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#### **Abbreviations**

Jur	:	Jurisdiction
AUS		Australia
HKG		Hong Kong
MY	:	Malaysia
SG	:	Singapore
UK	:	United Kingdom
ZA	:	South Africa

#### **IMPORTANT**

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## BURSA ENFORCING LISTING REQUIREMENTS

There were two recent decisions on enforcement of listing requirements taken by Bursa Malaysia (the Bursa) against directors of listed companies for breaches of such requirements of the Bursa (LR). First was the High Court decision in *Khiudin Mohd & Anor v Bursa Malaysia Securities Bhd & Anor Case*<sup>i</sup> and the other was the Court of Appeal decision in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa Malaysia Securities Bhd & Anor Appeal*<sup>ii</sup>.

(1) *Khiudin* case involved the CEO and directors and members of the Audit Committee of the Board of Directors (the Applicants) of Transmile Group Berhad. The Listing Committee of the Bursa (R) had imposed penalties including public reprimands and fines on all the Applicants for breaches of the LR, which punishment was upheld by the Appeals Committee of R. R as an exchange holding company is vested with statutory powers under the Capital Markets and Services Act 2007 (CMSA). At about the same time, the Securities Commission (SC) initiated criminal charges against the Applicants pursuant to the Security Industry Act 1983. The Applicants applied for an order of *certiorari* to quash the decision of the Appeals Committee.

On the contention that simultaneous criminal action by SC and proceedings on breach of the LR by Bursa would pose real risk of bias, the court held that the issues before the court and the Bursa were separate. The criminal charges before the court required proofs that were different from the one required before the Bursa. Further, the judge had no cause to admit any evidence from the enforcement proceedings into the criminal case. More importantly, the power entrusted on the Bursa to protect investors' interest and to ensure public confidence would be defeated if Bursa could not act in a swift manner.

The two allegations of breaches were essentially delay in the submission of accounts and significant deviation between the financial

results. The CEO attempted to extricate himself from the breaches by contending that the financial matters of the company rested with the financial department, internal and external auditors who had purportedly been negligent for failure to detect any defect.

This contention was held to be unsustainable in the light of the legal duties imposed on directors in respect of which the court cited and followed the recent decision of the Federal Court of Australia in *Australian Securities and Investment Commission v Healey*<sup>iii</sup>. Reliance on advice of management and auditors was rejected and such reliance did not *per se* discharge directors from their duties. In particular, reliance would not be reasonable where the directors know, or should have known by exercise of ordinary care, of any fact that would deny such reliance<sup>iv</sup>. In this case, the submission that matters of finance be left to professionals in the area was untenable when the Applicants knew or ought to have known of the audit concerns relating to the audited annual accounts for year 2006 of the company.

On the alleged breach of natural justice for being denied oral submission before the Appeals Committee, it was held that the right to natural justice only required a right to fair hearing which could not be equated with a right to an oral hearing. In the absence of mandatory rule, the right to oral hearing was not an automatic right. The enforcement proceedings of the Bursa were premised on documentary evidence and written representations of the parties as set out in the relevant enforcement procedure. On the facts, there was sufficient opportunity given to all the Applicants to present their respective case.

On the contention that daily penalty should cease upon resignation of the director concerned, the court disagreed. If such was allowed, it would defeat the whole purpose of the enforcement proceedings. The breaches took place when the Applicants were in the position to rectify and they must be responsible for their failures. They could not in the face of an action by the Bursa resign and claim to be no longer in control of the accounts. The penalties should run until the

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breaches were remedied and not after the resignation.

As conclusion, the court reiterated the general judicial stand in Commonwealth jurisdictions which was reluctance in interfering with the decision of a regulatory body (mandated under the law to maintain and promote the interests of public members dealing on the exchange) in enforcing its objectives done in good faith.



(2) *Tengku Dato' Kamal* case concerned directors of Cepatwasan Group Berhad. Shortly before the appellants were removed as directors of the company, they had caused its wholly owned subsidiary (Prolific Yield) to pay out RM13m to a company known as Opti Temasek and RM3m to the 1<sup>st</sup> appellant's driver in breach of the financial assistance provisions in the Bursa(R)'s Listing Requirements (LR). The Listing Committee (LC) found the appellants in breach of the LR, fined the 1<sup>st</sup> and 2<sup>nd</sup> appellants (then the only directors of Prolific Yield) RM1m each, directed them to restore to the company the RM13m paid to Opti Temasek and the RM3m paid to the driver and fined the 3<sup>rd</sup> and 4<sup>th</sup> appellants RM500,000 each. R thereafter applied to the High Court to enforce the LC's sanctions against the appellants pursuant

to ss.360(1)(c)(i), (1)(d)(ii)(J) and (1)(d)(ii)(K) of the CMSA.

On the contention that only the SC could make the instant application to enforce the penalties, it was held that R was a recognized stock exchange under the CMSA. Under s.360(1)(c), it was clearly entitled to make such application to enforce its penalties.

It was contended that since the company had (in the civil suit instituted by the company and Prolific Yield against the appellants for the return of RM16m paid to Opti Temasek and the driver [1168 Suit]) entered into a consent judgment with the appellants for the return of monies to the company, the instant application was a duplicity of proceedings. Further, pursuant to the consent order, the appellants' obligation was to pay nothing more than RM3m.

The appellate court rejected such contention. The cause of action in the instant suit was totally different from the 1168 Suit for it was not about an accrued right but was a fresh proceeding. R's action based on a breach of the LR did not overlap with the 1168 Suit's cause of action. CMSA set out R's statutory duty to act in the public interest with particular regard to the need for the protection of investors. Public interest was best served by R directing the return of the monies wrongly paid out in breach of the LR. Notwithstanding the settlement between the parties in the 1168 Suit, public interest and investors' confidence must be protected by ensuring R could still take action to rectify the breach by directing such return.

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<sup>i</sup> [2012] 7 CLJ 407

<sup>ii</sup> [2012] 8 CLJ 678

<sup>iii</sup> (2011) 278 ALR 618

<sup>iv</sup> *Australian Securities and Investment Commission v Adler* (2002) 41 ACSR 72

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## **CHARGEES' RIGHT TO WITHHOLD AN AMOUNT FOR FUTURE COSTS THAT IT MAY INCUR**

The Hong Kong Court of Appeal decision in *Tele-Art Inc (in liq) v Bank of China (HK) Ltd*<sup>i</sup> raised an important point on the right of a chargee to withhold from sale proceeds reasonably anticipated future costs and expenses of legal proceedings. The facts are fairly straight-forward. P charged shares to B as security for loans made to P's subsidiary (S). S defaulted. B enforced its power of sale leading to 5 sets of legal proceedings in several jurisdictions. From the net proceeds of sale, B sought to retain a provision for future costs and expenses not yet settled or incurred as some of the legal proceedings were then ongoing. P contended that B was not entitled to deduct from the sale proceeds costs and expenses in advance of their being incurred. The Court of First Instance held that B was entitled to withhold or seek to retain reasonably anticipated future costs of the proceedings limited to those required to finalize the accounting process.

The decision was upheld on appeal. As a matter of principle, B should not be deprived of its security interest merely because of the timing of the accounting exercise, and be forced to incur further costs to seek security for costs under the Companies Ordinance or the Rules of the High Court. In redemption suit, a mortgagee had a right

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### **BANKING LAW**

#### **COMPETING CLAIMS TO MONIES PAID INTO BANK ACCOUNT**

The facts in the South African Supreme Court of Appeal case of *Standard Bank of South Africa Ltd v Echo*<sup>j</sup>: Echo Petroleum (E) deposited money into the bank account of Sky Petroleum Ltd (S) in the bank, in payment for goods that would be delivered in the future, intending that S would use those funds to purchase the goods that s had sold to E. Unknown to E, S was heavily indebted to its bank, which promptly set off the credit brought

to have its costs taken out of the security, unless he was guilty of misconduct, and so to require the payment, in addition to the principal and interest, of a reasonable sum to cover the anticipated costs of the proceedings in which the dispute of the payout figure was to be resolved<sup>ii</sup>.

As P's contention that the right of a trustee to a lien to retain part of the trust fund to cover his contingent liabilities was not applicable to a mortgagee holding surplus proceeds on trust for the mortgagor as a constructive trustee (as in the instant case), the court answered that there was no requirement that there must be a pre-existing fiduciary duty before a constructive trustee was allowed a lien for the costs and expenses incurred by him.

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<sup>i</sup>[2012] 5 HKLRD 399

<sup>ii</sup>See *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273, 283, *Project Research Pty Ltd v Permanent Trustee of Australia Ltd* (1990) 5 BPR 11,225. But see *Ginelle Pty Ltd v Singh* [2010] NSWSC 1166

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about by E's deposit against the debt due and owing by S to the bank. The issues : (1) whether E could recover the amount it deposited from the bank; (2) whether a customer of the bank (ie. S) to whose credit a deposit had been made acquired a right to deal with the proceeds of that credit.

On the facts and evidence tendered, the appellate court held that E transferred the price pursuant to a contractual obligation to pay in advance of delivery of the goods purchased so as to enable S in turn to pay its supplier and thereby procure delivery of the goods to E. As soon as the deposit was credited to it, S became entitled to use the funds and was therefore entitled to the benefit of the credit. The credit was thus a debt of the bank to S against which existing debts of S to the bank could be set off. The conclusion was thus that E had no right in law to reclaim the deposit

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from S or the bank by vindication. The bank had acted lawfully in appropriating the credit. The answer to issue (1) is therefore “No” while the answer to issue (2) is “Yes” on the facts of the case.

The principle in essence is that a bank may set off funds paid into its customer’s bank account by a 3<sup>rd</sup> party contracting with the customer against the customer’s existing debts to the bank.

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2012 (5) SA 283

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## COMPANY LAW

### PAYMENT OF DIVIDEND NOT OUT OF PROFITS OF COMPANY

The High Court decision in *Dato’ Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd [in liquidation]) v Kuan Leo Choon & 12 Ors* drives home the points that it is illegal to declare dividend not out of the profits of the company in contravention of s 365(2) of the Companies Act 1965 (the Act), those responsible in declaring such dividend will be made liable and accountable as constructive trustee for the amounts so declared and paid out and the onerous duty expected of a director of a company.

Let’s just focus on pertinent facts. The company had defaulted in payment towards one of its contractor, Kemas Construction Sdn Bhd (Kemas), which resulted in an arbitration award of RM4.301 million against the company (the said award).

The company was subsequently wound up upon Kemas’ petition under s 218 of the Act on the ground of inability of the company to pay its debts. The 1<sup>st</sup> and 3<sup>rd</sup> defendants (D1 and D3) were the directors of the company. The plaintiffs were the liquidators of the company. Their claim was premised on s 304(1) of the Act for the recovery of debts and liabilities of the company, alleging that D1 and D3 had carried on the business of the company with the intent to defraud the creditors of the company, notably Kemas by means of 2

declarations of dividend payments (2<sup>nd</sup> and 3<sup>rd</sup> dividend payments) to shareholders out of what they knew were not profits of the company and were thereby in breach of s 365 of the Act. D3 and the 13<sup>th</sup> defendant (D13) were alleged to have knowingly received the illegally effected dividend payments and were liable as constructive trustee for such payments.

Evidence was led to show that for the year ended 31.12.1999, the ‘revenue’ in the figure of RM31.8m, the ‘profit after taxation’ and the ‘retained profits’ of RM13.5m were all tainted by artificial boosting from the sales of constructed shop offices of the company to its own shareholders for RM10.2m.

The shareholders did not make any payment for those purchases but they were contra from the dividends. Additionally, four other purchases were structured in such a way that the ‘retained profits’ and ‘net current assets’ positions of the company were boosted. It was contended that if this ‘revenue’ figure was wrong, then the ‘profit’ and ‘retained profits’ figures would also be wrong which would not permit the company to declare the dividends.

It was further submitted that even if the 1999 accounts figures for ‘revenue’, ‘profit’ and ‘retained profits’ were correct, there was still no basis for the 2<sup>nd</sup> and 3<sup>rd</sup> dividend payments. As at 31.12.2000, only a sum of RM4.34 m of ‘retained profits’ was brought forward to 1.1.2001 and the ‘profit after taxation’ for the financial year ended 31.12.2001 was RM7,266.

The 2<sup>nd</sup> dividend payment was declared by a resolution dated 25.4.2001 and the 3<sup>rd</sup> dividend by a resolution dated 2.5.2001 with the total dividends of RM4.3m. Payment of the RM4.3m

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were only made between 13.11.2001 and 31.12.2001. In the meantime, the said award (for RM4.301m) was made on 26.5.2001, hence the said sum crystallized a liability upon the company and would have to be provided for in full in the accounts for the financial year ended 31.12.2001. If the said sum was provided in full, the 'retained profits' brought forward from 31.12.2000 to 1.1.2001 would not have been 'retained profits' but a 'retained loss'.

The trial judge in essence agreed with the plaintiffs' submissions. He went on to hold that a scheme had been structured in such a manner that the money of the company could be paid out as dividends as if there were profits contrary to its true position. Further, the company ought not to have paid out the dividends knowing very well that by such payment, there would not have been sufficient fund left to meet the said award and to pay creditors which would render the company insolvent. The plaintiffs therefore had proved on a balance of probabilities<sup>ii</sup> the ingredient "with intent to defraud creditors" under s 304(1) of the Act.

On the allegation under s 365(1) of the Act, the plaintiffs contended that at best, the 'retained profits' was overstated by RM1.252m being the difference between the said award of RM4.3m and the 'provision' or disclosure (vide note 15 in the financial statement for 2001) of RM3.048m. This, too, was upheld by the trial judge. As a consequence, D1 and D3 as directors of the company, in the knowledge of said award, ought to have refrained from making payment of the 2<sup>nd</sup> and 3<sup>rd</sup> dividends, knowing fully well that by taking into account the provision of RM3.048m as disclosed, there could not have been sufficient profits out of which dividends could be paid out.

Both D1 and D3 were held to have acted to the prejudice of the creditors and infringed s 365(1) and (2)(b) of the Act by willfully paying out or permitting to pay out the 2<sup>nd</sup> and 3<sup>rd</sup> dividends in the face of the said award and have thereby failed to take into account the creditors' interest. The reasonable inference from their action was that the company business was carried on by them with intent to defraud creditors.

D13 admittedly was the nominee of D3. The trial judge did not make any order against D13. Instead, D3 was held liable as the 'sole' shareholder in the company and a constructive trustee of the monies received by him<sup>iii</sup>. On the other hand, D1 argued that he was involved in the decision-making of the dividend payments, that he was never personally involved in the management of the company and that he had signed the resolutions to declare dividends on D3's instructions.

The trial judge was not with D1. In his judgment, D1 was not a stranger but a director/trustee of the company who owed a duty to the company to ensure that the company funds were properly managed. By signing the resolutions and the payment cheques, his signatures were irrefragable evidence of his assent to the declarations of dividends and the payment of the dividends from the company funds.

He must therefore be taken to have been knowingly assisting D3 in the removing of the company funds in the form of dividend payments with the intent to defraud the creditors of the company when there was in existence an award of RM4.3m which, if taken into account, would clearly render the company without any sufficient funds to pay dividends. D1 and D3 were thus held liable to jointly and/or severally liable to pay the plaintiffs as liquidators of the company and on behalf of the creditors of the company the sum of RM1.211m which was the extent by which the dividends so paid have exceeded the profits of the company.

In answering D1's contention, the trial judge made the following extracted remarks:

"It is unacceptable for a director to plead innocence and ignorance when he has an overriding duty to act bona fide for the benefit of the company particularly in the disposition of the company's monies...The first defendant in blindly following the instruction of the third defendant by abating his duty to the company as a

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director without even exercising his independent discretion as such cannot be relieved of his liability under s 365(2)(b) of the Companies Act 1965. By merely following the instruction of the third defendant blindly, it certainly does not amount to the bona fide exercise of the discretion required of a director. He had indeed failed to perform his duty as a director when he failed to exercise any discretion vested in him.<sup>iv</sup>

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<sup>i</sup>[2012] 2 AMCR 829

<sup>ii</sup>See *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 CLJ 68

<sup>iii</sup>See *Pharmmalaysia (In Receivership) Bhd v Dinesh Kumar Jashbai Nagjib Patel & Ors* [2004] 7 CLJ 465

<sup>iv</sup>See also *Blackwell v Moray & Anor* (1991) 5 ACSR 255

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## COMPANY LAW

### EXERCISE OF DIRECTOR'S RIGHT TO INSPECT COMPANY'S DOCUMENTS

In *Ng Yee Wah v Lam Chun Wah*<sup>i</sup> W and her ex-husband, H were the only shareholders-directors of company C. C owned the former matrimonial home of W and H, which was mortgaged to a bank. Prior to the couple's separation, W was not closely involved in C's affairs. However, W subsequently discovered that C was indebted to the bank for a substantial sum as the mortgage was also used to finance C's trading activities. W then filed a derivative action against H and C (the HC Suit). The HC Suit and W's application for ancillary reliefs in the divorce proceedings were pending. While H allowed W to inspect various company documents, W complained that some documents were missing and that the accounts so far disclosed did not give a true and fair view of C's affairs. W applied for an order that H produce C's accounts, various financial documents and contracts for her inspection pursuant to s.121 of the Companies Ordinance (Cap.32) of Hong Kong<sup>ii</sup>. H resisted on the ground that W's application was a "fishing expedition" and sought to strike it out for abuse of process of court.

The Court of First Instance ruled for W. It reiterated the well-established principles in common law<sup>iii</sup>:-

(1) The right of a company director to inspect the company's documents flowed from the director's duties to the company and a director did not have to explain why the inspection was sought or demonstrate any particular ground or "need to know" as a basis. Thus, his intention to discover misfeasance with a view to seeking relief or that the desire to find evidence was motivated by vindictiveness was irrelevant.

(2) It was only where it could be proved that the director concerned intended to abuse the confidence in relation to the company's affairs and to injure the company in a material way that such right could be interfered with.

(3) Such interference could only effected in circumstances where a restriction on such right could be imposed because of misuse of confidential information leading to damage.

(4) The onus of establishing that the right would be exercised for an improper purpose lay on the person who asserted it. "Clear proof" was required to satisfy the court "affirmatively" that granting it would be detriment to the company's business.

(5) The scope of inspection could potentially be very wide, covering any documents belonging to the company, corporate material, corporate records and accounts, corporate information and accounting and other records of the company.

(6) A director could exercise his right of inspection through his agent and it was perfectly proper for him to engage an accountant to do so.

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He was also entitled to take copies of the documents during the inspection.

(7) The statutory provision was consistent with and did not detract from the aforesaid common law right of inspection.

Under s.121(3A) of the Ordinance, the obligation to keep books of accounts under s.121(1) was for 7 years, the right of inspection was not restricted to documents for this period if the company retained documents for a longer period

Here, there was no allegation by H that the right of inspection sought by W would be detrimental to C's interests or that W intended to abuse the confidence in relation to C's affairs. Any ulterior motive for W wanting to exercise her right to inspect, whether to advance her case in the HC

Suit or to put pressure on H in the ancillary relief application, was irrelevant. Likewise, the fact that W was seeking redress on behalf of C for alleged wrongs committed by H against its interests was immaterial. H's striking out application was thus dismissed.

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<sup>i</sup>[2012] 4 HKLRD 39

<sup>ii</sup>In the Companies Act 1965 of Malaysia, the relevant provision is s.167(3).

<sup>iii</sup>See further *Re Baldwin Construction Co Ltd* [2001] 3 HKLRD 430, *Wu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65

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## CONTRACT LAW

### CAUGHT BY DELAY TO ACT

The Ipoh High Court decision in *Yeong Oon Kong & Anor v Lee Chu Ming & 6 Ors*<sup>i</sup> serves as a reminder the importance of acting fast on any decision that may have legal implications. The facts though lengthy are fairly simple. P entered into a sale and purchase agreement (1<sup>st</sup> SPA) with D1 to buy a property. However, unbeknown to P and his solicitors (D2), the balance of D1's existing outstanding loan was more than the balance purchase price (BPP). Meanwhile, P had been permitted by D1 to occupy the property before the completion of the 1<sup>st</sup> SPA (the interim period). P went on to renovate the property.

It was P's claim that an extension of the completion period of the 1<sup>st</sup> SPA had been agreed upon and that he could occupy the property in the interim period without paying rentals. D1 however contended that an oral agreement was made that P would pay a reasonable amount of rentals. In any case, indisputably parties entered into a supplementary agreement to keep the 1<sup>st</sup> SPA

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operative by postponing the completion period until such time as the balance of the loan was reduced through monthly payments to a sum which corresponded or lower than the BPP, whereupon P would pay D1 the BPP within 3 months from the date D1 had redeemed the property.



Some 6 years later, in October 1997, the balance of D1's loan fell below the purchase price. D2 accordingly wrote to advise the parties but D2 overlooked the existence of the supplementary agreement and erroneously notified both P and D1 that the 1<sup>st</sup> SPA had long lapsed and had to be revalidated. D1 then informed P that he was no longer interested to sell the property and demanded P to pay rentals for the interim period

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which was refused by P. On the last day of 1997, P moved out of the property. P asserted that he had also forgotten about the supplementary agreement.

In September 1999, D1 entered into another sale and purchase agreement (2<sup>nd</sup> SPA) to sell the same property to D3 to D7. Subsequently, both D3 to D7 and P lodged private caveats over the property. In January 2000, P commenced proceedings against D1 for specific performance of the 1<sup>st</sup> SPA. D3 to D7 applied to intervene in the midst of the trial between P and D1.

It was held that the 1<sup>st</sup> SPA had lapsed and was no longer valid and subsisting. P had breached his contractual duty (an essential term under the 1<sup>st</sup> SPA) to pay the BPP to D2 as stakeholder to enable the redemption of the property to be carried out. Thus, on the evidence, P was never ready, able or willing to complete the 1<sup>st</sup> SPA. It followed that D1 was legally entitled to sell the property to D3 to D7 via the 2<sup>nd</sup> SPA. It was further held that the P's conduct ie. long period of delay and inactivity on their part (almost 2 years after vacating the property) as evinced towards D1 had led D1 to reasonably believe that P had abandoned the contract. In reliance on that

belief, D1 had altered his position by entering into the 2<sup>nd</sup> SPA with D3 to D7. P no longer had the right to enter his caveat and were liable in damages to the Ds. D3 to D7 had priority over the earlier right of P and they had a better equity. P had not properly discharged his duty under the 1<sup>st</sup> SPA and had never lodged a caveat to protect his right under the 1<sup>st</sup> SPA until the 1<sup>st</sup> SPA had lapsed and after the 2<sup>nd</sup> SPA was executed by Ds and after D3 to D7 had lodged their caveat. As to D1's counter-claim for rental for P's occupation of the property during the interim period, the trial judge disbelieved D1's evidence and preferred the testimony of P. Further, it was held that if there was an oral agreement for the charging of the rental, D2 would have inserted a provision to that effect in the 1<sup>st</sup> SPA and also the supplementary agreement. D1's claim for rental was thus dismissed.

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[2012] 5 AMR 540

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## CONTRACT LAW

### FORFEITING BONUSES EARNED IF EMPLOYEE LEFT TO COMPETE WITH EX-EMPLOYER

In *Mano Vikrant Singh v Cargill TSF Asia Ltd*, the Singapore Court of Appeal delivered a comprehensive judgment on their law on Forfeiture-for-Competition clause (FFC clause), Payment-for-Loyalty clause (PFL clause) and the American Employee Choice Doctrine (AEC Doctrine) in the area of restraint of trade under the law of contract. Generally, FFC is a clause forfeiting an employee's benefits when he competes with his ex-employer after the termination of his employment. A typical PFL clause provides that, if the employee concerned

continues in the employment of the employer, he will receive an additional payment for his loyalty<sup>ii</sup>. The AEC Doctrine assumes that an employee who elects to leave his employer makes a free and informed choice between forfeiting a certain benefit (by competing) or retaining the benefit by avoiding competitive employment (by not competing) and on that basis, the clause which makes provision for such forfeiture is enforceable.

In *Mano Vikrant Singh*, P was an employee of R trading in Singapore for R from 2006 to 2008. In addition to his monthly salary, P received an annual discretionary incentive award available to all key senior staff based on his performance. 50% of the incentive awards were paid out in cash, and the remaining were retained by R and paid out in stages over 3 years (the deferred award). The deferred award earned compound interest. It was also subject to a forfeiture provision which P had to agree to in order to receive the incentive award (the Forfeiture Provision). The Forfeiture Provision allowed for

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forfeiture of the deferred award in the event that P left R's employment and competed with R within a period of 2 years from the date of termination (the 2-year non-compete period). Upon Ps' resignation in 11/2008, P received a letter informing him that his outstanding deferred award would be paid in a lump sum within 60 days after the expiry of the 2-year non-compete period. P competed with R after leaving employment which resulted in R refusing to pay P the deferred award.

On P's suit for declaration that the Forfeiture Provision was void as being in restraint of trade, the apex court ruled in favour of P. The Forfeiture Provision contemplated a situation where the deferred award was *already vested* in P as a *legal entitlement*. There were no separate sums awarded specifically for loyalty, and the fact that P had a right to collect interest from the deferred sum suggested that the deferred award belonged to him. The express words of the Forfeiture Provision meant precisely what they said, *viz*, that P would have to *forfeit* monies which were *vested* in him. *A fortiori*, the Forfeiture Provision operated to *restrain* P from leaving R's employment to join a competitor by way of a *threat* to *forfeit* a not insubstantial financial reward which had *already vested in P* should he in fact leave and join a competitor. The Forfeiture Provision thus fell within the ambit of the restraint of trade doctrine. However, this did not automatically result in that clause being rendered void. The clause would have been valid if it was reasonable in the interest of the parties and of the public (the twin tests of reasonableness). But this was not the case here. The apex court concurred with the findings of the High Court below that, had the Forfeiture Provision been a restraint of trade (which the court below held to be not), it would have been void for unreasonableness as it covered too wide a geographic area and the non-compete period was too long. The appeal was thus allowed.

In the course of judgment, the court made numerous remarks on the FFC clause, PFL clause and AEC Doctrine. That the Forfeiture Provision dealt with *vested monies* distinguished it from PFL clauses. While the results of both clauses were the same, *viz*, the employee would continue in the employment of the employer, the respective causes of both clauses differed. The Forfeiture Provision was characterized by *restraint*, while a

PFL clause involved an *additional payment* and was characterized by *incentive*.

In addition to legal entitlement or vesting as the basis for holding that the restraint of trades doctrine applied, the court also expressed a tentative view (*obiter*) that if the facts resulted in a *reasonable expectation* on the part of the employee that he would be entitled to the benefit concerned, then the clause which sought to forfeit such a benefit might still come within the scope of the doctrine. This would only apply in exceptional circumstances where (drawing from criteria that governed the doctrine of equitable estoppel) the employee had been induced to enter or continue in employment in reliance on the employer's representation and this reliance resulted in some inequity. However, the concept of reasonable expectation would *not* apply with respect to a PFL clause in the *same* manner as it would with respect to the FFC clause. The *only* reasonable expectation engendered in the employee concerned by a PFL clause was that he would obtain extra payment *only if* he remained in the employment of the employer for the stipulated period. The reasonable expectation would be *wholly coterminous* with the contractual obligations entered between the parties, which obligations involved no restraint in substance and/or form. The operation of the FFC clause in the post-employment context also distinguished it from a PFL clause. The employee who left under the FFC clause might still be entitled to the benefit if he did not compete. The employee who left under a PFL clause forfeited the benefit completely, even if he subsequently chose not to compete.

The AEC Doctrine and the US doctrines of restraint of trade were not applicable to Singapore. There had been no uniformity in the way in which the doctrine had been treated in the US and its application had been diverse. Further, the critical issue in this case, namely, whether the Forfeiture Provision fell within the ambit of the restraint of trade doctrine, did *not* center on the concept of choice but, rather, on the question as to *whether the content of the Forfeiture Provision involved a restraint*. In the view of the court, the AEC Doctrine was an analogue of the doctrine of freedom of contract. An application of such doctrine was

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simply to privilege freedom of contract over freedom to trade without more.

<sup>ii</sup>ibid, p.387

[2012] 4 SLR 371

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## CONTRACT LAW

### INDEMNITY AGAINST CIVIL/CRIMINAL LIABILITY

In *Mulcaire v News Group Newspapers Ltd* P was employed by D as a private investigator. Following P's conviction of conspiracy to intercept communications and unlawful interception of communications in the form of mobile telephone voicemail messages, claims were brought against P and D jointly for damages for breach of confidence and misuse of private information. P sued and sought for an indemnity from D on the strength of an indemnity letter whereby D had agreed to indemnify P in respect of any liability for costs and damages awarded against P arising from such claims. D denied liability on the ground that such a contract was unenforceable as a matter of public policy.

It is trite law that an indemnity against civil or criminal liability resulting from the deliberate

commission of a crime by the person to be indemnified is not enforceable by the criminal or his representatives<sup>ii</sup>. The rationale is that no person can claim indemnity or reparation for his own willful and culpable crime. However, in the court's view, this principle was not applicable to an agreement made AFTER the relevant criminal event, such as a conditional fee agreement in relation to civil proceedings arising out of a prior criminal act. The mischief to which this rule of public policy was directed did not include agreements concluded after the criminal event in relation to civil proceedings arising out of it so as to preclude one of two joint tortfeasors agreeing to pay the costs of the other in defending the claim or satisfying the judgment if that defence was unsuccessful. Thus, the validly concluded contract by which D had agreed to indemnify P in respect of the costs and damages arising from litigation to which they were joint defendants on terms contained in the indemnity letter were not void.

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[2012] Ch 435

<sup>i</sup>See *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, *Charlton v Fisher* [2002] QB 578

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## CONTRACT / EMPLOYMENT LAW

### AFTER-DISCOVERED MISCONDUCT NO DEFENCE TO PAYMENT OF ACCRUED DEBT

What do you think the verdict was in the following scenario? C was employed as managing director by W company. There was a provision in the service agreement that C's employment would continue "unless and until terminated by either party giving to the other not less than 6 months prior written notice". W could, under another provision, "terminate the appointment forthwith by

paying salary and the value of all other contractual benefits in lieu of the required period of notice...and it is expressly agreed that such payment in lieu of notice shall not constitute a repudiation of this agreement." There were other provisions entitling W to terminate the agreement forthwith on grounds that included gross misconduct and willful breach or non-performance of his duties. W had been making losses for years and finally decided on a new business structure. By a letter, W informed C that he would become redundant and that he would receive "all appropriate payments in lieu of any notice period" to which he was entitled. Subsequently, however, it was discovered that 2 months before the letter, C had wrongly procured a payment of £10,000 to be made by the company to his pension provider. W

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refused to make any payment to C in lieu of notice. C sued W for the 6 months' salary and benefits in kind in lieu of notice.

The verdict of the UK Court of Appeal was that W was obliged to pay C the salary in lieu of notice despite his subsequently discovered gross misconduct. The appellate court in *Cavenagh v William Evans Ltd*<sup>i</sup> distinguished the earlier decision made more than a century ago in *Boston Deep Sea Fishing and Ice Co v Ansell*<sup>ii</sup>. The principle laid down in *Boston Deep Sea Fishing* was that an employer could defend a claim for damages for wrongful dismissal by using at trial, in its defence of justification, evidence of misconduct by the employee that was not known to the employer at the time of dismissal. However, in *Cavenagh*, the claim was for payment of a debt arising from the company's election to terminate summarily the service agreement. C had acquired an accrued right under the service agreement to 6 months' salary in lieu. There was no provision in the agreement denying C that right if the company subsequently discovered that he had committed a prior act of gross misconduct. Having chosen to terminate the service agreement, the company was not entitled to resile from the contractual consequences of its choice by later following the

different common law route of accepting repudiation by relying, after the termination event, an earlier act of misconduct by C of which it had been unaware. The company had made an irrevocable election.

The court in conclusion reminded employers that when they elected to terminate a contract on notice and offered payment in lieu of that notice, they elected for a clean break. They took the risk that they might subsequently discover matters which would have justified summary termination for breach. They had obtained precisely what they had bargained for. There was no basis upon which they could or should have been able to deny their employee(s) that for which correspondingly they had bargained.

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<sup>i</sup>[2012] IRLR 679  
<sup>ii</sup>(1888) 39 Ch D 339 CA

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## CONTRACT / TENANCY LAW

### “IN GOOD FAITH ENDEAVOUR TO AGREE”

The above phrase was the focal of attention in *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd*. The lease agreement between A qua landlord and R qua tenant contained a rent review mechanism (the Rent Review Mechanism) which provided that the rent for each new rental term after the first rental term was to be determined by agreement between the parties {Stage 1}, or failing agreement, by “three international firms of licensed valuers” (Designated Valuers) appointed either jointly by the parties {Stage 2} or by the President (or other stipulated

officer) of the Singapore Institute of Surveyors and Valuers (the SISV) {Stage 3}. Specifically, the Rent Review Mechanism provided that the parties “shall **in good faith endeavour to agree** on the prevailing market rental value of the Demised Premises” (the Good Faith Term) prior to the appointment of the designated Valuers.

About a year before the commencement of the next new rental term, R unilaterally approached all eight “international firms of licensed valuers” present in Singapore to prepare valuation reports on the market rental value of the Demised Premises. R subsequently engaged the 7 firms which agreed to prepare the requested valuation reports (the Toshin Valuations). At the 1<sup>st</sup> meeting to discuss the new rent for the upcoming rental term, R did not disclose the existence of the Toshin Valuations. A was dismayed when it subsequently discovered what had transpired. At the 2<sup>nd</sup> meeting, A highlighted its concern that R, by procuring the Toshin Valuations, had unfairly procured an advantage for itself in relation to the rent review exercise. R then provided A with

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copies of the rental valuation reports produced by 5 of them. [The parties had earlier, before A learnt about the Toshin Valuations, jointly issued Requests for Proposals to these 5 valuation firms.] R hoped that this would assuage A's "perceived concerns about its alleged disadvantage in selecting 3 valuers" to be the Designated Valuers. R further suggested that the parties issue joint instructions to the 3 valuation firms eventually appointed as the Designated Valuers stating that in determining the prevailing market rental of the Demised Premises, the valuers "shall be independent and fair to both parties and in particular shall not be bound by any previous valuations which they had carried out for either party". A was not placated by this gesture. It claimed that R's actions (the Toshin Valuations) had irremediably undermined the machinery of the Rent Review Mechanism, thus rendering it inoperable and filed a suit seeking a declaration to that effect.

The Singapore Court of Appeal upheld the decision of the High Court which dismissed A's application. Given the Good Faith Term, the appellate court identified 3 issues: whether the Good Faith Term was valid; if so, what the content of the "good faith" obligation was; whether R was in breach of that obligation; and if so, whether the Rent Review Mechanism had been rendered inoperable.

Contrary to popular belief, the House of Lords' decision in *Walford v Miles*<sup>ii</sup> (*Walford*) did *not* have the effect of invalidating an express term in a contract which employed the language of good faith. A distinction could be drawn between the pre-contractual negotiations in *Walford* and the "negotiations" between the parties under the rent review exercise. In the former, a duty of good faith in negotiations was inherently repugnant to and inconsistent with the adversarial position of the parties involved in the negotiations. It was thus uncertain. In the latter, unlike parties merely in pre-contractual negotiations, the parties here were not free to simply walk away from the negotiating table for no rhyme or reason as, by virtue of entering into the lease agreement, they had committed themselves to a rent review exercise (consisting of the three Stages 1 to 3) for the purposes of determining the new rent for each new rental term

after the first one. The court found no reason why an express agreement between contracting parties that they had to negotiate in good faith should not be upheld. It was not contrary to public policy. Indeed, "negotiate in good faith" clauses were in the public interest as they promoted the consensual disposition of any potential disputes. The choice made by contracting parties, especially when they were commercial entities, on how they wanted to resolve potential differences between them, should be respected. The obligation on "in good faith endeavour to agree" on the new rent for each new rental term was both certain and capable of being observed by the parties. It was not difficult to ascertain what *reasonable commercial standards of fair dealing* required in such a context.

What then was the content of the obligation and did R breach it? It depended heavily on the commercial nature and purpose of the contract in question. Here, as far as the Rent Review mechanism was concerned, the ultimate purpose was the determination of the prevailing market rental of the Demised Premises. Both the parties were required to faithfully co-operate with each other to achieve this common purpose. *Faithfulness to the common purpose incorporated an obligation during the course of negotiations not to attempt to unfairly profit from the known ignorance of the other.* Reasonable commercial standards of fair dealing called for the disclosure of all *material* information which could have an impact on the negotiations and/or the ultimate determination of the new rent. That the Toshin Valuations had been carried out was a material information. Given that R had commissioned valuation reports from, not one or two, but 7 of the 8 international valuation firms present in Singapore --- that was to say, all of the valuation firms eligible<sup>iii</sup> for appointment as the Designated Valuers --- its failure to disclose the existence of the Toshin Valuations during the 1<sup>st</sup> meeting could be said to constitute a breach of its "good faith" obligation. Further, for disclosure of time-sensitive information to have any real impact, disclosure must be made as soon as practicable. There was no good reason for R to have concealed the Toshin Valuations during the 1<sup>st</sup> meeting other than to gain a distinct commercial advantage over A apropos the rent review exercise. R was thus in

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breach of its obligation to make full disclosure of these valuations in a timely manner as part of the obligation to “in good faith” negotiate the new rent.

However, while there was, at the onset of the parties’ negotiations, a breach by R of this obligation, since all the Toshin Valuations were eventually disclosed before the negotiations were completed or an agreement reached, R’s initial breach was remedied and the parties ought to have resumed their endeavours to “in good faith...agree” on the new rent. The Rent Review Mechanism remained workable so long as the independence and probity of the valuation firms eligible for appointment as the Designated Valuers had not been irretrievably compromised. There was nothing to suggest that any of the 7 valuers if appointed as one of the Designated Valuers would be unable to carry out a fair and independent valuation of the Demised Premises simply by virtue of having carried out a prior valuation of the same premises for R. When a prior retainer of a valuer by one of the parties to a lease agreement had ended, the valuer in question no longer owed any competing legal duties that might give rise to a conflict of interest in the preparation of a fresh valuation of the property concerned. Thus, the parties ought to proceed in accordance with the agreed procedure to determine the new rent.

The court concluded with advice to parties, where there was an express obligation to act in good faith, to act with the circumspection and ensure that they complied with ethical commercial standards *vis-à-vis* any unilateral dealings with experts. There was often no clear line between seeking an advantageous but legitimate position in business dealings and negotiations on the one hand, and offending the basic standards of commercial fair play on the other. Parties ought to err on the side of caution and reveal their cards openly. The voluntary and timely disclosure of all material information would often go a long way towards ameliorating or rectifying any information deficits. And if an expert or adjudicator had or previously had a significant relationship with any interested party, particulars of this ought to be disclosed without any prompting, failure of which might raise serious concerns about apparent bias on the part of the expert or adjudicator.

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<sup>i</sup>[2012] 4 SLR 738

<sup>ii</sup>[1992] 2 AC 128

<sup>iii</sup>The eight one declined to act.

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## COURT PROCEDURE

### OF NON-PAYMENT OF MONETARY JUDGMENT AND CONTEMPT OF COURT

Can non-payment of a monetary judgment be punished by way of contempt of court? The law appears to be settled by the decision of the Court of Appeal in *Hong Leong Bank v Phung Tze Thiam*<sup>i</sup> which followed common law<sup>ii</sup>. Non-payment of a monetary judgment cannot be punished with contempt of court.

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In June 2012, however, the legal position was doubted by the same Court of Appeal in *Hong Kwi Seong v Ganad Media Sdn Bhd*<sup>iii</sup>. The plaintiff, having obtained a money judgment against the defendant (judgment debt), proceeded to obtain an order to examine the defendant. When the defendant did not appear for the examination, the plaintiff obtained an order for payment of the judgment debt in instalments (the payment order). The defendant did not make any payment on the due dates. The plaintiff then obtained leave to issue committal proceedings, followed by the committal orders for contempt of court (the committal orders).

On appeal, it was contended on behalf of the defendant the ground on which the plaintiff had obtained the committal orders was the defendant’s failure to pay the instalments under the payment

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order. Based on the law prevailing then, such non-payment could not be punished with contempt of court.

The Court of Appeal subjected both the English decisions, *In Re Oddy* and *Iberian Trust Ltd* which were relied upon to arrive at the decision in *Hong Leong Bank* to close scrutiny. In the relevant provision on the enforcement of an order by committal for contempt [Order 45 r 5 of the Rules of the High Court 1980 (RHC)], it is only *an order that requires a party to do or refrain from doing an act that may be enforced by committal for contempt*. In *In Re Oddy*, an order for the plaintiff to recover money was held not to be an order on the defendants to do anything. In *Iberian Trust Ltd*, the order was that the plaintiffs do have a return of the shares within 14 days. It was held that the terms of the order were too vague and did not specify that the defendant was to return the shares. Thus, the order did not direct the defendant to do anything; the order was that the plaintiff was to have a return of the shares from the defendant. Both those orders did not require the defendant to do or refrain from doing an act, hence obviously those orders could not be enforced against the defendant by way of committal for contempt.

The Court of Appeal in *Hong Kwi Seong* was not agreeable with the decision in *Hong Leong Bank* that “a money judgment directing the plaintiff to repay the money could not be enforced by committal proceedings, since the money judgment was not a judgment requiring the

performance of an act”. As a matter of construction, the appellate court in *Hong Kwi Seong* found that the terms of the order in *Hong Kwi Seong* directed the defendant to pay the judgment sum in five instalments in specific sums on specific dates. This meant that the defendant was directed to do an act within a specified date. The neglect or refusal of the defendant to obey the order by the time therein limited resulted in the defendant liable to process of execution for the purpose of compelling him to obey the same. Thus, the payment order could be enforced by means of committal proceedings.

In other words, if a judgment or an order states that a party is to pay specific judgment sums on specific dates coupled with a properly worded indorsement on the consequence of refusal or neglect to make the payment as directed, then the judgment or order is peremptory and falls within O 45 r 5(1) (a) of the RHC which is enforceable by committal proceedings.

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<sup>i</sup> [2012] 6 AMR 221

<sup>ii</sup> As in *Re Oddy, Major v Harness* [1906] and *iberian Trust, Ltd v Founders Trust and Investment Co. Ltd* [1932] 2 KB 87

<sup>iii</sup> [2012] 6 AMR 221

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## CRIMINAL PROCEDURE

### A ‘FRACTURED’ TRIAL WHICH WAS NOT A MISTRIAL

An accused was tried and convicted of murder under s 302 of the Penal Code in *Irawadi bin Mohammad v Public Prosecutor*<sup>i</sup>. However, it was not an ordinary course of trial that was embarked upon, because the entire trial from the commencement in October 2005 took 4 years and 1 month to conclude. What was more disturbing was the fact that there were three different judges

who heard and had conduct of the case before a finding of guilt was pronounced in November 2009.

The 1<sup>st</sup> trial judge heard all of the prosecution’s witnesses. However, by reason of the 1<sup>st</sup> trial judge being posted to Putrajaya in July 2007, with the consent of all parties, the case was transferred to another High Court judge. The 2<sup>nd</sup> trial judge heard the submissions of the deputy public prosecutor (DPP) and the defence to determine whether the prosecution had made out a prima facie case against the accused. In June 2008, the 2<sup>nd</sup> trial judge ruled that the prosecution had made out a prima facie case against the accused and called upon him to enter his defence. Then, the 2<sup>nd</sup> trial judge was no longer serving at the Shah Alam High Court on the continued hearing date in November 2008. The case was

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called before another judge. On this occasion, the DPP informed the court that the defence counsel had been barred from practicing as an advocate and solicitor. A new counsel was duly appointed in May 2009 to represent the accused. This 3<sup>rd</sup> trial judge then heard the defence's case and concluded with a finding of guilt and conviction.

The accused appealed against the decision of the 3<sup>rd</sup> trial judge on the grounds that the entire trial was a mistrial as the accused had been deprived of the reasoning of the 2<sup>nd</sup> trial judge who had conducted the case; and without audio-visual advantage of observing the demeanour or the body language of the prosecution's witnesses, it was difficult for both the 2<sup>nd</sup> and 3<sup>rd</sup> trial judges to resolve issues relating to the credibility of key witnesses. Thus, it was contended that the appellate court should set aside the High Court decision and direct a retrial.

The Court of Appeal did not agree with the accused's contention. They held that despite the 'fractured' trial, the accused had been accorded a fair trial. The defence was represented throughout by competent counsel. No complaint was made as

to the conduct of the three trial judges in the handling of the case during the course of the hearing. The lack of reasoning of the 2<sup>nd</sup> trial judge in finding a prima facie case and the making by the 3<sup>rd</sup> trial judge of a second ruling on the prima facie case were not of such a nature that it vitiated the whole trial or caused a miscarriage of justice. The 3<sup>rd</sup> trial judge had directed his mind on the right issues and had drawn correct inferences from the proved and admitted facts. He was right to rule that the accused had not raised a reasonable doubt on the prosecution's case and that the case against the accused had been proved beyond any reasonable doubt. Thus, the appeal of the accused was dismissed.

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[2015] 5 MLJ 650

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## DIGEST OF EMPLOYMENT LAW CASES

### 1. PLOY TO ENGINEER REDUNDANCY

The ploy of a company to get rid of a highly paid financial controller was torn apart by the Industrial Court in *Chang Siew Been v Universal Music Sdn Bhd*. The claimant was promoted to become Finance Director of the company after less than two years in the employment of the company. About 5 years later, she was notified that she would be given a new role befitting her many years of experience in finance. She became the Project Leader/Co-ordinator in the implementation of a marketing cost control program in the regional office in Hong Kong. A few months later, she was dismissed on the ground that certain changes in the implementation of the said program had led to a redundancy and there was no suitable alternative position available. On a claim of wrongful dismissal, the court ruled in favour of the

employee. There was no genuine redundancy. It was the company which had put the claimant in a position allegedly on transfer which it knew was temporary in nature where sooner or later her function would cease. In other words, the company engineered her 'redundancy' after a short period of seven months.

The fact was that it had employed a junior employee to replace the claimant who had served the company for eight years. If the company was genuine in asking the claimant to assist in the relevant project, the company could have assigned the duty of Project Leader/Co-ordinator without removing her from the position as Finance Director (as was done with all the others who performed their usual functions while being involved in the project). Furthermore, she was the only person whose service was terminated by reason of the cessation of the project. The company's ploy to get rid of a long serving employee whom the company had found to be difficult failed and the claimant's claim was allowed.

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## 2. WHO IS THE BEST PERSON TO JUDGE THE SERIOUSNESS OF AN EMPLOYEE'S MISCONDUCT?

An employee has been found, upon a domestic inquiry, to be guilty of misconduct. The employer meted out the punishment of dismissal. The employee filed a claim of dismissal without just cause or excuse against the employer. Upon hearing, the Industrial Court held that the employer succeeded in proving that the employee was indeed guilty of misconduct. However, with regard to the punishment, there are divergent views as to whether the court is empowered to substitute its own views on the appropriate penalty for the views of the employer.

In *Panzana Enterprise Sdn Bhd n Norizan Bakar & Anor*<sup>ii</sup>, the Court of Appeal held that in coming to the conclusion as to what the appropriate penalty for the employee ought to be, the court must not substitute its own views for the view of the employer. About 6 months later, in *Raja Abdul Rahman Raja Abdul Aziz v Exxonmobil Exploration And Production Malaysia Inc*<sup>iii</sup>, another panel of the Court of Appeal reversed the decision of the High Court which ruled that it was not for the Industrial Court to decide whether the punishment was fair or not and that the best person to judge the seriousness of the misconduct was the employer himself.

The appellate court in this instance distinguished the cases dealing with disciplinary proceedings relating to public officers under the Federal Constitution and General Orders governing public officers from the cases dealing with private sector employers/employees under the Industrial Relations Act 1967 (IRA). It was held that the Industrial Court was not wrong when it considered that the punishment of dismissal was without just cause or excuse under the particular facts and circumstances of the case. Indeed, earlier, the apex court, the Federal Court had in *R.Ramachandran v The Industrial Court of Malaysia & Anor*<sup>iv</sup> reasserted the principle of 'proportionality' of punishment as part of the consideration whether the dismissal was with just cause or excuse. English decisions too appear to permit interference by the court with the decision of the employer on matter of punishment. In *Foley*

*v Post Office HSBC Bank plc*<sup>v</sup>, the Court of Appeal had stated that the test of reasonableness or unreasonableness of the action of an employer must always be conducted by reference to the objective standards of the hypothetical reasonable employer and not by reference to their own subjective views of what they in fact would have done as an employer in the same circumstances. The answer, to our mind, to the question posed in the title above ought to be "not necessarily the employer".

## 3. NEGOTIATED GOLDEN HANDSHAKE

In *Omar Suhaimi Abu Hassan v Eastern Pacific Industrial Corporation Berhad*<sup>vi</sup>, the Claimant was the CEO of the company. He claimed that he was forced to resign on a pre-prepared letter of resignation which was allegedly obtained under duress and threat. However, the Industrial Court accepted the version of the company that the Claimant's willingness to leave the company was brought about by the terms of a negotiated settlement to end the employment. The Claimant had signed the resignation letter without any qualification or protest. Further, he also signed the letter of appointment as Independent Advisor of the company and had received monetary benefit in the sum of RM245,000. In such circumstances, the Claimant's contention that he was forced to resign was improbable and there was no wrongful dismissal.

## 4. CONTRACTUAL RIGHTS EXTINGUISHED PURSUANT TO VSS

In *Zainon Ahmad & Ors v PadiBeras Nasional Bhd*<sup>vii</sup>, the employees' handbook contained a provision which entitled an employee to termination benefits when terminated from employment before attaining the age of 55 due to reasons other than compulsory retirement, optional retirement, death or a disability (the said Clause). As part of D's restructuring scheme, employees were invited to leave their employment under the Voluntary Separation Scheme Contract (VSS). Ps succeeded in their applications but after two years of ceasing employment with D and receiving benefits under the VSS, Ps claimed for the

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payment of retirement benefits under the said Clause. Ps succeeded at High Court but lost on appeal.

At the final appellate court, the Federal Court dismissed Ps' appeal. Ps had exercised their option under the VSS and accepted the payable amounts. They were thus not entitled to the benefits under the employees' handbook. The two contracts did not co-exist. VSS was a separate and independent contract intended to mutually override and terminate an existing employment contract.

A contract which was rescinded by agreement was completely discharged and could not be revived. After VSS, the employee could not return to ask for other benefits under the terms of his contract of employment, although it was not expressly stated that VSS would extinguish the rights and obligations under the employment contract. Under the VSS, the employees had the option to accept the said scheme or continue to work as before. Once the option had been exercised, the question of it being unfair did not arise. An employee who, on his own will, had accepted the benefits of the VSS, resigned, signed a full and final settlement and walked away could not then turn around and ask for other benefits.

## 5. WORKMAN OR CONTRACTOR FOR SERVICE ?

In *Mohd Firdaus Abdullah v Hup Aik Wood Products Sdn Bhd*<sup>viii</sup>, the claimant who was the machine operator of the company alleged wrongful dismissal but the company denied that he was an employee and alleged that he was a sub-contractor of the company. There was no contract of employment or letter of appointment governing their relationship. There was EPF contribution during the time the claimant worked under COW1's father but when the company was incorporated to the present name, the company had stopped the EPF contribution consistent with the contention that the claimant continued working as a sub-contractor. Contribution towards SOSCOPER SE could not imply the existence of an employer-employee relationship.

Such payment was made by the company on the advice of SOCSO officers and as added security for the claimant in view of the nature of the job handled by him. The invoices, cash vouchers and salary slips tendered by claimant did not state SOSCOPER DEDUCTIONS. Further, his EA forms stated his position as sub-contractor. It was also improbable that the company exercised control over the claimant in the absence of written contract of employment, and considering the facts that payments made by the company to him were not fixed but based on the production made by him and his workers (piece rate system) and there was no evidence to show he was paid overtime. Indeed, all the payments to other members of his team were made through the claimant for him to distribute. The claimant signed in all the cash vouchers as sub-contractor. For the reasons adumbrated above, there was no contract of service between the company and the claimant.

## 6. CONTINUOUS FIXED-TERM CONTRACTS

In *Abdul Rahman Wahidin v Universiti Tun Abdul Razak Sdn Bhd*<sup>x</sup>, the claimant was a Senior Lecturer with the University who had been, since August 2002, employed under a 12-month contract which was renewable for a further 12 months subject to mutual agreement and for a fixed term of 12 months every time. The last contract expired on 31 May 2006. The University did not renew his contract but then appointed him as a Course Leader and part-time lecturer for a short semester until July 2006.



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The claimant claimed that he had been constructively dismissed. The Industrial Court ruled in favour of the University. The claimant's contention that his contract was continuous went against the grains of evidence as all the contracts stipulated that they were renewable subject to mutual agreement. The argument that it had always been automatically renewed without him asking for it was inconsistent with his own letter to the University when he applied for an extension of his contract.

On the contention that he had been induced to accept the short term appointment by the assurance from the President of the University that his contract would be renewed in due course, the court held that he had signed it in his own volition and being a qualified academician, his excuse on inducement was not acceptable. Since there was no subsisting contract, the conduct of the University in not paying the salary for June till August and no renewing his contract was not fundamental breaches of his contract of employment. The pre-conditions of constructive dismissal were not met, hence the claim was dismissed.

## 7. NO WRITTEN WARNINGS

The claimant in *Yeoh Seok Yeow v Niaga Sari Sdn Bhd*<sup>x</sup> claimed that he was forced to resign while under probation. There was no warning nor disciplinary action taken against him. On the other hand, the company asserted that he resigned voluntarily after he was informed of his poor and unsatisfactory performance in his work. The company contended that his superior (COW1) did comment and repeatedly warned the claimant on several issues, ie. refusal to follow the superior's instructions, lack of concentration and accuracy at work and his poor general behaviour during working hours. The court ruled in favour of the company.

As evident from a document dated 3 days before the claimant's resignation, COW1 had the intention to extend his probation. Thus, if COW1 had wanted to pressure or coerce him to resign, she would not have bothered to prepare that

document. The court also accepted COW1's testimony that she had given him repeated verbal warnings to improve himself. On this, the court viewed that it would have sufficed if verbal advice and occasional warnings were conveyed to the claimant within the probation period. The failure of the company to provide proof of written warnings was not proof that he was an exemplary probationer. It would be too onerous a task on any employer, for written warnings to be issued against the probationer for each failing, whether serious or minor. The court concluded therefore that the claimant had resigned on his own volition.

It is interesting to note the obiter of the court chairman that new employees under probation should be given reasonable time to learn and acquire the skills and knowledge in their new jobs. Not all employees were fast learners, so oral or written warnings and disciplinary action taken against them should only be resorted as last resorts. Such warnings or actions were more likely to result in employees who were demoralized and which would naturally strip them of self-confidence. It was fair to the employers to resort to guidance, advice and oral assessment to assist the probationers to acclimatize to the job. By advocating this, it must be emphasized that employers were also entitled, by striking a balance, to protect their interests against problematic and poor performers by issuing reminder letters and not extending their probation.

## 8. AWOL IS SERIOUS MISCONDUCT

An employee applied for leave for two days. The leave was not approved. The employee nonetheless absented herself despite being told that her leave had not been approved. The company issued show-cause letter and she responded that she was not answerable to the maker of the letter. On such facts, the employee claimed that she had been dismissed without just cause or excuse in *Ong Siew Ching v Guestserv (Malaysia) Sdn Bhd*<sup>xi</sup>. The court held that she had been absent without prior approval. Firstly, no employee could claim as a matter of right, leave of

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absence without any permission and remaining absent without leave was a gross violation of discipline which would not be condoned by the court. Secondly, she had indeed been rude and arrogant in her letters. Her rude behaviour was unbecoming of a General Sales Manager. Her failure to explain herself and the manner in which she had responded to the letters had shown a lack of respect for the management and that had constituted insubordination.

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ii [2012] 4 ILR 1  
iii [2012] 4 ILR 4  
iv [1997] 1 CLJ 147  
v [2000] ICR 1283  
vi [2012] 4 ILR 41  
vii [2012] 4 ILR 225  
viii [2012] 4 ILR 355  
ix [2012] 4 ILR 365  
x [2012] 4 ILR 629  
xi [2012] 4 ILR 672

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i [2012] 3 ILR 306

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## EMPLOYMENT / CONTRACT LAW

### A CLAIM ON WRONGFUL TERMINATION OF EMPLOYMENT IN CIVIL COURT

There are numerous principles that can be derived from the High Court decision in *Yasuyuki Kayashima v Dato' Seri F Konishi & Anor*<sup>i</sup>. Firstly, however, it must be borne in mind that this case did not originate from a reference by the Minister of Human Resources under s.20 of the Industrial Relations Act 1967 in a case of dismissal without just cause or excuse. It was not the plaintiff(P)'s intention to seek reinstatement which was the remedy available only in the Industrial Court pursuant to such reference<sup>ii</sup>. Instead, P's claim was filed in civil court for damages for wrongful termination/repudiation of his contract of employment. It involved an allegation of breach of contractual term in an employment contract as opposed to an industrial dispute.

The company/employer (D2) sought to justify its termination of P's employment on two acts of insubordination. The court adopted the meaning of 'insubordination' from the oft-cited *OP Mallhotra's The Law of Industrial Disputes*. It means not submitting to authority, disobedience to lawful orders and it is not necessarily rebellious. As long as the employer's order or instruction is lawful, the subordinate must comply and abide by that lawful order or instruction and it is not for him

to argue that it is unreasonable. Thus, on the 1<sup>st</sup> allegation that P (who was engaged as advisor on all factory related matters) had gone abroad (purportedly to negotiate business or company related matter) despite specific instruction by the CEO (D1) to him earlier to stay in the factory to attend to operations, it was disobedience to his superior order and the allegation of insubordination was established. On the 2<sup>nd</sup> allegation that P had privately met up with a President of another company but failed to inform D1 of such meeting, there was no evidence that D1 had ordered/instructed P to inform him of any such private meeting in advance and obtain his consent before P could meet the party. The order or instruction by the employer must be clear or specific and cannot be implied. There was thus no disobedience of D1's order/instruction to constitute insubordination.

On P's complaint that no charges were leveled against him to afford him an opportunity to defend himself in breach of the rules of natural justice, the court pointed out the distinction between termination of contract pursuant to any breach of any terms and dismissal of an employee pursuant to any misconduct which is not stipulated as a term of the contract<sup>iii</sup>. In our case, D2 had exercised its right to terminate the employment agreement with P pursuant to specific provision thereunder (Clause 13.1(i)(b)) which provided that the agreement could be terminated if the employee committed any act of insubordination or other serious misconduct. Further, an employee cannot ordinarily under common law compel his employer to reinstate him to his former job and thus, exercising a right of being heard is an exercise in futility in so far as it is sought to prevent such

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dismissal.<sup>iv</sup> The claim for reinstatement is only available to a claimant in Industrial Court. In an ordinary court of law, the claimant is only entitled to damages if he shows that the dismissal is wrongful.

D2 sought to rely on a letter of reprimand issued on past incidents. The court rejected it. A letter of reprimand is in itself a form of punishment and it can be referred as an aggravating factor towards termination of an employment contract but by itself cannot be the ground to terminate. Previous allegations of insubordination in such letter had been dealt with and considered spent. It is not justified to punish an employee twice for the same insubordination which he had been previously dealt with by a warning letter or a reprimand letter.

In response to the charge of absence without leave in the letter of reprimand, P argued that he was entitled to replacement leave for the non-working days that he was allegedly working overseas. However, the agreement was silent on any right to replace non-working days involved in business trip with annual leave. Thus, P's absence from work without leave which he had never applied for was an act of misconduct.

Whilst D succeeded to prove an act of insubordination (the 1<sup>st</sup> one) but not the other (the 2<sup>nd</sup> one), the letter of termination cited both acts conjunctively and not alternatively. As a result, the

court could not hold that the single act alone to be sufficient to terminate P's contract of employment even if the court was of the view that the 1<sup>st</sup> act of insubordination was a serious act that warranted termination. The court must not substitute its own views as to what is appropriate for the employer to justify the termination of the contract of employment<sup>v</sup>. Therefore, on the whole, the termination of P's employment pursuant to Clause 13.1(i)(b) particularly in relation to the 2<sup>nd</sup> act of insubordination was unjustified and wrongful. However, since in the court's view P had contributed towards such termination, only nominal damages in the sum of RM30,000 were awarded.

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<sup>i</sup>High Court Penang, Civil Suit No: 22-426-2003

<sup>ii</sup>See *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin Hj Abu* [2010] 6 CLJ 1 CA

<sup>iii</sup>See *Zakiah Ishak v Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77

<sup>iv</sup>See *Mohd Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135 FC

<sup>v</sup>See *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 CLJ 405

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*Pendaftar Cap Dagang, Malaysia --- Interested Party v Walton International Limited*<sup>vi</sup>.

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## INTELLECTUAL PROPERTY

### GIORDANO MARK

#### --- WHO HAS PRIOR RIGHT ?

It was a contest between the registered proprietor of the renowned 'GIODARNO' trade mark under Classes 13<sup>i</sup>, 18<sup>ii</sup>, 25<sup>iii</sup> and the Third Schedule to the Trademarks Regulations 1983 in Malaysia as well as under Classes 9<sup>iv</sup>, 14<sup>v</sup>, 18 and 25 in many other countries around the world (the respondent, R) and another registered proprietor of an identical or similar 'GIORDANO' trade mark under Class 14 in Malaysia (the appellant, A) in the Federal Court case of *Yong Teng Hing berniaga sebagai Hong Kong Trading Co and*

A was in the business of selling watches with leather or imitation leather straps since 1986 and optical and sunglasses with cases made of leather or imitation leather since 1992 in Malaysia and sold all its goods under the 'GIORDANO' trade mark. A had only obtained registration of 'GIORDANO' trade mark under Class 14. In July 1992, A applied for registration of the 'GIORDANO' trade mark under Class 9 for optical and sunglasses. R filed an opposition against A's application, contending that A's 'GIORDANO' trade mark was identical to that of R's and that R's 'GIORDANO' trade mark had acquired significant goodwill and reputation in Malaysia, Hong Kong and many other countries prior to the filing date of A's application. The Registrar of Trade Marks, Malaysia (the Registrar) dismissed R's opposition

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which decision was upheld in the High Court. The Court of Appeal however allowed R's appeal. A thus appealed to the final appellate court.

The Federal Court upheld the decision of the Court of Appeal. Before we set out their reasons, it is germane to remind ourselves of the several principles relating to the law of trade mark as reiterated by the apex court. Under the Trade Marks Act 1976 (the Act), priority to a trade mark is not necessarily accorded to the first party or the first user to file the trade mark. The entitlement to a trade mark is dependant on numerous factors.<sup>vii</sup> Under s 36 of the Act, the mere fact of registration is only prima facie evidence of the validity of the registration. Trade mark law is very territorial in many aspects<sup>viii</sup> and it is not unlawful under the Act for a Malaysian trader to become the registered proprietor of a foreign trade mark used for similar foreign goods provided that the foreign trade mark has not been used at all in Malaysia.

On the facts of the case, R had filed its opposition before A's mark could be registered. Thus, the onus fell on A to prove that he was entitled to register the 'GIORDANO' trade mark. In this respect, it was held that A had failed to adduce any evidence to show that he had commenced using the 'GIORDANO' mark in relation to optical and sunglasses as on the application date. On the other hand, R had proven that it had used the mark in Malaysia since 1990 prior to the application date in relation to goods such as articles of clothing, bags, wallets and other fashion accessories. Indeed, R had established extensive and substantial use of the mark in Asian countries such as Hong Kong and Singapore since 1981 which had given rise to reputation of the mark in Malaysia long before A's application in 1992.



It was also the finding of the court that A had not independently devised the mark himself and that A had tried to obtain the benefits of the worldwide reputation of R. The court had also resorted to the new approach with regard to the acceptance of the reputation of foreign trade marks which would bar the registration by a proprietor of a mark that was similar thereto. This concept of well known trade mark had been introduced vide amendment to s 14 of the Act since 1.8.2001.

Further, the fact that A had registered the 'GIORDANO' mark in Class 14 did not automatically entitle him to register the mark in Class 9. There was nothing under the Act which prescribed such a priority consideration. Neither was the non-appeal by R against the Registrar's decision in dismissing R's opposition to registration of A's mark in Class 14 relevant.

As to the second question as to whether A's use of the 'GIORDANO' mark in relation to the goods in Class 9 could lead to deception or confusion to the public under s 14(1)(a) of the Act, by reason only of R's alleged goodwill and reputation and prior use in respect of the 'GIORDANO' mark in relation to the goods in Class 25, the apex court answered it in the affirmative. The said s 14(1)(a) caters for prohibition of registration of a mark if its use would result in deception or confusion due to the goodwill and reputation of a prior mark which is similar although used in relation to goods falling in a different class<sup>ix</sup>. Applying the test set out by the House of Lords in *BALI Trade Mark (No.1)*<sup>x</sup>, 'GIORDANO' was an unusual and uncommon term

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in Malaysia and A's 'GIORDANO' mark was identical both visually and phonetically to R's 'GIORDANO' mark. Thus, a number of persons would be caused to wonder whether it might not be the case that the two products came from the same source by reason of the use of the identical mark. Members of the public would be very likely to associate R's goods bearing the 'GIORDANO' mark with A. Further, A's goods and R's goods in Class 9 and 25 respectively were fashion wear which shared similar nature and purpose. Both A's and R's goods were targeted at the same customers and made available through similar retail channels and were commonly found to be sold together or next to each other in stores and boutiques. The fact that the goods were classified in different classes did not mean that there would not be likelihood of confusion in the use of identical trade marks by two different proprietors. Furthermore, in recent years, proprietors of major brand names had expanded their product lines to embrace all facets of fashion products. This prompted the court to take judicial notice of the fact that many famous trade mark owners such as Chanel, Gucci, Giorgio Armani and Louis Vuitton boasted product lines that encompassed optical wear and sunglasses, clothing, leather products as well as cosmetics and perfumes. Given the modern day retail business, it was in the view of the court no longer realistic to segregate market segments by the different types of goods sold. Thus, it was inevitable that the consumers would assume that both products of A and R were of the same origin, that was, ultimately originating from or authorized by R, as they carried an identical trade mark. A's use of the 'GIORDANO' mark in relation to optical and sunglasses would result in

misappropriation of the goodwill and reputation of R which R enjoyed internationally as well as in Malaysia. A's use of the 'GIORDANO' would certainly infringe s 14(1)(a) of the Act.

In the result, R succeeded in its challenge against the registrar's decision to allow A's application to register the 'GIORDANO' trade mark for optical and sunglasses in Class 9 under the Act.

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<sup>i</sup>For GIORDANO ladies

<sup>ii</sup>For leather and imitations of leather, and goods made of these materials and not included in other classes, animal skins, hides, trunks and traveling bags, umbrellas, parasols and walking sticks, whips, harness and saddlery.

<sup>iii</sup>For garments and wearing apparels; jeans, T-shirts, pouch, accessories, trousers, clothing, footwear and headgear and articles of clothing.

<sup>iv</sup>For optical goods and sunglasses.

<sup>v</sup>For watches.

<sup>vi</sup>[2012] 2 AMCR 749, [2012] 6 CLJ 337

<sup>vii</sup>Factors such as whether the applicant is the bona fide proprietor of the mark pursuant to s 25 of the Act; whether the mark is distinctive of the applicant and whether the mark shall be prohibited from registration pursuant to other provisions of the Act eg. ss 14 and 19.

<sup>viii</sup>*Lim Yew Sing v Hummel International Sports and Leisure A/S* [1996] 3 MLJ 7

<sup>ix</sup> See cases such as *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337, *Thrifty Rent-A-Car System Inc v Thrifty Rent-A-Car Sdn Bhd & Anor* [2004] 2 AMR 57

<sup>x</sup>[1969] RPC 472

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## LAND / CONTRACT LAW

### DOES A PARTY TO A JV AGREEMENT TO DEVELOP LAND FOR PROFIT *PER SE* HAVE A CAVEATABLE INTEREST IN THE LAND?

That was one of the questions posed to the Federal Court in *Score Options Sdn Bhd v Mexaland Development Sdn Bhd*. D was the registered proprietor of the land and was a subsidiary of Austral Development S/B (Austral). D

entered into a Joint Venture cum Project Management Agreement (the JVPM Agreement) with P to develop part of the land into a housing estate (the Project Land). Under the JVPM Agreement, Austral was the developer whilst P was the project manager. 2 powers of attorney were executed in favour of P giving it rights in respect of the development project (PA). In return, P would pay D and Austral a guaranteed sum of not less than RM38m or a sum equivalent to the percentages of gross development value (GDV) for each type of building developed.

Under the JVPM, P was granted physical possession of certain portions of the Project Land,

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the exclusive right to manage the development and the right to enter a private caveat on the land but confined only to the Project Land. P accordingly entered a private caveat against the land but over the whole land. Disputes arose between the parties resulting in D terminating the JVPM Agreement. Dissatisfied, P filed a suit to seek specific performance. D applied to remove P's caveat on the land while P applied for extension of the caveat until disposal of the suit.

For the benefit of our readers, a caveat is a creature of the National Land Code (NLC) and can only be lodged by a claimant who has a caveatable interest under the NLC. Its purpose is to protect an interest in a land or a right to an interest in that land and to preserve the *status quo* of the land pending enforcement of such interest or right. It is an interim protection to freeze the position until an opportunity has been given to a person claiming right under an unregistered instrument to regularize the position by registering the instrument.

The Federal Court distinguished the earlier case of *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd*<sup>i</sup>. In *Zemine*, the respondent had a caveatable interest by virtue of its entitlement to 80% of the subdivided lots in the land. In the instant case, though, P did not have any share in the subdivided lots or units of buildings on the land, but merely a share in the profits under the GDV. It was purely a share in the profits and not in the land. To be caveatable, the interest must be an interest in the land which is capable of registration. It must represent a transaction that can ultimately lead to its registration. Although D had conferred numerous

rights in P under the JVPM Agreement and the PA, all these rights were merely rights to develop the Project Land that would give rise to a monetary interest, *ie*, a right in *personam* against D and does not create any interest in the Project Land. In short, the JVPM for sharing of profits per se did not confer any caveatable interest.

Further, an interest to be registrable must be a present or existing interest or right to such existing interest as opposed to a potential interest or interest *in futuro* in the land. Even though P was given option to purchase units it developed and to transfer the units to itself if it chooses to do so, that right had yet to be exercised at the time the caveat was lodged. It had not ripened into an interest in the land.

The parties also cannot by agreement between themselves create a caveatable interest. A caveat is purely a creature of statute and can only be lodged and maintained according to the statute by a person who is authorized to do so by the statute. A contract cannot override a statute by inventing a right which is not recognized by statute.

The answer to the question is thus negative.

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<sup>i</sup> [2012] 7 CLJ 802

<sup>ii</sup> [2009] 5 CLJ 218

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## LOCAL GOVERNMENT

### INTRUSION OVER PRIVATE PROPERTY TO BUILD PUBLIC ROAD

In *Koh Beng Teck & Ors v IOI Properties Bhd & Ors*<sup>i</sup>, P1 & P2 were the owners of a bungalow (the property) situated at Jalan Puteri 9/2A, Bandar Baru Puchong within the housing development project (Puteri 9) known as Elyssa Villas. D1 and D2 were the developer of Puteri 9 whilst D3 was the local authority having jurisdiction

over Puteri 9 and the property. Elyssa Villas was part of the larger Puteri 9. The property was situated next to Jalan Puteri 9/2, which was in turn next to a retaining wall and a slope. Jalan Puteri 9/2 was the only access road leading to Elyssa Villas.

In 2009, certain portions of the access road to Elyssa Villas fractured followed by a landslide two years later which caused severe damage to Jalan Puteri 9/2 and the retaining wall. Early 2012, the soil condition of Jalan Puteri 9/2, the property and the entire land of Elyssa Villas deteriorated. D3 issued a notice to P1 & P2 which declared the property as dangerous and at a near-collapse state and instructed them to vacate the

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property. A few days later, the outer wall of the property was demolished and a public road was built on the property without the consent of P1 & P2. P1 & P2 filed a suit for injunction to restrain the defendants from carrying out construction whatsoever on the property and from removing any part of their land. D3 argued that in exercise of its statutory duties and functions, it had issued the notice pursuant to s.83 of the Street, Drainage and Building Act 1974 (the Act). Reliance was also placed on s.97 and s.101(v) of the Local Government Act 1976 (LGA) to justify its actions.

On the aforesaid facts, an interim injunction was granted in favour of P1 & P2. In the court's view, the demolition of the outer wall of the property and the subsequent intrusion over the property by the defendants to build a public road without the plaintiffs' consent was *prima facie* a clear exemplification of trespass. Trespass did not depend on the balancing of rights but on the right of a property owner to exclude trespassers. Thus, a landowner was entitled to an injunction to restrain trespass onto his land whether or not the trespass harmed him.

Upon a plain reading of s.83 of the Act, no power was given to D3 in regard to the construction of a temporary access road upon the plaintiffs' land. Indeed, any action taken by a

public body must be justified by a positive law. This rule is necessary in order to protect the people from arbitrary interference by those in power. As for the provisions of s.97 of the LGA, it did not give the local authority an unfettered and unchecked authorization in all cases but only for the specific and limited '*purpose of making any survey or inspection as for the purpose executing any work authorized by the Act to be executed by it.*' The power under s.101(v) of the LGA for D3 '*to do all things necessary for or conducive to the public safety, health and convenience*' was to be exercised strictly in accordance with a positive law. It was not an enabling power by itself. D3 had not shown any statutory provision which specifically or generally allowed it to enter upon the plaintiffs' land to build a temporary access road. The interim injunction was therefore maintained until the hearing of the suit.

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[2012] 7 CLJ 731

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names of its directors. For the purpose of this Update, we shall focus only on the latter.

The facts are fairly straight-forward. The taxpayer had from time to time given out 'loans' to its directors free of interest with no terms of repayment. These monies were placed in numerous fixed deposit accounts in the name of directors with several financial institutions with each deposit of not more than RM100,000 as interest earned. The SCT found that the monies were still the taxpayer's monies and that the Director General of Income Tax (DGIR) was entitled to treat the interest earned on such fixed deposits as income of the taxpayer pursuant to s 140 of the Income Tax Act 1967 (the ITA).

The said s 140 provides that the DGIR, where he has reason to believe that any transaction has the direct or indirect effect of (a) altering the incidence of tax which is payable or suffered by any person; (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or make a return; (c) evading or avoiding any duty or liability which is

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## REVENUE LAW

### MONIES IN FD UNDER NAMES OF DIRECTORS TO MITIGATE TAX LIABILITY

In *Yeoh Eng Hock Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*<sup>i</sup>, the taxpayer's attempt to mitigate its tax did not find favour with the Special Commissioners of Taxation (SCT) nor the High Court. There were indeed two issues for the determination of the court, one concerning the treatment of terminal handling charges collected by the taxpayer from consignees as agent on behalf of principal and the other relating to the nature of the fixed deposits placed by the taxpayer with financial institutions in the

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imposed or would otherwise have been imposed on any person by the ITA; or (d) hindering or preventing the operation of the ITA in any respect; may ...disregard or vary the transaction and make adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction.

The taxpayer relied on the case of *Sabah Berjaya Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*<sup>i</sup> for the principle that it was entitled to mitigate its liability to tax and its scheme was tax mitigation, not tax avoidance. Unfortunately for the taxpayer, the court disagreed and upheld the finding of the SCT. Against the background of the facts, it was held that there was reason to believe that the taxpayer was diverting its monies as fixed deposits under the name of its directors systematically under the guise of a loan, not once or twice but from time to time. The monies nonetheless remained that of the taxpayer so that whenever it required funds, the fixed deposits could be withdrawn as it wished or required. Such *modus operandi* was in fact or reasonable inference could be drawn that it was a scheme, with the intention to alter the taxpayer's tax

position pursuant to s 140 of the ITA. If the loans were genuine and lawful, the interest earned from the fixed deposits would have been the income of the individual directors who shall declare the same as their respective personal income and the taxpayer would have no difficulty in adducing evidence thereof to negate such a scheme. There was also no board resolution authorizing the giving out of the loans to the directors. Further, there was no evidence that the interest earned from all these fixed deposits accounts were not the receipts, income or gains or profits of the taxpayer but that of the respective directors. Thus, there was no reason to disturb the findings of the STA and the taxpayer's appeal was dismissed.

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<sup>i</sup>[2012] 5 AMR 474

<sup>ii</sup>[1999] 3 AMR 3264

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## TORT

### USE OF SAME MANUFACTURER BY RIVALS TO MAKE PRODUCTS

The tort of knowingly inducing or procuring a breach of contract was the principal cause of action in the decision of the Federal Court of Australia in *LED Technologies Pty Ltd v Roadvision Pty Ltd & Anor*<sup>i</sup>, with much discussion on the requisite mental element of the tort [knowledge]<sup>ii</sup>. The facts: LED Technologies Pty Ltd (P) sold automotive parts, with LED automotive lights one of its major products. In July 2003, P entered into an agreement with a Taiwanese manufacturer, Valens Co Ltd (Valens) under which Valens agreed to manufacture LED automotive lights for P. The relationship between P and Valens ended in February 2006. Meanwhile, in early 2003, Baxters Pty Ltd (R2) began purchasing LED automotive lights from Valens while in 2008, Roadvision Pty Ltd (R1) also began to do so. P

sued R1 and R2, alleging, among others, that they had induced or procured a 3<sup>rd</sup> party, Valens, to breach its contract with P.

The vital question was whether the respondents knew the same existing moulds partly paid by P were used to manufacture lights Valens supplied to them. Evidence in the case did not support a finding that either respondent knew that Valens would or were using such moulds to manufacture lights supplied to them. That brought us to the second category: whether either of them turned a blind eye to the possibility, namely whether they made a conscious decision not to inquire into the existence of a fact in case they "discovered a disagreeable truth". Here, R2 had been asked to pay for the moulds and did make an upfront payment. R2 was entitled to assume that Valens had manufactured new moulds. Thus, the respondents could not be said to be turning a blind eye towards the possibility that the money it had paid might not have been used to acquire new moulds and that Valens might have used existing moulds.

The third category of knowledge, namely "reckless indifference", was something quite close to "wilful blindness". It would be negated by an

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honest belief, even one exhibiting a high degree of credulity. It would be established only if facts showed affirmatively that the alleged tortfeasor, faced with knowledge of at least a substantial prospect of a breach, proceeded not caring whether or not a breach would occur. Although R1 and R2 did not make reasonable inquiries about whether Valens would or were using the moulds paid for by P to manufacture lights supplied to R, their knowledge did not rise to the level of willful blindness or reckless indifference. The findings of the trial judge that P had failed to establish that R1 and R2 had committed the tort of inducing or

procuring a breach of contract were correctly made.

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<sup>i</sup>(2012) 287 ALR 1

<sup>ii</sup>See also *Allstate Life Insurance Company v Australia and New Zealand Banking Group Ltd* (1995) 130 ALR 469, *OBG Ltd v Allan* [2007] 4 All ER 545.

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## TORT (NUISANCE)

### WATER STAGNANCY

Water stagnancy due to earthworks by developer was the centre of attention in *Lim Kok Ping & Anor v Thai Wah Construction & Development Sdn Bhd & Ors*<sup>i</sup>. There, P owned a piece of land (Lot 700) whose front portion was on high ground lying next to a road with a public drain (the JKR drain) running alongside the road. The rear portion of Lot 700 was about 6 metres lower than the front portion and shared a common boundary with three lots of land owned by Ds (the Defendants' lots) where development was being carried out by D1. Prior to that development, the Defendants' lots were grassy undeveloped land at a lower level to Lot 700. P had used the rear portion of Lot 700 for income-earning agricultural activities. P had also constructed a perimeter drain around their house (situated on the front portion of Lot 700) which carried surface water from this front portion to the JKR drain. The surface water from the rear portion of Lot 700 naturally flowed out through the Defendants' lots.

Due to earthworks by D1 on the Defendants' lots to raise their level, serious drainage problems were caused to Lot 700. Large volumes of water, mud and waste flowed onto Lot 700 after every heavy downpour, severely damaging P's agricultural activities. P also claimed that D1's workers had entered upon Lot 700 and built concrete slabs for the construction of a

retaining wall for the benefit of the Defendants' lots. When P complained about this, D1 abandoned whatever work they had done and began building a new retaining wall afresh on one of the Defendants' lots (Lot 99). P sued the defendants for, among others, nuisance. The defendants counterclaimed by asserting that P owed a duty to provide for proper drainage of water from Lot 700 which P had failed resulting in loss and damage to the defendants.

The High Court held that D1 was liable in nuisance for the water stagnancy problem of P. The earthworks and construction of a retaining wall on the Defendants' lots had prevented the natural flow of water from the rear portion of P's land. D1 should have provided adequate drainage from the outset. It should have foreseen that the surface run off and spring water would be trapped on the rear portion of Lot 700 due to the increase in height of Lot 99. Further, D1 was not immune from tortious claim merely because its project had been approved by the relevant local authority. The defence of statutory authority had no application because D1 was not authorized by any Federal or State Law to carry out its project which was merely a commercial project subject to local authority approval. It is trite that the grant of planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorize nuisance<sup>ii</sup>. In any event, to avail of the defence of statutory authority, D1 had to demonstrate it was not negligent. Here, it was foreseeable that raising the level of the Defendants' lots and erecting a retaining wall would pen back water from Lot 700 which was formerly higher than the Defendants' lots. D1 had been negligent in raising the level of Lot 99 without providing sufficient drainage for the natural flow of

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water from Lot 700. On the other hand, there was no duty on P's part to provide for drainage as water from Lot 700 had naturally flowed to the Defendants' lots prior to the execution of D1's development project. The defendants' counterclaim was dismissed.

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<sup>i</sup>[2012] 10 MLJ 815

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## TORT (NUISANCE)

### SMELLY ODOUR FROM PERMITTED WASTE DUMPING ACTIVITY

The claimants in *Barr & others v Biffa Waste Services Ltd*<sup>i</sup> claimed against the operator of a landfill site (D) [which was adjacent to their residential estate] in nuisance arising from the strong smells emitted from waste dumped by D at the site. D did have a waste management permit and relied, among others, on the scheme of the statutes<sup>ii</sup>. The trial judge ruled in favour of D. Among others, it was held that the 'controlling principle' of the modern law of nuisance was that of 'reasonable user'; if the user was reasonable, then absent proof of negligence, a claim would fail. The common law had to be adapted to march in step with the legislation; D's user was to be deemed reasonable if it complied with the terms of the permit. In any event, since the some level of odour was inherent in the permitted activity and accepted by residents, it was necessary to set a 'threshold' to distinguish between the acceptable and the unacceptable; judged by the threshold of 'one odour complaint day each week regardless of intensity, duration and locality', all but two of the claims would have failed.

On appeal, that decision was over-turned. The Court of Appeal reiterated that the principles of the law of nuisance relevant to the category of nuisance caused by a person unduly interfering with his neighbour in the comfortable and convenient enjoyment of land were all settled:- (a) it was a question of degree whether the interference was sufficient serious so as to

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<sup>ii</sup>*Gillingham Borough Council v Medway (Chatham) Dock Co Ltd & Ors* [1992] 3 All ER 923. Whilst the proposition is correct, it was also held in this case that a planning authority could. Through its development plans and decisions, alter the character of a neighbourhood and that may have the effect of rendering innocent activities which, prior to the change, would have been an actionable nuisance.

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constitute nuisance with reference to all the circumstances; (b) there had to be a real interference with comfort or convenience of living, according to the standards of the average man; (c) the character of the neighbourhood area had to be taken into account; (d) the duration of an interference was an element although not decisive; (e) statutory authority could be a defence but only if statutory authority to commit a nuisance was express or necessarily implied; and (f) the public utility of the activity in question was not a defence.

In this case, the episodes of unpleasant smells affecting the ordinary enjoyment of residents' houses had not been isolated or trivial occurrences, but had continued to attract substantial and credible complaints. There was no principle that the common law should 'march with' a statutory scheme covering similar subject matter. Short of statutory authority to commit a nuisance, there was no basis for using such a statutory scheme to cut down private law rights. The permit had not authorized, and had not purported to authorize, the emission of such smells. There was no general rule requiring or justifying the setting of a threshold in nuisance cases. By adopting such a threshold, the judge had deprived some of the claimants of their right to have their individual cases assessed on their merits. The appeal was thus allowed.

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<sup>i</sup>[2012] 3 All ER

<sup>ii</sup>Environmental Protection Act 1990, Environment Act 1995 and Pollution Prevention and Control (England and Wales) Regulations 2000.

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## TRUSTS

### TRUSTEES TO ACT REASONABLY IN EXERCISING DISCRETION

A trust was created by the father's (testator) will which involved the family home (the property) where the whole family used to stay in. The beneficiaries were all the siblings. R1 and the mother were the trustees (trustees). Under the terms of the trust, the trustees were directed to sell the property, with a power to postpone the sale in their absolute discretion, and divide the proceeds among the beneficiaries.

When the mother was still alive, rooms in the property were rented out for extra income, and this continued after her death. Eventually, all the siblings ceased to live on the property. Disagreements arose as to how the property should be dealt with. A wanted the property to be sold, but R1, insisting that the property was an ancestral home and still capable of reaping benefits without being sold, refused to do so. At that stage, the property was in a dilapidated state. The rental proceeds were paltry in comparison to the value of the property. A commenced proceedings to compel R1 to sell the property and distribute the sale proceeds in accordance with the will.

The above were the facts in *Foo Jee Seng and others v Foo Jhee Tuang and another*<sup>1</sup>. The Singapore Court of Appeal held in favour of A. The overriding aim in construing a will was to give effect to the testator's intention, which had to be derived from the wording of the will. Although a trustee of a trust for sale was accorded the power to postpone sale as he thought fit, such a power had to still be exercised reasonably. Whether a court should interfere in the decision of the trustee was fact-sensitive and would be ultimately dictated by the demands of justice of the case.

R1's assertion that the testator intended the property to be an ancestral home was

untenable given that the will directed the property to be sold by the trustee. While the testator had every right to determine how his assets were to be managed through his will, the trustees' duty to exercise discretion under the will also had to be exercised properly. This duty would be subject to the court's purview, and was not only limited to instances where there had been bad faith on the trustee's part, but the Singapore courts would not extend the public law concepts (*Wednesbury* unreasonableness) to this area of trust law.

The court regarded the following factors as showing that R1 had acted unreasonably in refusing to sell the property: 30 years had elapsed since the testator's death, the current dilapidated state of the property, the dismal rental income, R1's lack of plans for the property, the beneficiaries were getting older, none of them were living in the property, and most of them were in favour of a sale. On the other hand, R1's decision to not sell the property was baffling and put him in breach of his fiduciary duties as the surviving trustee.

He had taken into account an irrelevant consideration, *viz*, that the testator had intended the property to be an ancestral home. He had failed to take into account a relevant consideration, *viz*, that the continued holding of the property would no longer be of benefit to the beneficiaries. The discretion to postpone sale given to the trustees was for the purpose of ensuring that the sale would be effected at an appropriate moment so that maximum benefit could be obtained for the beneficiaries. In the circumstances here, to postpone the sale any longer would amount to depriving the beneficiaries of their just entitlement under the will. Also, it could not be the testator's intention that the trustees should postpone the sale indefinitely. The court thus directed R1 to take steps to sell the property not later than six months and distribute the sale proceeds to the beneficiaries according to their entitlements under the will.

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<sup>1</sup>[2012] 4 SLR 339

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