

THE UPDATE



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Abbreviations

Jur	:	Jurisdiction
AUS	:	Australia
CN	:	Canada
MY	:	Malaysia
SG	:	Singapore
UK	:	United Kingdom

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AGENCY / TRUST

BUYER'S AGENT RECEIVING SECRET COMMISSION FROM SELLER

What is the appropriate remedy against an agent who has received a secret commission from the seller of property which his principal bought at a price negotiated on his behalf by the agent? That was the question in the UK Court of Appeal case of *FHR European Ventures v Mankarious*¹.

The facts are not complicated. D1 set up D2 company to provide consultancy services to the hotel industry. The owner of a hotel, MCG wanted to sell the hotel. D1 encouraged his clients, the Investor Group, to explore the possibility of buying the hotel and prepared a memorandum which told them that the owner was offering the hotel for sale through D2 on an off market basis. MCG and D2 entered into an 'exclusive brokerage agreement' under which D2 had for a defined period an exclusive right to sell the hotel and, if a sale was made to the Investor Group, D2 would be paid a fee of €10m within 5 working days of receipt by MCG of the proceeds of sale. D2 was to introduce MCG to the Investor Group and to advise them. However, D2 was not to be involved in any negotiations on behalf of MCG. The agreement stated that D2 was only acting as a 'facilitator' and would be advising the Investor Group, participating in the negotiations as a purchaser. It also stated that the parties to the brokerage agreement waived any conflict of interest, and that D2 was to disclose its appointment under the agreement to the Investor Group.

A sale to the Investor Group took place in the form of a share purchase for €211.5m of the entire share capital of MCG. The Investor Group sued D1 and D2 for the recovery of €10m on the ground that it had been paid to the defendants at a time when they were acting as

the Investor Group's agent with the result that the defendants were in breach of their duty as fiduciary agents not to profit from their position or to put themselves in a position where their interest and duty were conflict.

At the trial, the judge of the first instance held that D2 had not made sufficient disclosure of its relationship with MCG, so that it could be said that it had acted with the informed consent of the Investor group. Thus, D2 was liable and accountable in equity for the amount of the commission in the sum of €10m. The remaining question was whether the remedy was a personal remedy or a proprietary one. In this regard, the Investor Group was held not to be entitled to a proprietary remedy against D2 but was only entitled to the personal remedy of an account in equity. The judge relied on the proposition that "*a beneficiary of a fiduciary's duties could not claim a proprietary interest, but was only entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money was or had been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary.*"² The judge ruled that the secret commission did not fall within either of the two exceptions.

One may ask why it matters which type of remedy. In some cases, it matters because the fiduciary is insolvent; and the establishment of a proprietary remedy may mean that the profit

²*Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 4 All ER 335. This decision opted to follow *Lister & Co v Stubbs* [1886-90] All ER Rep 797 rather than *A-G for Hong Kong v Reid* [1994] 1 All ER 1 (PC) and confirmed that not all benefits wrongly obtained by a fiduciary in breach of fiduciary duty were subject to a constructive trust even though the fiduciary was still under a duty to account in equity. See however the contrary position in Australia in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6

¹[2013] 3 All ER 29, [2013] 3 WLR 466

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is unavailable for distribution among his creditors. In some cases, it matters because the secret profit has been invested in an asset that itself increased in value. Sometimes, it matters because the defaulting fiduciary no longer has the profit and the principal wishes to recover it from a 3rd party into whose hands it has come. In the instant case, it mattered because the Investor Group was pursuing accounts and inquiries to discover what had happened to the commission and who had benefited from it. Such proceedings would be more effective 'in ensuring payment in full' if a proprietary interest in the commission was established.

On appeal, the Investor Group argued that D2 had received the commission in substance out of the sale proceeds, which had been paid by the group out of money that they had beneficially owned, and thus the payment of the commission fell within the 1st of the two exceptions. The appellate court however shot down this argument. Such argument was founded on the basis that the moneys paid by the group to the vendors had never ceased to belong beneficially to them. However, as the Investor Group had paid the vendors in return for the shares, the vendors would acquire beneficial title to the sale price. It could not be said that any part of the payment remained the property of the Investor Group. In short, the group was not entitled to a proprietary remedy on the basis that the secret commission had been paid from funds which could be tracked back to money which had once belonged to them.

The Investor Group however succeeded on the 2nd exception. The secret commission had been acquired by D2 by taking advantage of an opportunity or right that was properly that of the Investor Group (the beneficiary). The brokerage agreement was held to be part of the overall arrangement surrounding the purchase of the hotel. It, and the fact that it was not disclosed by D2 to the Investor Group, diverted from the group the opportunity to purchase the hotel at the lowest possible price, ie. a price lower than the price they ultimately agreed to pay. D2, the fiduciary, had exploited this opportunity such as to attract the application of the rule with the consequence that D2 held the benefit of the contract on a constructive trust for

the Investor Group. The Investor Group was thus entitled to a proprietary remedy to 'follow and trace' the money paid under the contract to D2.

On a final note, the appellate court expressed their earnest hope that the Supreme Court could and would in due course '*provide an overhaul of this entire area of constructive trusts in order to provide a coherent and logical framework*'. So, you may not have heard the final word on this decision.

BANKING / SECURITY / LAND LAW

PRINCIPLE OF ACCRUED RIGHTS IN COMPETING CLAIMS AND CONSOLIDATION

It is not unusual at all in a security documentation to find a provision on "consolidation" which entitles the lender/chargee to consolidate some accounts of the borrower/chargor. Issue arises when the chargee, in the course of realizing its security, seeks to exercise such rights vis-à-vis another unsecured judgment creditor who is in the midst of enforcing its judgment obtained against the same judgment debtor/chargor by way of auction resulted from a prohibitory order and order for sale. These competing claims happened in *Gale Force Sdn Bhd v Ling Yun Yoke*³.

Facts

The judgment creditor (JC) had obtained a judgment for monies due by the judgment debtor (JD). It then obtained a prohibitory order against the JD's property in July 2010 and its application for an order for sale was pending. Meanwhile, the chargee of the same JD's property, MBB had on 22.11.2010 obtained an order for sale of the same property in the exercise of its rights as a secured chargee (MBB's OFS) for the purpose of satisfying the JD's indebtedness to MBB under 2 accounts (the JD's Original 2 accounts).

The court allowed JC's application for an order for sale (JC's OFS) on 31.1.2011 and a public auction was fixed which resulted in successful sale in March 2011. MBB sought to include 2

³[2012]1 LNS 5

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additional accounts (the Additional 2 Accounts) for which the JD was a guarantor in purported exercise of its rights under the provision on consolidation. The powers of consolidation were wide as to enable MBB to consolidate accounts not in the name of the JD/Chargor but that to which the JD/Chargor was merely a guarantor. The JD expressly consented to MBB to apply the proceeds of sale towards settlement of the Additional 2 Accounts. If such consolidation was allowed, the combined amount due under the JD's Original 2 Accounts (RM1.6m) and the Additional 2 Accounts (RM1m) would leave the JC with an excess of only RM1.2m from the realized sale proceeds of the JD's property (RM3.8m). Without consolidation, MBB's share of the proceeds of sale was only RM1.6m with the balance RM2.2m being the JC's entitlement. MBB filed an application (in April 2011) to amend MBB's OFS to include the Additional 2 Accounts which was allowed in July 2011 (MBB's Amended OFS). JC applied for directions for the determination of the actual sums payable out of the proceeds of sale to MBB.

Issues

Whether MBB should be allowed to consolidate the Additional 2 Accounts into the MBB's OFS by MBB's Amended OFS made after the JC's OFS;

Whether MBB was *estopped* from raising the issue of consolidation of the Additional 2 Accounts

Decision and Principles

Once the rights of the JC had crystallized with the JC's OFS vis-à-vis that of the chargee/MBB, MBB did not have the right anymore, even with the consent of the chargor/JD, to consolidate the Additional 2 Accounts of the JD. To do so would militate against, erode away and indeed infringe the accrued rights of the JC that had already crystallized. Thus, any consolidation must be effected before the JC's OFS of 31.1.2011.

MBB's move was a clever one, seeking to rely on the trite law that all amendments to a pleading/order relate back to the date of the original pleading/order, so that the MBB's Amended OFS would have taken precedence and had priority over the JC's OFS. The learned Judge held that the amendment must be

confined to the express purpose which was to regulate the indebtedness/banker-customer relationship between MBB and the JD and it had no bearing on the competing claims to priority on the proceeds of sale between MBB and the JC.

It was further held that *estoppel* applied against MBB. Its representation to the court in its order for sale proceedings and in its opposition to the prohibitory order that the indebtedness due under the charge over the JD's property was in respect of the JD's Original 2 Accounts only. With consolidation, the JC's right and entitlement would suffer from its diminution to its detriment.

BANKRUPTCY / SECURITY

LIMITATION ON CHARGEES' RIGHT IN REALIZING SECURITY

The Federal Court decision in *Pilecon Realty Sdn Bhd v Public Bank Berhad & 2 Ors (and Another Appeal)*⁴ appeared to have made abundantly clear the limit of the right of a chargee/mortgagee in realizing the charged/mortgaged property belonging to a bankrupt/wound up chargor/mortgagor. Under s.8(2A) of the Bankruptcy Act 1967 (the BA), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order. It is in *Pilecon Realty*, the issue was whether this provision was equally applicable to a winding-up situation where the chargor/mortgagor was not an individual, hence non-application of the BA.

The apex court ruled that by virtue of s.4(1) and (2) of the Civil Law Act 1956 and s.291(1) and (2) of the Companies Act 1965, s.8(2A) of the BA was also applicable to secured creditor in a winding-up situation, and there was no reason to confine its application against a bankrupt and not to a wound-up debtor. Therefore, a secured creditor is given 6 months after the bankruptcy order (in the case of an individual chargor/mortgagor) or the winding-up order (in the case of a corporate

⁴[2014] 4 AMR 481

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chargor/mortgagor) to sell the charged property, failing which it is not entitled to any interest.

In the instant case, the bank, having realized the charged property only some 2 ½ years after the winding-up of the chargor/mortgagor, was not entitled to any interest. The decision of the lower court in allowing interest for a period of six months after the winding-up order was made was wrong and was set aside. In other words, failure to meet the six-month deadline would entail disentitlement of any interest post-bankruptcy order or post-winding-up order and the chargee/mortgagee's claim is limited to the sums due and owing on the date of the bankruptcy order or the winding-up order, as the case may be.

COMPANY LAW

LOSS OF SUBSTRATUM, JUST AND EQUITABLE TO WIND UP

In Malaysia, a company may be wound up on numerous grounds, one of which is 'just and equitable' under s.218(1)(i) of the Companies Act 1965 (the Act). The authoritative case in this regard is of course the House of Lords decision in *Ebrahimi v Westbourne Galleries Ltd & Ors*⁵. The same words 'just and equitable' appear in s. 35 of the Partnership Act 1890 in UK⁶ as a ground for dissolution of a partnership, hence it had given rise to a tendency to associate this just and equitable jurisdiction with companies which are 'quasi-partnership' or 'in substance partnership', *ie.* to invoke this 'just and equitable' ground in circumstances where the company is in substance a partnership and members owing partner-like obligations to each other which are so basic that if broken, their association must be dissolved⁷. However, is this the law? Or rather, must the company be a quasi-partnership or in substance a partnership before one can call s.218(1)(i) to aid? This issue arose in *Dato' Ting*

*Check Sii v Marine Utama Sdn Bhd & Anor*⁸, a decision of the High Court in SibU.

In that case, P applied to wind up R1 under s.281(1)(i) of the Act on the grounds, among others, that : (a) R1 was a dormant company and had ceased to be a viable entity for more than 9 years; (b) R1 had breached various statutory duties; and (c) the substratum of R1 had completely disappeared and gone. It was not in dispute that P and R2 were the two surviving shareholders of R1 and were close personal friends. R1 was incorporated out of that friendship to carry out the business of shipping and was running as a quasi-partnership between them. The only principal client of R1 was AJT Co. which was owned by the family members of R2. Eventually, AJT Co. abruptly terminated all transport services with R1 after the relationship between P and R2 soured. Numerous suits were subsequently filed between P and R2. R1 ceased carrying on any business and there was no one to manage the company. P was locked out from the registered office of R1 and was denied access to all accounts and records. R1 had not prepared its annual accounts and held AGM for 9 years.



In response to R2's contention that P must prove that R1 was a quasi-partnership under the 'just and equitable' limb of s.218 of the Act and thus, all the 3 elements laid down in *Ebrahimi's* case must be fulfilled, Supang Lian J held that there was no authority that the just and equitable limb in s.218(1) of the Act was solely applicable to quasi-partnership companies.

⁵[1972] 2 All ER 492.

⁶The Malaysian equivalent is s.37(f) of the Partnership Act 1961.

⁷*Re a Company (No 005685 of 1988), ex parte Schwarcz (No 2)* [1989] 2 BCLC 427.

⁸[2013] 9 MLJ 527.

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Further, the High Court had in *Woodsville Sdn Bhd v Tien Ik Enterprise Sdn Bhd & Ors*⁹ interpreted *Ebrahimi* as merely setting out the circumstances under which the equitable considerations could be adopted and by way of an illustration, the three elements were stated as examples of such circumstances. Indeed, on appeal the Supreme Court in *Tien Ik*¹⁰ went further and held that it was not essential that before *Ebrahimi* principles could be applied, at least one of the three elements must be present.

For the readers' benefit, the 3 elements laid down by Lord Wilberforce in *Ebrahimi* were: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence, which is often found where a pre-existing partnership had been converted into a limited company; (ii) an agreement, or understanding, that all, or some, of the shareholders should participate in the conduct of the business; (iii) restriction on the transfer of the members' interests in the company --- so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere¹¹.

Back to *Marine Utama*, the main object of R1 was providing transportation and since AJT Co. had ceased doing business with the company, the main objective for which R2 was established had ceased to exist. R2 had thus lost its substratum more than 9 years ago. On this ground alone, the court could order winding up of R2 under the just and equitable rule. Further, the relationship between P and R2 had irretrievably broken down leading to loss of mutual trust and confidence, thereby resulting in deadlock in management. The company had also not been able to comply with its statutory obligations for years due to the acrimony and dispute between P and R2. It was thus just and equitable to order that R1 be wound up under s.218(1)(i) of the Act.

PREFERENCE SHARES WITHOUT ORDINARY SHARES

Can a share be a 'preference share' for the purpose of (Australia) Corporations Act 2001 when there is no ordinary share issued? That was the issue for determination in the High Court of Australia case of *Beck v Weinstock & Ors*¹². The company had 5 subscriber shares described as "A' 5% Convertible Preference Shares". Later, it issued shares described as "C' Redeemable Preference Shares" and other preference shares having the same rights as the 'C' class shares, but never issued any ordinary shares. The company's purported redemption of certain 'C' class shares was debated. The 'C' class shares could be redeemed validly only if they were "preference" shares liable to be redeemed but there were no other issued shares over which the 'C' class shares had preferential rights. The rights attaching to the share did not confer any preference or priority over the rights attaching to any other share actually issued in the company.

The High Court held that the 'C' class shares were preference shares and the redemption of the shares was valid. It boiled down to the company's articles of association. It described the rights which attached to each of the classes of shares. Notably, the subscriber shares were described as preference shares even though no other shares had been issued. In the court's view, the holder of a share had whatever rights the memorandum and articles of association attached to that share. If, after the share was issued and allotted, there were to arise some questions about the order in which the shareholders would be repaid capital, participate in surplus assets or profits, receive or accumulate an entitlement to dividends, vote, or obtain payment of capital or dividend, these questions would be resolved according to the rights attaching to the respective shares. Thus, what was a preference share required consideration only of what was provided by the constituent documents of the company.

The disputed shares had rights which preferred the holder of those shares over the

⁹[1994] 3 MLJ 89.

¹⁰[1995] 1 MLJ 769.

¹¹*Ibid*, p. 500.

¹²[2013] HCA 15

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holder of any ordinary share in the company. That no ordinary shares were ever issued did not deny that the disputed shares were preference shares. The articles of association provided that the disputed shares were liable to be redeemed. They were redeemable preference shares.

COMPANY LAW / TORT

CONSPIRACY TO POACH STAFF TO SET UP RIVAL BUSINESS

A private education centre claimed against an ex-director for joining a rival centre and poaching its staff and against its ex-teachers for joining such centre. The former claim was for breach of fiduciary duties including placing himself in a situation of conflict between his interest and his duty to the company. The latter was for breach of employee's duty of fidelity and good faith and breach of confidentiality. In addition, conspiracy was also pleaded against all the defendants. Such is in essence the case of *Sundai (M) Sdn Bhd v Masato Saito & Ors*¹³.

The parties were:

D1, D2 and D3: ex-teachers of P, all came from Japan to work for P and had worked for P for 2-3 years

D4: LEC, the rival education centre

D5 and D6: directors and shareholders of D4, with D5 the original principal of P

Whilst still the director of P, D5 had failed to bring the information that a rival centre (LEC KL) was going to be set up by D4. On the converse, he joined force with D2, D3, D5, D6 and LEC KL which had resulted in the most senior teachers and the core team in P to resign at the most crucial time just before the final examination, thus giving P very short time or no time at all to find good replacement teachers. This had caused disruption in the operations of P. D1 had even poached his replacement, D2 to leave P and joined LEC KL. D1 had thus breached his fiduciary duties to P.

To prove conspiracy, P had to show the conspiratorial agreement (with an unlawful object or if in itself not unlawful, it must be

brought about by unlawful means) followed by overt acts causing damage. The court found that there was a combined and concerted action by D5 and D6 to poach the ex-teachers to set up LEC KL with the aim to compete with P. The unlawful acts here in relation to D1 was the inducement for D1 (a director of P and nominee of Sundai Japan) to commit breach of his fiduciary duties to P which under the law D1 had a duty to protect. D5, D6, D1 and D3 had also conspired to induce D2 who was P's most senior teacher appointed to take over from D1 to walk off from P. Thus, these teachers at the instigation of D5 and D6 were guilty of committing breaches of duty of good faith and infidelity as well as breach of contract. Their unlawful acts had resulted in P losing 57 students, disruption in P's education centre and loss of P's reputation in the eyes of the parents. A case of conspiracy was thus made out against the defendants.

It is our belief that this is the very first case in Malaysia on liability arising from the act of poaching and enticing fellow employees to leave employer as a breach of an employee's duty of loyalty and fidelity to his employer. The English decision of *UBS Wealth Management (UK) Ltd and another v Vestra Wealth LLP and others*¹⁴ and to a certain extent, the Singapore case of *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles*¹⁵ were relied upon to impose such a duty on employees particularly senior managers.

CONTRACT LAW

INNOCENT PARTY BARRED FROM RIGHTS UNDER ORIGINAL CONTRACT

In *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd*¹⁶, D was the licensee under a timber licence for a concession area which had engaged P as contractor to fell, extract and harvest timber logs from the area and to transport the same. P asserted that there was a collateral agreement (partly orally, partly in writing and partly by conduct) that would ensure P making profit from the timber operation and which resulted in a timber extraction

¹³[2013] 9 MLJ 729

¹⁴[2008] EWHC 1974 (QBD)

¹⁵[2009] 4 SLR 111

¹⁶[2013] 4 MLJ 693

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agreement (TE agreement) with D. P claimed that in breach of the collateral agreement and TE agreement, D had unilaterally imposed a reduction on the contract fees by 20% purportedly due to depressed timber market. P's monthly invoice claim for June 2001 was rejected by D and P was asked to re-submit the claim and all future claims based on the reduced rates. P complied albeit with protest which was continuously by letters. P also contended that D had illegally charged interest on certain machineries sold to P and misrepresented regarding the actual production limit figures, thereby causing P losses.

The Court of Appeal reversed the High Court decision which favoured P. In the view of the appellate court, P had accepted the reduced contract fees and continued to perform the contract when it had the option of insisting on the performance of the terms of the original TE agreement. As such, P was barred from asserting something when it had the right and opportunity to do so earlier. The doctrine of *estoppel* applied. It would be unjust and unconscionable to allow P to question the reduction of the contract fees after six years.

The court also stated the principles on avenues opened to a non-defaulting party when there was a default. If a contracting party has refused to perform or disabled himself from performing his promise in its entirety, the non-defaulting party may accept that non-performance, repudiate the contract and sue for damages for breach of contract – Section 40 of the Contracts Act 1950. However, if he elects to disregard the breach, the contract remains in full effect and he is said to have 'affirmed' the contract. The said s 40 does not allow the innocent party to stay on the contract and claim for damages later. The test for deciding whether the innocent party elected one way or the other is an objective one and it is for the court to infer from the surrounding circumstances of each case. Here, P after realizing the purported non-performance of the contract by D and having the option of accepting the non-performance and ending the contract, had continued to work in the logging operations for the period of nearly 54 months. Having done so, P had 'affirmed' the contract and acquiesced in its continuance. P had accepted the breach and elected to

continue with it by performing his part of the bargain. This election was communicated to D by its act of continuing with the contract with the reduced contract fees. P having made such election could not retract itself from it. D's appeal was thus allowed and P's claim was dismissed.

CONTRACT LAW

RECOVERY OF MONEY PAID BY MISTAKE

A bank has by mistake paid a sum of money to a person. The person claimed that he has onwards dealt with the money. What do you think the court will decide in a claim by the bank for the return of the money? That was the issue for resolution in the case of *The Royal Bank of Scotland Bhd v Seng Huah Hua & Ors*¹⁷.

The bank (P)'s pleaded case was that it was tricked into transferring an amount of RM308,000 by a fraudster (using forged letter of authorization of one of its customers) into the account of KS. KS was a firm owned by D1-D4 (the defendants) which maintained an account with D5 bank. The transfer was effected by P instructing D5 to credit KS' account with D5. The fraud was discovered the next day whereupon P immediately notified D5 to stop payment and refund the amount. D5 initially froze the amount but because there was no follow-up order from the court or the police, D5 had to oblige its withdrawal by KS. P sued the defendants for the return of the amount as money paid under a mistake of fact under s.73 of the Contracts Act 1950 (the Act).

The defendants' version was that they also operated a money-changing business named Insa at the same premises as KS. Insa had acted on a request from a man allegedly named 'John' to exchange US\$100,000 whereby a sum of RM308,000 was banked into KS' account in D5 followed by a woman allegedly named 'Kueh' turning up at Insa premises to collect the US\$100,000. The defendants contended that they had given valuable consideration for the RM308,000 when they gave Kueh US\$100,000 and they were not

¹⁷[2013] 9 MLJ 681

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party or privy to the fraud committed. Further, the loss was entirely due to O's negligence.

It was held that P was entitled to recover the RM308,000 as money had and received under s.73 of the Act. The money was transferred to KS' account by mistake. In such an action, the bank's negligence was irrelevant. It would be against conscience for the defendants to retain the money. The defendants had not been able to prove that they were in fact contacted by 'John' as claimed or that 'Kueh' had actually come to their office to collect the US\$100,000. Whilst they explained that KS had US\$100,000 because of barter trading, they failed to produce any evidence of such from the accounts of the firm. Even if KS did have the US\$100,000, they failed to prove that the money was actually handed over to 'Kueh'. In such circumstances, the court on the balance of probabilities ruled for P.

There are two points that we wish to make. Firstly, the English law relating to the recovery of money paid by mistake has undergone tremendous changes over the years. Suffice to state here that it has now recognized such a claim to be founded as a claim in restitution (unjust enrichment) and not a claim based on implied contract¹⁸. Secondly, the verdict would most likely be different if the defendants had succeeded in proving their version. If the defendants have changed their position in good faith or are deemed in law to have done so, then P may be precluded from the recovery¹⁹.

CONTRACT LAW

DEFAULTING PURCHASER CONSTRUCTING MALL ON LAND BEFORE COMPLETION OF SPA

An abridged version of the facts in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*²⁰ is warranted so as to bring out more forcefully the impact of the orders made. D had contracted to purchase a piece of land from P.

¹⁸See the write-up at p.417 in *Paget's Law of Banking*, 12th Ed

¹⁹See *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677, *Philip Collins Ltd v Davis* [2000] 3 All ER 808

²⁰[2013] 6 CLJ 541

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The sale and purchase agreement (SPA) permitted D to carry out construction works on the land pending completion. P had also granted a power of attorney (PA) in favour of D. It was also provided that if D failed to pay the balance purchase price (BPP) on the completion date, then the SPA was to be automatically terminated and the deposit forfeited to P and the contract to be treated as null and void and of no further effect. Pending completion, D had completed the construction of a mall on the land. D defaulted in paying the BPP to complete the SPA. P filed a suit to claim for, among others, the vacant possession of the land to be returned to it forthwith.

The issue was the nature of reliefs available to P as well as D upon the termination of the SPA, having regard to the fact that D had completed the construction of the mall which was then in business. The trial judge had ordered that the land be returned by D to P, the deposits be forfeited and assessment of the income received from the sale and letting of the land and for all profits acquired by D to be paid to P.

The Court of Appeal affirmed the order. The trial judge was justified in requiring D to account to P for the benefits it received by the use and occupation of the land and the mall prior to the completion of the SPA. D had proceeded with the construction of the mall when it had been expressly required to refrain from doing so when there was a dispute as to whether the SPA had been terminated. D had thus taken a risk and it could not be seen to benefit from the use of what was in effect in law P's land at all times. Further, D had used the PA to conclude sale and lease agreements beyond the authority of D. It was also trite that a purchaser let into possession of land before completion of the contract was liable for the use and occupation of the land. D must account to P for the benefits by way of rental income and sale proceeds of the units constructed on the land while in possession of the land until the surrender of the possession of the land and the mall to P. D's contention that the trial judge's order was tantamount to compensating P both income and profits was also misplaced for the order was for all of the income derived by D to be assessed and thereafter for D to pay the

ensuing profits derived from such income only to P.

As against P, the trial judge had opined that it was unconscionable to allow P to receive a windfall (the mall) to the tune of hundreds of million of ringgit irrespective of the conduct of the parties or whether or not any party might have a wrong or a breach. She ordered for an assessment of the costs of the construction of the mall and for such costs following the assessment to be paid by P to D.



The appellate court also affirmed such an order. It was held that to make an order for P to pay the market value of the mall would effectively enable D to benefit from any appreciation in the value of the land notwithstanding D being the contract breaker, hence allowing the contract breaker to benefit for his wrong²¹. Such an order was also justifiable under s.71 of the Contracts Act 1950 where the party in breach was entitled to compensation for any benefit conferred upon the victim if 3 conditions were met: (i) the thing must be done lawfully; (ii) it must be done by a person not intending to act gratuitously; and (iii) the person for whom the act was done must enjoy the benefit of it. D's continued construction of the mall was "lawful" since the validity of the termination of the SPA was not settled then. The construction by D was in the expectation of being successfully in its claim for

²¹See also *Berjaya Times Squares Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 269

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specific performance. Since P did not seek the assistance of the court to demolish the mall but had acquired possession of the land and the mall pursuant to the order of vacant possession, P was clearly enjoying the benefit of a completely constructed mall.

In conclusion, the appellate court confirmed all the orders made by the trial judge save to clarify that the order requiring D to account to P was limited to having to pay P only the profits derived from the use and occupation of the land and the mall.

CONTRACT / LAND LAW

FAILURE TO COMPLY WITH CP AND TO DELIVER VP OF LAND IN A SPA OF SHARES

There were a few principles that emanated from the Court of Appeal decision in *Code Focus Sdn Bhd v Tan Chee Hoe & Sons Sdn Bhd*²². The transaction in question was a sale and purchase agreement of the entire shareholding in a company (the SPA) but the true nature was a sale and purchase of a piece of land which the company owned. The SPA was subject to two conditions precedent (CP), namely the approval of the Foreign Investment Committee within 75 days from the date of the SPA and the approval of D(the vendor's) shareholders in an EGM for the said sale to P, the purchaser. It was also part of the SPA that D should deliver vacant possession (VP) of the land to P on the completion date. Time was the essence of the SPA. P discovered various encroachments on the land and that a tenanted car park remained in operation on the land. When D allegedly failed to remove the encroachments or prepare the land for delivery of vacant possession on the completion date, P sued D for the return of the 10% deposit paid under the SPA. D defended that all the encroachments had been removed except the car park operation that would cease by the completion date. Alternatively, the obligation to deliver VP was a mere warranty which breach did not entitle P to delay payment of the balance purchase price (BPP) or to terminate the SPA. On P's contention that D had failed to fulfill the

²²[2013] 4 MLJ 59

CP in the SPA, D argued that such requirement had been waived by P vide P's letter.

Whilst the High Court had dismissed P's claim, the Court of Appeal allowed P's appeal. Firstly, on the requirement to obtain shareholders' approval in an EGM for the said sale of shares to P, the alleged waiver was ineffective and void by virtue of s 132C of the Companies Act 1965²³. Such mandatory legislative requirement could not be waived by agreement of the parties. Bereft of that compliance, the SPA became voidable at the option of P.

The contractual obligations of the parties under the SPA were reciprocal. On the completion date, P was to pay the BPP while D was to deliver VP of the land. Sections 52, 53 and 55 of the Contracts Act 1965 (the CA 1965) were relevant. Applying illustration (a) to s 53 of the CA 1965 and upon the fact that the real nature of the transaction was the sale and purchase of land, the obligation to deliver VP of the land had to be performed first before the obligation to pay the BPP. Further, by illustration (a) to s 52 of the CA 1965, P would not be required to pay the BPP on the completion date because on that date, D was unable to deliver VP of the land. And by s 55 of the CA of 1965, P was also entitled to withhold payment of the BPP until the encroachments had been cleared from the land.

On the completion date, there was intrusion of about 2 feet and there were wooden structure and materials simply left or placed on the land and the car operator was still operating although he had said that he would cease operating in two days' time. It was held that with the 2 feet intrusions and wooden structures and materials still on the land, D could not be said to have been able to deliver VP to P. P was also not able to enjoy the right to possession of the land with the car park operator still on the land.

The fundamental breach in not delivering VP of the land on the completion date went to the root of the SPA and coupled with the voidability of the SPA at the instance of P, it was

²³Section 132C requires directors not to carry into effect any arrangement or transaction for, among others, the disposal of a substantial portion of the company's undertaking or property unless the arrangement or transaction has been approved by the company in a general meeting.

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unconscionable to allow D to retain the deposit. The deposit was ordered to be refunded to P which was also awarded damages to be assessed or *in lieu* of assessment, RM3.2m as agreed liquidated damages as stipulated in the SPA.

COURT PROCEDURE

ERINFOLD INJUNCTION PENDING APPEAL

Where a claimant applies for an injunction to restrain a defendant from certain acts but such application is dismissed, and the claimant appeals to the higher court against such decision, pending hearing of the appeal, there is a real likelihood that the defendant may carry out such acts which would have irreversible effects and resulted in the appeal become meaningless, is there any remedy for the claimant? The answer is "Yes". The type of remedy is commonly known in the legal circle as "*erinfold* injunction", which is named after the decision that invented the remedy, *Erinfold Properties Ltd & Anor v Cheshire County Council*²⁴. The words of Megarry J are germane :

"...where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one upon which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in the conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human is infallible...A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it

²⁴[1974] Ch 261

would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officio* quoad granting any injunction at all.”

Recently, such an injunction was the subject matter in *Philip Morris Brands Sarl v Goodness for Import and Export & Ors*²⁵. P had filed for an injunction to restrain D from dealing with the 10 ‘MALIMBO’ containers and/or cigarettes pending full disposal of the suit. An *ex-parte* injunction was initially granted by the High Court (HC) but after the inter-parte hearing, the injunction was discharged. Further, D’s application to strike out the claim on the ground that the court had no jurisdiction over D was allowed. P appealed to the Court of Appeal (COA) against such decision, and applied for a stay and/or suspension of the HC order pending appeal and for an *erinford* injunction until the final disposal of the appeal by the COA, so as to restrain D from claiming and/or seeking for the release and/or taking possession and/or custody and/or control and/or accepting delivery and/or dealing and/or disposing in any way whatsoever the said containers and/or MALIMBO cigarettes.

Relying upon the remedy of *erinford* injunction, the same HC judge allowed P’s application. To the learned judge, there was an imminent danger that D would at any time between then and the appeal remove the MALIMBO cigarettes from Malaysia based on its previous intent to do so at the second last hearing date of P’s application. Should the court not grant the stay order, it would render P’s appeal to the COA nugatory and academic. A balancing exercise was also carried out. The alleged infringing act and/or illegal conduct of D might cause irreparable damage to P’s credit, goodwill and business reputation which might not be adequately compensated by damages. On the other hand, should the COA decision be in favour for D, monetary compensation should

be an adequate remedy for it and P would be in the position to compensate D. Thus, the HC granted P’s application on the condition that P undertook to compensate D in damages in the event P failed in its appeal to the COA.

COURT PROCEDURE / COMPANY LAW

COSTS IN S176 PROCEEDINGS

In legal proceedings, ordinarily the costs follow the event²⁶. What this means is that the costs will be awarded to the person in whose favour the decision goes, that is to say, the party who loses the suit or the application (the loser) will be ordered to bear the costs of the party who wins the suit or the application (the winner). Whether the winner will be able to recover, from the loser, all his legal costs incurred by him arising from the suit or application is dependent on the amount of costs assessed. Under the new Rules of Court 2012 (RC), there are two modes/basis of assessment: standard basis and indemnity basis. The standard basis entails allowing a reasonable amount in respect of all costs reasonably incurred, while the indemnity basis allows for all costs except for costs of an unreasonable amount or which have been unreasonably incurred. The normal mode of assessment is the standard basis with the court taking into account the various items set out in O 59 r 16 of RC, unless the circumstances are such as to warrant the grant of costs on an indemnity basis. That said, it must not be forgotten that the award of costs of proceedings is in the full discretion of the court which has the full power to determine by whom and to what extent the costs are to be paid. Of course, any exercise of discretion must be judiciously carried out by the judge concerned based on relevant established principles.

Does this general approach apply in an application to court for sanction of a scheme of arrangement under s 176(4) of the Companies Act 1965 (the Act)? This interesting question was posed to the High Court in *Transmile Group Bhd & Anor v Malaysian Trustees Bhd & Ors*²⁷. Now, a scheme of arrangement is essentially a structured proposal to re-negotiate or re-

²⁵[2013] 9 MLJ 484

²⁶Order 59 r 3 of the Rules of Court 2012

²⁷[2013] 9 MLJ 43

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schedule debts and other contractual agreement that one may have with a creditor(s). Section 176 of the Act is a statutory scheme of arrangement in that it provides for a scheme of arrangement of a company to be binding on creditors and members alike after (i) the requisite approval given by the specified majority and (ii) upon confirmation by the court.²⁸ Basically, there are 2 stages envisaged by s 176 of the Act. First is the application to the court for leave to convene meeting for the affected creditors (where the scheme is a scheme of arrangement between the company and its creditors) or for the members (where the scheme is between the company and its members)²⁹ – the convening stage. Once the requisite approval is obtained in the meeting convened, the 2nd stage kicks in, *ie.* the company will have to apply to the court for sanction/confirmation of the scheme of arrangement³⁰ – the approval stage. In both stages, creditor(s) or shareholder(s) affected by the proposed scheme is entitled to be heard. They can object to the application at the 1st stage or the 2nd stage.

Bearing in mind the mechanism of s 176, it is therefore unsurprising for the courts to adopt the approach that the company concerned will bear the costs of the application, even if the opposing creditor is unsuccessful. The rationale is that the court welcomes the helpful assistance on the issues before the court in proceedings which deal with and are for the benefit of class rights³¹. This general approach applies to objections which have been of some assistance or which have not 'lacked all substance' or which are not frivolous or which are not of no assistance to the court and have not served to delay the proceedings. However, if the objections lacked substance, were prolix, and calculated to delay the sanctioning of the scheme, then the costs ought not to be borne by the company in keeping with the general approach but by the party which had raised such objections. The question thus turned on a

²⁸Aiman Nariman Mohd Sulaiman and others, *Commercial Applications of Company Law in Malaysia*, 2nd Ed, CCH Asia Pte Ltd, page 512.

²⁹Section 176(1) of the Act

³⁰Section 176(4) of the Act

³¹*Royal & Sun Alliance v British Engine* [2006] EWCH 2947

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consideration of the nature of the 1st respondent(MTB)'s objections and the manner in which they were put forward.

Based on the grounds of MTB's opposition to the sanctioning of the scheme, the court found that MTB's opposition had caused considerable delay and the incurring of significant costs as additional cause papers had to be filed and research undertaken to meet new points raised. There was no merit in the 12 objections raised in the sanction proceedings (which included classification, disregard of STL votes, coercion of MTB, unreasonableness and illegality of the scheme and various procedural objections). They were not taken with a view to genuinely evaluating the scheme but rather with a view to stultifying or delaying the sanctioning of the scheme and seeking to procure priority in its own interests. Many of the objections were noticeably lacking in substance or devoid in merits. Thus, the court made the cost order against the objector, MTB which had to bear the costs of the company and the 2nd – 14th respondents.

Luckily for MTB, the court only made the cost order on a standard basis, instead of indemnity basis as sought for by the company and the other respondents. There were some objections that were genuinely taken with a view to assisting the court. The fact that it was ultimately determined that those objections lacked merit did not in itself warrant an inference that all objections were taken *mala fide*.

CRIMINAL LAW

CHILD ABANDONMENT --- SUBJECTIVE OR OBJECTIVE MENS REA ?

The facts in the Canadian case of *R v A.D.H*³² are not uncommon. A young woman, not previously knowing that she was pregnant, gave birth in a toilet in a retail store. Thinking the child was dead, she cleaned up as best as she could and left, leaving the child in the toilet. The child was in fact alive, was quickly attended to by others and transported to the hospital where he was successfully resuscitated and found to be completely healthy. The accused

³²2013 SCC 28, [2013] 2 S.C.R.269

was eventually identified and when contacted by police, she cooperated fully and confirmed that she was the mother of the child. She was charged with unlawfully abandoning a child under the age of 10 and thereby endangering his life contrary to s.218 of the Criminal Code. In Malaysia, s.317 of the Penal Code provides for the offence of exposure and abandonment of a child under 12 years by parent or person having care of it.

The trial judge held that by her act of leaving her child in the toilet, she had committed the *actus reus* (prohibited conduct) of the s.218 offence. As for the *mens rea* (element of fault), the trial judge believed the accused's claim that she was not aware of her pregnancy until the child appeared and that she believed the child was dead when she left him. Her fear and confusion explained her subsequent conduct. Thus, the issue was whether the fault element was to be assessed according to what the accused actually knew (the subjective fault)³³ or by what a reasonable person would have known and done (the objective fault)³⁴.

The Supreme Court of Canada affirmed both the decision of the trial judge and the Saskatchewan Court of Appeal. The text of the provision did not expressly set out a fault requirement, but when read in light of its full context, it supported the conclusion that subjective fault was required. An important part of the context in which s.218 must be interpreted was the presumption that Parliament intended crimes to have a subjective fault element. There was nothing in the text or content of the child abandonment offence to suggest that Parliament intended to depart from requiring subjective fault. The requirement for subjective fault also ensure that only those with a guilty mind were punished.

The words "abandon", "expose" and "wilful" all suggested a subjective fault

requirement. The first two of these words involved more than just leaving a child alone or failing to take care of it; they denoted awareness of the risk involved and they suggested a requirement for knowledge of the consequences flowing from the prohibited acts. As for the word "wilful", it was used only in the non-exhaustive definition of the words "abandon" and "expose" in relation to omissions, and a wilful omission was the antithesis of a crime involving a mere failure to act in accordance with some minimum level of behaviour. Conversely, what was absent from the text of s.218 strongly suggested that subjective fault was required. Further, the text of the child abandonment provision did not contain any of the language typically employed by Parliament when it intended to create an offence of objective fault. There were no references to "dangerous", "careless" or "reasonable" conduct or any requirement to take "reasonable precautions".



The accused was therefore rightly acquitted on the basis that the subjective fault requirement had not been proved.

³³That the accused knew that the acts of alleged abandonment or exposure of a child were such that the abandoned child's life was or was likely to be endangered or his or her health permanently injured

³⁴That the accused's conduct constituted a marked departure from that expected of a reasonable person in the same circumstances and that the risk to the child's life or health would have been a foreseeable result by such a person

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CUSTOMS & EXCISE

FORFEITING SEIZED GOODS

What will happen if goods were seized by the customs pursuant to suspicion that an offence has been committed under the Customs Act 1967 (the Act) but no charge was ultimately proffered? Will such goods be returned to the rightful owner? Or is the customs entitled to confiscate such goods?

These issues surfaced in the case of *Assan bin Mohamad & Ors v Hock Huat Chan Sdn Bhd*³⁵. The Customs Department of Kuching, Sarawak had pursuant to s 113 of the Act seized 21 containers of rice (the goods) imported by P at the port on the ground that the goods were falsely declared to be broken rice, when actually they were normal rice. P had a licence to import the former but not latter. Although an offence of false declaration of imported goods was allegedly committed under the Act, no prosecution was carried out. Section 128 of the Act provided that the seized goods would be deemed forfeited after one month from the date of seizure unless before such expiration, a claim to the goods was made by any person asserting that he was their owner and that they were not liable to forfeiture. P did not make such claim. The customs department sold them to BERNAS. P sued D for damages for unlawful seizure of the goods.

Whilst the trial court decided in favour of P, the Court of Appeal (COA) reversed that decision, holding that P's complaint was against the legality of the seizures of the goods and not against the legality of the forfeitures. The trial judge had ruled that the seizures were lawful but proceeded on his own volition to hold that the forfeitures were unlawful although such plea was not pleaded. He held that the customs department was under a duty to notify the owner of the goods (P) of the provision on forfeiture, by reading Article 13 of the Federal Constitution³⁶ and principles of natural justice into s 113 of the Act. The COA disagreed with his interpretation, holding that the statutory scheme in place in the Act was fair and reasonable. Further, his view that the giving of the 'forfeiture notice' was

mandatory as it was not reasonable to expect P, an ordinary citizen, to know of his right under s 128 of the Act was unmeritorious. Mohd Hishamudin JCA speaking for the COA had this to say:

"Our legal system operates on the principle that the members of the public must be deemed to know the law. If we were to do away with this principle, there will be chaos in the administration of justice."

P did not make any claim to the seized goods within the one-month period stipulated under s 128 of the Act. P had only itself to blame for failing to exercise its rights thereunder. In such situation, the Act provided that the seized goods 'shall be taken and deemed to be forfeited at the expiration of one calendar month' from the date of seizure of the goods. Thus, the customs department had lawfully dealt with them.

DAMAGES

DAMAGES FOR BREACH OF SALE OF LAND

The remedy available to a purchaser (P) of a property upon proven liability of the vendor (D) (was one of the issues in *Chew Ai Hua Sandra v Woo Kah Wai*³⁷). D had reneged on the agreement to sell the property by rejecting P's attempted exercise of the option to purchase. Specific performance of the sale of the property or the issuance of an option capable of being exercised within 3 working days was refused by the Singapore High Court as the property had already been sold to an innocent 3rd party without notice. P's delay of 16 months in commencing the action also rendered specific performance an inappropriate remedy³⁸.

That left P with the remedy of damages. The general rule was that damages were to be assessed as at the date of breach, and the general measure of damages for the breach of a contract for the sale of land was the difference

³⁵[2013] 5 MLJ 76

³⁶Art 13 reads: No person shall be deprived of property save in accordance with the law.

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³⁷[2013] 3 SLR 1088

³⁸See also *Tay Joo Sing v Ku Yu Sang* [1994] 1 SLR(R) 765

between the market value of the property at the date of completion and the contract price³⁹. Though the court had the power to fix such other date as might be appropriate, the trial judge refused to depart from the general approach because of P's delay in commencing the action.

In the instant case, there was only an agreement to grant an option and not a concluded sale and purchase agreement, P would have to prove that she could have and would have proceeded to exercise the option and complete the purchase but for the breach. In this regard, there was no evidence that P was not in a position to proceed to complete the purchase. On the facts and evidence, there was no practical obstacle to exercising the option.

However, the court ordered a separate assessment of damages instead of deducing the market value of the property on the completion date from the indirect evidence before the court. The reason was that such indirect evidence would only be a rough estimate since it was not clear how reliable the evidence was and property prices might have been changing rapidly at the time.

March 2012 was whether the claim for damages was to be measured by reference to the value of the property at the date of the breach of contract or by reference to its value at a later date after H had given up trying to sell the property.

The evidence of the joint expert valuer on the open market value of the property was as follows:

At the date of completion of contract	£600,000
21.10.2008	£545,000
13.9.2008	£495,000 (date of inspection/valuation)

The expert had taken "market value" as the estimated amount for which a property should exchange at the date of valuation between a willing buyer and a willing seller in an arms length transaction after proper marketing wherein parties each acted knowledgeably, prudently and without compulsion.

DAMAGES / PROPERTY

ASSESSING DAMAGES NOT ON DATE OF BREACH

*Hopper v Oates*ⁱ is a rather simple but interesting case of the UK Court of Appeal. H agreed to sell their property to O for £605,000. That was on 8.2.2008. The completion of the sale was by 30.6.2008. O did not complete the sale and his repudiation was accepted by H on 14.7.2008. H tried to sell it but failed despite 14 months' marketing. In October 2009, they let it to tenants for 6 months. After that, they marketed it again but still unsuccessfully. They gave up in summer 2011 by which time, the value of the property had fallen substantially because of the events of autumn 2008 which impacted the property market. The liability having been ruled against O, the issue on assessment of damages which took place in

³⁹ *Lie Kie Siang v Han Ngum Juan Marcus* [1991] 2 SLR(R) 511

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The normal rule is to take the value at the breach date, so that damages is the contract price less the market price at the contractual completion date. This is in accord with the general principle for assessment of damages which is compensatory, *ie.* the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. There is exception to the rule which is to take another date to more accurately reflect the compensatory rule as a matter of fairness.

The appellate court concurred with the lower court which assessed the damages by reference to the later date and the sum of £495,000. It held that the breach rule was the right date for assessment of damages for breach of contract only where there was an immediately available market for the sale of the relevant asset or conversely, for the purchase of the equivalent asset. They observed that this was unlikely where the asset was land as in this case.

If the defaulting party was the buyer, much would depend on what the seller did in response to the breach. If the buyer was unable to show that the seller had failed to take reasonable steps to mitigate his loss (eg. too long to sell, failing to follow professional advice), the eventual resale price was likely to be the figure to be set against the contract price for the assessment of damages. The reason was not because it represented the market value at the date of the breach, but because it showed what loss the seller had suffered, uncomplicated by issues of remoteness or failure to mitigate.

If the property market had declined during that time, the defaulting buyer could not be heard to say that that should not be laid at his door; if the buyer had completed the contract, he would have suffered that decline in value, so that was part of the loss for which the seller needed to be compensated. Where the seller did not resell and took no steps to do so, the relevant date would be the date of the breach or a date soon after, when the seller was shown, or taken, to have decided to retain the property. In the instant case, by contrast, the seller had only decided not to resell after taking reasonable steps to find a buyer. It was thus not right to impose on the seller the value as at the

breach date rather than the later date when, after taking steps with a view to mitigating his loss, he had finally decided to retain the property upon the failure of his attempt to mitigate. Indeed, there was no suggestion at all that H failed to take reasonable steps to mitigate loss. Accordingly, the appropriate date was the date H brought to an end their reasonable attempts to resell and took the property back for their own use.

DAMAGES / EQUITY / EMPLOYMENT LAW

EQUITABLE COMPENSATION FOR EMPLOYEE'S BREACH OF FIDUCIARY DUTIES

"When an employee who is in a fiduciary relationship with his employer uses his employer's business opportunities, time and revenue-generating equipment to earn a secret profit for himself, what are the principles on which the court will assess the employee's obligation to pay equitable compensation to his employer?"

That was the pivotal question in the Singapore High Court case of *Quality Assurance Management Asia Pte Ltd v Zhang Qing*⁴⁰. The facts are fairly straight-forward, since the employee concerned, Z, who was a senior employee of P, did not deny that he had breached fiduciary duties that he admittedly⁴¹ owed to P, breached his employment contract and misused confidential information. The breaches took place when Z, while under the employment of P, set up D3 and ran it using P's business opportunities, time and revenue-generating equipment to earn profits. However, what makes the case interesting was that P elected to claim only damages, and not an account of profits, for Z's breaches. That

⁴⁰[2013] 3 SLR 631

⁴¹It is not the law that every employee is a fiduciary for every employer in every respect. The true position is that the employer/employee relationship is one of the well-established categories of legal relationship which is *capable* of giving rise to a fiduciary relationship, although it does not *ipso facto* do so.

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election provided an opportunity for the court to discuss and come out with a highly illuminating judgment on a rather technical area of law in remedies: an account of profits which is equitable in nature and a gain-based measure of relief and damages which is a common law remedy and a loss-based measure of relief.

Principles

1. A breach of a fiduciary duty was an equitable wrong triggering equitable remedies. Equity did not have a general power to award “damages”, but had the power to order “equitable compensation” for breach of fiduciary duties. Common law damages was neither available nor an appropriate remedy for equitable wrongs.

2. While both common law damages and equitable compensation were both compensatory, each was rooted in the differing approach taken by common law and by equity to wrongdoing. The common law’s starting point was that both the innocent party and the wrongdoer were equal and capable of acting in their own self-interest. Thus, it had regard to the wrongdoer’s freedom of action and kept the wrongdoer’s liability within reasonable limits through qualifiers based on causation, foreseeability and remoteness. Conversely, equity’s starting point was the trust and confidence the innocent party reposed in the wrongdoer. Equity did not regard them as standing on equal footing since the innocent party depended on the wrongdoer to act in the best interests of the innocent party. Equitable compensation vindicated the high duty which a fiduciary owed to the wronged and thus had a deterrent function. This meant that the common law rules of causation, foreseeability and remoteness did not readily apply when assessing equitable compensation: *Brickenden v London Loan & Savings Company of Canada*⁴² (the *Brickenden* principle).

3. The *Brickenden* principle in the first blush was that a claim for equitable compensation arising from a breach of fiduciary duty would succeed so long as the wronged party could show that the fiduciary’s breach of duty was in some way connected to the loss, even if it was simply to set the occasion for the

⁴²[1934] 3 DLR 465

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loss rather than by being the cause of the loss. Thus, a fiduciary would be held liable to pay equitable compensation even if the principal would have suffered the loss in any event (*ie.* even if the fiduciary had not breached his duty). However, the court clarified that the *Brickenden* principle did not go that far, at least in UK⁴³ and Singapore⁴⁴. The test of liability for equitable compensation would still be subject to “but for” test, *ie.* whether the innocent party’s loss would have been suffered but for the breach of fiduciary duty.

4. The *Brickenden* principle was also not to be applied in full rigour in cases far removed from the traditional trustee/beneficiary relationship in which equitable compensation first became available or in cases of innocent breaches of fiduciary duty.

Application

It was no doubt the *Brickenden* principle applied here. Z was in a well-established category of fiduciaries, namely employees. His breach was of the duty of loyalty, a core fiduciary duty. The breach was conscious, deliberate and flagrant.

The legal burden of proving “but for” causation remained on P. However, once P had adduced *some* evidence to connect the breach to the loss, equity would readily shift the evidential burden on causation to the breaching fiduciary⁴⁵. Causation would thus be determined shorn of the common law rules of foreseeability, remoteness and *novus actus interveniens*⁴⁶. Other common law limiting principles such as principles of mitigation and comparative fault were also inapplicable.

Loss of profits on diverted business

Given P’s election for loss-based compensation, the measure of its compensation was not D3’s

⁴³See *Target Holdings Ltd v Redferns* [1996] 1 AC 421

⁴⁴See *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [2000] 2 SLR 501, on appeal [2000] 3 SLR 529; *Firstlink Energy Pte Ltd v Creanovate Pte Ltd* [2007] 1 SLR 1050, on appeal [2007] 4 SLR 780

⁴⁵*John While Springgs (S) Pte Ltd v Goh Sai Chuah Justin* [2004] 3 SLR 596

⁴⁶*Maguire v Makaronis* (1997) 188 CLR 449

gains but the profit which P would have earned on the contracts which Z diverted to D3 in breach of his fiduciary duties. If not for Z's diversion, the contracts were destined for P. Thus, P was entitled to loss of profits which was assessed at 50% (profit margin) of the revenue generated from these contracts.

Loss of opportunity on project for C Ltd.

P lost an opportunity to profit from a testing contract for C Ltd by Z's keeping the information about the potential project to himself. That reduced the lead time for P to quote for the contract. If Z had pursued the opportunity to the maximum extent possible for P's benefit - as it was his fiduciary duty to do so - there was a real and substantial chance that P would have had sufficient time to put in a competitive quote to C Ltd. The evidence that Z was behind this lost opportunity was sufficiently strong to shift the evidential burden of proof to Z who failed to discharge that burden.

Repayment of salary, bonus and monetary reward

P succeeded on two basis. First was the "but for" causation required P to show that Z owed P a duty to disclose his wrongdoing, so that it could be said that but for Z's breach of his duty to disclose his own wrongdoing, P would never have paid the bonuses. There was such a duty in equity⁴⁷. So P could have succeeded to recover the amount as equitable compensation. However, that was not how P based its claim. Its claim was based on causative mistake of fact for monies had and received⁴⁸, in that P had paid the bonuses to Z while labouring under a causative mistake of fact. The court also held P succeeded on this basis.

Loss of M's condensation nucleus counter

P was precluded from recovering any damages under this head. Z paid for the counter (to verify the cleanliness of high purity gas lines) with his

own money and P did not show that it suffered any loss by not having that counter. Although Z earned a secret profit from renting that counter back to P, that secret profit was not recoverable because of P's election to claim damages instead of an account of profits. Z's gain was not matched by any loss on P's side for which loss-based compensation could be awarded. P paid rental but it received the benefit of the use of the counter. There was no subtraction of P's wealth for such use.

Professional fees of T

The sum paid by P to T to carry out forensic inspection of the defendants' hard drive, two thumb drives and laptop was recoverable as this expense would not have been incurred but for Z's breach of fiduciary duties.



⁴⁷ *Item Software (UK) Ltd v Fashhi* [2004] EWCA Civ 1244

⁴⁸ The reason being that *John While Springs* no reasonable employer would have offered a bonus to a cheating employee, or one who was in breach of his fiduciary duty : *John While Springs*.

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1. SEXUAL MISCONDUCT BY SUPERIOR

In *Freescale Semiconductor Malaysia Sdn Bhd v Edwin Michael Jalleh & Anor*⁴⁹, R was dismissed from his employment due to sexual harassment misconduct committed on a co-worker. However, both the Industrial Court and High Court found that the punishment of dismissal to be too harsh. They took into account that the incident happened in full of the other colleagues in an open area on the factory floor, that R and the victim were attired in smocks which were of knee length, masks with only the eyes exposed and caps, that the victim's flesh was not violated by R as it was protected by layers of cloth, that the entire act of slapping the victim on her buttocks would have taken a few seconds and it was not a prolonged act, and that the victim had reacted by screaming and scolding R without further danger to her. The character evidence was also taken into consideration. The Court of Appeal however disagreed with such finding. In their view, the lower courts had failed to take other equally relevant matters into consideration. The fact that the misconduct was committed by a superior, R who was a senior manufacturing supervisor increased the magnitude of the misconduct, as it invited the implication that he was taking advantage of his subordinate who might be afraid to complain. The fact that it was committed in a place where a saw machine was used suggested a certain disregard of safety. That it was committed in full view of other employees or the fact that the victim was fully attired did not make it any less objectionable. The misconduct was not of any inadvertent or accidental physical contact but wilful. And there was no effort to apologize. By failing to take into account such matters, the Industrial Court had failed to exercise its jurisdiction fairly or justly which warranted intervention by judicial review.

⁴⁹[2013] 5 AMR 25

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2. INTERFERENCE WITH EMPLOYER'S DECISION ON PUNISHMENT

Further to our write-up in Issue Q4 of 2012 under the heading "*Who is the best person to judge the seriousness of an employee's misconduct?*", where we highlighted the two divergent views on the power of court to substitute its own views on the appropriate penalty for a misconduct for the views of the employer, another Court of Appeal came up with its decision that seemed to be in favour of non-interference. In *Hariato Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor*⁵⁰, the appellate court affirmed the approach of the High Court judge who had applied the principle laid down by the Supreme Court in *Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn Bhd*⁵¹:

"..where misconduct has been proven, different employers might react differently. To quote Acker L J in *British Leyland UK Ltd. v Swift* [1981] 1 IRLR 91. "An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees, from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special."

The court thus rejected the appellant employee's contention that the punishment of dismissal was too harsh.

3. CONSTRUCTIVE DISMISSAL DUE TO NON-PAYMENT OF SALARY

Non-payment of salary itself is a fundamental breach of an employment contract which justifies the employee to walk out of his employment and claim constructive dismissal against the employer. No matter how bad the employer's financial position had been, it had not permitted them to delay or fail to pay the salary of its employees. This was made clear in *Lee Ting Fong v MyBiz Malaysia Bhd*⁵² where the claimant's salary for June and July 2001 were delayed whilst she was not paid for her

⁵⁰[2013] 5 CLJ 733

⁵¹[1997] 1 CLJ 646

⁵²[2013] 3 ILR 58

August 2001 salary together with her outstanding claims. However, it must be noted that in the decision cited by the court, *ie. Adam v Charles Zub Associates*⁵³, the UK Employment Tribunal did say that the circumstances of each case must be looked at.

4. MINISTERIAL POWERS IN DECIDING ON S.20(3) REPRESENTATION

What is the avenue opened to an employee who has filed a wrongful dismissal complaint (representation) against his employer with the Industrial Relations Department (IRD) pursuant to s.20(3) of the Industrial Relations Act 1967 but the Minister concerned (Minister of Human Resources) decide not to refer such complaint to the Industrial Court (IC)? What is the role of the Minister concerned? The answer to the first question is simple---the employee is entitled to file an application in the High Court for judicial review for an order of *certiorari* to quash the decision of the Minister and for an order of *mandamus* requiring the Minister to refer the said representation to the IC. The second question is essentially on the powers granted to the Minister in carrying out his function. In the recent Court of Appeal case of *Hasni Hassan & Ors v Menteri Sumber Manusia & Anor*⁵⁴, it was reiterated that the Minister was not merely to act as a 'postman' between the IRD and the IC and to refer every representation to the IC. Only fit and proper cases ought to be referred by the Minister to the IC. A discretion is conferred on him. And the court will interfere only if and when there is evidence that his discretion has been exercised unlawfully. The principles as laid down by the Supreme Court in *Minister of Labour & The Government of Malaysia v Lie Seng Fatt*⁵⁵ were recited: the Minister must act *bona fide* without improper motive and he must not take into account extraneous or irrelevant matters. Further, the court in *Hasni Hassan* added two criteria for judicial intervention: where there has been procedural non-compliance and unfairness. On

the facts of *Hasni Hassan*, there were questions of facts and law on whether the employer had complied with the employees' fixed term contracts when it decided not to extend such contracts but allowed them to lapse through effluxion of time. It would appear to us that once there is a question of law, the Minister ought to have referred the representation to the IC. The question of whether the conditions set out in the contracts had been complied with by the employer was an issue for the IC to adjudicate, not the Minister. The question of whether such contracts were genuine was a question of law to be decided by the IC and not the Minister. There was also interpretation of provisions in the contracts. Apart from these, there were many other issues and questions that ought to be determined by the IC. Therefore, the Minister's decision not to refer the representation to the IC was irrational or unreasonable and in excess of its jurisdiction.

5. LEGITIMATE EXPECTATION TO EXTEND FIXED TERM CONTRACTS

In the same case of *Hasni Hassan*, the employer (Telekom Malaysia) had offered all its senior management staff the option of either remaining under existing permanent employment or accepting the offer of fixed term contracts by resigning from their current employment. The latter was part of the initiative to improve its performance and productivity post-privatisation and in turn the staff concerned would be given higher income, benefits and allowances. The appellants opted for the latter. On the expiry of the 3-year fixed term contracts, their contracts were not extended. The appellants contended that such non-extension constituted a dismissal without just cause or excuse. One of the contentions was that the contracts spelt out procedures in cl. 1.3 read with cls.8 to be followed by the employer when deciding whether the contracts would be extended or not. Thus, they had a legitimate expectation which the employer had breached when it did not carry out the assessment of their performance in accordance with these provisions. The Court of Appeal upheld such

⁵³[1978] IRLR 651

⁵⁴[2013] 6 CLJ 74

⁵⁵[1990] 1 CLJ 1103

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contention. It applied two English decisions⁵⁶ to hold that substantive enforceable rights could be conferred by the doctrine of legitimate expectation. The employees here had a legitimate expectation to receive procedural fairness⁵⁷ in full compliance of cl. 1.3 and cls.8 before the employer could decide not to extend the fixed term contracts.



In another case, *Gerald Blaise Ryan v See Hua Marketing (Sabah) Sdn Bhd*⁵⁸, the meaning and application of legitimate expectation was considered. The claimant was first engaged on a 1-year fixed term contract under which he was confirmed after 1-month probation. Thereafter, he was employed (on increased salary) under 2nd 1-year contract and then, 3rd 1-year contract upon which expiry, there was no further extension. The claimant claimed that he had harboured a legitimate expectation that his employment contracts would be renewed automatically upon each expiry. In rejecting the claimant's assertion, the Industrial Court stated some of the principles that would justify the application of the doctrine of legitimate expectation: (i) the promise or representation made by the employer underlying the expectation must be clear, unambiguous and not subject to qualification; (ii) the expectation must be reasonable and must be induced by the decision maker; and (iii) the representation must be one that it was competent for the decision maker to make. In the words of the court, legitimate expectation was not the same thing as anticipation and was distinct and different from a desire and a hope. It was grounded in the rule of law that required regularity, predictability and certainty in employment relationship. Repeated renewals in the past of fixed term contracts might weigh in favour of legitimate expectation but that was by no means a conclusive proof. The mere fact that the fixed term contract made provision for the negotiating of the possible renewal did not by itself mean that there was a reasonable expectation for renewal. Based on the three employment contracts, there had clearly not been any evidence to indicate that the claimant's legitimate expectation on extension of his contract had been aroused by his employer. The three consecutive contracts by their very wordings had not been sufficient to raise the doctrine in favour of the claimant.

⁵⁶*R(on the application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2008] UKHL 61, *R v North & East Devon Health Authority ex p. Coughlan* [2001] QB 213

⁵⁷See also *Law Pang Ching & Ors v Tawau Municipal Council* [2010] 2 CLJ 821, *John Peter Berthelsen v Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409

⁵⁸[2013] 3 ILR 307

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6. CLEAN RECORD IN THE LIGHT OF BAND OF REASONABLENESS IN PUNISHMENT

The employee in *Jaya Balan @ Sundra Raj Suppiah v Texan Instrument (M) Sdn Bhd*⁵⁹ was a first time offender and he had been in long service (24 years) with the company during which time he had never received any warning letter for any wrongdoing (the long and clean service record). He was found guilty of being in breach of the company's IT policy by inappropriately using the company's computer, internet and/or email resources to receive, view and transmit pornographic material on 18 occasions. The Industrial Court did consider the long and clean service record but nevertheless upheld the employer's decision to sack him. References were made to principles in *Esso Malaysia Bhd v Chiang Lick Teck*⁶⁰ that long unblemished service did not immunize a claimant from dismissal, otherwise all employees would merely fall back on their past clean record to vindicate themselves from their misconduct which would seriously undermine the enforcement of discipline and proper conduct. The test was whether the employer had acted reasonably in making the decision to dismiss the employee⁶¹, since in all cases, "there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view...If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair; even though some other employers may not have dismissed him;..."⁶²

⁵⁹[2011] 3 ILR 502

⁶⁰[2003] 2 ILR 716

⁶¹*Utusan Melayu (M) Bhd v National Union of Journalists Malaysia* [1991] 2 ILR 840, *Hasbullah Abd Jalil v KUB Power Sdn Bhd* [2011] 1 ILR 629

⁶²*Subramanyah AJ Karuppiah v Bank Negara Malaysia* [2011] 2 CLJ 178

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7. EMPLOYER FAILING TO REPLY TO EMPLOYEE'S GROUSES

In *Chandran S Vangadajelam v J G Direct (M) Sdn Bhd*⁶³, the claimant was involved in a fight with one of his subordinates. He was injured and hospitalized. The company investigated the matter and issued him a warning letter. The staff were not happy with the punishment meted out. This caused the company to reconsider the punishment and 2 days later, issued him a demotion letter. The claimant objected to the demotion letter in writing and he continued to work whilst waiting for its response but he did not receive one. About 3 weeks later, he resigned and claimed constructive dismissal.



The Industrial Court held that the claimant had brought his grievances to the attention of the company and had patiently waited for a reply which had not been forthcoming. Thus, he had without delay and pursuant to the breach by the employer claimed constructive dismissal. The company had not given him an opportunity to answer the accusation against him. Although failure to hold domestic inquiry was not fatal, the company was under an obligation to call witnesses before the Industrial Court to establish the wrongdoing of the claimant. This had not been done. The dismissal was thus without just cause or excuse.

⁶³[2013] 3 ILR 562

HOUSING DEVELOPER

RECOURSE TO TRIBUNAL FOR HOUSEBUYERS CLAIMS

The Tribunal for Homebuyer Claims (the tribunal) was set up under Part VI (Tribunal for Homebuyer Claims) of the Housing Development (Control and Licensing) Act 1966 (HDA) to hear and determine a claim arising from a sale and purchase agreement entered between a homebuyer and a licensed housing developer. Does the tribunal have power to adjudicate a homebuyer's claim against a party which was not a licensed housing developer? This in turn requires determination of 2 questions: whether the 'activity' of the unlicensed housing developer was 'housing development' or was being undertaken by a 'housing developer' within the meaning of those terms under the HDA; and whether a party who was engaged in 'housing development' and who had refused or failed to obtain license under the HDA could rely on their 'unlicensed' state to avoid being subjected to tribunal proceeding under Part VI of the HDA.

Those were the jurisdictional issues raised in the case of *ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah & Ors*⁶⁴. The High Court held that the activity as evidenced by the terms of the sale and purchase agreements between the applicants (vendor and contractor) and respondent purchasers (SPA) and undertaken by the applicants involved the sale of more than 4 units of 'housing accommodation'. It was therefore within the definition of 'housing development' under the HDA. The fact that the 'housing accommodation' were being constructed at separate times, *ie.* four at a time, was irrelevant.

Notwithstanding their reference as 'the contractor' and 'the vendor' in the SPA, it did not detract from the legal effect that the applicants were indeed 'housing developer' under the HDA. The President of the tribunal was thus not in error when he ruled that the applicants were collectively a 'housing developer' in respect of the SPA with the purchasers.

The legislative intent to the setting up of the tribunal was to regulate in an orderly manner

the business of housing development and to protect the interests of purchasers of housing accommodation. In the court's view, the phrase 'licensed housing developer' ought to be interpreted harmoniously with the wider objectives and legislative intent to include such persons who were required to be licensed under the HDA to undertake housing development but had failed or neglected to do so. Such failure or neglect to apply to be licensed should not be accepted as a legitimate route to escape from the purview of the tribunal. Thus, the applicants could not be permitted to hide behind the provisions in the HDA that the tribunal's jurisdiction was limited to only hearing claims between a homebuyer and a 'licensed housing developer'. The President of the tribunal was correct in seizing jurisdiction and dealing with the respondent purchasers' claim.

It follows that the tribunal was correct in proceeding to hear out the purchasers' claim and to rule that the 'delivery of vacant possession' clause in the SPA contravened the Schedule G statutory contract of the Housing Development (Control and Housing) Regulations 1989. It was a right decision to replace the terms of the SPA with the contractual terms as found in Schedule G.

In the circumstances, the award of the tribunal was not tainted with any illegality, irrationality or procedural impropriety to merit judicial intervention.

INSURANCE LAW

"BASIS CLAUSE" IN INSURANCE CONTRACT

In *American International Assurance Co. Ltd. v Nadarajan a/l Subramaniam*⁶⁵, the insured signed 3 proposal forms to purchase personal accident insurance policies from D. The insured had stated his estimated annual income as RM150,000 in the proposal forms. He died in his home about a year after purchasing the policies. D repudiated P(the nominee in the policies)'s claim for payment under the policies on the ground that the insured did not die as a result of an accident but of a stroke caused by hypertension. The post-mortem report and other

⁶⁴[2013] 9 MLJ 193

⁶⁵[2013] 5 MLJ 195

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medical evidence showed the insured did not die due to a fall. It was also D's case that there was material non-disclosure or incorrect disclosure by the insured in his proposal forms in that his annual income was only about RM50,000.

At the High Court, the trial judge held that any discrepancy in the proposal forms about the actual income should not be material as the policies were to cover against accidents and what was important was whether the insured was employed in a job where accidents were high risk. It was also held that the insured did die of a fall.

On appeal, the decision was overturned. It was held that the insured was bound by the warranty in each of the proposal forms that the answers he gave were true and that the answers would form the basis of the contract between the insured and D. It was not the court's function to inquire into the materiality of the answers. The answers were deemed material as the truth of the answers had been made a condition of the policies. In any event, there was material non-disclosure or incorrect disclosure. The big difference in the estimated income was a material fact as it might have had a bearing on the true occupation of the insured and this might in turn have affected D's decision on whether or not to accept the risk and consequently to determine the premiums and terms in the policies.

On the cause of death, the court was satisfied that it was consistent with a stroke, which was an illness and not due to a fall. There was no external injury, bruises or haematoma noted on the body. The medical report stated that the bleeding in the brain was due to 'spontaneous rupture of small blood vessels probably caused by underlying hypertension'. Thus, the insured in the view of the court must have suffered intracerebral haemorrhage before the fall. Further, the words 'due to a fall' must have been inserted by person(s) unknown in the physician's statement after it had been signed casting grave suspicion on P's case. The trial judge's finding was against the weight of evidence and was set aside.

DEATH BY HEART ATTACK NOT CLAIMABLE UNDER PA INSURANCE POLICY

In *Sawarn Singh a/l Mehar Singh v RHB Insurance Berhad*⁶⁶, P purchased an insurance policy from D for his mother (the insured) which conferred benefits payable in the event of death or injury arising from accidental, violent, external and visible means. The exact words in the policy were that "if the insured shall sustain any bodily injury caused solely and directly by violent accidental external and visible means and being the sole and direct cause of the insured's death", the benefits were payable. It was essentially a basic personal accident policy. The insured had a fall in the bathroom which caused a massive heart attack from which she then died. P made a claim on the policy which was declined by D on the ground that the circumstances of the insured's death were not covered by the policy. The post mortem report stated that the cause of death was a massive heart attack which resulted in left ventricular failure, that there was no external injury associated with a fall and the insured was a heart patient. P's contention was that the massive heart attack was indirectly caused by the accident in the bathroom thereby entitling the claim.

The High Court held for D on two grounds. Firstly, on a proper reading of the policy, the cause of death must be "bodily injury" sustained by accidental violent external and visible means." The term "bodily injury" could connote an injury to any part of the body including the heart. However, that injury must be one that caused death. In this case, the means which caused the death of the insured was not established, let alone a means which was "violent accidental external and visible".

Secondly, the bodily injury sustained must be the sole and direct cause of the death, the *causa causans* or *causa proxima* and not *causa sine qua non*. In this regard, there was exclusion in the policy which provided that the policy did not cover death directly or indirectly caused by "any pre-existing physical defect or

⁶⁶[2013] 2 AMCR 424

IMPORTANT

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infirmity, fits of any kind, disease or sickness of any kind.” On the evidence, the insured did have such an existing condition (*hypertension and bronchial asthma*) which “co-operated” with the fall, resulting in her death. Thus, the fall was not the sole or independent cause of her death. P’s claim was therefore not proven and dismissed.

LAND LAW

FORFEITURE OF LAND DUE TO LATE PAYMENT OF QUIT RENT BY A 3RD PARTY

Parcels of land were owned by P. There were quit rent arrears. Could the land office reject payment made towards the arrears by a 3rd party? If payment was made after the 30-day period stated in Form 6A notice of demand (the Form), could the land office refuse to accept such payment? In either or both instances, were the parcels of land forfeitable by the land authority?

The answers can be found from the High Court decision in *Permodalan YBK Sdn Bhd v Pentadbir Tanah Daerah Hulu Selangor*⁶⁷. Legally, s 97(2) of the National Land Code (NLC) required a notice of service of the Form to be endorsed on the register document title (RDT) of the land. However, in the instant case, the endorsements were done only after the 30-day notice period specified in the Form had expired. The landowner (P) argued that although s 97(2) did not specify when the endorsement should be made, it stood to reason that it had to be made before the notice period expired so that the provision in s 99 of the NLC (on effect of payment of sum demanded) could be complied with. The learned Judge accepted such argument, holding that the purpose of endorsement was to give notice to all and sundry having existing or prospective interests in the land that forfeiture may be imminent if the registered owner failed to comply with the notice of demand. If the endorsement was made after the three months’ notice given to the landowner had expired, it meant the world at large was denied a chance to make payment as by then, the subject matter no longer existed, the offer would have lapsed and the land would be liable

to forfeiture. In the circumstances, the endorsement on the RDT had no effect in law since the endorsements were made after the three months’ notice in the Form had expired. The effect was as if there was no endorsement at all. It meant that the land administrator concerned (D) had not strictly complied with s 97(2) of the NLC.

However, assuming the endorsements were validly entered, the three months’ period should start to run from the date of the endorsement to give the requisite notice to the world at large. Since the quit rent arrears were paid before the endorsement was entered, the payment were made within time. If the court was wrong on this point and time started to run from the date of service of the Form, the payment was made two days after the last date for payment. This was not inordinate delay and no prejudice was caused to D. Rejecting the payment for a two-day delay was unreasonable.

The 3rd party was entitled in law and in fact to make the payments on P’s behalf. Section 98 did not expressly prohibit any person not having any interest in the land from making payment. Read as a whole, s 98 allowed payment to be made by persons other than the registered proprietor. A liberal and wider interpretation should be given to s 98 as D’s main concern was to collect payment and not to enquire into the capacity of the entity which made the payment.

As to the other parcels of land in respect of which Form 6A was not issued, the payment of quit rent arrears was returned by D simply because the balance amount owing was paid 14 days later than the promised date. The court held that this was unreasonable and D had no basis to reject and return the payment made.

All in all, D had not only failed to comply with the provisions of ss 97(2), 98, 99 and 100 of the NLC but had acted unreasonably. His refusal to accept payment and to return payments and to issue forfeiture notices were all unlawful and ought to be set aside.

⁶⁷[2013] 9 MLJ 28

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PARTNERSHIP LAW

RESTRAINT OF TRADE CLAUSE IN PARTNERSHIP AGREEMENT

In *Millenium Medicare Services v Nagadevan a/l Mahalingam*⁶⁸, a doctor (D) had entered into a partnership agreement with the plaintiff (P), a partnership running the business of a healthcare centre. One of the terms of the agreement was that within 3 years after D had ceased to be a partner of P, D would not practice as a medical practitioner by setting up any medical practice by himself or as a partner or as an employee within the radius of 15 km away from any of P's branches (the restraint of trade clause). 3 months later, D resigned with three months notice and withdrew as a partner of P. Before the expiry of the notice, he stopped working for P and practised as a medical practitioner in another clinic, which was within the radius of 15km from one of P's branches. P sued D for breach of the partnership agreement. D contended that the restraint of trade of clause was void for violating s 28 of the Contracts Act 1950 whereas P's reply was that the agreement fell under Exception 2, in that it was made upon or in anticipation of the dissolution of the partnership.

Section 26 of the Contracts Act 1950 provides:

"Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which goodwill is sold

Exception 1 --- One who sells the goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person derive title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the court reasonable, regard being had to the nature of the business, of agreement between partners prior to dissolution

Exception 2 --- Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

The High Court in Johor Bharu ruled in favour of D and dismissed P's claim. There are 3 points to be made from the grounds of the decision. Firstly, on the said Exception 2. It was held that this exception was meant to cover two situations: upon the dissolution of a partnership or in anticipation of the dissolution of a partnership. The literal meaning of the phrase "dissolution of partnership" was the official ending of a partnership. Sections 34-37 of the Partnership Act 1961 provided 4 situations where a partnership could be dissolved⁶⁹. None of these cover a situation where a partner left a partnership whilst the other partners remained and the partnership continued. Thus, D's contention that the said Exception 2 did not apply to the case where a single partner left the partnership and the partnership remained was preferred over P's interpretation.

Secondly, the purpose of the agreement was to admit D as a working partner of the partnership practice. There was neither any discussion between P and D of any possibility of the partnership being dissolved in the near future nor any specific clause in the agreement which dealt with the dissolution of the partnership practice. The agreement only dealt with the termination of the agreement between P and D but not the dissolution of the partnership. P's argument that when a partner entered into a partnership, he ought to anticipate that it would continue or dissolve in the future was also rejected.

Thirdly, although the territory limit imposed by the restraint of trade clause was reasonable, being reasonable by itself was not enough to invoke the said Exception 2. The agreement must be one which was made upon or in anticipation of the dissolution of the partnership.

⁶⁹Dissolution by expiration or notice, by bankruptcy, death or charge, by illegality of partnership and by the court.

⁶⁸[2013] 9 MLJ 873

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BATTLE OF WILLS

*"It does not surprise me a bit that the defendant who has been estranged from the deceased for 20 years suddenly became the sole beneficiary of the deceased's will. After all, the defendant is her own brother and the deceased has felt betrayed and was cheated by the 1st plaintiff. She was angry with her and that prompted her to change her will," said the trial judge in *Karn Woon Lin & Anor v Cheah Chor Bok*.⁷⁰*

Facts: The executor of an earlier will (1st Will) filed a suit in the court against the executor of a subsequent will (2nd Will) to challenge the validity of the subsequent will made by the testator who had died of brain cancer. In the 1st Will (made about 10 years before her death), the widowed testator had appointed the plaintiffs (P) as her executors and P's daughter as her sole beneficiary, whereas in the 2nd Will (made about 2 months before her death), she had appointed her estranged brother of over 20 years (D) as her executor, trustee and sole beneficiary of her estate. She had thumb printed the 2nd Will.

The trial judge ruled against P. For a will to be valid, a testator must have testamentary capacity. The earlier Court of Appeal decision in *Lee Eng Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor*⁷¹ had laid down the law on the meaning of testamentary capacity: "what would vitiate testamentary capacity was mental disorder or insane delusion. Mere bodily ill-health or imperfect memory was insufficient. Testamentary capacity was not to be equated with contractual capacity, for one may lack the mental capacity to enter into a contract and yet has sufficient testamentary capacity. The relevant time to consider the mental capacity of the deceased testator was the time at which the will was made and not at some other earlier or later point of time."

On the facts and evidence, whilst it was true that when the deceased testator was at the hospital about a week before she made the 2nd Will, she was at times in a confused state and

depressed, there was no evidence of mental disorder or delusion. Her doctor (DW2) testified that on the day of her discharge from the hospital which was a day before the making of the 2nd Will, she was alert and in satisfactory condition and ready for home. Evidence was also led through an independent witness (DW5), ie. the manager of the bank at which the testator wanted to open her safe deposit box on the very day of discharge, that the testator was angry and upset with the 1st plaintiff (P1) and was complaining about being cheated by P1 and describing her as being ungrateful. DW5 also testified that the testator was wheel chair bound and weak but knew what she was doing and asked D to help her and at the same time told him that she wanted to give him everything. Evidence was led through D and his cousin (DW4) that on the next day, the testator made the 2nd Will as prepared by a lawyer who has since deceased and witnessed by his staff and DW4. The testator spoke normally and coherently when questioned by the lawyer and was alert although physically weak.

The trial judge gave a lot of weight to the testimony of DW5 and DW4. He arrived at the finding that the testator was aware of what she was doing and knew exactly the nature of her acts at the time of making the 2nd Will. In his words,

"At most, the evidence of DW2 shows that the deceased while in hospital was at times, in a confused state. That condition of confused state was on and off. Confusion, in my view is not incapacity. In any event both doctors, DW2 and DW3 further confirm that the (2nd Will) could have been done when the deceased was experiencing a lucid interval. Lucid interval according to DW2 refers to the period when the patient was fully oriented and rational and aware of everything."

The Court of Appeal found no fault with the trial judge's findings and affirmed his decision that P had not established that the testator lacked mental capacity when she made the 2nd Will.

As to P's contention that there were 'suspicious circumstances' that vitiated the

⁷⁰[2013] 4 MLRA 135

⁷¹[2003] 3 MLJ 97

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making of the 2nd Will in that there was a collusion between D, DW4 and the deceased lawyer, the evidence relied on by P, particularly that the deceased testator had a feeble mind and lacked understanding because of her disease, were all related to matters and events that took place either before or after the making of the 2nd Will. They did not relate to the making of the 2nd Will. The appellate court therefore refused to interfere with the findings of the trial judge that there was insufficient evidence to support the allegations of fraud against D and DW4 and of their conspiracy with the deceased lawyer. P's claim stood dismissed and D's counter-claim was allowed.

TENANCY

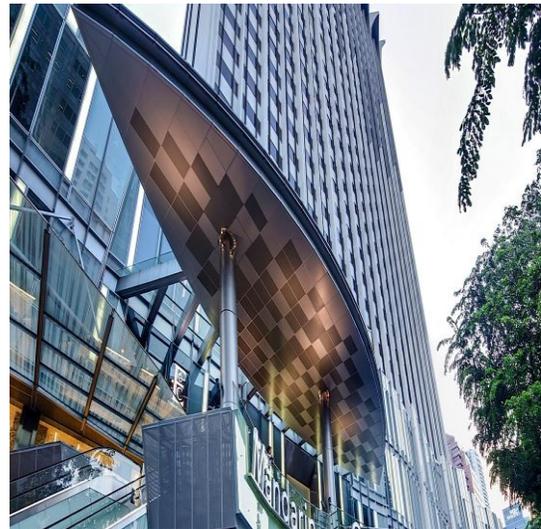
EXCLUDING RIGHT OF SET-OFF IN LEASE

In *Overseas Union Enterprise Ltd v Three Sixty Degree Pte Ltd and Anor*⁷², P let to D the 39th floor of its hotel, Mandarin Orchard Singapore (Level 39) under a lease whilst retaining the 38th floor. The public gained access to Level 39 only through an open internal staircase from the 38th floor. This design feature created difficulties for D when it applied for a fire safety certificate (FSC). Consequently, D abandoned its FSC application and its plans to operate a bar/lounge business on Level 39 but retained its possession. However, D failed to pay P any of the sums dues under the lease. P thus exercised its right of re-entry, terminated the lease and demanded vacant possession. A suit ensued.

D raised the defence of equitable set-off to withhold payments under the lease, contending that P had breached its covenant(s) (i) that D would have quiet enjoyment of Level 39; (ii) by implication, that Level 39 would be fit for the purpose for which it was leased; and (iii) by implication, that P would not derogate from its grant of the lease. It was contended that P had breached the latter by failing to assist D in obtaining the FSC.

The High Court in Singapore allowed P's claim. Firstly, on equitable set-off, it was a substantive defence which enabled a person to

lawfully withhold payments which were contractually due to his counterparty even in the absence of legal proceedings. In the context of a lease, a tenant might assert a right of equitable set-off against his landlord if the tenant's cross-claim against his landlord was so closely connected to the landlord's claim for rent as to go to the root of that claim. However, in the instant case, there was a clear provision in the lease requiring payment "without any deduction or set-off whatsoever" sufficiently clear to exclude the right of equitable set-off said to arise from a breach of the implied terms of a lease. D was thus left with having to bring a separate action/counterclaim against P in respect of P's alleged breaches of covenants under the lease⁷³.



Secondly, there was considerable overlap between the covenants of quiet enjoyment and that of non-derogation from grant⁷⁴, both of which were implied into every

⁷³See also *Pacific Rim Investments Pte Ltd v Lim Seng Tiong* [1995] 2 SLR(R) 643

⁷⁴The covenant of non-derogation of grant is a covenant by the landlord that he will not grant a lease of land to a tenant on terms which effectively or substantially negative the utility of the grant. Its essence is the protection of the tenant's utility of his lease against substantial interference by the landlord. See also *Wee Siew Bock v Chan Yuen Yee Alexia Eve* [2012] 3 SLR 1053, *Southwark London Borough Council v Tanner* [2001] 1 AC 1.

⁷²[2013] 3 SLR 1

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leasehold agreement. Five principles concerning these two covenants could be distilled from case law:

- (i) The covenant against non-derogation from grant did not amount to an implied obligation on the landlord to underwrite the profitability of the tenant's business⁷⁵;
- (ii) The landlord had no obligation to take measures outside the reasonable contemplation of the parties with regards to the leased premises unless these measures were specifically bargained for under the lease⁷⁶;
- (iii) Even non-physical interference could constitute substantial interference with ordinary enjoyment of premises under the covenants of quiet enjoyment and non-derogation from grant⁷⁷;
- (iv) The existing use of adjoining premises was always a material consideration in considering whether either the covenant of quiet enjoyment or that of non-derogation from grant had been breached⁷⁸; and
- (v) The covenants of quiet enjoyment or non-derogation from grant were both prospective in nature⁷⁹.

Thirdly, D had failed to prove that P breached both the covenants by reason of P's failure to provide D with certain documents for its FSC application, its refusal to give D an occupancy load of 120 persons for Level 39 or its failure to remedy numerous serious defects at Level 39. D was entirely responsible for the difficulties which plagued its application.

Fourthly, there was no term implied in fact or law⁸⁰ that Level 39 would be fit for D's

purposes – D had inspected Level 39 and took the lease subject to the design feature and the uses to which P put Level 38 at the date of the lease.

TORTS

LIABILITY FOR FUND MANAGER'S FRAUD

In *Kumpulan Wang Persaraan (Inc) v Meridian Asset Management Sdn Bhd*⁸¹, P had pursuant to an investment management agreement (the Agreement) appointed D, a professional fund management company, to provide professional investment advice and management services over the investment portfolio owned by P (the P's fund). Arab Malaysian Trustee Berhad (AMTB) was appointed as the custodian for the P's fund which amounted to RM30 million. One of D's employees had committed a criminal offence by remitting D's client's monies (including P's) to his own trading account, forging D's managing director's signature and losing the bulk of money in the futures market crude oil and palm oil trading. The loss from the P's fund was about RM7 million. A police report was lodged by D against the employee concerned. P terminated D's services under the Agreement and sued D for vicarious liability in respect of the acts of its employee which resulted in losses to P. D defended by contending that it was not responsible vicariously for its employee's criminal act or fraud as such conduct was beyond the control and authority of D. D also attempted to shift the blame to AMTB and contended that P had contributed to the negligence of the custodian since it was P which consented to the appointment of the custodian.

The High Court in Kuala Lumpur allowed P's claim. D's defence that it was free of vicarious liability was rejected. In the court's view, if there was proper check and balance, the incident could have been avoided. Cases have established that a professional fund manager such as D had greater duty and responsibility

SLR(R) 1029, *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896

⁸¹[2013] 9 MLJ 614

⁷⁵*Cold Storage Singapore (1983) Pte Ltd v Management Corporation of Chancery Court* [1989] 2 SLR(R) 180, upheld on appeal [1991] 2 SLR(R) 992

⁷⁶*Robinson v Kilvert* [1889] 41 ChD 88

⁷⁷*Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200

⁷⁸*Southwark* at 24-25

⁷⁹*Southwark* at 11, 23-25

⁸⁰For the general approach to the interpretation of leases, see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3

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and could not easily hide behind the criminal acts of the employee when it involved, directly or indirectly, the funds of clients⁸². On the custodian, the mere appointment of the custodian could not be a subject matter of contributory negligence. It was also mischievous to argue that P had failed to check the flow of funds considering the evidence that P could not have checked the flow as the facts, figures and instructions were only with D and only D would have the information to do so.

TORTS

REFUSING TO SIGN DMC, YET DEMANDING FOR UTILITY AND SERVICES

In *Dr Christian Jurgen Kaul & Anor v Meru Valley Resort Bhd*⁸³, P had purchased a piece of land in a resort developed by D from the original purchaser. P intended to tap into the water supply provided by D but refused to sign a deed of mutual covenants (DMC) wherein matters pertaining to utility services, guard and security services, use of common facilities and terms for the construction of one's home in the resort were set out. P contended that they were entitled to such supply and that D, not being a licensed holder for a water supply system, would be committing the tort of nuisance if it continued to prevent P from having access to such supply.

The High Court in Ipoh held that although D was not, statutorily under the Water Services Industry Act 2006 (WSIA), obliged to supply water to P, contractually it was obliged to and indeed would want to do just that, provided a proper agreement encompassing water supply and other utility services and amenities incorporated into a DMC was signed by P. Even if Lembaga Air Perak (LAP) as licensee under WSIA was the party supplying the water to P, P would be required to sign an agreement governing the conditions for the supply of the water and circumstances under which the service might be terminated.

⁸²*Barlett and Others v Barclays Bank Trust Co Ltd* [1980] 1 All ER 139

⁸³[2013] 4 AMR 367

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The instant case was not one in which P were being prevented from tapping into water that naturally flowed through the said land. Rather it was a system where D had purchased the water from LAP and had constructed the necessary piping and pumping system and meter reading to ensure that the water was safe and available to all residents who would enter into a contractual relationship governing the supply of the same. P's allegation did not even remotely come near to the tort of nuisance but a case where the parties could not agree on the terms of the supply of the water.

Whatever rates that were previously agreed upon between the original owner and D had been superseded by events and there was a need to sign a DMC to cover not just the supply of water but also electricity, guard and security services. There was no evidence that D as the developer had discriminated against P. By buying into the concept of resort living, it was implied that P would have agreed to abide by whatever was already in place with respect to the contractual obligations of the previous owner vis-à-vis D and also the purchaser here vis-à-vis the other purchasers. Impliedly, P had agreed to sign a DMC to govern the use, maintenance and payments for common areas and common facilities. If they refused, then they could not complain if the particular service was not provided for. P's claim was in the result dismissed.

TORTS

OBSTRUCTED BY BOOM GATE IN GATED COMMUNITY

In a gated and guarded community, can a resident claim that boom gate and guard house is an obstruction on his path that constitutes nuisance? That was the simple question posed in *Au Kean Hoe v Persatuan Penduduk D'Villa Equestrian*⁸⁴. P was a resident at D'Villa Equestrian (the housing area) whilst D was the residents' association (RA) duly registered under the Societies Act 1966 which had taken over the responsibility for the security and maintenance of the housing area. P ceased to be a member of D and had stopped paying

⁸⁴[2013] 5 AMR 74

the maintenance and security charges. D distributed a circular to all residents notifying them that those who had not paid such charges would have to bear the consequences, *inter alia*, do self-entrance, i.e. by physically pressing the button to open the boom gate at the guard house to enter and exit the housing area. Contending that such action had resulted inconvenience and put safety at risk, P claimed against D for nuisance and obstruction due to the boom gate and guardhouse. P sought for, among others, demolition of the boom gate and the guardhouse. D on the other hand counter-claimed against P for arrears of security and maintenance charges, cost of boom gate damaged by P and an injunction to restrain P from harassing D and the guards.



In the instant case, the local council had given its approval for the boom gate and the guardhouse. The High Court held that it would not be just and appropriate to demolish both given the fact that 113 out of 114 residents had confirmed their disagreement and objection to any attempt to do so. It was, in the view of the court, not unreasonable to direct the guards not to assist residents who had not paid the security charges especially when all the other residents had agreed to adhere to the notice of self service entrance and had paid for the fees. There was no real interference with the comfort or convenience of living according to the standards of the average man by having the guardhouse and the boom gate. P was inconvenienced by having to lift the boom gate himself but he was not at any time prevented from entering his residence. P's claim was

purely for his personal satisfaction at the expense of all other residents.

On the counter-claim, it was held that P could not be compelled to become a member of the RA if he refused to be so. Thus, P was not liable to pay for the arrears. It followed that being a non-member, P could not be heard to complain about the services extended to members of D. Neither had he the right to interfere with the committee members and security guards in the discharge of their functions. An order was thus granted to restrain P from harassing the committee members of the RA and the security guards. The boom gate not being an illegality, P was held liable to pay the expenses incurred by D to repair the boom gate.

TRUST LAW

PURCHASE MONEY RESULTING TRUST

How does the law operate in a situation where funds are advanced to contribute to the purchase price of property without taking legal title to the purchased property? The Supreme Court of Canada had the occasion to decide on this question in *Nishi v Rascal Trucking Ltd*⁸⁵.

K leased its land to R to operate a topsoil processing facility. Eventually, upon complaints, the City stopped such operation and imposed the costs of removing the topsoil of \$110,679.74 on K as tax arrears. R's lease included a provision to 'hold harmless' K for 'any and all liabilities resulting from R's operations on the property'. R did not reimburse K for such costs. As a result of the tax arrears and the existing mortgage, K decided to stop making mortgage payments which led to foreclosure proceedings. Throughout the ensuing foreclosure proceedings, H as the principal of R tried to acquire the property but was unsuccessful. The property was ultimately sold to N for \$237,500. N was assisted in the purchase by R in the amount of \$110,679.74, the exact amount of the tax arrears. H\$110,679.74 sent to N's lawyers several faxes containing offers with different terms, attempting to acquire an interest in the property. N did not agree. Subsequently, H sent a fax indicating

⁸⁵(2013) 359 DLR(4th) 575. See also *Pecore v Pecore* [2007] 1 S.C.R. 795

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that the monies would be advanced “without any conditions or requirements”. However, R subsequently commenced the action claiming ½ undivided interest in the property, contending, among others, that since it had contributed to the purchase price of the property but did not take title, a resulting trust arose such that R was entitled to a share of the property in proportion to its contribution to the purchase price. The trial judge rejected such contention, finding that while there was “no issue of a gift”, N’s evidence was that there was no intention for R to have an interest in the land. The purpose of the payment was to satisfy the debt from R to K as a result of the tax arrears for which R acknowledged responsibility due to the ‘hold harmless’ undertaking. Further, the amount of the contribution was equal to the tax arrears.

On appeal, the Court of Appeal for British Columbia overturned the decision. In their view, it was a gratuitous transfer between unrelated parties that gave rise to the presumption of resulting trust. This was not rebutted due to the finding of “no issue of a gift”. The trial judge further erred in considering N’s intention rather than R’s intention since the intention of fund advancer was relevant, not the fund recipient. Also, the fact that R had an obligation to indemnify K for the tax arrears could not serve to rebut the presumption because N, to whom the payment was made, was a legal stranger to K.

On final appeal to the Supreme Court, Rothstein J speaking for the court prefaced his judgment:

“A purchase money resulting trust⁸⁶ arises when a person advances funds to contribute to the purchase price, but does not take legal title to that property. When the person advancing the funds is unrelated to the person taking the title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person’s contribution. That is called the presumption of resulting trust. The presumption can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift

to the person taking the title. Whilst rebutting the presumption requires evidence of the intention of the person who advanced the funds *at the time of the advance*, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self-serving changes in intention over time.”

Reviewing the trial judge’s reasons in their full context confirmed that he understood that R’s intention at the time of the advance was to contribute to the purchase price without taking a beneficial interest in the property because R was motivated by recognition of the costs that it had imposed on K. This intention to make good on R’s obligations to K by way of a payment to N, was not inconsistent with a finding of a legal gift. Moreover, R’s stated intention was to make the advance without any conditions and its contribution towards the mortgage on the property was on the amount of the tax arrears (\$110,679.74) down to the penny. It was open to the trial judge to conclude that the presumption of resulting trust had been rebutted as well supported by evidence. The trial judge’s decision was thus restored.

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<sup>86</sup>It is a species of gratuitous transfer resulting trust.

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