

THE UPDATE

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Abbreviations

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

BANKRUPTCY LAW

BANKRUPTCY ACTION AGAINST SOCIAL GUARANTOR

The Bankruptcy Act 1967 (the Act) provides that a creditor shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtorⁱ. The term 'social guarantor' is defined under s.2 of the Act as a person who provides, not for the purpose of making profit, the following guarantees: (a) a guarantee for a loan, scholarship or grant for educational or research purposes; (b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and (c) a guarantee for a housing loan transaction solely for personal dwelling. The questions before the High Court in *Azham Othman; Ex P Affin Bank Bhd*ⁱⁱ were (i) whether leave of court was mandatory to commence bankruptcy action against a social guarantor and (ii) whether a judgment creditor can be regarded as having exhausted all avenues to recover its debt from principal debtor since the principal debtor had been made a bankrupt.

The judgment debtor in this case was the husband of the principal debtor who had been made a bankrupt for non-payment of a judgment sum relating to a hire-purchase agreement. He was a guarantor. It was his contention that he was a social guarantor and the judgment creditor had not exhausted all avenues against his wife. The judgment creditor argued that all avenues had been exhausted as the wife had been made a bankrupt. The registrar struck out the bankruptcy notice filed against the judgment debtor.

COMMERCIAL TRANSACTIONS

IS SOFTWARE PACKAGE A GOOD?

In *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd*, the defendant (Comrad) was a provider of software and information management systems to radiologists while the plaintiff (Gammasonics) was in the business of providing services to radiology service providers. Comrad and Gammasonics entered into a contract for the delivery and installation of a software package known as 'Comrad RIS' designed to facilitate a new aspect of Gammasonics' business. The software package

On appeal, the High Court upheld the registrar's decision. It was clear from s.5(3) of the Act that there was a mandatory duty imposed on the judgment creditor to prove to the satisfaction of the court that he had exhausted all avenues to recover debts owed to him by the principal debtor before he commenced the bankruptcy proceedings against the social guarantor. The omission to provide a specific procedure and mechanism to enable the judgment creditor to satisfy the criteria set out in s.5(3) was no excuse for him to dispense with the leave of the court. In the opinion of the judge, there were various procedural methodologies to enable the judgment creditor to do so, such as filing an originating summons under O.5 r. 3 of the Rules of the High Court 1980 or filing an application to obtain the leave of court at the time the request for bankruptcy notice is filed. In this case, there was no positive evidence before the court that the criteria set out in s.5(3) of the Act had been satisfied by the judgment creditor. The bankruptcy notice was therefore bad in law.

The answer to question (i) above is affirmative whilst question (ii) has, in our view, been left open and has not been decisively ruled upon although it is arguable that following the decision in *Azham Othman* case, the answer seems to be negative.

ⁱs. 5(3)
ⁱⁱ[2012] 2 CLJ 96

was delivered by means of a remote internet download onto Gammasonics' server. Gammasonics was responsible for providing and configuring various hardware and networking infrastructure to meet the specifications of the software package. After delivery, Gammasonics alleged that Comrad had failed to deliver a functioning software package and that the software package was not of a merchantable quality and not fit for its intended purpose.

The primary issue concerned the application of the Sale of Goods Act 1923 (the Act) and the implied statutory warranties of merchantable quality and fitness for purpose provided for in s 19 of the Act. This raised the question whether the software package supplied under the contract was a 'good' under s 5 of the Act. The term 'Goods' is defined as including 'all

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chattels personal other than things in action and money and the term includes emblems and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'.ⁱⁱ

The Local Court in the state of New South Wales of Australia decided that the software package did not fall with the statutory definition of 'goods' under the Act and accordingly the Act did not apply. This decision was upheld on appeal.

In Malaysia, if such similar issue arises, the Consumer Protection Act 1999 will be relevant as it is applicable in respect of all goods and services that are offered or supplied to one or

more consumers in trade including any trade transaction conducted through electronic means.

ⁱ[2010] 77 NSWLR 479

ⁱⁱIn Malaysia, s 2 of the Sale of Goods Act 1957 defines 'goods' as every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

COMMERCIAL TRANSACTIONS

A DEFECTIVE NEW LUXURY CAR

When buying a car, we always hope that the car is in a good condition free from defects. However, sometimes luck is not with us and even a brand new luxury car may encounter problems. What can we as consumers protect ourselves if we happen to buy a 'defective' new car? In *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd*, the Appellant filed a suit against the Respondent, a car dealer known of dealing in Mercedes-Benz motor vehicles of high quality and standards for loss and damage suffered in relation and consequent to the supply of a brand new luxury model Mercedes-Benz S350L. The Appellant contended that the Respondent had breached the implied conditions and/or guarantees under s.32 of the Consumer Protection Act 1999 (CPA) whereby in relation to goods supplied to a consumer, there shall be implied a guarantee that the goods are of acceptable quality. The Appellant took delivery of the Mercedes-Benz on 13.04.2006 and in ten months since then, it failed to start on six occasions.

On each occasion, the car had to be towed to the Respondent's workshop for repairs. After the sixth occasion, the Appellant rejected the car by leaving the car at the workshop. About two months later, upon the Respondent giving assurances and guarantees that no further breakdown for similar defect would occur again, the Appellant took the car. However, three days later, the same defect recurred and the Appellant, having lost all confidence in that car, re-affirmed its rejection.

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The Court of Appeal decided for the Appellant. The Respondent was in breach of the conditions and/or guarantees. The car was not of an acceptable quality within CPA. Further, the Appellant had also complied with the manner of rejecting goods set forth in s.45 of the CPA. The provision requires the consumer to notify the supplier of the decision to reject the goods and of the ground(s) for the rejection. The Appellant was held to have rejected the car when it was left at the workshop on the seventh occasion without taking it back which constituted notification of the rejection to the supplier. The Respondent admitted that the car did have defects, albeit minor defects (which was denied by the Appellant) and averred that the car had been repaired and thus was of an acceptable quality. However, the court held that if the car could not start in the morning, it could not be said to be of an acceptable quality. Given the numerous fundamental problems encountered by the Appellant, the Appellant was justified to have rejected the car.

ⁱ[2011] 9 CLJ 833

SUPPLY OF MACHINE OF DIFFERENT LENGTH

In *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd*, the plaintiff and the defendant entered into a contract to sell and purchase a drilling and boring machine. The contract included a specification that the drilling machine would be 11m in length. The Drilling Machine was delivered to the plaintiff who acknowledged receipt by signing the delivery order. However, unbeknownst to the plaintiff, the said machine that was delivered was 13.5m in length due to the mistake of a third party Chinese manufacturer whom the defendant had contracted with to supply the said machine.

Four days later, on suspicions that the said machine was old, the plaintiff engaged the services of an independent party (SGS) to carry out an inspection. It was then that the plaintiff discovered the discrepancy in length of the machine. SGS also reported the said machine to be “in refurbished condition”. The plaintiff brought a claim against the defendant for alleged breaches of contract. The plaintiff asserted that it was either an express or implied term of the contract that the said machine was to be ‘newly manufactured’, and thus, the defendant was in breach for delivering a refurbished machine. Alternatively, the defendant was in breach of failing to deliver a drilling machine that conformed to the specifications set out in the contract.

It was held by the Singapore Court of Appeal that the contractual term specifying the length of the said drilling machine was a condition under s.13(1) of the Sale of Goods Actⁱⁱ (the Act). Under the said subsection, it is an ‘implied condition’ that the goods will ‘correspond with the description’. Therefore, any breach of it, regardless of the consequences, entitles the plaintiff to elect to treat the said contract as discharged.

The defendant’s argument that the discrepancy in length made no difference to the plaintiff might have had more traction under the *Hongkong Fir* approach (set out in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*ⁱⁱⁱ) --- the innominate term approach where the focus is on the nature and consequences of the breach, *ie* where the breach in question will “give rise to an event which will deprive the innocent party of substantially the whole benefit which it was

intended that he should obtain from the contract”, then the innocent party is entitled to terminate the contract.

However, such argument was legally irrelevant in the present context where the approach under the Act is a condition-warranty approach which focuses on the nature of the term breached, *ie* whether it is a ‘condition’ or a ‘warranty’^{iv}. If the intention of the parties was to designate that term as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract, then such a term is called a ‘condition’. If, however, the intention of the parties was to designate that term as one that is not so important so that no breach will ever entitle the innocent party to terminate the contract (even if the actual consequences of such a breach are extremely serious), then such a term is called a ‘warranty’.

The defendant contended that the plaintiff knew of the discrepancy in length and had therefore, under s.11(1) of the Act^v, waived his right to rely upon the breach as entitling it to treat the contract as discharged. It was held that the mere acceptance of delivery of the said machine was not relevant to the issue of waiver which requires knowledge by the plaintiff coupled with acceptance of the said machine of increased length.

The defendant had not furnished clear and objective evidence to demonstrate that the plaintiff did in fact have knowledge that the machine was 13.5m instead of 11m. The plaintiff thus succeeded in his appeal and was entitled to refunds of the sums paid in respect of the machine and damages for his losses due to the breach.

ⁱ[2012] 1 SLR 152

ⁱⁱIt is similar to the first limb of s.15 of the Malaysian Sale of Goods Act 1957.

ⁱⁱⁱ[1962] 2 QB 26

^{iv}A good analysis can be found in the Court of Appeal decision in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413.

^vIt is in pari material with s.13(1) of the Malaysian Sale of Goods Act 1957.

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EQUALITY OF GENDER

In a landmark decision, the High Court in Shah Alam upheld the equality of gender in the case of *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors*ⁱ. The plaintiff in this case was offered the post of ‘Guru Sandaran Tidak Terlatih’ (GSTT) [untrained teacher] but the offer was revoked by the defendants upon learning that the plaintiff was pregnant. GSTTs were employed on a temporary, month to month basis, paid a monthly allowance and might resign at any time. It was also expressly stated that they were not entitled to maternity leave. The plaintiff sought for a declaration that she was qualified and entitled to be appointed as a GSTT and that the withdrawal of appointment was unconstitutional, unlawful and void. It was the plaintiff’s contention that the defendants’ action was gender discrimination in violation of Article 8(2) of the Federal Constitutionⁱⁱ. The defendants objected on the grounds, *inter alia*, that there was no binding contract between the parties and thus, the plaintiff lacked *locus standi*. It was also argued that the decision not to employ a pregnant woman as a GSTT was a policy consideration which decision ought not to be reviewed or questioned by the courts.

The court held that it was duty-bound to take into account the government’s commitment and obligation at international level especially under an international convention, such as Convention on Elimination of All Forms of Discrimination against Women (CEDAW) to which Malaysia was a party. As a convention, it has the force of law and is binding on member states. In defining equality and gender discrimination under

Articles 8(2) of the Constitution, the court would look at CEDAW. Applying Articles 1 and 11 of CEDAW, pregnancy was a form of gender discrimination because the basic biological fact was that only a woman has the capacity to become pregnant.

The issue of *locus standi* was irrelevant as the plaintiff was claiming that her right to be employed had been affected by the defendants’ decision which was contrary to Article 8(2) of the Constitution. Whilst it is correct that the courts should not be involved in policy decisions by the government, the argument of policy consideration in this case was an afterthought, because if such policy was that important, it should have been raised during the interview of the plaintiff or incorporated into the circular of Ministry of Education services Bil.1/2007. The circular did not specifically prohibit a pregnant woman from applying for the post but that a GSTT was not entitled to maternity leave which in effect would support the argument that a pregnant woman could be engaged as a GSTT.

The court therefore allowed the plaintiff’s claim for declaratory reliefs.

ⁱ[2012] 1 CLJ 769, [2012] 1 AMR 839, [2012] 1 MLJ 832
ⁱⁱArt 8(2) provides that except as expressly authorized by the Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in, among others, the appointment to any office or employment under a public authority.

CONTRACT / FAMILY LAW

SETTLEMENT AGREEMENT OUT OF BREACH OF A PROMISE TO MARRY

No fortune was received out of an illegal contract. This is what happened in the suit brought by a famous celebrity/the plaintiff, a Muslim woman (P) against the defendant (D) for breach of a settlement agreement which was entered into as a consequence of a breach of a promise to marry.

In *Maria Tunku Sabri v Datuk Wan Johani bin Wan Hussin*ⁱ, P and D had agreed to marry each other in an agreement which was entered into when P was still legally married to her husband (the 1st Agreement). D later on changed his mind and breached the 1st Agreement. A

demand notice was issued to D which led to a 2nd agreement whereby D agreed to pay P a sum of RM5.5m as damages to P for breaching the 1st Agreement (the SA). D again breached the SA by his failure to pay the sum within the stipulated time. P then sued D to recover the said sum.

The Court in dismissing P’s claim held that:-

- 1) The 1st Agreement itself was illegal and void as it contradicted s.14(1) of the Islamic Family Law (Federal Territories) Act 1984 which provides that “no woman shall during the subsistence of her marriage to a man, be married to any other man”. As such, P was disqualified and did not have the capacity to enter into the 1st Agreement under s.11 of the Contracts Act. Despite the fact that the subject of the application was the SA which was a promise to pay P due to the breach of promise to marry, it was in effect

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enforcing the terms of the 1st Agreement which was entered into by the married P who had no capacity to enter into an agreement to marry in the first place.

- 2) The SA was also illegal and void under s.24(a) of the Contracts Act 1950 as the subject matter of the SA (ie the 1st Agreement) was illegal and void. If the court was to allow P to enforce the SA, the court would be enforcing a contract (the 1st Agreement) which was prohibited by statute.

P argued that the 1st Agreement was entered into on a contingency basis in which P must get a divorce from her lawful husband in order for the parties to be married. It was contended that P was not marrying D during the subsistence of her marriage but only after getting a divorce from her husband. The court held that as

the agreement was based on contingency, it made the promise uncertain for there was no certainty that there would be a divorce between P and her husband or that a Syariah Court would eventually grant a divorce to P. Therefore, s.33 of the Contracts Act 1950 rendered the 1st Agreement unenforceable for uncertainty. Further, on the facts, there had been no divorce between P and her lawful husband and there was never an occasion that D refused to marry P thereafter. The enforcement of the SA was premature.

ⁱ [2012] 7 MLJ 419

CONTRACT LAW

LIMITATION OF COURIER COMPANY'S LIABILITY

A courier company was engaged by the claimant to deliver tender documents to the ministry concerned on 11.6.2003 by 10.00am, which was two hours before the tender was closed. The courier company however neglected or failed to submit the documents on or before the time endorsed on the cover of the envelope containing the documents. The claimant thus filed a claim for RM1m against the courier company as loss of profit on the expectation that it would be awarded on the tender.

The aforesaid are the main facts in the case of *ABP Perfab (M) Sdn Bhd v Nationwide Express Courier Services Bhd*. In defending the claim, the courier company relied upon limitation clause which was printed in the middle at the bottom of the consignment note as follows:

Condition Precedent to the Acceptance of Consignment by Courier

By tendering goods with NECSB, the sender agrees to be bound by the terms and conditions printed on the reverse side of the sender's receipt. This non-negotiable consignment-note is subject to the Standard Conditions of Carriage shown on the reverse side. Subject to the said Standard Conditions of Carriage the

maximum liability of the carriage per consignment shall not exceed RM200.00 for any reason whatsoever and the carrier shall not be liable for incidental or consequential damage/loss in the carriage of this shipment.



On the reverse of the note of consignment, there were standard conditions of carriage which, among others, provided that save as to loss or damage due to the negligence of the courier company, it shall be under no liability in respect of the documents or goods carried by it and in particular shall not be liable for consequential loss however arising. It is also stated that the consequential loss shall be deemed to include commercial, financial or other direct loss including loss of interest, profit, markets and utility. Further, the liability of the courier company shall be limited

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to the payment by it by way of damage of a sum not exceeding RM200 or its equivalent per consignment or the value of consigned goods or documents, whichever is lesser.

Both parties agreed for the suit to be decided based on a preliminary issue concerning whether the liability of the courier company was limited to RM200 pursuant to the standard conditions of carriage as stipulated on the consignment note. The judge answered it in the

positive and gave judgment favour of the plaintiff for RM200 only. As to costs, the plaintiff was ordered to pay RM8,000 to the defendant.

[2012] 1 CLJ 704

CONTRACT LAW

AN UNFAIR SELLER

The decision of the High Court in *Sandakan in Rayner Segismund Balagut & Anor v Saaid bin Abdullah & Ors*ⁱ shows that our courts will not hesitate to dispense justice when the facts and circumstances cry out loud for fair play.

The 1st defendant, owner of a plot of land, executed a letter of undertaking (LOU) authorizing the plaintiffs to seek and introduce a prospective buyer for the land at a selling price of not less than RM2,500 per acre. If the prospective buyer bought the land for more than that figure, the 1st defendant undertook to pay the excess above the said figure to the plaintiffs as their service fee and commission. This payment would be made upon the signing of sale and purchase agreement between the purchaser and the 1st defendant. The 2nd plaintiff introduced the 6th defendant to the 1st defendant as a purchaser who was prepared to pay RM4,100 per acre for the land. A draft sale and purchase agreement (Draft SPA) was prepared but the 1st defendant intentionally refused to sign it and kept avoiding the 2nd plaintiff, which led to the sale being aborted. The 1st defendant after having known the identity of the

purchaser from the Draft SPA appointed the 2nd defendant to approach the 4th defendant (who was a director and substantial shareholder of the 6th defendant and the 5th defendant) to negotiate for another deal which was more lucrative to the 1st defendant. The commission requested by the 2nd defendant was much lower than the commission to be paid to the plaintiffs. The 5th defendant ultimately became the purchaser of the land. The plaintiffs sued the 1st defendant for breach of the LOU.

The plaintiffs' claim was allowed with costs. The fact that no sale and purchase agreement had been concluded between the 1st and 6th defendant did not sway the case in favour of the defendants for, in the words of the learned Judicial Commissioner, it would be grossly inequitable for the 1st, 2nd and 3rd defendants to deny the plaintiffs the commission due and to reap the fruits of the plaintiffs' hard work in securing a *bona fide* buyer for the land. The 1st defendant's reason for not concluding the sale was simply *mala fide* and not credible.

[2012] 7 MLJ 55

CONTRACT / EMPLOYMENT LAW

FORFEITING DEFERRED INCENTIVE FOR COMPETING WITH EMPLOYER

It is not unusual to find clauses in employment contracts which prohibit an employee from working for a competitor upon termination of employment. Such clauses are commonly known as restraint of trade (ROT) clauses. In common law, such clauses may be enforceable, if they are 'reasonable and necessary' for the purpose of

freedom of trade. In Malaysia, however, we have s.28 of the Contracts Act 1950 which provides that every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void, unless it falls within one of the three exceptions. The three exceptions deal with agreement not to carry on business of which goodwill is sold, agreement between partners prior to dissolution and agreement between partners during continuance of partnership. Thus, subject to the three categories of agreements, in general, all covenants in restraint of trade are void in Malaysia even if the covenants were reasonableⁱ.

To avoid from being caught by invalid and unenforceable ROT clauses, employers have

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evolved their remuneration packages to provide financial incentives for employees to remain with them and for financial disincentives not to leave them or to join a competitor. With such clauses, when an employee leaves the employer and if he chooses to join a competitor, there would be financial disincentive, for example, the forfeiture of a deferred bonus. Will such clauses be upheld?

This issue was subject to detailed discussion in the recent decision of the High Court of Singapore in *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd*ⁱⁱ. It must be pointed out, however, that unlike our jurisdiction, the courts in Singapore follow the common law in determining the validity of a ROT clause.

In *Mano Vikrant Singh* case, the plaintiff was previously employed by the defendant as a senior trader in the Trade and Structured Finance business which involved leveraging on trade flows between countries to customize cross-border financing solutions for trade related financing. Apart from the main contract of employment with the plaintiff, the defendant had an individual incentive award plan (the Incentive Award Plan). The plan provided that 50% of the individual incentive award would be paid out as a cash award and the remaining amount would be paid out as a deferred incentive over one to three fiscal years from the date the individual incentive award was granted (the Deferred Incentive Payments). It also contained a provision that provided for the forfeiture of the deferred incentive payments if the employee continued a career within the financial or commodity trading industry outside of the defendant within a period of two years from the termination of his employment unless his termination was by reason of death or disability (the Forfeiture Provision). The plaintiff eventually gave notice of his resignation, which was accepted by the defendant. The defendant claimed that the plaintiff in setting up a competing business had breached the Forfeiture Provision and hence was not entitled to the balance of the Deferred Incentive Payments otherwise due to him. The plaintiff brought the action to seek declaration that the Forfeiture Provision was void and an order that the Forfeiture Provision be severed from the Incentive Award Plan.

The trial judge stated that there were three types of clauses which appear to provide some form of restriction on competing with the employer following the termination of employment. There are: (a) the first type features a promise by the employee not to compete with his employer (Traditional ROT Clauses); (b) the second type involves the forfeiture of certain benefits if the employee competes with his employer (Forfeiture-

for-Competition Clauses); and (c) the third type forfeits benefits if the employee resigns (Payment-for-Loyalty Clauses) which provides for the forfeiture even if the employee does not compete with the employer upon his resignation. The Forfeiture Provision in the present case is a Forfeiture-for-Competition Clause. The trial judge then went into analysis of the historical development of the ROT doctrine, the case law development in the UK, Australia and United States and academic views.

It was held that the Forfeiture Provision was not in restraint of trade. There was no compelling public policy that required the court to intervene to hold the Forfeiture Provision as in restraint of trade when in truth there was no restraint in form or substance. The trial judge said: "On its face, Forfeiture-for-Competition Clauses do not prohibit the employee from competing with the employer. Instead they operate as a *financial disincentive* for the employee to compete after he leaves the employer. If the plaintiff decides to compete upon leaving the employment of the defendant with the full knowledge of the financial disincentive, *ie*, the forfeiture of his Deferred Incentive Award, then he would have made a calculated business decision that he would nonetheless be better off financially working for a competitor... The plaintiff was completely at liberty to compete with the defendant and had in fact done so when he set up a competing business in Xangbao. There is therefore no question of society being deprived of his skill and competency which is the cornerstone behind the restraint of trade doctrine."

The plaintiff's claim was therefore dismissed with costs. For the benefit of our readers, it is apposite to point out that insofar as the Payment-for-Loyalty Clauses are concerned, they have consistently been upheld by courts in the UK and Australia as not being in restraint of trade, which trend was similarly followed by the trial judge.

ⁱSee cases like *Wigglesworth v Anthony Wilson* [1964] MLJ 269, *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127, *Nagadevan Mahalingam v Millenium Medicare Services* [2011] 1 AMCR 473.

ⁱⁱ[2012] 1 SLR 311

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'FORTUNA INJUNCTION' IN OPERATION

"Fortuna injunction" derives its name from the Australian case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation*ⁱ. It is a type of injunction to restrain presentation of a winding-up petition in relation to which two principles govern its issuance: (i) where there is clearly a disputed claim where the defendant is using a procedure which will invariably produce irreparable damage to the plaintiff's company rather than by a suitable alternative procedure; and (ii) where the winding-up petition, if presented, would have no chance of success since the debt is disputed on substantial grounds. These principles had been accepted by our Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd*ⁱⁱ and recently, they were applied by a High Court judge to arrive at different outcomes in two cases.

Firstly, the case of *Seawalth Nautical Sdn Bhd v Kekal Kaya Marin Sdn Bhd*ⁱⁱⁱ. The defendant was a sub-contractor doing wiring works on a shipping vessel whilst the plaintiff was the main contractor. The defendant produced its invoices to purportedly establish a sum owed by the plaintiff on a bare allegation that works had been done as per the contract between them. The plaintiff applied for an injunction to restrain the defendant from filing a winding-up petition against it. It produced a "job progress and completion status" document verified by a marine surveyor which proved that there was as yet no satisfactory completion of the works which were still subject to testing and commissioning. The learned Judge held that it was a proper case to grant a Fortuna injunction as the facts fell within the first principle governing the grant thereof.

On the next day, the same Judge ruled against the grant of such injunction in *Pacific & Orient Insurance Co Bhd v Muniammad*

Muniandy^{iv}. There, a judgment had been obtained by the defendant against the plaintiff which was a listed company on Bursa Malaysia with a healthy balance sheet position. The plaintiff had appealed to the Court of Appeal whilst the defendant sought to enforce the judgment by resorting to winding-up proceedings by serving a s.218 notice under the Companies Act 1965 on the plaintiff. The plaintiff had failed to pay the judgment sum within the statutory period of 21 days. The plaintiff applied to the court for injunctive relief to restrain the defendant from proceeding further. Initially, on *ex parte* basis, the plaintiff was granted the injunction on condition that it must pay the judgment sum into court within two weeks which was complied with. On *inter partes* hearing, the *ex parte* injunction was discharged and the application for an interlocutory injunction was dismissed. With a judgment already recorded in favour of the defendant, both principles for the grant of a Fortuna injunction could not be satisfied. The learned Judge remarked that the presentation of a winding-up petition might cause commercial harm and damage to the plaintiff company but the short answer to this had to be for the company to pay up the judgment sum, in the absence of a stay of execution^v.

ⁱ [1978] VR 83

ⁱⁱ [2007] 3 CLJ 295. See also *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305

ⁱⁱⁱ [2011] 9 CLJ 577

^{iv} [2011] 9 CLJ 569

^v It must however be noted that a winding-up petition is not execution on a judgment, see *Re A Company* [1915] 1 CH 520, *Juara Aspirasi (M) Sdn Bhd v Tan Soon Ping* [2012] 1 MLJ 50.

DIGEST OF EMPLOYMENT LAW CASES
1. WHAT NEED NOT BE DONE IN RETRENCHMENT

Two principles in relation to carrying out a retrenchment exercise were re-emphasized by the High Court when considering a judicial review in *Pook Li Ping v Mahkamah Perusahaan Malaysia & Anor*^j. The applicant was the Commercial Director of the 2nd respondent when pursuant to reorganization exercise, her services were terminated and she was given redundancy benefits. It was held that there was sufficient

evidence to show that the reorganization exercise was not carried out with the ulterior motive of driving the applicant out of her employment. There were at least two senior employees being terminated pursuant to the review exercise. The court went on to reiterate the principle that the company was not obliged to warn or consult the employee before retrenching her. The company was also not duty-bound to offer the employee suitable alternative employment or to transfer her to other units of the company. Thus, the applicant's submission that the applicant had specific skills and expertise to be offered alternative positions as finance director or manager was devoid of merit.

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2. PROJECT DEFERMENT DOES NOT JUSTIFY RETRENCHMENT

In *Jacqueline Helen Davies v Saujana Hotel Sdn Bhd/ The Saujana Kuala Lumpur*ⁱ, the claimant commenced employment with the hotel on 1.10.06 under a two-year contract. During interview, the claimant was told that she would oversee the preparation and renovation work of a club facilities which would be re-launched in August 2007 as an exclusive club named 'The Club at The Saujana' and she would then be in charge of its operations. After 2 ½ months working in the hotel, she was informed that The Club Project had to be deferred indefinitely due to financial constraints. She was offered an alternative employment in the hotel but within a few days the offer was revoked and a letter of retrenchment was issued to her end December 2006 on the ground that her position had become redundant. She claimed that she had been dismissed without just cause or excuse. It was in evidence that the work finally commenced in May 2007. The hotel contended that it could not be simply expected to pay the claimant's monthly salary of US\$4,500 for the extended period of five months as the job she had been employed to do was deferred indefinitely. However, the Industrial Court took the view that the fact that the hotel was able to proceed with the project five months after it was postponed showed that the hotel was still working towards acquiring the additional funding needed for the project when it decided to retrench the claimant. There had not been cessation of the kind of work upon which the claimant had been engaged. As such, she could have carried out some of her other duties during that five months period of deferment. The hotel had made an unreasonable decision concerning the necessity of redundancy at that particular time considering that it had acquired half of the funding of its project and was working towards getting the additional fund. The fact that the hotel offered a two-year employment contract gave her a legitimate expectation of securing an employment of two years. The court awarded her backwages of 24 months less 15% deduction on account of payment that had been made to her on the termination of her employment plus compensation of one month salary *in lieu* of reinstatement.

3. NO FORCED RESIGNATION

The claimant in *Mazli Mohamed v SAP Holdings Berhad*ⁱⁱ was accused by the company of committing criminal breach of trust and was asked to resign immediately without any notice. The

claimant's request for time to consider was rejected. He was denied entry to his office. The company's version was that the claimant was told to resign voluntarily or otherwise he would have to face disciplinary action. The claimant opted to resign. The issue was whether the company had forced the claimant to resign. It is established law that if it is proved that an employer offered the employee the alternatives of "resign or be sacked" and, without anything more, the employee resigned, that would constitute a dismissal^{iv}. The principle is said to be one of causation – the causation being the threat of the sack. Such threat causes the employee to be willing to resign.

However, where that willingness is brought about by some other consideration, and the actual causation is not so much the sacking but other accepted considerations in the state of mind of the resigning employee, then he resigned voluntarily because it was beneficial to him to do so and there is thus no dismissal. The court held that in this case, the claimant resigned because it was beneficial for him to do so to avoid any action being taken against him by the company. The claimant's resignation was not a forced resignation but a voluntary one. The court remarked that it was not unusual for an employer who was faced with an employee who had allegedly committed serious misconduct to call him in and told him the company's dissatisfaction with him. The claimant might be told of the consequences of the show cause letter.

The court was of the opinion that the claimant knew of the effect of the show cause letter and that was why at the material time he thought it would be in his best interest to resign. As to the letter written by the claimant's solicitors to set out events and circumstances concerning his tendering of the letter of resignation, the court viewed it as an after-thought exercise and had no effect on his resignation letter. The claimant was held to have failed to prove that he was forced to resign and thus, there was no dismissal.

ⁱ[2012] 1 MLJ 536

ⁱⁱ[2012] 1 ILR 292

ⁱⁱⁱ[2012] 1 ILR 399

^{iv}*Harpers Trading (M) Sdn Bhd., Butterworth v Kesatuan Kebangsaan Pekerja-pekerja Perdagangan* [1988] 2 ILR 314

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APPLICATION OF THE DOCTRINE OF MARSHALLING

The doctrine of marshalling was the focus in the case of *Serious Organised Crime Agency v Szepietowski and others*ⁱ (SOCA case). As described in the earlier case of *Re Bank of Credit and Commerce International SA (liq) (No 8)*ⁱⁱ, it is a principle of doing equity between two or more creditors, each of whom are owed different debts by the same debtor, but one of whom (the first creditor) can enforce his claim against more than one security or fund and the second can only resort to only one.

It gives the second creditor an equity to require that the first creditor satisfy himself (or be treated as having satisfied himself) so far as possible out of the security or fund to which the second creditor has no claim, so that the only security or fund to which the second creditor has access may remain clear to him.

In SOCA case, D1 (who was the wife of D3) was the legal owner of property A and property B. The Serious Organised Crime Agency (SOCA) had a claim against property B alleging that it constituted recoverable property within the meaning of s 266 of the Proceeds of Crime Act 2002, having allegedly been acquired with the proceeds of unlawful conduct.

By a compromise agreement embodied in a settlement deed and consent order, SOCA gave up its existing claims that property B was recoverable property.

Under the compromise, D1 granted SOCA a second charge over property A. D2 bank held a first charge over property A as well as a second charge over property B. Thus, the position was that D1 and D3 owed debts to two creditors---the bank and SOCA, with the bank able to enforce its claim against two securities (over properties A and B) and SOCA only had one security over property A.

Eventually, property A was sold but the proceeds of sale nearly exhausted in paying off the sum due to the bank, leaving only a small sum

to be paid to SOCA. Under such circumstances, SOCA brought proceedings seeking to invoke the equitable doctrine of marshalling by being subrogated to the bank's second charge over property B in order to recover the shortfall.

The High Court in UK pointed out a further formulation of the doctrine of marshalling in *Re Bank of Credit and Commerce International SA (liq) (No 8)*ⁱⁱⁱ. Where one creditor (A) has two securities for the debt due to him and the other (B) has only one, B has the right to have two securities marshalled so that both both he and A are paid so far as possible. Thus, if the debtor has two estates (Blackacre and Whiteacre) and mortgages both to A and afterwards mortgages Whiteacre only to B, B can have the two mortgages marshalled so that Blackacre can be made available to him if A chooses^{iv} to enforce his security against Whiteacre.

Whilst the right to marshal could be excluded or varied by contract, the court held that there was nothing in the settlement deed or the consent order which either explicitly or implicitly prevented SOCA from relying on the principle of marshalling in relation to property B. There was no agreement excluding property B from bearing any part of the liability for the debt to the bank from D1. SOCA was not prevented by contract or any principle of equity from invoking the doctrine of marshalling.

Thus, SOCA should be subrogated to the bank's second charge over property B as a security for the shortfall which was left following the sale of property A.

ⁱ[2011] 1 BCLC 458

ⁱⁱ[1998] AC 214

ⁱⁱⁱ[1996] 2 BCLC 254

^{iv}The doctrine is never allowed to delay or defeat the creditor with several securities in the collection of his debt and the enforcement of his securities. He is allowed to realize his securities as he pleases.

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ERRONEOUS CERTIFICATE OF INDEBTEDNESS

Erroneous certificate of indebtedness, admissibility of newsprint copies of letters of demand and missing AR registered card are the few issues that called for determination in the High Court decision of *RHB Bank Bhd v Yu Yuan Vegetarian Food Trading Sdn Bhd & Ors*ⁱ.

As usual as in a claim based on default of banking facilities, the plaintiff-bank relied upon certificate of indebtedness as conclusive evidence so as to excuse the plaintiff from having to adduce proof of debt and shift the burden to the defendant-borrower to disprove the amount claimed. However, in this case, the defendant contended that a difference of RM100.00 in the proceeds of sale (out of the sum of RM491,250) stated in the certificate constituted a manifest error which would displace the conclusiveness of the certificate. It was contended that although the difference was small, the *de minimis* principle ought not to be applied as the compounding of interest rendered the total amount outstanding as at 5 April 2011 vague and uncertain. The learned trial judge however disagreed with such contention. Citing an earlier case of *Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpayai*ⁱⁱ, he held that the principle regarding conclusiveness of certificate of indebtedness could not mean that if the defendant succeeded in showing a manifest error which thus displaced the presumption of conclusiveness, it would defeat the plaintiff's claim in its entirety. On the facts, there was sufficient

evidence adduced to support the claim as pleaded, namely the total amount outstanding as at 11 October 1999, for which the defendant had not established any manifest error. This amount would be a fluctuating sum since the full proceeds of sale had as yet not been received and the correct figure outstanding at any one time thereafter could be calculated.

The office copies of the letters of demand/recall were tendered. These documents were newsprint copies (which were exact copies of the letterhead copies) kept by the previous solicitors of the plaintiff and being made from the original, they were admissible as secondary evidence under s.63 of the Evidence Act 1950.

The previous solicitors testified that the original AR registered cards for the letters of demand/recall had been mislaid. The plaintiff thus relied upon Photostat copies of the AR registered cards. Relying upon s.65 of the Evidence Act 1950 which allows secondary evidence to be given to prove the 'existence, contents or condition' of a document when 'the original has been...lost', the learned judge accepted the proof of the AR registered cards.

All in all, the plaintiff's claim was allowed with costs and judgment was entered for the sums outstanding as at 11 October 1999.

ⁱ[2012] 1 MLJ 562

ⁱⁱ[1995] 3 AMR 2337

INSURANCE / CONTRACT LAW

AVOIDING INVESTMENT-LINKED INSURANCE POLICY

The extent of duty to act in utmost good faith, or in Latin, *uberrima fides* in a contract of insurance was in issue in the case of *Tan Jing Jeong v Allianz Life Insurance Malaysia Bhd & Anor*. The plaintiff had bought from D1 through one of its agents, D2, an investment-linked insurance policy known as 'Investpro' wherein a certain portion of the premium was allocated for investment-linked fund for the purpose of yielding returns from the investment. The Investpro policy with a coverage of RM8m provided the payable yearly premium of RM400,000 and that 45% of the premium which had translated to RM180,000 was earmarked for investment-linked fund. The plaintiff

had paid the first year premium. About a year later, the plaintiff was notified by D1 that the investment-linked fund total account value had dwindled to RM19,024.48 and he was also issued with a premium due notice requiring him to pay the premium for the next policy year in the sum of RM400,000. The plaintiff sued D1 and D2 to rescind the contract on account of misrepresentation and non-disclosure of material fact regarding the feature of the Investpro which, it was alleged, they ought to have disclosed to him, as it would have impacted his decision whether to buy the Investpro policy or not.

The trial judge held that indisputably, D2 had represented to the plaintiff about the returns of investments based on D1's past performance and that the returns would be sufficient to cover the plaintiff's subsequent yearly premium for the policy. It was the trial judge's finding on a balance of probabilities that D2 did represent to the plaintiff that a one-time payment premium of RM400,000 was sufficient to cover the rest of the premiums throughout the subsequent years in relation to the

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policy. This feature could be said to be the most important factor that had persuaded the plaintiff into agreeing to purchase the policy.

Further, more probable than not, D2 did not inform the plaintiff that the balance 55% of the premium would be used to pay for D1's product and acquisition expenses. The material documents relating to the policy also did not carry such information. Insurance contract being *uberrima fides* in nature, placed the duty of utmost good faith on both parties with equal force. All parties to an insurance contract must deal in good faith, making full declaration of all material facts in the insurance proposal. Once a positive duty was imposed on a party by law to be truthful, including to disclose material fact, that duty was not discharged simply on account of the fact that the other party had failed to inquire about some material fact that had not been disclosed, but which fact was within the knowledge of the party. The duty to disclose the use of the balance 55% of the premium rested with the defendants. Until that

duty was discharged by them, there was no duty on the plaintiff to even inquire about the same. The mere fact that the plaintiff might have occasion to inquire about the same but did not do so, did not diminish the duty imposed on the defendants to disclose, a single bit. Both the defendants had therefore failed to discharge that onus. The effect of non-disclosure of a material fact in an insurance contract was exactly the same as that of a misrepresentation and justified the aggrieved party to avoid the contract.

In the circumstances, the plaintiff was entitled to rescind the Investpro contract by reason of misrepresentation and material non-disclosure.

[2012] 7 MLJ 179

inaccuracy and/or incorrect meter reading which fell within the ambit of reg.11(2).

PUBLIC UTILITIES

TNB'S CLAIM FOR LOSSES IN TAMPERED METER CASE

In *Wong Kwi Fong v Tenaga Nasional Bhd*ⁱ, the defendant which was the supplier of electricity to customers found that the meter at the plaintiff's rented premises had been tampered with and issued a notice to the plaintiff for an offence under s.37(3) of the Electricity Supply Act 1990 (Act 447). The defendant also notified the plaintiff that the electricity supply to the premises would be terminated unless a sum of RM717,393.78 was paid within 14 days of the notice. The plaintiff commenced the suit against the defendant for a declaration that the defendant had no right to issue the notice and an interlocutory injunction to stop the defendant from cutting off the electricity supply. The defendant counter-claimed for loss in revenue for 4 ½ years in the said sum of RM717,393.78.

The trial judge dismissed the plaintiff's suit and allowed the defendant's counter-claim but for only three months, ie. RM47,313.08. Whilst the defendant was entitled, by virtue of s.38(3) of Act 447, to claim for loss of revenue due to the offence of the tampering of the meter, reg.11(2) of the Licensee Supply Regulations 1990 contained a provisoⁱⁱ that restricted the period for any retrospective adjustment to three months from the date the consumer had been informed about being undercharged (or overcharged). It was held that once a meter was tampered with, there was



The defendant's contention that the words 'meter inaccuracy' and 'incorrect meter reading' were meant only for situations where the meter was faulty or not working due to the fault of the defendant was rejected. In the view of the court, if Parliament intended to exclude meter inaccuracy due to tampering, clear words must be provided in reg.11(2). Until and unless that takes place, the proviso to reg.11(2) in respect of collection of losses of revenue applies to cases of tampered meters.

ⁱ [2012] 1 CLJ 285

ⁱⁱ The proviso was introduced vide Licensee Supply (Amendment) Regulations 2002 and came into force on 15.12.2002.

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INTEREST ON WRONGFULLY RETAINED TAX REFUND

In *Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*, gains arising from compulsory land acquisition were wrongly subjected to income tax by the respondent, Inland Revenue. This happened despite earlier decisions of superior courts which were brought to its attention. As a result, the applicant was kept out of money amounting to RM2,360,723.82 which ought to have been refunded to the applicant. The applicant successfully applied for a judicial review and obtained a declaration that the respondent's decision was unlawful. The applicant claimed for interest under s.11 of the Civil Law Act 1956 which empowered the court to order interest to be given together with judgment sum.

The High Court held that the basis of interest claimed by the applicant did not

tantamount to an order of *mandamus* under s.44 of the Specific Relief Act 1950 which would have made it impermissible against the respondent being a public authority. Interest is awarded in the nature of compensation to remedy the aggrieved party whose money has been unlawfully deprived by the other party. In the present case, the respondent had retained the applicant's tax refund which at all material times was rightful money belonging to the applicant. Since the respondent has had the use of the money, the respondent ought to compensate the applicant accordingly. It was thus ordered that the applicant be paid an interest of 4% on the refund amount from 4.1.2011.

[2012] 1 MLJ 825

TORT**CTOS NOT LIABLE FOR INVASION OF PRIVACY**

In issue Q4 of 2011, we reported a decision which found CTOS Sdn Bhd (CTOS) --- a company which provides credit information to individuals, banks, credit institutions etc.--- to be liable for defamation and negligence for publishing outdated information concerning an individual. In yet another decision involving CTOS, the plaintiff's claim for negligence and invasion of privacy against CTOS was dismissed in *Mohd Zaid bin Johan v CTOS Sdn Bhd*.

In this case, the plaintiff claimed to have been adversely affected by the information provided by CTOS, namely that a bankruptcy action had been filed against the plaintiff by Ambank Berhad. Ambank Berhad had informed CTOS about the bankruptcy action by letter and advertised the bankruptcy notice in a national newspaper. In fact, the bankruptcy action had been mistakenly filed by Ambank Berhad. The plaintiff claimed that as a consequence of the inaccurate information provided by CTOS concerning the bankruptcy proceedings, his attempts to obtain loans from several banks (the banks) failed as he was blacklisted. Ambank Berhad discontinued the bankruptcy action against the plaintiff but not before the plaintiff had initiated an action against Ambank Berhad and its solicitors for negligence (the 1st suit). Whilst the 1st suit was ongoing, the plaintiff filed a separate suit against

CTOS in September 2006 which alleged that CTOS had been negligent in obtaining, storing and providing wrong information concerning the bankruptcy proceedings against the plaintiff and as such, had committed invasion of privacy towards the plaintiff. Ambank Berhad and its solicitors were found liable in the 1st suit.

It was held that the particulars of the bankruptcy notice sent to CTOS by Ambank Berhad and published in the newspaper was not intrusive and private information or which could be safely said as obtained by unlawful access of the plaintiff's private life or movement as it was within the public domain. CTOS' act of holding the particulars of the bankruptcy notice in its database as supplied by Ambank Berhad did not constitute an actionable invasion of privacy. The information given to CTOS by Ambank Berhad was not tortiously obtained or was tortious in any way.

It was also found that *res judicata* or estoppel applied against the plaintiff who had attempted double recovery of damages by filing two suits against different parties based on similar set of facts and seeking similar reliefs. The court was also satisfied that CTOS was not obligated to investigate or make enquiry that the information given by Ambank Berhad and entered into its database was true. There was no evidence to show that CTOS had been made aware of the discontinuance of the bankruptcy action against the plaintiff. The plaintiff himself had not taken any step to notify any of the banks or CTOS the actual facts regarding the bankruptcy proceedings. It was only in March 2007 that CTOS received notification from Ambank Berhad whereupon CTOS updated its records accordingly.

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There was also no evidence produced to establish that the banks had relied solely on the information retrieved from CTOS' database to determine an application for loan facility from a customer. However, if the defendant was expressly made aware that the banks would be relying on the information retrieved from CTOS' database and that CTOS intended that the banks should rely on the said information, in those

circumstances, CTOS might be under a duty of care.

[2012] 1 AMR 44

TORT (BREACH OF CONFIDENCE)

**DENTIST-PATIENT
COMPROMISED**

CONFIDENCE

A medical doctor brought a claim against a dental surgeon for breach of duty of confidence for revealing confidential information to a third party in *Dr Tan Ah Ba v Dr Wong Foot Meow*. In August/September 2004, the plaintiff went to consult the defendant, a consultant oral maxillofacial surgeon specializing in oral surgery and dental implantology, with regard to dental implants which were done on him by another dentist (Dr How) which implants were causing him severe pain and distress.

plaintiff had asked him to prepare a dental report which was collected personally by the plaintiff. It was also argued that after the Malaysian Dental Council (MDC) had dismissed the plaintiff's complaint against the defendant on the breach of professional confidence, the plaintiff's suit amounted to an abuse of the process of court.

The High Court ruled for the plaintiff. The role of MDC was different from that of court. The MDC was a statutory disciplinary body dealing with the ethical conduct of the defendant. It had no jurisdiction to determine any dispute between the plaintiff and the defendant. Thus, the doctrine of *res judicata* was inapplicable in this case. There was no abuse of the process of the court.

On the balance of probabilities, the court held that the dental report was neither requested by the plaintiff nor was it ever handed over to the plaintiff as contended by the defendant. The court found that the appearance of the report in the hands of Dr How's solicitors just before the trial without any plausible explanation as to how it came to be there led the court to the irresistible conclusion that it was the maker of the report who had given it to the said solicitors.

The defendant was ordered to pay to the plaintiff general damages of RM25,000, interest and costs.

[2012] 7 MLJ 467

The defendant did not resolve the plaintiff's pain and suffering as all implants had already been placed by Dr How. However, about four years later, in the course of a suit brought by the plaintiff against Dr How for negligent implant treatment done by Dr How, the plaintiff was served with an expert report prepared by the defendant. The plaintiff contended that the said report was prepared by the defendant without his express knowledge, consent or approval and that the sole purpose was to defeat his claim against Dr How. This amounted to a breach of the defendant's professional duty of care and confidentiality owed to the plaintiff. It was the plaintiff's claim that the dental report was one of the causes of the settlement amount with Dr How being at much lower figure (RM800,000) than that which was originally demanded (RM5m) against Dr How. On the other hand, the defendant contended that the

in the eyes of the public. There are two categories of defamation. The first is libel where words are expressed in a permanent form which is usually visible to the eye, like in a book, e-mail or picture. The other is slander where words are expressed in a temporary form, usually when spoken or made by body movements.

In the case of *YB Hj Khalid bin Abdul Samad v. Datuk Aziz bin Isham & Anor*¹, the

TORT (DEFAMATION)

DO NOT BLINDLY REPRODUCE !

Defamation occurs when a person utters words that may lower another person's reputation

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plaintiff was a member of Parti Islam Se-Malaysia (PAS) and Member of Parliament (MP) for Shah Alam who sued the defendants for libel. The first defendant was sued as the chief editor of the second defendant's publication. The second defendant had republished an article that appeared on the official blog of another MP that portrayed the plaintiff as a person who was capable of distorting verses from the Holy Quran for his own political ends. The impugned article was made in connection with the plaintiff's role in attempting to resolve a dispute over the relocation of a Hindu temple in Section 23, Shah Alam, which had stirred up strong emotions among the residents there. On whether the words were defamatory, there were several formulations but generally, if the words complained of tend to lower the plaintiff in the estimation of right thinking men in general, or expose him to hatred contempt or ridicule or would cause him to be shunned or avoided, those statement or words would be held to be defamatory. In this case, the judge decided to put the estimation of the plaintiff in the eyes of a control group selected by court. It was said that if the readers were not Muslims, it would not have the effect of lowering the estimation of the plaintiff in their eyes but here, the second defendant's circulation would be in the main Malay Muslims. To publish the impugned article suggesting the plaintiff was a person who was inclined to distort verses from the Holy Quran would certainly not only cause the plaintiff's estimation to be lowered in the eyes of this control group but also subject the plaintiff to contempt, ridicule even hatred in a matter as sensitive as this. It could have even stirred up violent emotions as it was involving

religious issues and not forgetting that the plaintiff was an MP and stood on the political platform.

Although the impugned article was extracted from the official blog of another member of parliament, YB Zulkifli Noordin, it was no defence that the defendants received the libelous statement from another whose name was disclosed at the time of publication. The court rejected the argument that the second defendant had thought that it was safe to rely on the article just because it appeared on an official blog of a MP. Indeed, sensitive matters were raised and the standard of conduct required of the second defendant to constitute responsible journalism was much higher.

The second defendant made no attempt to verify the veracity of the article. No disclaimer was published to make known to its readers that the views expressed in the article were those of the MP of the blog and not that of the second defendant. No opportunity was given to the plaintiff to give his views on the article, thus presenting a one-sided picture of him to the readers. The trial judge therefore held that reportage or responsible journalism raising qualified privilege as a defence was not applicable. The plaintiff was awarded a sum of RM70,000.00 in compensation and cost.

[2012] 7 MLJ 301

TORT (NEGLIGENCE)

NEGLIGENCE IN FAILING TO SUPERVISE PLAY BETWEEN CHILDREN AND DOG

The owner of a dog, D, was held liable for injury caused by the dog's biting to a nine-year-old boy, P whilst P was playing with the dog in D's home. This was the outcome of the case of *Chiang Ki Chun lan v Li Yin Sze*ⁱ. P had gone on a play date with D's son and there were six boys, aged nine and under, and five domestic helpers, but no parents. The dog, a two-and-a-half-foot-tall mongrel was kept leashed in a corner of the living room. All the boys were excited to see and played with the dog, patted it, and fed it dog biscuits over a prolonged period. Eventually, the domestic helpers and the other children left P alone with the dog. P followed the other children's example by

patting the dog gently and saying 'good boy'. The dog was standing when P fed it a dog biscuit and then it suddenly rushed towards and bit P on his cheek. Before he was bitten, P did not tease the dog, which did not bark or growl. Evidence was led to show that the dog was tame and well-behaved with D's family and visitors including children, and there was nothing to suggest that it was easily excitable or that it was in fact excited or annoyed by the children on that day.

Both the court of first instance and the Court of Appeal of Hong Kong ruled in favour of P. At the outset, it is germane to set out the established propositions concerning the duty expected of the owner of a domestic animal. Such an owner is liable for damage caused by the animal, either if the owner knows the animal to have some mischievous propensitiesⁱⁱ or if there are special circumstances where the animal is put in such a position that a reasonable man would know that it was likely to cause danger and therefore he ought to regard himself as under an obligation to do something by way of precautionⁱⁱⁱ.

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The appellate court identified the common thread running through the law of negligence as that a neighbour must refrain from an act or omission (where he was charged with a positive duty to act) if he reasonably foresaw a real, as opposed to a fanciful, risk of harm to his neighbour from his act or omission. The court would evaluate whether the risk of harm was real or fanciful by assessing the likelihood of the risk materializing on the specific facts and circumstances of the case, and by balancing the likelihood of the risk materializing against the severity of harm, were it to materialize, the cost and practicality of precautions, and the utility of the activity in question.

On the facts of the case, the lengthy period of continuous play by a large group of lively young boys would have caused the dog to become stimulated and excited, and that must have been amplified by the fact that it was restrained and unable to interact freely with them. It could properly be inferred that the act of biting P was not a spontaneous act that was wholly out of character, but the result of unsupervised play that so excited the dog that it bit P, either accidentally or because it misinterpreted the unfamiliar P's act as being unfriendly. A spontaneous act that was wholly out of character was unforeseeable but the

latter was reasonably foreseeable. In such a situation, there was a real, and not a fanciful, risk of an untoward reaction by the dog to the continuous playfulness of the children. It was thus incumbent on D and her agents (domestic helpers) to ensure that there was periodic supervision by at least one of them of the children and of the dog, to ensure that it did not get overexcited and overreact to the playful children, some of whom were strangers to the dog. D was held negligent in failing to ensure as aforesaid and the District Court award of damages in the sum of HKD152,062 remained.

It is pertinent to observe the concluding remark by the court that this decision is not to be taken as a precedent that young children playing with tame dogs must always be supervised by adults. The decision was made on the particular facts and circumstances.

ⁱ[2011] 5 HKLRD 727

ⁱⁱ*Fardon v Harcourt-Rivington* [1932] All ER Rep 81

ⁱⁱⁱ*Sycamore v Ley* (1932) 147 LT 342, *Aldham v United Diaries (London) Ltd* [1940] 1 KB 507, *Searle v Wallbank* [1947] AC 341

BANKING / CONTRACT LAW

FRAUD ON BANK & MONEYCHANGER

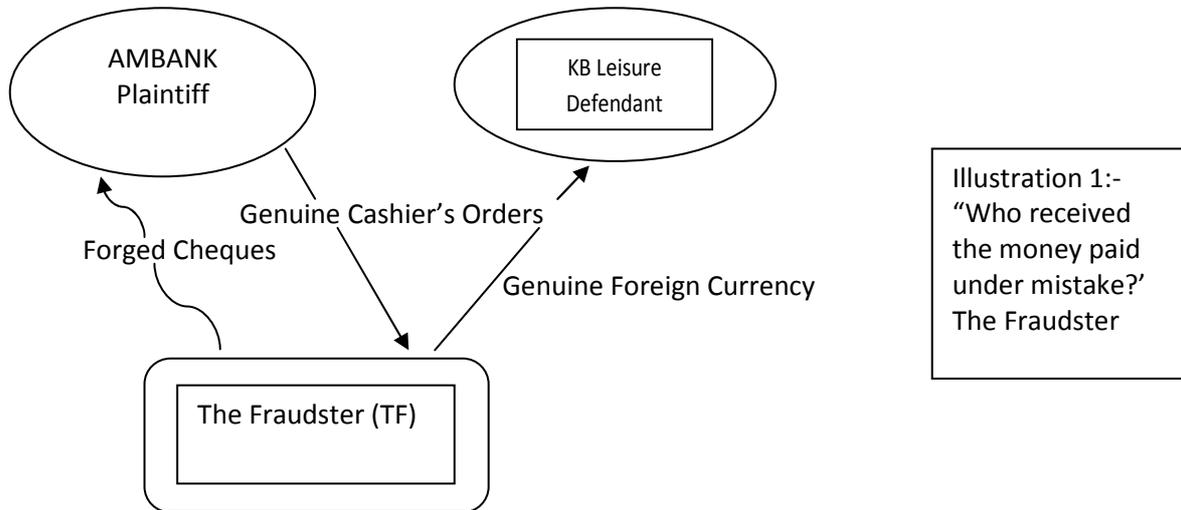
Two innocent parties --- a bank and a moneychanger --- were tricked by a fraudster. Forged cheques, genuine cashier orders, bank accounts and foreign currencies were used to facilitate the fraud. Who, then, should be made to bear the loss arising from such fraud? That sums up the scenario in the interesting case of *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd*.

An unknown person had forged three cheques which were drawn on the account of a customer of the plaintiff bank (P), KOHOKU. These cheques were used as payment to purchase three cashier's orders (COs) from P. The sum of the value of these COs was RM1,074,710.50. Both KOHOKU and P did not know that the cheques had been forged. The three COs were made payable to the defendant (D), a licensed moneychanger. They were subsequently cashed into D's account with Maybank. It was not known who was actually responsible for cashing in the COs. Police investigation had established no link between D and the fraudster.

D's version was that it was approached by one 'Allen', purportedly acting for a company called Source Code, seeking to buy certain relatively large sums of foreign currency from D. With D's agreement, the relevant sums in Ringgit Malaysia were deposited into D's account (in Maybank), whereupon D acquired foreign currency from another money changer, Sharazmin Resources, and duly sold on the foreign currency to Source Code. It turned out that the money deposited into D's account came from the COs that had been raised using the forged cheques. By illustration:

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D had stated that it had no knowledge of any fraud or forgery that might have been perpetrated on P. Police investigation had established no link between D and the fraudster. P had reimbursed KOHOKU all sums wrongfully drawn from its account. Thus, P sought to recover the sum of RM1,074,710.50 paid to D under the COs under three heads: (a) payment under mistake pursuant to s.73 of the Contracts Act 1950 (the Act)ⁱⁱ; (b) moneys had and receivedⁱⁱⁱ; and (c) D receiving the sum as constructive trustee.

On (a), the learned trial judge pointed out that s.73 of the Act envisaged a pre-existing contractual relationship between the payer and the payee pursuant to which the payer made the mistaken payment that it sought to recover. This contractual nexus was missing on the facts. Further, there was no payment from P to D, let alone a payment under mistake. From the illustration, in acceptance of the forged cheques, P honoured the remittance applications submitted by the fraudster and thereupon issued the COs. This was the true 'payment under mistake', for it was at this point that P gave the genuine COs which have the value of money to whom they were made payable, under the mistaken belief that the cheques were genuine. The fraudster then paid the COs onto D's account, received in exchange the genuine foreign currency provided by D, and disappeared.

On (b), it is essentially that of unjust enrichment at the expense of the plaintiff. On the facts, D could not be said to have been unjustly enriched at the expense of P. In return for being credited with RM1,074,710.50, D had disgorged the sum of RM1,069,711.50 in foreign currency to Allen, Source Code and/or whichever imposter dealing with D with regard to the foreign currency exchange. The remainder of RM4,998.96 which represented D's profit margin from the exchange was the normal margin that D would have made in any foreign exchange involving the same sums. Further, in the absence of knowledge of fraud on the part of D, natural justice and equity would not require D to refund P. Lastly, parties could not be restored to their original position by D refunding P. The benefit of the fraud committed via the forged cheques had passed to the fraudster. Requiring D to compensate D would be unjust to D, they having altered their position to their detriment by purchasing foreign currency which they then disbursed to the fraudster. The purpose of restitution *in integrum* being the remedy for unjust enrichment could not be achieved.

On (c), it would require D to have had some form of knowledge of the fraud that had been perpetrated, or the mistake that had occurred in the course of issuing the COs. This would necessarily require an inquiry into whether D could have discovered, had the relevant enquiries been made, the fact that the unknown trickster had procured the COs through the device of the forged cheques. The court held that it was not established that D was at any time in breach of the Moneylenders Act, the Anti-Money Laundering and Anti-Terrorism Financing Act for not making the enquiries they ought to have made thereunder. The most that could be said was that D might not have complied with the guidelines as laid down by Bank Negara on frequently asked questions related to foreign exchange administration. But, even if D had enquired as to the truth of the statements contained on the Forms 9 and 49, they would have been in no position to discover the fraud that had been perpetrated.

The court also held that D had demonstrated a good defence of change of position as elucidated in the case of *Lipkin Gorman a firm v Karpnale Ltd & Anor*^v. D had in good faith materially altered its position by acquiring for value, and disbursing the foreign currency in exchange for the payment credited into its account. Such alteration would be substantially to its detriment if it were to be required to refund P the moneys

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credited. Such alteration was neither tainted or invalidated by any act of illegality or imputation of any actual or constructive knowledge of any illegality behind the foreign exchange transaction.

P's claim was dismissed with costs.

ⁱ[2012] 7 MLJ 364

ⁱⁱIt reads: A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

ⁱⁱⁱThe cause of action of moneys had and received was described as the kind of equitable action to recover back money which ought not in justice to be kept and which the defendant ought to refund, see *Bank Bumiputra (M) Bhd v Hashbudin Hashim* [1998] 3 MLJ 262.

^{iv}[1992] 4 All ER 512

FAMILY LAW

DIVISION OF ASSETS AND PROVISION OF MAINTENANCE IN DIVORCE

The division of matrimonial property and assessment of maintenance for wife and children following a divorce were the focus in the High Court case of *Shireen a/p Chelliah Thiruchelvam v Kanasingam a/ Kandiah (Sureshan Marchandan, party cited)*ⁱ. The petitioner wife (W) and the respondent husband (H) were married in August 1994 and blessed with four children. W left RH and matrimonial home in August 2008. Both had consented to the marriage be dissolved and custody, care and control of the four children be given to W with reasonable access to H, leaving issues on matrimonial properties, maintenance and H's claim against the party cited for adultery with W to be tried.

In deciding the division of assets acquired by joint efforts, the court shall generally have regard to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets, any debts owing by either party which were contracted for their joint benefit and the needs of the minor children. Subject to such considerations, the court shall incline towards equality of division. On the other hand, if such assets were acquired by the sole effort of one party, the court shall consider the extent of contributions made by the other party to the welfare of the family by looking after the home or caring the family and the needs of the minor children. Subject to such considerations, and in making the division order, the party by whose effort the assets were acquired shall receive a greater proportion. Assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by joint efforts shall also be regarded as assets acquired during a marriage.ⁱⁱ

There were numerous assets acquired before as well as after the marriage.

(i) In relation to the properties purchased by H before their marriage and payment of full purchase price took place before their marriage, W was not entitled to any share of the properties as there was no proof of contribution by her towards the acquiring of those assets or her contribution to substantially improve those properties during the marriage.

(ii) In relation to properties purchased before the marriage and payment of loan towards purchase price of properties made during the marriage, the relevant features, findings and decisions of the Family Court are as summarized in the following table:-

No	Properties (year of purchase)	Features	Finding	Decision (%)	
				W	H
1	Condominium in Menara Seputeh (1993)	Loan to pay balance purchase price (75%) in the course of marriage; fully paid by H in 2002; H conceded W had 35% share	W's contributions in taking care of home and caring for the family as a wife and mother	37.5	62.5
2	Bourgainvilla Apartment (1990)	Loan to pay balance purchase price (about 50%) in the course of	No proof of monetary contribution by W or of W's contribution to	25	75

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		marriage; fully paid by H in 1998	substantially improve the property during marriage; W's contributions in taking care of home and caring for the family as a wife and mother		
3	Factory Lot in Taman Perindustrian Puchong (1993)	Loan to pay balance purchase price (about 72.5%) in the course of marriage; fully paid by H in 2002	No proof of monetary contribution by W or of W's contribution to substantially improve the property during marriage; W's contributions in taking care of home and caring for the family as a wife and mother	25	75
4	Land at Tropicana Golf and Country Resort (1992)	Loan to pay balance purchase price of land (about 44.3%) in the course of marriage; fully paid by H in 1996. Construction of house began in 2000; loan taken and withdrawal from H's EPF	No direct monetary contribution except that loan for balance purchase price of land and loan for construction cost were paid during marriage; W's contributions in taking care of home and caring for the family as a wife and mother	30	70
5	Shop lot T090 in Sungai Wang Plaza (1994)	Loan to pay balance purchase price of land (80%) in the course of marriage; fully paid by H in 2003. Sold off in 2003, proceeds of sale in joint account of H and W	W's contributions in taking care of home and caring for the family as a wife and mother	25	75

Table 1

As to the assets acquired after the marriage, the relevant features of the Family Court are as summarized in the following table:-

No	Properties (year of purchase)	Payment
1	Land in College Heights (1998)	Full payment in 2001
2	Factory lot No.30 Puchong (2004)	Settlement via joint account
3	Factory lot No.26 Puchong (2005)	Settlement via joint account
4	Factory lot No.32 Puchong (2002)	Settlement via joint account

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5	House No.38 at Lakeside Puchong (2007)	Purchased under W's name and sold by W for a profit of RM22,000
6	House No.40 at Lakeside Puchong (2007)	Purchased under W's name and sold by W for a profit of RM42,000

Table 2

The court held that H was making payments towards the properties for most of the time; that W only contributed her salary to their joint account for eight months in 2004; and that W's main contribution was to the welfare of the family by looking after the home and caring for the family. W was held to be entitled to 35% share and H 65% share of the properties in Table 2.

As to the shares in the three companies in which H and W had varying proportion of shareholdings, the court held that although both H and W had worked hard to improve the business by joint efforts, H was the prime mover and had contributed more than W. W was thus entitled to 35% of their total shareholding in the three companies and H 65%.

On the claims for three motor vehicles acquired during the marriage, H made all the monetary contributions towards purchase thereof whilst W made non-monetary contributions by looking after the home and caring for the family. Both were given equal share of such vehicles.

In deciding on the division of the above matrimonial assets, the court had taken into account factors that W had withdrawn large sums of money from their joint accounts without knowledge of H and the safe at their matrimonial home and that H had collected rental from the matrimonial assets without giving W her share.

As for H's claim for household items of RM50,000 taken by W from the matrimonial home, W was allowed to keep them for her benefit and the benefit of the children in lieu of higher maintenance from H since it was H's duty to provide proper accommodation for the children and W together with all the appliances and furnishings. Regarding W's claim for H's EPF, W was given 25% share and H 75% share since the monies in the EPF were earned by the sole efforts of RH and were meant for H's retirement.

On the maintenance of children, whilst it was the duty of a parent to maintain or contribute to the maintenance of his or her children whether they were in his or her custody either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereofⁱⁱⁱ, W had not been working since the marriage broke down. Thus, the responsibility to maintain the children fell on H.

On the maintenance of W, s.78 of the Law Reform (Marriage and Divorce) Act 1976, the court shall base its assessment on the means and needs of the parties and the degree of responsibility which the court apportioned to each party for the breakdown of the marriage. There was no evidence that W was working and thus, H was held to maintain her, as far as possible, on the same standard of living that she had enjoyed before the marriage broke down.

Sufficient evidence had been led that H did cause the irretrievable breakdown of the marriage through his unreasonable behaviour as an abusive husband and father. H's allegations of W's adultery with four men had not been substantiated by direct evidence of actual acts of adultery being committed on specific dates, times and places on the standard of beyond reasonable doubt. The fact that the party cited was living together with W at his condominium did not prove adultery between them. Nonetheless, the supporting and circumstantial evidence including photographs tendered proved that W had an unusually close relationship with the party cited. For this, the court apportioned to W a high degree of responsibility for the breakdown of the marriage in order to assess maintenance for W. Thus, instead of awarding W a monthly maintenance of RM10,000 as claimed (which was not substantiated by actual itemized expenses), the court only awarded W a sum of RM3,750. The court took into account W's last drawn salary and that W was expected to go and earn a living considering that she was working continuously before the marriage broke down.

H's claim against the party cited for adultery with W was dismissed as there was no proof beyond reasonable doubt of such adultery.

ⁱ[2012] 7 MLJ 315

ⁱⁱS.76 of the Law Reform (Marriage and Divorce) Act 1976

ⁱⁱⁱS.92 of the Law Reform (Marriage and Divorce) Act 1976

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HUSBAND FAILED IN CLAIM FOR SHARE IN MATRIMONIAL HOME

In another High Court decision, the husband (H) attempted to claim that a house bought under the wife(W)'s name (during the marriage) and charged to a bank was a matrimonial home in a petition for divorce brought by W. In *Loh Kwee Eng v Phua Nai Peng*, W contended that the said house was purchased and financed by her solely. It was alleged that H did not contribute financially to the upbringing of the children, frequently disturbed the peace of the family by making noise and beating W and their daughters. W and her children were forced to leave the said house due to H's misbehavior. H refused to vacate the said house and had continued living there while paying the monthly loan repayment towards the said house to the bank. W had stopped making the monthly loan repayment since she moved out. H thus argued that he had contributed to the said house which made it a matrimonial home. H asked for an order for sale of the said house and he be given half share of the sale price.

In the learned judge's view, H exhibited a mean personality in terms of his non-supporting W and the children financially and emotionally and had a tendency to being abusive physically and mentally to them. The judge could not accept H's testimony that he was the one who paid deposit sum for the said house and not W, and yet at the same time his agreeing to W's 'request' to have the said house registered in her name and not his name just because she had asked him to do so. H was also unable to produce contemporaneous documentary evidence that he had contributed to the payment of the said house. H's payment of the monthly repayments after W and her daughters had left the said house was only right and proper as he would have had to pay rental towards another accommodation if he had decided to move out. The said repayments did not constitute H's 'contribution' towards the said house. In the circumstances, the court ordered the said house to be offered for sale subject to W paying H the total sum of RM4,568.40 (the reimbursement amount) in respect of cukai tanah and cukai harta of the said house. In other words, H did not get any share of the said house except the reimbursement amount.

As to the maintenance of their youngest underage daughter, based on the fact that H played the share market and derived a rather lucrative income and the fact that the daughter was schooling in the secondary school, H was ordered to pay maintenance of RM500 per month.

[2012] 7 MLJ 343

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

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