

THE UPDATE



The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

Issue Q3 of 2012 (Jul – Sep 2012)

PP16300/03/2012(029822)

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Abbreviations

| | | |
|-----|---|----------------|
| Jur | : | Jurisdiction |
| AUS | : | Australia |
| HKG | : | Hong Kong |
| MY | : | Malaysia |
| SG | : | Singapore |
| UK | : | United Kingdom |

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BANK PENALIZED FOR DELAY IN DISPOSING OF SECURITY !

The bank was penalized for the delay in enforcing the security although within limitation period in the recent High Court case of *MBF Finance Berhad v Muruges a/l Kuppusamy*ⁱ. The plaintiff had in October 1996 granted a loan facility to the defendant and upon default, the plaintiff enforced their rights under the deed of assignment which resulted in the assigned property auctioned off in August 2007. The plaintiff issued its letter to recall the facility on 15.11.2001 to demand the defendant to settle the balance amount due within one month but only commenced its foreclosure proceedings on the security on 27.11.2006. The defendant contended that the plaintiff had unreasonably delayed the auctioning of the property which resulted in burdening the defendant with the accumulation of interest and other charges. The plaintiff had thus failed to discharge his duty of care in good faith. The plaintiff's reasoning was that due to the merger exercise between the plaintiff and Arab Malaysian Finance Berhad, there was transfer of officers and restructuring of the plaintiff's management which resulted in lack of follow-up action.

The trial judge held that at the time of the execution of the loan agreement, the merger of the plaintiff and the resulting delay was not foreseeable nor was it foreseeable that the defendant would be liable to additional interests during the period of indefinite delay caused by the plaintiff. Since the reason for the delay was beyond the contemplation of the parties at the time of execution of the loan agreement, the defendant ought not to be penalized or burdened with the interest and late payment interest during the delay caused by the plaintiff. The defendant must be compensated by deducting the interest, the late payment interest and charges for the period from the expiry of the time stipulated in the notice of demand dated 15.11.2001 till the date of the first auction, 27.11.2006.

The judge was of the view that the fact that the plaintiff was entitled to proceed with the auction within 12 years under the Limitation Act 1953 did not mean that the plaintiff could sleep on its right. By delaying the legal process in realizing the security, the plaintiff had acted unfairly by continuing to charge interest during the period of delay. He further ruled that the plaintiff owed a duty of care to the defendant to proceed with the auction promptly and expeditiously and mitigate

the loss so as to reduce the interest and late payment interest.

It is to be noted that the judge allowed the plaintiff's claim of interest with regard to the period after 27.11.2006 as the delay to complete the auction process was ordinary delay caused by abortive auctions due to having no bidders for which the plaintiff should not be held responsible.

With due respect, we are of the view that this decision is incorrect. The provisions in the loan agreement were explicit. Upon default, the bank was entitled, among others, to sell, transfer or assign the property as the beneficial owner at such price and in such manner and subject to such conditions as the bank shall in its absolute discretion think fit free from any interest of the borrower. Similar clauses have been held to have conferred upon the lender an unfettered right to dispose of the propertyⁱⁱ subject only to a duty on the lender to use reasonable care to obtain the proper price of the mortgaged property at the date on which he decides to sell itⁱⁱⁱ. The imposition of a duty of care to auction off the property promptly and expeditiously is unheard of. Indeed, it is established law that the chargee/mortgagee/lender can choose his own time for the sale^{iv}. In the words of the High Court judge in the Singapore case of *Good Property Land Development Pte Ltd v Societe General*^v:

"These duties (of care) do not preclude the mortgagee from preferring his own interest to that of the mortgagor provided that he does not disregard the interests of the mortgagor. He is not a trustee of his power of sale vis-à-vis the mortgagor.... He is also not required to consult the mortgagor as to the time and manner of sale."

Be that as it may, it is advisable as well as prudent to have this decision in mind when taking steps to recover defaulting loan, until and unless the appellate court overrules it.

ⁱ [2012] 4 AMR 852

ⁱⁱ *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662, *Keppel Finance Ltd v Phoon Ah Lek* [1994] 3 MLJ 26

ⁱⁱⁱ *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633, *Standard Chartered Bank Ltd v Walker and Anor* [1982] 3 All ER 938, *Malayan Banking Bhd v Lim Poh Ho* [ibid], *Pengurusan Danaharta Nasional Bhd v Choo Oh Kim & Others* [2010] 4 CLJ 450

^{iv} *China & South Sea Bank Ltd v Tan Soon Gin, George* [1990] 3 CLJ (Rep) 398 at 401,

^v [1989] 1 SLR(R) 97

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DISREGARDING ASSIGNMENT NOTICE AT OWN PERIL

That was the costly lesson learnt by the Government of Malaysia in the case of *CIMB Bank Berhad v Kerajaan Malaysia*ⁱ. W was appointed by a government department, Jabatan Pengairan and Saliran Malaysia (JPS) to carry out a construction project. W obtained banking facilities from P and informed JPS vide an irrevocable letter of instruction (the LOI) that it had assigned to P its rights to receive payments from JPS who was to pay P directly. A deed of assignment of benefits of contract between P and W (the DOA) was signed. The LOI was received and acknowledged by JPS. JPS made first progress payment to P and continued making a total of 16 progress payments. W then requested JPS to pay the balance progress payments Nos. 17 to 40 into W's other account in another bank by reason of "some problems between W and P". JPS obliged and thereafter, for the next four years, progress payments were made to W. Despite numerous demands, JPS refused to pay P the outstanding sums due under the DOA, hence the suit.

JPS contended that it had not given consent to the DOA which invalidated the DOA. The trial judge rejected such contention, as an assignment (unlike a novation) did not require the consent of the debtor, *ie.* JPS in this instance. The LOI referred specifically to the DOA and there was nothing to suggest that W had novated its rights to P. Thus, the DOA was a valid assignment. A proper notice had been given to JPS. JPS was therefore in breach of the DOA in making progress payments from No.17 onwards to W directly and JPS was compelled to pay the amount over again to P.



P's right to payment from JPS under the DOA could not be varied or modified unilaterally by W. W could not validly inform JPS to pay directly to its other account without P's consent. By doing so, JPS ran the risk of having to pay progress payment Nos. 17 to 40 twice. And indeed, the judge held JPS accountable to pay RM15 million to P.

You may ask: does JPS have any recourse against W? Theoretically, yes but in reality in this case, no because W was eventually wound up by another creditor.

ⁱ[2012] 2 AMCR 9

BANKING LAW

NEW DEFENCE TO BANKS ON HONOURING FORGED CHEQUES

The recently reported High Court decision in *Malaysian Plastics Sdn Bhd v United Overseas Bank (M) Bhd*ⁱ is very much welcomed by the banking industry. It pronounced the new law (as it should be) pertaining to defences available to

banks in cases of honouring forged cheques following the amendment to the Bills of Exchange Act 1949 (BEA) on 1.7.1998. Prior to that, the liability of a paying banker which honour a forged cheque is strict, almost 'absolute'. When a customer's signature on a cheque is forged, the instrument is inoperative and the bank has no authority to make payment based on the forged signatureⁱⁱ. The bank is thus liable (on the tort of conversion) to compensate or reimburse its customer if it makes payment on a forged instrument. It is no answer for the bank to say that it was unaware of the forgery or that it took

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reasonable care. The forged instrument is a nullity and the bank has no authority, actual or implied, from its customer to act upon it. This common law position has been codified in s.24 of BEA, which created a limited exception in favour of a bankⁱⁱⁱ. There are only two defences open to the bank, both of which arise from the duty of care imposed upon a customer. The first is the duty owed by a customer to his bank to refrain from drawing a cheque in such manner as may facilitate fraud or forgery and is often referred to as 'the Macmillan duty' after the House of Lords decision in *London Joint Stock Bank Ltd v Macmillan*^{iv}. The second is the duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it, or 'the Greenwood duty' named after the case *Greenwoods v Martins Bank Ltd*^v. If the customer fails to exercise due care in any of these duties, the bank may avoid liability. Attempts to expand the scope of the customer's duty of care to include duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques from being presented for payment or duty to take steps to check his periodic bank statements to enable him to notify the bank of any debit items in the account which he had not authorized were rejected^{vi}.

Now, our legislature has introduced a new s.73A to the BEA which read as follows:

"Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and the person whose signature it purports to be *knowingly or negligently contributes to the forgery or the making of the unauthorized signature*, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value." (emphasis added)

In an extensive judgment which had traced the development of law in this area, the High Court in *Malaysia Plastics* held that s.73A extended beyond the narrow confines of the two common law duties of care as aforesaid. S.73A statutorily altered or amended the law to the extent that it

provided a complete defence to any claim for monies from the paying bank under a forged instrument where the same customer knowingly or negligently contributed to the forgery or allowed the forgery to be perpetrated. However, the burden remained on the bank to prove that the customer was complicit or negligent in facilitating the forgery.

The learned Judge proceeded to rule that the plaintiffs (the customers) had facilitated the forgery by, *inter alia*, allowing their executive in their accounts division, TMW full custody and control of all their accounts documentation. This, together with a failure to check, audit or supervise the cheque books and bank statements, contributed directly to the forgery. S.73A thus operated to afford a defence to the bank. The customers' claim was dismissed.

As end note, for the sake of completeness, we must state that prior to *Malaysia Plastics*, there are at least three reported High Court decisions which had interpreted or applied s.73A widely as in *Malaysia Plastics*. They were *Leolaris (M) Sdn Bhd v RHB Bank Bhd*^{vii}, *Prima Nova Sdn Bhd v Affin Bank Berhad*^{viii} and *Trolli Master Sdn Bhd v RHB Bank Bhd*^x. However, there are also some High Court decisions which had decided that s.73A did not alter the common law duty of care, such as *Globelink Container Line (M) Sdn Bhd v Bumiputra Commerce Bank Berhad*^x, *Leolaris (M) Sdn Bhd v Malayan Banking Berhad*^{xi} and *Melewar Apex Sdn Bhd v Malayan Banking Bhd*^{xii}. The latest to join the fray is the High Court decision in *Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Berhad*^{xiii} delivered on 14.8.2012 which preferred the wide view of s.73A. A decision from the higher Court of Appeal is certainly necessary to provide certainty in this area of law.

ⁱ[2012] 9 MLJ 336

ⁱⁱPoh Chu Chai, *Banking Law* (2nd Ed)

ⁱⁱⁱ*United Asian Bank Bhd v Tai Soong Heng Construction Sdn Bhd* [1993] 1 MLJ 182

^{iv}[1918] AC 777

^v[1933] AC 51

^{vi}*See Tai Hing Ltd v Liu Chong Hing Bank* [1986] 1 AC 80

^{vii}[2009] 10 CLJ 248

^{viii}[2010] 7 AMR 229

^{ix}[2011] 7 CLJ 105

^x[2011] 5 AMR 555

^{xi}Unreported, KLHC Suit No.D5-22-218-2003

^{xii}[2007]

^{xiii}Unreported, KLHC Suit No. D5-22-219-2003

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DILIGENT USE OF CORPORATE VEIL

The principle of separate corporate personality as propounded in the famous case of *Salomon v Salomon & Co Ltd*ⁱ applies as between a company and its shareholders who are individuals and as between a subsidiary and its parent company. The exceptions to the principle came into focus yet again in the Hong Kong Court of Appeal decision in *Winland Enterprises Group Inc v Wex Pharmaceuticals Inc*ⁱⁱ. These exceptions were based on a principle of public policy or the principle that devices used to perpetrate frauds or evade obligation will be treated as nullities or on a presumption of agency or trusteeship.

Let's look at the facts in *Winland Enterprises* case. C was a Canadian pharmaceutical company whose subsidiary, S1 held the China patent for a Drug. Another subsidiary, S2, contracted with P for the sole distributorship of the Drug in Peru (the Agreement). The various companies shared common management, directors and staff. C subsequently informed P that it had discontinued its development of the Drug and proposed to terminate the Agreement and dissolve S2. P regarded this evinced an intention by C not to be bound by the Agreement and accepted the repudiation by C and S2 by filing a claim.

P then obtained leave to serve the writ on C, a non-party to the Agreement and against which P had no independent cause of action, outside the jurisdiction in Canada on the basis that S2's corporate veil should be lifted. P subsequently amended its claim to contend that C had withheld the supply of Drug from S2 which was in anticipatory breach of the Agreement by failing to supply the Drug to P; and that S2 was an alter ego of C and a façade to cloak the fact that the Agreement was carried on by C to evade its legal obligation and liability.

The Court of Appeal in Hong Kong refused to lift the corporate veil of S2. Although there was documentary evidence to make out a good arguable case that S2 was a façade or a puppet of C, that alone was not sufficient. P must further show that the façade was used or S2 acted as C's puppet to cloak the fact that in truth the Agreement

and its business was carried on by C to evade its legal obligation and liability. P failed to do so.



The appellate court delivered a timely reminder on the principle of separate corporate personality. The principle ought to be viewed with commercial realism. The law permits the use of a corporate veil to avoid legal obligation and liability, which was precisely why the principle evolved.

What is not permitted is its use for illegitimate purposes such as evading legal obligation and liability or to commit fraud. Members of a group of companies may share common management, directors and staff. A subsidiary may have no separate mind of its own. It may be run by same staff as or at the direction of the parent company.

These factors may lead to an inference that the subsidiary is a façade or puppet but this reason alone does not justify lifting of the veil. For the law is that the use of a corporate veil to insulate its shareholders or its parent company from legal liability is not objectionable, unless it is coupled with some illegitimate purpose.

ⁱ[1897] AC 22

ⁱⁱ[2012] 2 HKLRD 757

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CONTRACT LAW

SLIP UP IN RESERVING RIGHTS TO PERSONAL INJURY CLAIMS

In *Ter Yin Wei v Lim Leet Fang*ⁱ, R had an accident with A. R suffered some personal injuries. R's lawyers, TKSP negotiated with A's insurers, HSBCI with a view to settle the property damage and loss of use claim. Settlement having been reached, TKSP returned HSBCI's standard discharge voucher (DV) duly signed by a workshop employee on behalf of R stating that the payment was "in full and final settlement of all claims we/I have or may have" in respect of the accident and that it constituted a full discharge on those terms. TKSP failed to stamp the words "without prejudice to any personal injury claim", as was their usual practice, on the DV. R subsequently brought an action against A and HSBCI for her personal injury claims.

The High Court of Singapore upheld the defence of HSBCI that R had settled all claims when she without any qualification signed the DV including a claim for personal injury. The DV was not a receipt *simpliciter*. It stated in clear and unambiguous language that the payment was a full and final settlement of and full discharge from all claims that the recipient *had or may have had*

against the insurer and the insured driver. This clearly referred to all existing claims and claims not put forward at the time or that might arise in the future. TKSP had forgotten to reserve R's personal injury claims and thereby compromised her right to make such a claim. The fact that the correspondence between TKSP and HSBCI only mentioned property damage and loss of use was insufficient to displace the unambiguous meaning of the words "all claims we/I have or may have in respect of the incident" in the DV. R's attempt to use contextual approach as propounded by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*ⁱⁱ was rejected. Extrinsic evidence must be used to explain or illuminate the written words and not to contradict or vary them. The words of the DV were clear and unambiguous and with a meaning that was plain and fixed. R could not maintain her claim for personal injuries.

ⁱ[2012] 3 SLR 172

ⁱⁱ[2008] 3 SLR(R) 1029

COURT PROCEDURE

PUBLIC SERVANT NOT IMMUNE FROM CONTEMPT OF COURT ORDER

Are public servants protected from contempt of court order by reason of their discharging duties under the Local Government Act 1976 (the Act)? That was the issue before the High Court in *Ronald Philip Devereux & Anor v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors*ⁱ. A consent judgment had been entered between the plaintiffs and the 1st defendant local authority which essentially required the latter to revoke the building approval and other approvals it had granted and to demolish certain illegal and unauthorized structures. The judgment was served personally on the President and the secretary of the 1st

defendant. The 1st defendant however failed to comply with the judgment. In an application to cite the President and secretary (the alleged contemnors) for contempt of court, it was contended that as public servants, the alleged contemnors were protected in discharge of their duties under s.125(1) of the Act. The provision stipulates that no matter or thing done by the President, officer of the local authority shall if the matter or thing was done for the purpose of carrying out the provisions of the Act subject him personally to any action, liability, claim or demand whatsoever. The judge however held that the said provision did not confer such protection.

ⁱ[2012] 4 MLJ 665

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LIMITATION PERIOD FOR CLAIM OF MONEY SECURED BY CHARGE & EFFECTIVE ACKNOWLEDGMENT OF DEBT

In *Malayan Banking Bhd v Wembley Industries Holdings Bhd*ⁱ, D had defaulted in the repayment of the banking facilities granted by P. D then entered into a debt restructuring agreement dated 15.10.2004 (DRA) involving their financiers and creditors including P. In the recitals and body of the DRA (recitals [B] and [C] and cl.10.1), D had acknowledged its indebtedness to various creditors including P. The DRA was never implemented and lapsed on 31.12.2004. It was an express term of the DRA that after its termination, each of the creditors would be at liberty to make demand on D for immediate payment of debts and to commence legal actions. P's demand was not met, hence the suit.

It was contended that the suit was barred by limitation. There are a few material dates to bear in mind:

| | |
|------------|--|
| 29.1.1999 | Date of agreement agreeing to payment in a lump sum a year later |
| 29.1.2000 | Date of accrual of original cause of action |
| 15.10.2004 | Date of DRA and fresh acknowledgment of debt |
| 29.1.2006 | Date limitation set in if 6-year limitation applies to original accrual |
| 24.2.2009 | Date the writ was filed |
| 29.1.2012 | Date limitation set in if 12-year limitation applies to original accrual |

Pursuant to the debentures, P had recovered sale proceeds from the shares over which a first fixed charge had been created. P's claim was therefore for the shortfall. It was held that since D's indebtedness was secured by a charge over the assets, properties and undertakings of D, the relevant period of limitation was 12 years under s.21(1) of the Limitation Act 1953 (the Act) and not the ordinary 6-year limitation for a claim under contract under s.6(1) of the Act.

More interestingly is P's reliance on a term in the DRA that upon termination of the agreement, each creditor shall be entitled to make

demand for the immediate repayment of outstanding indebtedness "as if the agreement had never been entered into". As a consequence, the recitals [B] and [C] and cl.10.1 were no more because in as much as the DRA had never been entered into, so also those recitals and clause had never been there to begin with! The court rejected such contention. The expression "as if the agreement had never been entered into" must be interpreted in the context of the clause which had reference to P making a demand for the outstanding sums. In such context, there was nothing impeding P from so proceeding as if the DRA had never been entered into. Further, it did not make commercial sense to P on one hand to give extension of time for D to pay based on restructured facilities and on the other hand consenting to D being able to dispute the amount said to be owing. Recitals [B] and [C] and cl.10.1 survived the termination of the DRA and D was estopped from denying what was acknowledged there. There was a fresh acknowledgement of debt within the meaning of s.26(2) of the Act.

The above view was shared by another High Court judge in *RHB Investment Bank Bhd & 5 Ors v Plaza Rakyat Sdn Bhd & Anor*ⁱⁱ. The same DRA was before the court although the parties are different. The recitals [B] and [C] and cl.10.1 were held to have constituted express acknowledgement of the debt. Further, it was opined that the rule of non-enforceability of a contract did not affect its availability as an acknowledgement as it was merely evidence of a defendant's pre-existing liability and not the foundation of the plaintiff's claim.

Of more importance is the ruling that regardless the action is to recover a shortfall after a charge action or one premised entirely on the loan agreement, s.21 of the Act which provides a limitation period of 12 years for a claim of money which is secured by a charge applies. It is not the source of the claim which is critical but the more general consideration whether the money being claimed is secured by a charge. In this respect, the English position in *Barnes & Anor v Glenton and Other*ⁱⁱⁱ should not be followed as the parallel English legislation did not have s.6(5) of the Act which expressly stated that nothing in s.6(1) shall apply to any action to recover money secured by any mortgage of or charge on land or personal property.

ⁱ [2012] 5 CLJ 956

ⁱⁱ [2012] 5 AMR 363

ⁱⁱⁱ [1899] 1 QB 885

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1. WHAT DOES NOT AMOUNT TO FORCED RESIGNATION ?

In *North South Development Sdn Bhd v Aloysies Fathianathan*ⁱ, the claimant contended he was forced to tender his resignation by his superior following the conclusion of a domestic inquiry against him. The Industrial Court found that there was a gap of four days or cooling-off period between his resignation and his meeting with his superior. During the four-day gap, he was not working. He had typed his resignation letter in his own words in the comfort of his home, using his personal computer without any company staff present.

All these facts showed that he was not under any compulsion to resign. To establish forced resignation, the claimant had to show that he was not allowed time to think over the matter, not allowed to come out of office but was physically restrained and that he had signed under protest. If indeed the claimant was forced to resign, the company would not have allowed him to occupy its premises and use the company's car for another six weeks. The court also found that it was not unusual for an employer who was faced with an employee who had allegedly committed serious misconduct to be called in and told of the company's dissatisfaction with the said employee and during that meeting, the issue of resignation arose.

That however did not mean that the claimant was forced to resign. It was not unusual that an employee might decide that it would be in his best interest to resign where he had been told of the several aspects in which he had failed to meet the standards of conduct expected of him. In the circumstances, the claimant was held to have resigned voluntarily for his own benefit and there was no dismissal.

2. SLANDEROUS REACTION TO WARNING LETTER

In *Roslan Yussof v Toyochem Sdn Bhd*ⁱⁱ, the claimant was alleged to have committed two acts of misconduct. He uttered the words "babi" and "anjing" when his immediate superior (who was a Muslim) attempted to deliver a warning letter to him and he threw the said letter to the floor. The claimant contended that he had directed the words to himself and not his superior. The Industrial Court nonetheless held that the said

words whether directed to the claimant himself or his superior in the circumstances in which it was blurred out could not be anything other than conduct that was unbecoming, rude, derogatory and plainly abusive by an inferior to a superior. A refusal to acknowledge receipt of a warning letter would justify an instant dismissal. In the instant case, that the claimant had the gumption to utter those words while refusing to acknowledge a legitimate letter issued by the employer intensified his downright insubordination. Unsurprisingly, the claimant's dismissal was upheld.

3. WORKED FOR 32 MONTHS, RECEIVED SALARY OF 68 MONTHS

Fascinating but true, in the High Court decision of *Rizana bt Mohamad Daud v Naluri Corporation Berhad*ⁱⁱⁱ. P was formerly employed by D as the head of legal/corporate secretarial under a contract of employment dated 7.8.2002. P by a letter dated 14.1.2005 exercised her option to terminate the contract by giving 3 months' notice as provided in clause 18. It was provided in the same clause that cessation of employment for termination shall entitle her to compensation equivalent to 36 months' average monthly emoluments over the immediately preceding 12 months. P filed her claim for the compensation on 6.4.2011.

Among the defences pleaded were that the appointment of P who was the wife of a former director of D and also the sister-in-law of Tajuddin Ramli (the then chairman of D) was not approved by the board of directors of D although P's contract of appointment was signed by the executive director of D, that P did not have formal legal qualifications to assume the said post; that the compensation was unconscionable and excessive and that P's claim was time-barred. The High Court held that the compensation payable to P under clause 18 would only arise upon cessation of her employment (ie. upon completion of the three-month notice) which was after 14.4.2005 and not upon the date of her notice of resignation dated 14.1.2005.

Thus, P's claim filed in court on 6.4.2011 was not time-barred. Although the court did not totally rule out matters concerning family relationship were irrelevant per se, on the facts and surrounding circumstances and upon considering that P's claim was based on the contract of employment, the court regarded the fact that P was the wife of a former director and her brother-in-law was the former chairman of D was not relevant so as to deprive P's rightful claim.

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Furthermore, D had never contested the terms of the contract of employment nor disputed P's salary and benefits or compensation from the time P was employed or even when P had given notice of resignation. D had continued to pay P's salary until she ceased employment. D's conduct was held to be inconsistent, inequitable and unjust. P succeeded in her claim.

4. VOID APPOINTMENT OF A DE FACTO BUT NON-DE JURE DIRECTOR

In *Tan Sri Dato' Wan Sidek bin Wan Abdul Rahman v Rahman Hydraulic Tin Berhad*^v, C was appointed on 3.6.1998 as a director of R to fill a casual vacancy pursuant to article 109 of the articles of association of R (AA) which provided that C would hold office until the next AGM. After 1997, there was no AGM held until 15.6.2001. On 31.3.2000, C entered into a service agreement with R under which C was appointed as the executive chairman cum managing director of R for three years from 1.2.2000.

The agreement was signed by one of R's directors. Subsequently, C was informed that he had ceased to hold office as a director on the expiry of the extended period for holding the AGM for 1998 i.e. on 31.12.1998. In a suit filed by C for constructive dismissal by virtue of non-payment of C's salaries from October 2000, the Court of Appeal upheld the concurrent findings of the Industrial Court and High Court that C was not a "workman" under the Industrial Relations Act 1967 (IRA) as the alleged service agreement was null and void and unenforceable. S. 143 of the Companies Act 1965 (the Act) provides that the AGM shall be held not more than 15 months after the holding of the last preceding AGM subject to any extension of the period of 15 months by the Registrar of Companies. Article 60(1) of the AA provides that the company shall in each year hold its AGM and not more than 15 months shall elapse between the date of one AGM and that of the next.

The appellate court ruled that the effect of Articles 60(1) and 109 of the AA and s.143 of the Act was clear that C would hold office of his directorship only until the next AGM of R^v. C had ceased to be a director on or after 31.12.1998. C and all the other directors of R during the period from 31.1.2.1998 until 15.6.2001 were not *de jure* directors of R as they were not duly appointed in accordance with the AA. C may be a *de facto* director but not a *de jure* director. His *de facto* directorship did not entitle him to be appointed as

a managing director of R under the AA. By virtue of articles 92 and 93 (which required an executive and managing director to be a director of the company), he had no capacity to be appointed executive chairman cum managing director and consequently he had no legal capacity to enter into the service agreement. The agreement was invalid, null and unenforceable. Further, the director signing the agreement on behalf of R was also merely a *de facto* director who was deemed to have vacated the office at the same material time and thus had no legal capacity to sign the agreement which rendered it likewise invalid. The court also rejected C's attempt to rely on s.30(5) of the IRA to resort to "equity, good conscience and substantial merits of the case without regard to technicalities and legal form" to assist him. C could not be said to have come to the court with clean hands after having flouted the provisions of the Act and the AA of R. C's claim was therefore rightly dismissed by the courts.

5. DISGUISED DEMOTION

Two remarkable features emerged from the Court of Appeal decision in *Rajamohan Maniam v GPA Plastic Industries Sdn Bhd*^{vi}. There, the claimant had worked as a plant executive in the production department of the company for nine years. Then, he was transferred to the store as a store executive. He refused to accept the transfer on the ground that it was a demotion and that it was a move engineered by the company's assistant general manager who had a dislike for him due to past work-related incidents. He issued a letter asking the company to withdraw the transfer order within seven days failing which he would terminate himself unwillingly (the ultimatum letter).

He stopped work on the eight day, left the company, started work with another company and lodged his claim for constructive dismissal. The Industrial Court favoured him but the High Court overturned the decision. On further appeal, the appellate court reinstated the Industrial Court decision and ruled that the claimant had been wrongfully dismissed. In their view, the transfer was a disguised demotion of the claimant^{vii}. There was an ulterior motive which meant the transfer was not *bona fide*. The first notable point is that although his salary remained the same, the court held that his new post was an inferior post compared to the previous post when other factors were considered.

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Previously, he had 30 staff working under him but in the new post, he had only three coolies of foreign nationality under him. His scope of work was wider previously. Going to the store would be frustrating and humiliation for him. The second point is this. The company took issue on the fact that he joined another company upon expiration of the seven days' notice and that he received from the new company a letter of offer dated three days before he gave the ultimatum letter. Thus, it was contended that he had left the company voluntarily because he had secured a higher paying job. The appellate court however accepted the explanation of the claimant that he only started looking for a new job around the time he considered himself as having been constructively dismissed and he only joined the new company upon the expiration of the seven days' notice. It was reasonable for him to look for another job as he had a family to support and financial commitments to meet.

6. ANOTHER VIOLATION OF LIFO

The Court of Appeal disturbed the concurrent findings of the Industrial Court and High Court in *Nordson (M) Sdn Bhd v Lee Chin Tao & Anor*^{viii} and quite rightly so. It was a case of whether the company had properly carried out a retrenchment exercise on the principle of 'last in, first out' (LIFO). Its business operation was divided into four: Finishing Sales, Finishing Service, Hotmelt Sales and Hotmelt Service. The relevant factual comparison between the claimant and another manager (Cheong) is as follows:

| | Claimant | Cheong |
|------------------------------|-------------------------------------|--------------------------------|
| Date joining the company | 7.4.1997(sales manager [finishing]) | 22.11.1995 (sales) |
| Date becoming manager | 7.4.1997 | 1.11.1996 (technical services) |
| November 1997 reorganization | Headed Finishing Department | Headed Hotmelt Department |

In 2001, the company was restructured and the two sales departments managed by the claimant and Cheong were merged which caused the claimant's position redundant and he was retrenched accordingly. The claimant contended that the company had not complied with LIFO since Cheong was appointed as a sales manager in late 1998 and was junior to him. Upon scrutinizing the evidence, it was held that Cheong

was in actual fact a senior to the claimant in terms of both service and as a manager. In terms of principle, the court appeared to have agreed with the principle that managers should be treated as one class and the last to be appointed as manager should be the first to be retrenched^{ix}.

7. ON NON-DI PERFORMANCE CASE, NON-APPLICATION OF EVIDENCE ACT AND NON-COMPLIANCE OF AWARD BY EMPLOYEE

In a case where an employee was dismissed due to poor work performance, it is not necessary for the company to initiate and hold a domestic inquiry. Such an inquiry is only relevant when it involves misconduct and disciplinary issues. This oft-heard mix-up was put to rest in *Yusof Talib v IDI Sdn Bhd*^x.

On a separate note, the inter-play between Evidence Act 1950 and proceedings in Industrial Court was clarified in *Santokh Singh Visaka Singh v Cashflow Horison Sdn Bhd*^{xi}. There, the company became aware of the claimant's association with the company's main competitor through an anonymous phone call received by the company's staff (COW3) who reported it to which resulted in further investigations culminating with the claimant's dismissal.

The court ruled that the information received by COW3 was given by third party of which she had no personal knowledge. It was hearsay evidence. However, the admissibility of hearsay evidence in Industrial Court was not to be treated in the same manner as in the civil courts. The Industrial Court had the flexibility in arriving at its decision and was not burdened with technicalities regarding the rules of evidence that were applicable in a court of law. The fact that the Industrial Court was a tribunal meant that objections taken to hearsay evidence were not *ipso facto* sustained. Further, the Evidence Act 1950 did not apply to the Industrial Court.

Nonetheless, the underlying principles codified in the Act were applicable. In applying the principle to the information received by COW3, the claimant had been given a fair opportunity of commenting on it and contradicting it both at the domestic inquiry and the trial before the Industrial Court. Thus, the information though hearsay was admissible to establish the fact that the company's suspicions of the claimant's involvement in the competitor aroused.

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Finally, in *Intharadavi Karuppan & Ors v Voith Paper Fabrics Ipoh Sdn Bhd*^{xii}, the claimant who had succeeded in the Industrial Court to be reinstated in his former position without any loss of wages, allowances, service, seniority, privileges or benefits within 30 days from the date of the Award failed to report to work on the appointed date set by the complainant's solicitors themselves. She then lodged a complaint under s.56(1) of the IRA for the company's alleged failure to comply with the award. However, the court held that the claimant's complaint of non-compliance by the company was unsustainable. The court cited the proposition that an award of reinstatement would impose duties on the workman if he wished to have the benefit of the award as well as on the employer.

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- ⁱ[2012] 2 ILR 267
 - ⁱⁱ[2012] 2 ILR 497
 - ⁱⁱⁱ[2012] 4 AMR167
 - ^{iv}[2012] 4 AMR 806
 - ^vReference was made to *Re Consolidated Nickel Mines, Limited* [1914] 1 Ch 883
 - ^{vi}[2012] 5 CLJ 900
 - ^{vii}See *Quah Swee Khoon v Sime Darby Bhd* [2001] 1 CLJ 9 which explained the principle of disguised demotion as constructive dismissal.
 - ^{viii}[2014] 4 MLJ 565
 - ^{ix}*AMZ Corporation Sdn Bhd v Sye Ah Chai* [1989] 1 MLJ 238
 - ^x[2012] 3 ILR 28
 - ^{xi}[2012] 3 ILR 59
 - ^{xii}[2012] 3 ILR 66
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EMPLOYMENT LAW

IS BARRING-OUT RELIEF AVAILABLE AGAINST FORMER EMPLOYEE?

In *Caterpillar Logistics Services (UK) Limited v Huesca de Crean*ⁱ, D was employed by C, a company which provided logistics services, as a logistic centre manager. There was no restrictive covenant in D's contract of employment, but there was a confidentiality agreement by which D had agreed not to use trade secrets or confidential information for herself or others, or divulge them to others, either during or after her employment. One of her responsibilities was with regard to a logistics services agreement (LSA) between C and QH, an important customer of C, for the provision by C to QH of logistics services. D participated in a meeting between C and QH to discuss possible efficiencies and reduction of costs under the LSA as intended by QH.

Two months later, D accepted the position of general manager of QH and gave her notice of resignation. C notified D that C would commence legal proceedings against her, contending that by accepting the role with QH, she had put herself in a position which directly conflicted with her fiduciary duties to C and that her appointment was an attempt by QH to secure confidential information. To avoid an interim injunction, D was required to give an undertaking to the court not to use or disclose any confidential information belonging to C or to undertake any tasks for QH in which she was directly dealing with C or LSA. D

replied to refute C's allegations and offered a written undertaking to C. C then filed a claim against D, alleging that D's employment with QH would result in the inevitable misuse by her of C's confidential information or alternatively, would put D in an inevitable position of conflict between the duty of fidelity to her new employer and her ongoing duty of confidence to C. C did not plead any misuse but sought *quia timet* injunctive reliefs.

The UK Court of Appeal (by a majority) affirmed the High Court's decision which refused both barring-out relief and a narrower order prohibiting D's use of C's confidential information and struck out C's claim. In the context of solicitor-client relationship, barring-out relief in essence prevents a solicitor in possession of confidential and privileged information from acting for another client with an adverse interestⁱⁱ. It was extended to a firm of accountants which has provided litigation support services in *Prince Jefri Bolkiah v KPMG (a firm)*ⁱⁱⁱ. In the instant case, C contended that D was a fiduciary and thus the barring-out relief was available against her. The court however held that the employer-employee relationship was not a relationship in which the employee was a fiduciary in the sense that a trustee or a solicitor was to his beneficiary or client, even though an employee owed certain fiduciary duties to its employer^{iv}. The principle under which barring-out relief was available was confined to solicitors and the like and it was not extended to the ordinary employer-employee relationship save as to the most exceptional circumstances^v which was not the case here.

Further, C had not contracted for barring-out relief. C could and should have required D to enter into express covenant not to enter the

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employment of a customer or competitor and such covenant would then be tested on its reasonableness as a covenant in restraint of trade. In the absence of such covenant, where D was innocent, it could not be said that D had threatened to infringe an enforceable right of C which justified the barring-out injunction.

C had not established any arguable case that D had broken or intended to break or even that there was a real risk that she would break the terms of the confidentiality agreement. The interim injunctive relief sought was rejected. There had been no reasonable grounds for bringing the claim against D, no evidence of any breach of contract or threatened breach of contract on D's part, and

no entitlement to barring-out relief as a matter of law. The claim was thus properly struck out.

ⁱ[2012] 3 All ER 129

ⁱⁱ*Rakusen v Ellis, Munday & Clarke* [1911-13] All ER Rep 813

ⁱⁱⁱ[1999] 1 All ER 517

^{iv}See also *Nottingham University v Fishel* [2000] IRLR 471

^vThe attempt to obtain such a relief against a former employee had likewise been rejected by the Court of Final Appeal of Hong Kong in *PCCW HKT Telephone Ltd v Aitken* [2009] HKCFA 11.

INSOLVENCY LAW

COMPETING CLAIMS TO PROPERTY AFTER DISCHARGE OF BANKRUPT

A property which is part of a bankrupt's estate only comes to the attention of the trustee (Official Assignee) after the discharge of the bankrupt. Who is entitled to the property? This scenario surfaced in the Singapore case of *Lim Lye Hiang v Official Assignee*ⁱ. The provisions under consideration in the case are not dissimilar to the provisions in the Bankruptcy Act in Malaysia. Therefore, the decision is highly relevant if similar issue arises in Malaysia.

In *Lim Lye Hiang*, the appellant was made a bankrupt in January 1998. Her sister (LLK) had nominated her pursuant to s 25 of the Central Provident Fund Act (CPFA) to receive LLK's Central Provident Fund (CPF) monies (the Monies). LLK passed away on 14.3.2008 at which point the appellant was still an undischarged bankrupt. On 16.10.2009, the Official Assignee (OA) filed a report to the court in support of its application to discharge the appellant from bankruptcy. By this time, it had admitted proofs of debt and had published a notice that it intended to declare a first and final dividend. On 13.11.2009, an order to discharge the appellant from bankruptcy was granted without any conditions (DO). On 12.1.2010, the appellant attempted to claim the Monies from the CPF Board which did not accede to her claim. On 24.2.2010, the CPF Board transferred the Monies to the OA's bank account in the belief that the Monies vested in the OA despite the appellant's discharge. On 12.5.2010, the OA filed a summons seeking an order that the Monies be divisible among the appellant's creditors and payable to them as

dividends on the basis that the Monies were property which had devolved on the appellant on 14.3.2008, notwithstanding that the Monies were received by the OA *after* the appellant's discharge from bankruptcy.

The Court of Appeal upheld the High Court order which allowed the OA's application. S 15(5) of the CPFA clearly provided that the appellant became entitled to withdraw the Monies upon LLK's death. This entitlement was a chose in action which constituted "property" within s 2(1) of the Bankruptcy Act (BA)ⁱⁱ. As this chose in action was acquired by or had devolved upon the appellant before her discharge from bankruptcy, it vested in the OA pursuant to s 78(1)(a) of the BAⁱⁱⁱ.

Did her subsequent discharge have the effect of revesting that entitlement in her? S 127(1) of the BA^{iv} provided that a discharge released the bankrupt from *all* debts provable in his bankruptcy, except for debts specified in s 127 itself and debts which were specified by the court under s 124^v or s 126. The absence of debts specified in the DO meant that the appellant was released from all debts provable in her bankruptcy. But such absence was not relevant to the question of whether the discharge had the *additional* effect of revesting the property, over and above releasing her from all such debts. Indeed, the court ruled that a discharge in itself did not have the effect of revesting property in the discharged bankrupt. First, the provisions of the BA (such as s 128(1)^{vi}, s 127(1) read with s 76(1)(a)^{vii} and s.123^{viii} and s.122^{ix}) plainly contemplated that the administration of the bankrupt's estate might still continue after discharge. Secondly, the objectives of the discharge regime supported the proposition that a discharge did not automatically revest property. Thirdly, the English and Australian courts had held that a discharge did not in itself revest the property and these decision were highly persuasive in so far as the relevant provisions were *in pari material* with those in the BA.

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Therefore, a discharge does not *ipso facto* revest property in the discharged bankrupt.

It is noteworthy that the appellant court over-turned an earlier High Court decision in *Chong Chee Keong v Official Assignee*^x which held that the right to claim the dividend *qua* chose of action vested in the OA reverted to the plaintiff after his discharge.

There are a few additional points which we wish to highlight. A discharge is different in effect from an annulment. An annulment^{xi} has the effect of wiping out the bankruptcy altogether and putting the bankrupt in the same position as if there had been no bankruptcy order made against him^{xii}. A discharge while acknowledging that the bankrupt was rightly made a bankrupt is intended to give him a second chance in life^{xiii}. A bankrupt's discharge releases him from provable debts not expressly allowed to continue by statute or order but it does not destroy the debts altogether. Those creditors whose debts are provable in the bankruptcy and from which the bankrupt is released due to s 127 are left to prove in the bankruptcy against the bankrupt's estate which remains vested in the OA for this purpose^{xiv}.

Where the OA has given notice to the creditors that it intends to declare a final dividend, he would specify a date in the notice to require claims against the bankrupt's estate to be established by the said date (the final date)^{xv}. The class of creditors who are entitled to dividends is crystallized on the said date. If a creditor has not proven in the bankruptcy by the said date, his claim would be expunged^{xvi}. This will ensure finality in terms of the identity of the creditors who are entitled to a portion of the bankrupt's estate.

Will there be any difference to the outcome of *Lim Lye Hiang* if the discharge is granted after a final dividend has been declared by the OA? The appellate court held *qua obiter* that where the discharge was granted after the final

dividend fell *short of satisfying* the creditors in full, a revesting of property would disrupt the statutory allocation of rights embodied in s 122, the reason being the bankrupt would be obtaining property which formed part of his estate without having satisfied the conditions in s 122. Where the discharge was after a final dividend of 100%, ie. all creditors had been paid in full, the requirements of s 122 had been met. Any property which subsequently came to light would be held by the OA on trust for the discharged bankrupt beneficially. In the premises, a discharge does not revest property in the discharged bankrupt, regardless of whether the discharge occurs before or after the OA has declared the final dividend.

ⁱ[2012] 1 SLR 228

ⁱⁱS 2(1) of the Bankruptcy Act 1967 of Malaysia (BA Malaysia)

ⁱⁱⁱS 48(1) of BA Malaysia

^{iv}S 35(1) of BA Malaysia

^vS 33(3) of BA Malaysia

^{vi}S 35A of BA Malaysia

^{vii}The closest is s 8(1) of BA Malaysia

^{viii}S 105 of BA Malaysia

^{ix}S 69 of BA Malaysia

^x[2005] 3 SLR(R) 546

^{xi}S 105 of BA Malaysia

^{xii}*Tan Teck Guan v Mapletree Trustee Pte Ltd* [2011] 3 SLR 1031

^{xiii}*Re Siah Ooi Choe* [1997] 3 SLR (R) 706

^{xiv}See also *Law Society v Shah* [2009] Ch 223

^{xv}S 119 of BA, s 66 of BA Malaysia

^{xvi}Form 103, BA Malaysia

LAND & CONTRACT LAW

VENDOR SEEKING SPECIFIC PERFORMANCE OF SALE OF LAND

It is common to hear that courts ordinarily order a contract for the sale of land to be specifically enforced. This is simply because unlike most other goods, no two pieces of land are identical (the *sui generis* rationale) and thus, damages, more often than not, are an inadequate remedy for the purchaser. How about the reverse situation where the purchaser is not willing to

complete the sale of the property? Does the same rationale apply? Is the specific performance remedy similarly applicable in favour of the vendor?

The answer seems to be “No”, as evident from the Singapore High Court decision in *New Dennis Arthur and Anor v Greesh Ghai Monty and Anor*¹. P had granted an Option to Purchase (OTP) for the sale of a property which was duly exercised by D. Prior to the completion, D discovered a huge puddle of water in the master bedroom, stain marks in the other bedrooms and water running down the wall of a bedroom. D refused to complete the purchase. P commenced an action against D seeking, among others, specific performance of the sale of the property.

D's counterclaim for rescission failed as the court found that there was no false inducement

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to sign the OTP. On P's claim, the court highlighted the obverse situation which was not a situation where the purchaser was eager to complete and was seeking specific performance of the sale of the property. Here, the vendors were seeking to foist the property on the unwilling defendants as purchasers. The *sui generis* rationale was not engaged, as the property did not have a particular value to the vendor whose interest was purely financial in nature. Since P had only a financial interest in the sale of the property, their loss could be adequately compensated with damages. However, P had not quantified and

particularized general damages claimed. The court thus awarded nominal damages of \$1,000 in favour of P, together with reduced sum of specific damages due to inadequate evidential support for the claim.

ⁱ[2012] 3 SLR 908

PROPERTY / BAILMENT

IS PRESERVED SPERM A 'PROPERTY'?

Once again, the characterisation of 'sperm' was in the limelight, after the ground-breaking decision in *Yearworth & Otrs v North Bristol NHS Trust*ⁱ the UK which we had featured in issue Q2 of 2009. But, this time, it is in Australia in the case of *Bazley v Wesley Monash IVF Pty Ltd*ⁱⁱ, a decision of the Supreme Court of Queensland. The applicant's husband had samples of his sperm stored by the respondent but did not provide written directive as to their use in the event of his death. Upon his death, the respondent informed the applicant that in accordance with their guidelines, the semen could no longer be stored and could not be used to facilitate a pregnancy. The applicant sought to restrain the respondent from destroying the stored samples.

It was held that sperm extracted from the human body and stored could be described as 'property'ⁱⁱⁱ, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The relationship between the respondent and the deceased was one of bailor and bailee for reward pursuant to which the entitlement of the deceased or his personal representative to call for the return of the property could be recognized subject to the contract of bailment.

The decision cited and followed *Yearworth*. *Yearworth* actually departed from the Australian decision in *Doodeward v Spence*^{iv} which carved out an exception to the common law rule that 'a living human body is incapable of being owned or possessed and there can be no property in a human corpse.' The exception is that 'when a person has by lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, subject to any

positive law which forbids its retention under the particular circumstances.' The exception was devised based on a distinction between body parts which have and have not been subject to the exercise of work or skill and that, in the view of the UK Court of Appeal in *Yearworth*, was not entirely logical. Instead, they adopted a common sense approach that by his body, a man generated and ejaculated the sperm to be used for his benefit later in certain events and concluded that no person other than each man had any rights in relation to the sperm which he had produced^v. This approach and conclusion was adopted in *Bazley*.

It would appear to us that this question of property in the sperm of a man is now more or less settled. The law in US seems to have reached the same conclusion that the sperm is properly part of a deceased man's estate, see the Californian decision of *Hecht v Superior Court of Los Angeles County (Kane)*^{vi}. It remains to be seen whether our Malaysian courts will follow these decisions.

ⁱ[2009] 2 All ER 986

ⁱⁱ[2011] 2 Qd R 207

ⁱⁱⁱS 36 of the Acts Interpretation Act 1954 (of Queensland) defines 'property' as 'any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action.'

^{iv}[1908] 6 CLR 406

^vA possible counter-argument is that sperm is an indivisible part of the body like an organ and is not inheritable. Such argument had been shot down in the French case of *Parpalax v CECOS* (1 Ch Cir) 1 Aug 1984.

^{vi}(1993) 20 Cal Rptr 2d 275

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ADDITIONAL ASSESSMENT FOR UNDER-DECLARED INCOME

In *Ketua Pengarah Hasil Dalam Negeri v Lai Keng Chong & Anor*ⁱ, the Inland Revenue conducted a field audit on a taxpayer (a trading company) in respect of the years of assessment 1998 to 2001. It was found that they had not recorded completely all their business transactions, they had failed to keep and retain their records of trading for the relevant years of assessment in good order, they did not declare their income of crane rental, the monies deposited into their bank account were higher than the amount declared and invoices and delivery orders were not available for all the relevant periods due to destruction by pests or misplacing. The taxpayer had declared the gross profit ratio for the relevant years of assessment as 28.33%, 26.84%, 16.79% and 15.81% respectively.

The Director-General of Inland Revenue (DGIR) invoked his power under s.91 of the Income Tax Act 1967 to make additional assessment by using 22% GPR. On challenge by the taxpayer, the Special Commissioners of

Taxation (SC) upheld it but the High Court dismissed the SC decision and applied the GPR of 8%. On appeal, the Court of Appeal reinstated the SC decision, holding that the SC was correct that the best evidence to rely was the first return submitted by the taxpayer which showed the GPR of between 15% to 26.84% and thus, the GPR of 22% was just and appropriate. The decision of the High Court was not supported by any evidence and the basis of GPR of 8% was simply plucked from the air without basis.

The appellate court also highlighted the statutory duty (under s.82(1)(a) of the Act) of a taxpayer to keep all their records in order particularly receipts, payment vouchers, orders and a host of other related documents pertaining to their business enterprise for a period of seven (7) years for tax purposes.

[2012] 6 CLJ 29

TORT (DEFAMATION)

QUALIFIED PRIVILEGE PROTECTING RESPONSIBLE JOURNALISM

Can it ever be said to be in the public interest to publish the detailed allegations underlying a criminal investigation against a suspect, reliant in part on anonymous sources, before even the police have investigated the allegations? This question attracted the application of *Reynolds* privilege in the UK Supreme Court case of *Flood v Times Newspapers Ltd*ⁱ. For the benefit of our readers, *Reynolds* privilege protects publication of defamatory matter to the world at large where (i) it was in the public interest that the information should be published; and (ii) the publisher has acted responsibly in publishing the information. This so called "responsible journalism" test was propounded by the House of Lords in *Reynolds v Times Newspapers Ltd*ⁱⁱ and has since been called into play in numerous casesⁱⁱⁱ.

In *Flood*, the publisher of a national newspaper published an article in the newspaper and on its website concerning allegations of corruption against the claimant, a serving police

officer. The article included information in a press statement issued by the police but in addition, named the claimant who had not been identified in the police statement and included the details of the allegations made to the police against him. A police investigation was initiated, with the result that the claimant was moved temporarily from his post, but when subsequently no evidence was found to support the allegations against the claimant, he returned to his post. It was made clear that the investigation was based on information from an unnamed source, that all parties had been offered the opportunity to comment and that the conduct was categorically denied on all sides. The article was moderate in tone and phrasing. The claimant brought an action in defamation against the publisher who invoked the defence of *Reynolds* privilege^{iv}.

The defence succeeded at the court of first instance but was rejected by the Court of Appeal which in the main held that the journalists responsible for the article had failed to act responsibly in failing to adequately verify the allegations of fact that it contained. On final appeal, the Supreme Court ruled for the publisher and accorded them the protection of *Reynolds* privilege.

There were three primary issues that fell to be determined in relation to the *Reynolds* privilege. First was the 'meaning issue'. The claimant

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contended that the article conveyed a “Chase level 2” meaning --- that there were reasonable grounds to suspect that the claimant was guilty, while the publisher contended it conveyed a “Chase level 3” meaning --- that there were grounds for investigating whether the claimant was guilty^v. The question boiled down to: where there was a range of meanings that the publication was capable of bearing, what approach should be adopted when considering whether the journalist acted responsibly in relation to it? The court held that a responsible journalist should have regard to the full range of meanings that a reasonable reader might attribute to the publication, and thus the claim to *Reynolds* privilege must be assessed having regard to this spectrum.

Secondly, the ‘public interest’ issue. Two questions arose: (i) was it in the public interest that the details of the “supporting facts” placed before police should be published? And (ii) was it in the public interest that the claimant should be named? In the judges’ view, the story (if true) was of high public interest in the fact of police corruption and also in its nature and concern that the allegations might not be properly investigated. The allegations themselves were the whole story and it would be impossible to publish the article without identifying the claimant as the officer against whom the allegations had been made or publishing the facts supporting the allegation. Thus, it was in the public interest that both the accusation against the claimant and the facts supporting it including his identity^{vi} should be published.

Thirdly, the ‘verification’ issue. Before that, however, a distinction has been drawn between a case of reportage^{vii} in which the public interest lies simply in the fact that the statement has been made^{viii} and a case where the public interest in the reported allegation lies in its content. In the former, the *Reynolds* privilege protects the publisher if he has taken the proper steps to verify the making of the allegation^{ix} and provided that he does not adopt it. In the latter, the publisher will only be absolved from the need to justify the defamatory publication if reasonable steps have been taken before publishing to verify that the allegations are true and if he reasonably believes that there are grounds for believing that they are. This does not necessarily require that he should know what those grounds are. Their existence can be based on information from reliable sources or inferred from the fact of a police investigation in

circumstances where such inference is reasonable. On the facts, the journalists were justified in concluding on the basis of the information available that there was a strong circumstantial case against the claimant and that there was a serious possibility that he was guilty of corruption. The fact that the police had obtained and executed a search warrant on the claimant’s house and office and removed him from his unit was one of the factors considered.

It is noteworthy that in arriving at its decision, the Supreme Court over-ruled any general principle that seemed to have been set out by the Court of Appeal that it was unnecessary and inappropriate and thus not in the public interest for reports of serious allegations of crime or professional misconduct to set out details of the allegations and setting out the charge itself was sufficient to inform the public of what it had an interest in knowing. In the judges’ view, each case would turn on its own facts and the overriding test was that of responsible journalism. The apex court also gave weight to the judgment of responsible journalists and editors as to the nature and content of an article within the boundaries of acceptable journalism. The decision is consistent with the prevailing trend of cases in UK and the European Court of Human Rights which seeks to promote greater freedom for the press to publish stories of genuine public interest.

ⁱ[2012] 2 WLR 760

ⁱⁱ[1999] 4 All ER 609

ⁱⁱⁱ*Bonnick v Morris* [2002] 1 AC 300, *Jameel*

(*Mohammed*) v *Wall Street Journal Europe Sprl* [2007] 1 AC 359

^{iv}A more accurate description of this defence is ‘public interest defence’, per Lord Phillips PSC in *Flood*.

^vThe shorthand label of the three possible defamatory meanings that might be derived from a publication alleging police investigations into the conduct of a claimant as identified in *Chase v News Group Newspapers Ltd* [2003] EMLR 218. A “Chase level 1” meaning is that the claimant was guilty.

^{vi}Cases on naming of person in the defamatory article: *Jameel* [paras 51-52], *In re British Broadcasting Corpn* [2010] 1 AC 145 [paras 25-26, 65-66], *In re Guardian News and Media Ltd* [2010] 2 AC 697 [para 63]

^{vii}The nature of reportage was extensively analysed in *Roberts v Gable* [2008] QB 502.

^{viii}*Al-Fagih v H H Saudi Research and Marketing (UK) Ltd* [2002] EMLR 215; *Jameel*, supra

^{ix}without having any obligation to verify the truth of the allegations or implications

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TORT (DEFAMATION)

DEFAMATION BY VISUALS IN NEWS BULLETIN

P owned a college while D was a television broadcaster. In its news bulletin, D aired news on the failure of 60 private colleges to comply with the conditions set by the Ministry of Higher Education which resulted in revocation of their registration. The news broadcast was accompanied by a visual of P's branch campus. It was also on the internet news portal of D that was available for about a month after the broadcast of the news bulletin. P sued D in defamation.



The above was a simplified version of the facts in *Masterskill (M) Sdn Bhd v Sistem Televisyen Malaysia Bhd*. The High Court held that an ordinary viewer would ordinarily have equated the news with the visuals of the college. Such a viewer would form the nexus between the two and hence, they were capable of referring to P.

TORT (DEFAMATION)

MINISTER LIABLE FOR DEFAMING CTOS

The recent reported decision of High Court in *CTOS Sendirian Berhad & 3 Ors v Datuk M Kayveas*ⁱ should serve as a lesson to our Ministers not to abuse their position to maliciously make public statements which are defamatory in the guise of public interest. The incident took place in a two-month period in June 2007 when the defendant who was then a Deputy Minister in charge of monitoring the administration of the

On the defence of qualified privilege, D attempted to rely on the broader *Reynolds* public interest privilege accorded to the media and founded upon a duty to publish a statement to the world at large as warranted by public interest as laid down in *Reynolds v Times Newspapers Ltd*ⁱⁱ. D would have to act reasonably in publishing the material, i.e. to practice responsible journalism. The trial judge held the view that since the Ministry had not listed out the 60 private colleges that had their registration revoked, all the more reason that there should not be the slightest allusion to any college whatsoever during the news broadcast. Nothing was done to verify with P if it was in the blacklist. D could have run the news without the visuals to avoid the risk of wrongful association. In spite of a notice of demand, D's internet portal was only removed some one month later. There was no public apology by D other than the fact that it regretted that the report had been misinterpreted by parents. Appreciating the power of association with the first broadcast of the news to P and the power of repeated access (via internet) to the news to view and verify, D's action or inaction in not removing the news report was not just regrettable and reckless but reprehensible. Thus, in the circumstances, the defence of *Reynolds* public interest privilege did not avail D.

The court awarded general damages of RM200,000 to P which had pleaded a claim of RM100 million and turned down claim of aggravated damages.

ⁱ[2012] 5 CLJ 296

ⁱⁱ[2001] 2 AC 127

Insolvency Department of Malaysia (JIM) made various defamatory statements concerning the plaintiffs through the mass media. The plaintiffs operate as data and information collection centres, collecting information on individuals in connection with legal proceedings, business and companies' profiles from the public domain, i.e. newspapers, gazettes, Companies Commission of Malaysia and JIM and supplying them to financial institutions.

The issues before the trial judge were whether the statements made by the defendant in their common and ordinary meaning were defamatory towards the plaintiffs and whether the defendant could rely on any of the defence of justification, qualified privileged and fair comment.

Though the trial judge did not state in her grounds of judgment the exact contents of the

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defendant's statements, there were a few clear instances that may be extracted. They were that the plaintiffs were operating illegally without a licence, that their operation as a supplier of information was against the law, that they had not been registered as a company, that their activities were detrimental to the security of the country and that they had hacked into websites and stole information. The defendant did not challenge the imputations as defamatory.

To succeed in the defence of justification, the defendant bore the onus of proving that the defamatory imputations were true. The trial judge found that there was no truth whatsoever in any of the imputations. On the contrary, the defendant was held to have known at the material time that the imputations were not true !

On a defence of fair comments, the comments must be based on facts or inferences of facts and they must be made in the interest of public. It will fail if the defendant was actuated by express malice. The court found that the defendant had made defamatory statements towards the plaintiffs with malicious intention. There was information with regard to the defendant in the plaintiffs' database when the defendant failed to obtain a loan facility from a bank. Having failed to remove his name from the plaintiffs' database, the defendant had initiated a private vendetta action against the plaintiffs. The statements made by the defendants were malicious statements made in the guise of public interest.

A privilege is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive itⁱ. The law affords protection to the maker

acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. The trial judge however found that the defendant had abused the privileged occasion. The defendant had wrongly conveyed to the public that the plaintiffs were operating illegally without a licence, when actually no licence was required for the nature of business carried out by the plaintiffs. The plaintiff had made contradicting statements to the public with false facts about the plaintiffs and with the knowledge that such statements were not true. These included his allegation that one might withdraw one's name from the plaintiffs' database by paying money to the plaintiffs' staff, that the plaintiffs were illegal and unregistered entities, that the plaintiffs had infringed various statutes and that the plaintiffs had hacked into the website of JIM to remove e-mail complaints against them.

The trial judge took into account the serious nature of defamatory remarks, the wide extent of publication and the continued publication after notice of demand had been given to the defendant and awarded RM120,000.00 as compensatory damages. She further granted exemplary damages of RM50,000.00 as the defendant in his capacity as a deputy minister was reckless in making the defamatory statements and to deter him and others from similar conduct in the future.

ⁱ[2012] 4 AMR 735

ⁱⁱ*Adam v Ward* [1917] AC 309

TORT (NEGLIGENCE)

ADVISING MERCHANT BANK IN RESTRUCTURING SCHEME OWES DUTY OF CARE TO SHARE INVESTORS

The scope of duty of care owed by a merchant bank as adviser to investors of shares based on a report produced by the said adviser in a proposed restructuring scheme was critically examined in the Court of Appeal case of *Amal Bakti Sdn Bhd & Ors v Affin Merchant Bank (M) Bhd*.

The brief facts. As advisor of the listed Omega Holdings Berhad (Omega), the respondent (Affin) had announced to Bursa Malaysia Securities Berhad that Omega and one Milan Auto

(M) Sdn Bhd (Milan Auto) had agreed to undertake a restructuring scheme. The scheme involved Milan Auto's retail business in importing and distributing Alfa Romeo vehicles in Malaysia under a concession agreement with Fiat Auto SPA of Italy (Fiat) to be acquired by a new listing company (Newco), Milan Auto to offer selected investors by private placement shares in Newco, Milan Auto to transfer the restructured business to Milan Corporation Sdn Bhd (Milan Corp) via business transfer agreement, Newco to acquire total share capital of Milan Corp from Milan Auto through issuance of new shares to Milan Auto and Omega to transfer its listing status to Newco. Affin issued explanatory statement (ES) and circular to shareholders stating, *inter alia*, that (i) Fiat had no objections to the business transfer agreement; and (ii) the concession agreement was subject to tenure and extension of franchise risks. The details of these statements were reaffirmed in a public

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prospectus subsequently issued by Affin. Unbeknown to the appellants, the concession agreement had been mutually terminated some time ago. The Securities Commission (SC) discovered this fact and revoked its approval for both the restructuring scheme and the listing of Newco on Bursa Malaysia but by then, Milan Auto had already sold the Newco shares to the appellants.

The appellants brought an action for negligent misstatement and breach of statutory duty against Affin. They claimed that they had been induced into purchasing the shares on account of Affin's statements. The High Court trial judge dismissed the claim but on appeal, it was allowed.

It was held that Affin knew, or ought to have known, that its statements and announcements would be communicated to the appellants who would very likely rely on them in deciding whether to purchase the Newco shares. Thus, there was sufficient proximity that it would be fair, just and reasonable that the scope of Affin's duty of care be extended to cover the investors (appellants) and the share transactions between the appellants and Milan Auto. Affin as advising banker was obliged to ensure that the information provided to potential investors was accurate and had been obtained from independent sources of the highest quality.

In issuing the ES and making the announcements, it was insufficient for Affin to merely rely on the report of the due diligence working group (DDWG) and/or information provided by the directors of Omega and Milan Auto who were interested parties without verifying the information independently. Affin's defence that

under its terms of appointment, it was only required to oversee matters and was under no obligation to independently verify any information provided by the directors of Omega and Milan Auto was rejected. Likewise, its defences that it was entitled to expect members of the DDWG to undertake their work in a professional manner and to rely on their professional skill and that it only issued the ES after the contents were approved by DDWG and the board of directors of Omega and Milan Auto were turned down. Affin as licensed to be adviser could not delegate its duties under the Securities Commission Act 1993 and related legislationⁱⁱ to third parties irrespective how qualified the members of DDWG may be.

The fact of termination of the concession agreement could have been verified by simply writing to Fiat as done by the SC which Affin had omitted. Affin's representation in the ES that Fiat Auto had been informed of the business transfer agreement to which it had no objection was palpably false. Affin had simply failed to make reasonable enquiry.

Affin was thus held to be liable in damages to the appellants being the purchase consideration paid by the respective purchasers to Milan Auto which remained outstanding arising from the aborting of the listing of the shares of Newco.

ⁱ[2012] 4 CLJ 813

ⁱⁱSection 9.16 of the Listing Requirements and clause 3.02 of the SC Policies and Guidelines on Issue/Offer of Securities

TORT (NEGLIGENCE)

WHETHER VALUER FOR MORTGAGEE OWES DUTY TO MORTGAGOR-PURCHASER

In *Scullion v Bank of Scotland plc (trading as Colleys)*ⁱ, C applied to the lender for a mortgage to assist him in buying a flat for the purpose of letting it out. The defendant property surveyors carried out a valuation of the flat on behalf of the lender. Their report gave a capital value of the flat and stated that its rental value was £2,000 per month. C purchased the flat without obtaining his own valuation. He was unable to find a tenant for the flat until some six months after completion at £1,050 per month. The tenant left after a year and the flat stood un-let for a further 2 years before it was sold. C claimed damages from the defendant in negligence in respect of rental valuation.

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The principal issue was whether the defendant owed a duty of care to C as the prospective mortgagor and purchaser of the flat to prepare the report with appropriate skill and care. Prior to *Scullion*, there was a House of Lords decision in *Smith v Eric S Bush*ⁱⁱ that a valuer instructed or employed by the prospective mortgagee to prepare a report on a property for the mortgagee was held to owe a duty of care to the prospective mortgagor-purchaser. However, the property in *Smith* was a modest house to be acquired as a residence by the purchaser, unlike the claimant in *Scullion* who bought the flat as an investment to let and who, likely to be richer and more commercially astute, could be expected to obtain his own valuation. Further, evidence in *Smith* was that the surveyor knew that about 90% of purchasers relied upon valuations provided to mortgages when deciding whether to purchase. In *Scullion*, there was no such overwhelming evidence.

The UK Court of Appeal thus seized upon the differences to reject an extension of the principle in *Smith* case to apply to the facts in *Scullion*. Although the trial judge had been entitled to find C had relied on the report, it was not sufficiently clear that it would have been foreseeable to the defendant surveyor that he would do so, nor was there a sufficient degree of proximity between C and the defendant. It was not fair, just and reasonable to make the defendant liable to the claimant for their negligence in assessing the rental value of the flat. Accordingly,

the defendant owed no duty of care to the claimant.

This is not the final decision as permission to appeal to the Supreme Court had been allowed. Let's see the ultimate outcome in due course.

ⁱ[2011] 1 WLR 3212

ⁱⁱ[1990] 1 AC 831

TRUST LAW

DIVIDING UP PROPERTY IN JOINT NAMES OF UNMARRIED COUPLE

The UK Supreme Court decision in *Jones v Kernott*ⁱ sought to clarify the law on beneficial interests of an unmarried couple in a house they had acquired in joint names to be their family home which was previously laid down by the House of Lords in *Stack d Dowden*ⁱⁱ.

First, the facts. In 1985, C and D who were not married to each other, bought in joint names a property (P1) in which they lived together as man and wife. C contributed 20% of the purchase price and the balance was financed by endowment mortgage in their joint names. The financial arrangement until 1993 was that D gave C £100 per week towards the household expenses and C paid the mortgage, the premiums on a life insurance policy and other household bills out of their joint resources. They separated in 1993 and D moved out. C remained with their two children and assumed sole responsibility for all outgoings and maintenance of P1. Parties accepted that at this point of time, they held the beneficial interest in P1 in equal shares.

In 1995, P1 was placed on the market but was not sold. The parties subsequently cashed in the life insurance policy and shared the proceeds, enabling D to buy his own home (P2) with the aid of a mortgage in 1996. 10 years later, D initiated claim on P1. C then filed a suit for a declaration that she owned the entire beneficial interest in P1.

Next, the scenario. A family home was bought in the joint names of an unmarried cohabiting couple who were both responsible for any mortgage, without any express declaration of their beneficial interest. The general principles: [1] The starting point --- the presumption that they were joint tenants both in law and in equity (and were thus entitled to equal shares). [2] That presumption could be displaced by showing that

(a) the parties had had a different common intention at the time when they had acquired the home; or (b) they had later formed the common intention that their respective shares would change. [3] The primary search was for the actual shared intention of the parties and their common intention was to be ascertained expressly or deduced/inferred objectively from their word and conduct. [4] Where it was clear that either (a) that the parties had not intended a joint tenancy at the outset; or (b) that they had changed their original intention but it was not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, each party was entitled to that share which the court considered fair having regard to the whole course of dealings between them in relation to the propertyⁱⁱⁱ. [5] Financial contributions were relevant but there were a range of factors^{iv} to enable the court to decide what shares were either intended (as in [3]) or fair (as in [4]).

Application to the facts. The trial judge had made a finding that the intention of C and D had changed, hence there was no need to impute change of intention. It was possible to infer that after D had left P1 and they had tried unsuccessfully to sell it, the parties had formed a new plan when they cashed in the life insurance policy and shared the proceeds, enabling D to buy himself a new home (P2). At that time, D's interest in P1 had crystallized so that the logical inference was that the parties had intended that C have the sole benefit of any capital gain in the joint property (P1) and that D have the sole benefit of any capital gain in his new home (P2).

The pinnacle court made clear that in the scenario posed above, there was no presumption of a resulting trust^v arising from the parties having contributed to the deposit or the rest of the purchase price in unequal shares.

In a different scenario, where a family home is put in the name of one party only. The general principles: [1] Different starting point --- no presumption of joint beneficial ownership, but to deduce their common intention objectively from

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their conduct. [2] The first issue is whether it was intended that the other party has any beneficial interest in the property at all. If he does, then the next issue is what that interest is. [3] If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will determine what is fair having regard to the whole course of dealings between them in relation to the property.

Last but not least, it is noteworthy that the two dissenting Law Lords used a different basis to arrive at the same decision as the majority. They disagreed that there could be inference of change of intention by the events of failure to sell P1 and cashing in of the life insurance policy. Instead, they held that an intention should nevertheless be imputed to them that the beneficial interests in P1 should be apportioned as the trial judge considered they should be^{vi}. The final result was

that the proportions of the beneficial interests in P1 should be held 90:10 in favour of C.

ⁱ[2011] 3 WLR 1121

ⁱⁱ[2007] 2 AC 432

ⁱⁱⁱOr, in another way, ask what their intention as reasonable and just people would have had had they thought about it at the time.

^{iv}See *Stack v Howden*, paras 33-34 and 68-70, *Oxley v Hiscock* [2005] Fam 211, paras 68-69

^vA resulting trust traditionally arose where A and B contributed unequally to the purchase price and the title was conveyed to A & B as joint tenants, whereby A and B held as equitable tenants in common in proportion to their contributions : *Lake v Gibson* (1729) 1 Eq Cas Abr 290

^{vi}The dichotomy between inference and imputation was recited in the judgment.

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