [2012] 3 MLJ 449, [2012] 1 AMCR 585

ⁱⁱ Item 32(b) reads: 'On sale of any stock, shares or marketable securities, to be computed on the price or value thereof on the date of transfer, whichever is the greater --- For every \$1,000 or fractional part of \$1,000 Proper Stamp Duty \$3.00'.

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TORT (DEFAMATION)

CAN A GOVERNMENTAL BODY SUE FOR DEFAMATION ?

Does a public body have *locus* to sue for defamation? This question cropped up in the High Court case of *Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong*ⁱ. The 1st plaintiff in the case, FELDA, was established pursuant to s.3 of the Land Development Act 1956 as a body corporate to undertake land development projects and related activities to promote and stimulate economic, social, residential, agricultural, industrial and commercial development. The 2nd plaintiff, a wholly-owned subsidiary of the 1st plaintiff, is an investment company which provides services to FELDA Holdings Bhd and its related companies.

The claim was based on an interview given by the defendant to a reporter of the newspaper known as Suara Keadilan wherein it was alleged that the defendant had said that the decision to acquire Menara Felda was left in the hands of only three individuals, namely the then Deputy Prime Minister, the President of the 2nd plaintiff and a third individual unrelated to FELDA and that such acquisition was one of the factors that had caused FELDA to allegedly become 'bankrupt'. It was alleged that such words imputed, among others, that the transaction was not for the plaintiffs' benefits but to benefit cronies and the terms of the transaction were dubious.

The High Court judge decided not to follow the law in England as laid down by the House of Lords in *Derbyshire County Council v Times Newspaper Ltd & Ors*ⁱⁱ. The English position is that a local authority did not have the right to maintain a defamation action as it would be contrary to the public interest for the organs of government to have that right. It was of the highest public importance that a governmental body should be open to uninhibited public criticism, and a right to sue for defamation would place an undesirable fetter on freedom of speech.

The learned Judge in *Tan Kee Kwong* case expressly disagreed with the proposition that it was contrary to the public interest to allow an organ of government to sue for libel. She held the view that there was a need for organs of local authorities to protect their reputation, and that damage to reputation might affect their ability to obtain loans or tender for contracts. She pointed out that the 1st plaintiff was a statutory body which was independent of the government and was neither a public authority nor local authority. In her opinion, the English decision was to ensure that UK complied with its international treaty obligations which were imposed by its accession to the European Convention for the protection of Human Rights and Fundamental Freedoms and was not a general development of the common law. It had also taken into account that the local authority in UK was a democratically elected body whereas the local authorities in our country were not so elected. Thus, she ruled that the 1st plaintiff could maintain an action for a libel reflecting on the management of their trade or business.

She went on to hold that the complained words imputed that the 1st plaintiff was badly managed, had no proper governance, conducted affairs in a dubious and unprofessional manner and made decisions which resulted in substantial losses. The words were defamatory. However, the plaintiff had failed to prove that there was communication of the complained words to a 3rd party, namely the reporter for Suara Keadilan, who was not called to testify. The plaintiffs also failed to prove that the defendant was responsible for the publication of the report in Suara Keadilan or that he knew or ought to have known that what he purportedly said would be published or that he intended or caused the article to be published. The plaintiffs claim was therefore dismissed with costs.

ⁱ[2012] 3 CLJ 87

ⁱⁱ[1993] 1 All ER 1011

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TORT (NEGLIGENCE)

DOES A NIGHTCLUB OWE A DUTY OF CARE TO ITS PATRONS IN RESPECT OF ACTIONS OF 3RD PARTIES?

The scope of the duty of the management of a nightclub in respect of the actions of third parties was adjudicated by the UK Court of Appeal in *Everett & Anor v Comojo (UK) Ltd (t/a The Metropolitan) and others*ⁱ. The nightclub in the case was part of the Metropolitan Hotel and its use was restricted to members, their guests and residents of the hotel. The claimants were guests of a member. One of the waitresses, T, was kicked or tapped on the bottom by one of the group in which the claimants were standing. T suspected it was the 2nd claimant who did this. She however did not wish to make fuss about it. The incident was witnessed by a club member named S who was aggrieved on T's behalf. S was a regular guest at the nightclub and a valued customer. S told T, more than once, that those responsible would apologize to her before the end of the evening.

Some time later, S asked T to put the name of C (his driver) on the guest list (which would enable C to be admitted to the bar). C arrived at about 2.00am. T was concerned about C as she regarded his appearance as 'scary'. It crossed her mind to hope that S was not going to send this man over to extract an apology for the earlier incident. She was sufficiently concerned to go to speak to the manager at his office. While she was away, the claimants were leaving when the 1st claimant was beckoned to S's table. S asked for an apology at which the 1st claimant told him to 'piss off'. The 1st claimant then tried to walk away but was punched in the face by C. A scuffle ensued, in the result the 1st claimant was stabbed five times by C and the 2nd claimant three times. C was convicted of the offence of causing grievous bodily harm. The claimants sued the company which managed the nightclub (Comojo) for damages for personal injury, alleging that it had failed to take appropriate steps to protect its guests. The issue was thus whether Comojo owed any duty of care towards the claimants in respect of the actions of another guest (*ie.* duty to take reasonable steps to protect them from dangers from third parties which it foresaw or ought reasonably to have foreseen). It was the claimants' contention that C (for whom Comojo would be vicariously liable) had been negligent in reporting her concerns about C to the manager, rather than directly alerting one of the door supervisors, which would have caused a supervisor to come into the nightclub immediately and would probably have prevented the violent incident.

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Generally, there is no duty to prevent others from suffering loss or damage caused by the wrongdoing of third parties. Thus, any affirmative duty to prevent deliberate wrongdoing by third parties is to be restrictedⁱⁱ. The court favoured the three-fold test to determine the existence as well as the scope of a duty of care as laid down by the House of Lords in *Caparo Industries plc v Dickman*ⁱⁱⁱ: (i) harm to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; (ii) the relationship of the claimant and the defendant was one of sufficient proximity; and (iii) in all circumstances, it was fair, just and reasonable to impose a duty of care on the defendant towards the claimant.

Under (i), the management of a nightclub is in control of the premises; it can regulate who enters, who is refused entry, and who is to be removed after entry. A guest comes for relaxation and enjoyment and for that prospect, he relies on the competence and prudence of the management. He expects and is entitled to expect that there will be no violence and that he will not be unsafe. The management of the nightclub is in business and wants the guest to come to spend his money; there is an economic relationship between them. These factors demonstrate sufficient proximity.

Under (ii), it is a well-known fact that the consumption of alcohol can lead to the loss of control and violence. It must be foreseeable to any licensed hotelier that there is some risk that one guest may assault another. The risk may be low in respectable members-only establishments and higher in a nightclub open to the public. The degree of risk, which will dictate what precautions have to be taken, will vary. There cannot be any general rule applicable to all nightclubs but the risk of such assault cannot be safely ignored.

The appellate court accordingly concluded that there was a duty of care on the management of a nightclub in respect of the actions of third parties on the premises but that the standard and scope of duty must be fair, just and reasonable.

Recognizing that the common law duty of care was an extremely flexible concept adaptable to the very wide range of circumstances, the court refrained from defining the circumstances in which there would be liability, as the scope of such duty varies according to circumstances. Instead, it proceeded to consider the circumstances present in the case and held that the trial judge was right in deciding that T had not been in breach of duty. At the time when T left the nightclub to speak to her

manager, there was no sufficiently great risk of injury. It was not as if a confrontation had begun and the risk of violence was imminent. The incident to which S had taken exception had occurred a considerable time earlier. While C's appearance gave rise to some concern, he was S's employee and S was a valued customer with no history of causing trouble. Even if T had done nothing, she could not have been criticized. As it was, she went to speak to her manager and let him decide what to do. That was, in the view of the court, sensible.

The claimants' appeal was thus dismissed.

ⁱ[2011] 4 All ER 315

ⁱⁱ *Smith v Littlewoods Organisation Ltd* [1987] 1 All ER 710

ⁱⁱⁱ[1990] 1 All ER 568, affirmed in *Van Colle v Chief Constable of Hertfordshire Police* [2008] 3 All ER 977.

plaintiff. The words in the credit report were thus capable of bearing a defamatory meaning.

The cautionary head-note appeared as a heading of the credit report as follows:

"IMPORTANT: This report is confidential. Reproduction is prohibited. Report only indicates the information was published in the relevant source. It is not intended as confirmation of the current status of the case. For the case's current status, your further probe with the relevant parties is required."

The High Court regarded such head-note as qualifying the information published below it in that such information was not intended to mean any of the libellous imputations alleged by the plaintiff.

However, the appellate court overturned it. It followed the decision of the House of Lords in *Stubbs Ltd v Russell*ⁱⁱ. There, the pursuer's name had erroneously appeared in the newspaper published by the defendant in the weekly list of persons against whom decrees in absence had been obtained in the small-debt courts, the fact being that the claim had been settled out of court. The list was headed by a prefatory note that in no case did the publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the court books.

The pursuer's claim that the entry falsely and calumniously represented that he was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given was allowed. The prefatory note afforded no defence to the claim. Likewise, the appellate court held the above head-note did not absolve the defendant from responsibility of its mistakes.

TORT (DEFAMATION)

INEFFECTIVE NOTE TO NEGATE LIABILITY

In issue Q4 of 2011 (Oct-Dec 2011), we featured the High Court decision in *Shafie Abdul Rahman v CTOS Sdn Bhd* under the heading 'CTOS liable for publishing outdated information'. There, the defendant had published that a bankruptcy notice had been issued and existed against the plaintiff although the case had been settled at the material times. The plaintiff succeeded in his claim for defamation. The defendant's attempt to rely on a cautionary head-note was rejected. Recently, in another case which contains facts substantially similar, the Court of Appeal confirmed that such head-note did not absolve the defendant from responsibility for its mistakes.

In *Soh Chun Seng v CTOS-emr Sdn Bhd*, by a credit check report dated 29.4.1997 undertaken by the defendant at the request of its customer, the defendant had stated that a creditor's petition had been issued in respect of the plaintiff. The plaintiff contended that such report did not reflect the true situation as the court had on 23.9.1992 ordered that the petition be struck off.

The appellate court considered the nature and purpose of the credit report vis-à-vis the business of the defendant. The defendant was a service provider of credit information which would lead to the assessment of the financial reputation and creditworthiness of the particular subject matter of the information. As the information on the plaintiff in the credit report related to the issuance of a creditor's petition, it amounted to credit information that would lead any reasonable reader to be suspicious of the creditworthiness of the

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However, the plaintiff failed to prove that the rejection of his application for credit card and his company's application for industrial hire-purchase financing was due to the credit report supplied by the defendant. The plaintiff has not proven damage as a result of the libel. So, while

the appeal was allowed on the issue of libel, the dismissal of the claim was upheld.

ⁱ[2012] 2 AMR 295

ⁱⁱ[1920] AC 66

TORT / COURT PROCEDURE

THE SAD END TO THE ADORNA SAGA

In the infamous *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* (the *Adorna* decision), the original and rightful proprietor of a huge piece of land (Mrs Boonsom) lost her land through no fault of her to Adorna Properties Sdn Bhd (Adorna). Mrs Boonsom had owned the land since January 1967. A fraudster then forged her signature and affirmed a statutory declaration in June 1988 alleging that she had lost the original memorandum of transfer (MOT). In reliance thereon, the office of Pengarah Tanah dan Galian, Pulau Pinang (PTGPP) issued and released to the fraudster two advance certificates of title of the land (ACT). The fraudster subsequently executed a memorandum of transfer (the impugned MOT) which signature was attested by a Assistant District Administrator, an officer of PTGPP on 7.4.1989. The land was fraudulently transferred to Adorna using the ACT and the impugned MOT. The fraud and forgery began to unravel when Mrs Boonsom's eldest son saw an advertisement concerning the land in a Thai newspaper dated 11.6.1989. The ensuing investigation revealed the aforesaid facts.

Mrs Boonsom thereafter filed a legal suit against Adorna. The proceedings went all the way to the apex court. On 22.12.2000, the Federal Court ruled in favour of Adorna essentially on the ground of immediate indefeasibility which rendered the title of Adorna indefeasible. That decision came under heavy criticisms as it was departure from the law that indefeasibility recognized under the National Land Code (NLC) is deferred indefeasibility (which would have made the title of Adorna defeasible and reverted the ownership of the land to Mrs Boonsom) and was generally regarded as an erroneous decision. The estate of Mrs Boonsom (who had since passed away) subsequently filed a motion to the Federal Court for review of that decision which was dismissed on 27.8.2004. All legal avenues to recover the land

from Adorna having been exhausted, the estate of Mrs Boonsom filed a suit against PTGPP (the defendant) on negligence and breach of statutory duty to recover damages. Of significance is that in 2010, the Federal Court in *Tan Ying Hong v Tan Sian San & Ors*ⁱⁱ overturned its earlier *Adorna* decision which lends credence to the legal view that the court was blatantly wrong in ruling against Mrs Boonsom in 2000.

The suit against PTGPP was filed on 15.3.2005 and its decision has now been reported as *Kobchai Sosothikul (representative of the estate of Boonsom Boonyanit @ Sun Yok Eng, deceased) v Pengarah Tanah dan Galina, Pulau Pinang*ⁱⁱⁱ. The High Court held that from the evidence, the defendant had failed to comply with all the mandatory statutory requirements under the NLC for the issuance of the ACT as well as the registration of the land through the impugned MOT. The defendant and its officers owed a duty of care to Mrs Boonsom to act in commensurate with the standard of care that was required of them in ensuring that mandatory statutory procedures were followed. The fraud could have been prevented had the defendant followed such procedures. The damage suffered by Mrs Boonsom and her estate (the plaintiff) had flowed from the defendant's breaches.

Unfortunately, the court held that the action was time-barred. It is trite that a cause of action in tort arose when the plaintiff first suffered damage. The plaintiff argued that damage was suffered only when damages was ascertainable and became quantifiable in monetary terms and this took place when the plaintiff had exhausted all legal remedies available for the recovery of the land. That finality came about when the Federal Court dismissed its motion to review the *Adorna* suit in August 2004. The suit filed on 15.3.2005 would have been within 36 months from the date the cause of action accrued^{iv}. However, the trial judge ruled against the plaintiff on two accounts: (1) the date on which the damage was suffered does not mean the date the financial loss was ascertainable. The moment Mrs Boonsom lost her legal title to the land following the fraudulent transfer to Adorna, damages in various form would have set in and the moment Mrs Boonsom knew of

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the impugned transfer material damage would have been suffered by the plaintiff which would include the loss of her legal title to the land, the right to possession of the land, the right to use the land and the right to deal with the land. That would have been some time in 1989. Thus, the suit filed in 2005 was obviously time-barred. (2) Even if the finality argument was accepted, that finality came about when the Federal Court made its decision on 22.12.2000 and 36 months would have set in on December, 2003. The suit filed in 2005 would be out of time as well. The plaintiff's argument that limitation set in after the motion for review was untenable. If accepted, it would lead to endless applications for review by litigants that would keep the limitation going without end.

The plaintiff's action was time-barred. The trial judge expressed his sympathy to the plight of the plaintiff. However, there was nothing else that he could do to alleviate the grief of the plaintiff. On hindsight, the solicitors for the plaintiff could have filed the suit against the defendant as early as 1989 when the fraud was found out. They however

took the stand that when the suit was filed in 1989 against Adorna, there were no damages in financial terms sustained by the plaintiff as a result of any negligence and breaches of statutory duty by the defendant. They were so certain of the law on defeasibility of title that they were confident the plaintiff would recover the land and thereby obviate the necessity to sue the defendant. Unfortunately their understanding of legal position did not find favour with the Federal Court in *Adorna* decision and the trial judge. The lesson that we can all learn from *Kobchai Sosothikul* is that it is better to be cautiously prudent than overly confident.

ⁱ[2001] 1 MLJ 241

ⁱⁱ[2010] 2 MLJ 1

ⁱⁱⁱ[2012] 3 MLJ 297

^{iv}S 2(a) of the Public Authorities Protection Act 1948

TORT (DEFAMATION)

CAN A PERSON BE SUED FOR MAKING DEFAMATORY REMARKS IN POLICE REPORT?

The plaintiff (P) in *Binaan Sentosa Sdn Bhd v Ng In Kun & Anor*ⁱ was the developer of a property in which the 1st defendant (D1) was a purchaser of a shop lot. D1 lodged a police report against P due to dissatisfaction that individual titles had not been issued even after 10 years of purchasing the shop lot. D2 was alleged to have published an article in their newspaper report entitled "Pemaju didakwa gadaikan bangunan tanpa kebenaran" (Developer alleged to have charged building without permission). P brought a suit against both the defendants for defamation.

The police report read: "I and shop lot owners of Menara Sentosa are dissatisfied and wish to make report because P has failed to issue individual titles to us after we had purchased the shop lots for 10 years and also dissatisfied when we found that grant of the property has been charged to Affin Bank Berhad and below is the list of the shop lot owners." P claimed that these words meant that P had cheated the buyers of the shop lots, could not be trusted, had acted dishonestly and had misused the grant without the knowledge of the owners by charging it to the

bank. The newspaper report read: "22 shop lot owners of Menara Sentosa made police report at police headquarters in Kota Setar District last night because the developer of the tower had charged their properties without permission...the developer concerned ...mortgaged the properties without knowledge of its owner...How could the developer charge our properties to another bank without our knowledge..." P claimed that these words meant that P could not be trusted, had cheated in its business, was not trustworthy and had misused the master title for its own use without the knowledge of D1 and the Shop Lot Owners Committee.

The High Court held that the police report, when read in its totality, was an expression of dissatisfaction, and a complaint so that investigations may be carried out. The report was not defamatory of P. The newspaper article was merely an allegation that P had charged the properties to a bank instead of applying for and obtaining individual strata title. Nowhere has it been stated that P was guilty of wrongdoing. The article took the form of complaints against P contained in a police report which was to be investigated upon. It was not defamatory of P.

At this juncture, it is apposite to say that a statement made by a person to a police officer in the course of police investigation is absolutely privileged. The Court of Appeal in *Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim*ⁱⁱ by way of *obiter dicta* held that defamatory statements in police reports attracted the defence

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of absolute privilege (and not merely qualified privilege) for reasons of public policy. The court remarked that if actions could be brought against complainants who lodged police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk. Against persons who make false police reports, criminal

charges can be brought such as s.182 of the Penal Code.

ⁱ [2012] 2 CLJ 232

ⁱⁱ [2011] 4 MLJ 346

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The Publisher of the UPDATE is TAY & HELEN WONG LAW PRACTICE of Suite 703 Block F Phileo Damansara I No. 9 Jalan 16/11 46350 Petaling Jaya Selangor Darul Ehsan Malaysia Tel (603) 79601863 Fax (603) 79601873 email: lawpractice@thw.com.my website: www.thw.com.my

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