

THE UPDATE



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Abbreviations

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

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RETURNED UNDELIVERED LETTER DEEMED SERVED

A simple issue was raised for a ruling in *Affin Bank (formerly known as BSN Commercial Bank (M) Bhd) v HIB-C Industries Sdn Bhd & Ors*¹. In a suit for recovery of loan facilities granted by the plaintiff to a borrower, two of the guarantors (defendants) raised an issue that they did not receive any notice of demand under the guarantee. Under the letter of guarantee (LG), a demand against guarantor(s) is a pre-requisite before a cause of action accrues against such guarantor(s). However, clause 12 of the LG provides:

“Any demand for payment ... under this Guarantee may be made by any of your manager...or by any person or firm for the time being acting as your solicitor...by letter sent by post addressed to me/us or each of us at my/our address specified herein or at my/our last known place of business or abode and a demand or notice so sent shall be deemed to be served on the day following that on which it is posted. In proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put in the post notwithstanding that the said notice or demand may subsequently be returned undelivered by the postal authorities.”

At the trial, the personnel in charge of recovery of loans in the plaintiff (PW4) conceded that the recipient of the notice of demand was one Customax Sdn Bhd and based on the AR cards the defendants did not receive the notice of demand.

Whilst the trial judge held in favour of the defendants that the notice of demand was not served on the defendants, the Court of Appeal overturned the decision. In the words of

the learned Judge delivering the unanimous decision of the appellate court:

“...clause 12 of the letter of guarantee is crystal clear and devoid of any ambiguity. The onus on the appellant is merely to show that the notice of demand to the second and third respondents was sent by post addressed to them at their address as stated in the letter of guarantee or at their last known place of business or abode. The demand or notice so sent shall be deemed to be served on the day following that on which it is posted. In proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put in the post *notwithstanding that the said notice or demand may subsequently be returned undelivered by postal authorities*....It is immaterial whether such notice or demand was actually delivered or not. The fact that the AR Cards were signed by an unknown person and bore the rubber stamp of Customax Sdn Bhd is irrelevant to the appellant's claim based on the letter of guarantee in view of cl 12 of the letter of guarantee. The admission by PW4 that the AR Cards showed that the notice of demand was received by Customax Sdn Bhd and not by the second and third respondents has no bearing on the proper construction of cl 12 of the letter of guarantee and cannot form the basis of dismissing the appellant's claim against the second and third respondents.”

We hasten to add that this decision is a correct one in the light of the earlier ruling made by the Supreme Court in *Amanah Merchant*

¹[2013] 3 MLJ 41

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*Bank Bhd v Lim Tow Choon*² on facts not dissimilar to *HIB-C Industries Sdn Bhd*.

date of the judgment or order:..."

BANKRUPTCY LAW

LEAVE NOT REQUIRED TO FILE BANKRUPTCY ACTION FOR JUDGMENT AGED ABOVE 6 YEARS OLD

In one of the most uncertain areas of law that has plagued law practitioners for a long time, the Federal Court finally made clear what the law ought to be in relation to enforcement of judgment by way of bankruptcy action in *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Soon and another appeal*³. The question was whether a judgment creditor wanting to file bankruptcy proceedings based on a final judgment that was more than 6 years old had to first obtain leave of court to issue execution pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980 (RHC). Prior to *Tan Tem Soon*, despite the negative answer given to the question by the Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee*⁴, there were several other decisions of the High Court and two by the Court of Appeal⁵ (both these courts are below the pinnacle Federal Court and by right, are bound by the decision in *Lim Ah Hee*) that had decided that question in the affirmative, hence the confusion.

O 46 r 2(1)(a) of the RHC reads:

- "2. (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
- (a) where six years or more have lapsed since the

In a very extensive judgment which combed through various past cases decided by both local and foreign courts, the Federal Court confirmed the negative answer as given in *Lim Ah Hee*. Firstly, O 46 r 2(1)(a) of the RHC was inapplicable to bankruptcy proceedings, for a bankruptcy proceedings was not a writ of execution within the meaning of O 46 r 2 of the RHC. A bankruptcy proceeding was an action to enforce a judgment *ie.* an action upon a judgment within s 6(3) of the Limitation Act 1953 (the Act). Since the limitation period for bringing an action upon a judgment was 12 years old, a judgment creditor was entitled to enforce a final judgment by instituting bankruptcy proceedings without the leave of the court within that period of 12 years. Further, unlike an execution proceeding, a bankruptcy proceeding bore the characteristics of a fresh proceeding. An execution proceeding was the continuation of the existing proceeding to enforce a judgment provided by the RHC, whereas bankruptcy proceedings were provided for by separate law and rules (*ie.* the Bankruptcy Act 1967 and the Bankruptcy Rules 1969). The focus of the latter was the judgment debtor, not the debt, and the object was to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the debtor's status into a bankrupt with certain disqualifications and disabilities.

With this conclusive pronouncement from the highest court in the country, there is no longer any doubt that a judgment creditor does not need to apply for leave of the court to initiate a bankruptcy action upon a judgment which is more than 6 years old.

²[1994] 1 MLJ 413

³ [2013] 3 MLJ 179

⁴[2004] 3 MLJ 253

⁵ *Chin Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178, *Tan Peng Hock v AmBank (M) Berhad (terdahulu dikenali sebagai AmFinance Bhd)* [2011] MLJU 333

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DIRECTORS SOUGHT INDEMNITY FOR COSTS IN DEFENDING SUIT

Former directors of a company (plaintiffs) claimed for indemnity by the company (defendant) for legal fees incurred by them in defending a legal suit taken against them by a minority shareholder for breach of duty of care, statutory and fiduciary duties in their capacity as directors of the company. The plaintiffs successfully defended the suit. Thus, they contended that they ought to be indemnified by article 170 of the articles of association of the company (the A&A).

That is in essence the scenario in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors v Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd)*⁶. Now, article 170 of the A&A reads:

"Every director...and other officer for the time being (of) the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the court in respect of any negligence, default breach of duty or breach of trust."

It is beyond dispute that articles of association constitute a contract between members of a company and between the members and the company. The uncertainty, however, lies in how the articles stand in relation to the relationship between directors and other officers of the company with the company. Upon considering submissions of both sides, Mohamad Ariff J agreed with the plaintiff's contention that it 'takes very little' to incorporate article 170 into the contract between the plaintiffs and the company since they must have been appointed on 'the footing of the articles', just as they were subsequently dismissed on the same footing at the EGM of the company. The

basis of incorporation is really by 'inference', as held in the old English case of *In re Anglo-Australian Printing and Publishing Union Isaac's Case*⁷.



Whilst the court ruled for the plaintiffs on the law, they lost the case on the facts. Apart from the said article, s 140 of the Companies Act 1965 must not be overlooked. Section 140(1) invalidates any provision that indemnifies any officer of the company from any liability in respect of any negligence, breach of duty, default or breach of trust. However, s 140(2) carved out an exception so that such an indemnity is permitted where a judgment is given in the officer's favour or in which he is acquitted. Thus, article 170 of the A&A could not be read as conferring a broad right to indemnity irrespective of facts but must be given a meaning consonant with s 140. In the instant case, the suit was a derivative action. It was dismissed purely on the ground of failure of substratum since the plaintiffs, having been removed at EGM of the company, were no longer in control of the company to attract the exception to the rule in *Foss v Harbottle* and to support the derivative action. There was no judgment in relation to the issue of liability of the plaintiffs for the alleged breaches of duty as directors. The plaintiffs had not been held innocent of the allegations nor vindicated. It

⁶[2013] 8 MLJ 280

⁷[1892] 2 CH 158

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would be grossly wrong in such circumstances to allow the assets of the company to be used to pay the legal costs incurred by them. Their claim was thus dismissed with costs.

COMPANY LAW

DE FACTO DIRECTOR BREACHING FIDUCIARY DUTY

Directors, do not think that you can get away scot free for short-charging the company. You may not be caught while you are at helm in the company but the long hands of law will eventually reach you. This was the fate suffered by some of the directors of CTI Leather Sdn Bhd as apparent from the reported decision in *CTI Leather Sdn Bhd v Hoe Joo Leong & Ors*⁸.

D1, D3 and D4 were directors of P company. D1 was appointed as the managing director on 30.9.1999. D3 was a director until his resignation on 30.9.1999 but he remained a cheque signatory of P. Due to shareholders' disputes, P was wound up and PW1 was appointed as a liquidator. He found that P had sustained accumulated losses and brought the present action against D1, D3 and D4 for breach of fiduciary duties on three instances.



Firstly, they had entered into tenancy agreements to rent out P's property at a gross undervalue with tenants related to D3. Secondly, P had acquired stock comprising 1515 metres of 'Dream Tex' material from THJM at RM300 per metre but sold it for RM9 per

metre at a gross undervalue. D3 was the sole proprietor of THJM. Thirdly, three of them had caused P to purchase 10,020 pieces of prayer mats but the stock had simply disappeared. AS against D3, it was P's case that notwithstanding his resignation, he continued to control the running of the company 'behind the scenes' and that D1 had acted in accordance with the directions and instructions of D3. D3 was therefore a director within the definition of the Companies Act 1965.

The High Court Judge, Nallini Pathmanathan J, held that D3 remained a *de facto* director of P despite his resignation as borne out primarily by the fact that he remained a cheque signatory until a provisional liquidator was appointed. D1 acted entirely at the behest of D3, not being able to function independently or to carry out the functions of MD so as to safeguard the interests of P. On the 1st claim, D3 knowingly allowed P's premises to be tenanted out at an undervalue, as a consequence of which he derived a direct benefit. He and D1 were in breach of their fiduciary duties and liable to P for losses suffered from the rental. On the 2nd claim, the averment that the quality of the stock had deteriorated due to compromised storage, hence the sale at a gross undervalue, was gravely in doubt as the same had not been pleaded in defence. D1 and D3 were held responsible for losses suffered in this instance. However, D4 was unaware and uninvolved in the entirety of the matter pertaining to the Dream Tex stocks. He was thus not in breach of his fiduciary duties and not liable. On the 3rd claim, the directors had put forth a reasonable and plausible explanation that the stock had been sold and delivered to AL Auto which was wound up without paying the price due for the goods. There was insufficient evidence to show that the transaction was a sham.

All in all, D1 and D3 were held jointly and severally liable to P in the sum of RM609,950 for the losses suffered by P as a consequence of their breaches of fiduciary duty.

⁸[2012] 10 CLJ 287

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STRATEGIZING AROUND PRE-EMPTION PROVISIONS

Faced with pre-emption provisions on sale of shares in a company, a corporate 'raider' got around such restrictions by acquiring shares of the corporate shareholder of that company, instead of shares in that company and thereby bypassed such provisions. This is in a nutshell the scenario in *Re Coroin Ltd*⁹, a decision of the UK Court of Appeal.

C Ltd is the subject company. It was set up by 5 investors who had entered into a shareholders' agreement. Clause 6 of the agreement contained pre-emption provisions preventing any transfer being made without the shares being offered to existing shareholders. Clause 6.1 required a shareholder desiring to transfer 'one or more Shares (or any interest therein)' to give written notice to the company of his desire to transfer the shares and the sale price and other sale terms. By cl 6.2, the directors were required to offer the shares to the holders of the voting shares. Clause 6.3 stated that if the offer was accepted, the offeror was bound to sell and the offeree bound to purchase the shares at the sale price. Clause 6.17 provided that 'No Share nor any interest therein shall be transferred, sold or otherwise disposed of save as provided in ...clause 6'. Article 5 of C Ltd's articles contained virtually identical pre-emption provisions.

In December 2010, the shareholders of C Ltd consisted of:

Shareholders	Shareholding
Appellant (A)	36.23%
Q	35.4%
KM	3.58%
M Ltd	24.78%

M Ltd was a wholly-owned subsidiary of A & A Ltd.

In 2011, the B Brothers, in an endeavour to acquire C Ltd, purchased all the

shares in M Ltd from A & A Ltd. It then purchased KM's shareholding in C Ltd, using M Ltd's right to purchase the shares under the pre-emption provisions. They also became the holder of Q's shares in C Ltd by taking over bank loans made to Q which were secured by his shares. The B Brothers then appointed three of its employees to be directors of C Ltd in place of the directors previously appointed by M Ltd, KM and Q, which effectively gave them a voting majority at board meetings. Their proposed takeover was opposed by A who refused to sell his shares to them and instead filed a petition under s 994 of the Companies Act 2006 alleging unfair prejudice to him in the conduct of the company's affairs.

Of the preliminary issues ordered to be tried, one was whether the holder of shares in a registered holder of shares (a corporate shareholder) in C Ltd was a shareholder within the meaning of the shareholders' agreement; another was whether a shareholder in a registered shareholder of C Ltd was to be regarded as having an 'interest' in shares in C Ltd, so that the pre-emption provisions relating to the transfer of C Ltd shares applied to the sale of M Ltd by A & A Ltd to the B Brothers. It was contended by A that 'any interest therein' in cll 6.1 and 6.17 was to be construed as including the type of indirect interest in C Ltd shares held by A & A Ltd by virtue of its ownership of M Ltd, and that a disposition of A & A Ltd's shares in M Ltd was a transaction involving a transfer of an 'interest' in M Ltd's shares in C Ltd which triggered the pre-emption provisions.

Both the trial judge and the UK Court of Appeal ruled against A. Cll 6.1 and 6.17 had no application to the sale and purchase of shares in a company which was the legal and beneficial owner of shares in C Ltd. The meaning which these two clauses would convey to a reasonable person having all the background knowledge was that the words 'any interest therein' did not, in the context, extend beyond a direct proprietary interest in C Ltd shares held by a shareholder. The natural sense of these two clauses was that they referred to a proprietary interest in the relevant shares, and since the only company having a proprietary interest in M Ltd's shares in C Ltd was M Ltd, neither A & A

⁹[2012] 2 BCLC 611

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Ltd nor its shareholders could be said to have had any sort of proprietary interest in those shares. Accordingly, A & A Ltd had no legal, beneficial or other interest in the C Ltd shares held by M Ltd, and a disposition by the sale of A & A Ltd's shares in M Ltd to the B Brothers could not be regarded as a disposition either of M Ltd's shares in C Ltd or of 'any interest' in such shares. The proprietary interest in such shares would be exactly the same both before and after any disposition of M Ltd. The sale of the share capital in M Ltd was not made contrary to cl 6.17 and did not trigger the other shareholders' pre-emption rights. Both the issues were thus answered in the negative.

CONTRACT LAW

DISTRIBUTOR'S WASTED ADVERTISING EXPENSES TOO REMOTE TO RECOVER AGAINST MANUFACTURER

In *Out of Box Pte Ltd v Wanin Industries Pte Ltd*¹⁰ A beverage distributor (P) engaged a manufacturer (D) to produce a new sports drink called "18 for Life" (18 For Life) by a bare-bones document that appeared to be nothing more than a routine contract for the supply of modest quantities of a generic sports drink ("Contract"). Aside from payments for the production of a mould and cylindrical drums, the extent of P's obligation under the Contract was to purchase at least 1,200 cartons of 18 for Life at \$10.30 per carton which translated into a committed outlay of \$12,360. Virtually nothing was spent on developing the drink itself. However, unbeknownst to D, P planned to aggressively and indeed proceeded to advertise and promote 18 For Life to make it into a major brand. This had resulted in an outlay of \$779,812.30 on marketing and advertising. The first shipment of 18 For Life changed colour and was found to be contaminated with insects. P had to recall all stock from the market and the 18 For Life brand was damaged beyond repair. P thus discontinued the planned venture and sued D for breach of contract.

¹⁰[2013] 2 SLR 363

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D was held liable and ordered to pay damages. The issue was how much. The registrar assessed damages in the sum of \$655,280.70 whilst the High Court reduced it to \$329,254.30. On final appeal, the decision of the High Court was affirmed. Of significance was how the Singapore Court of Appeal (SCOA) had, once again, carried out in depth analysis into the law on remoteness of damages in contract. Earlier, SCOA had in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*¹¹ and *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*¹² reaffirmed the continued applicability of the famous rule in *Hadley v Baxendale*¹³ in Singapore. In brief, under this rule, damages recoverable for a breach of contract are damages as may fairly and reasonably be considered arising naturally *ie.*, according to the usual course of things from such breach of contract or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. There are however two limbs of the rule: the first limb pertains to knowledge (actual or imputed) of consequences that arise naturally according to the usual course of things or flowing from what may reasonably be supposed to be in the contemplation of both parties when they contracted. The second limb deals with the contract breaker's actual knowledge of special or extraordinary facts and circumstances (that the reasonable person would not objectively be taken to know but which the contract breaker does actually know).

The SCOA pointed out that after *Robertson Quay*, the UK House of Lords departed from the rule in *Hadley v Baxendale* when in *Transfield Shipping Inc v Mercator Shipping Inc (The Archilleas)*¹⁴, it put forth a new test for remoteness of damages which focused on whether or not, on a true construction of the contract, the contract breaker had assumed the risk of the sort of consequences which the plaintiff was seeking recompense for. In the words of Lord Hoffmann, '...the question of whether a given type of loss is one for which (the contract breaker) assumed contractual

¹¹[2007] 3 SLR (R) 782

¹²[2008] 2 SLR (R) 623

¹³(1854) 9 Exch 341

¹⁴[2009] 1 AC 61

responsibility involves the interpretation of the contract as a whole against its commercial background, and this, like all questions of interpretation, is a question of law'. In short and in other words, the approach to the question of remoteness of damage was taken as a question of interpreting the contract. Notably, this new approach has not gone down well in English courts with numerous subsequent decisions refusing to adopt it. In Singapore, the SCOA had in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*¹⁵ rejected the new approach¹⁶ and pointed out that the concept of assumption of responsibility by the contract breaker was already embodied in both limbs in the rule in *Hadley v Baxendale*. The SCOA reaffirmed their stand in *Out of Box*. It would be wrong to conflate cases which concerned the interpretation of a contract in order to identify the specific nature of the obligation that had been undertaken with cases that truly were concerned with questions of remoteness. The question of remoteness should not be framed as one concerning the contractual assumption of risk or the true interpretation of the contract.

The SCOA proceeded to lay out a framework to help analyzing questions of remoteness of damage:

- (1) what were the specific damages that had been claimed?
- (2) What were the facts that would have had a bearing on whether these damages would have been within the reasonable contemplation of the parties had they considered this at the time of the contract?
- (3) What were the facts that had been pleaded and proved either to have in fact been known or to be taken to have been known by the defendant at the time of the contract?
- (4) What were the circumstances in which those facts were brought home to the defendant?
- (5) In the light of the defendant's knowledge and the circumstances in which that knowledge arose, would the damages in question

have been considered by a reasonable person in the situation of the defendant at the time of the contract to be foreseeable as a not unlikely consequence of the breach that he should be liable for?

In the instant case, P's claimed heads of damages were too remote. The specific type of damages claimed was the wastage of the extensive advertising expenses. However, there was nothing in the Contract which suggested that the parties had together applied their minds to the sort of advertising strategy that P was planning to launch. Its unique business strategy meant that it was exposed to risks (in terms of the sort of damages it might incur) which were different from what might have been faced by the average beverage distributor. The particular facts that bore upon the specific losses suffered in this case included the scale of P's ambitions for 18 For Life and its approach towards realizing these ambitions largely through advertising and promotion. Neither of these critical facts was brought home to D. Without knowing these additional facts, D would have approached the Contract on the footing simply that it was a contract to manufacture a generic sports drink which would have brought D a modest sum of at least \$12,360 in revenue. While the value of a contract did not limit the damages that a plaintiff could claim for the defendant's breach, it formed part of the factual matrix that a court should consider in assessing what would reasonably have been foreseeable to the defendant in all the circumstances at the time the contract was entered into. In short, without knowledge of these additional facts, D could not possibly have foreseen the losses and there was no basis upon which D could fairly be held liable for such open-ended losses as incurred by P. P's appeal was thus dismissed.

¹⁵[2011] 1 SLR 150

¹⁶We had in Issue Q1 of 2011 of The Update done a write-up on *MFM Restaurants* under the title "Assessing damages as an inexact science".

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CONTRACT LAW

“REASONABLE ENDEAVOURS”, “ALL REASONABLE ENDEAVOURS”, “BEST ENDEAVOURS” --- IS THERE ANY DIFFERENCE ?

That was one of the questions raised in *BR Energy (M) Sdn Bhd v KS Energy Services Ltd*¹⁷, a decision of the High Court of Singapore. One would not be wrong if he were to think that these phrases meant the same thing. In truth (and in law), however, they are various formulations of a contractual obligation to do something. Each formulation, properly worded, usually imposes an obligation to do something and is capable of giving rise to a legally binding obligation (non-absolute obligation). Under such a non-absolute obligation in a contract, the party who has to fulfil the obligation (the obligor) agrees to *try* to achieve the result stipulated, as opposed to an absolute obligation, where the obligor agrees to achieve a result. The problem is the standard which is intended to set by the use of the formulation in the contract concerned.



The learned Judge undertook a detailed examination of numerous Commonwealth cases before arriving at her ruling. Generally, an obligation to use “best endeavours” denoted a higher standard than one requiring “reasonable

endeavours”. The “reasonable endeavours” formulation was also different from the “all reasonable endeavours” formulation. The former only required the obligor to take one reasonable course of action and not all of them, unlike the latter. On the other hand, a “best endeavours” clause obliged the obligor to take all those reasonable steps in good faith which a prudent and determined man, acting in his own interests and anxious to obtain the required result within the time allowed, would have taken¹⁸. It had also been said that the obligor undertaking “best endeavours” must leave “no stone unturned” subject to the limits of reason¹⁹. Thus, in general, an obligation to use “reasonable endeavours” was at the lowest end of the three-tier hierarchy of obligations with “best endeavours” at the highest^{20, 21}.

Whether an “all reasonable endeavours” obligation was to be equated to or as onerous as a “best endeavours” obligation had to be decided on a case-to-case basis. The emphasis should be on the objective of the “endeavours” clause in question, as gathered from the clause itself, the contractual context (*ie*, the circumstances in which the obligation was imposed and/or undertaken) and other relevant terms in the contract.

It is not altogether easy when it comes to application of the test/standard. This may explain why it has been suggested that it is better, where possible, to specify the standard to which specific obligations are to be discharged in more detail, even if a catch-all clause is also used²².

¹⁸ *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR (R) 474

¹⁹ *Sheffield District Railway Company v Great Central Railway Company* (1911) 27 TLR 451

²⁰ *Jolley v Carmel Ltd* [2000] 2 EGLR 153

²¹ although, as pointed by the learned Judge, the author Richard Christou had in his book, *Boilerplate Practical Clauses* (Sweet & Maxwell, 6th Ed, 2012) observed that “all reasonable endeavours” was much closer to “best endeavors” than “reasonable endeavours”.

²² as highlighted in para [49] of *BR Energy*.

¹⁷ [2013] 2 SLR 1154

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VOID COMPENSATION AGREEMENT AGAINST SQUATTERS

In *Yeoh Thiam Poh & Anor v Bench Win Sdn Bhd & Anor and other suits*²³ Plaintiffs were occupiers of a premises built on a state land. Their late father was many years ago given a temporary occupation licence (TOL) for the land but it was ultimately cancelled. They continued to stay on the land without state consent or approval. D was a housing developer which wanted an access road through the land to gain access to its proposed housing project. Based on the plaintiffs' representation that they were either 'licensees' or 'sub-tenants' of the licensees' of the premises, D entered into compensation agreements with them that in return for their giving vacant possession of the premises to D, they would be given one free and two price-discounted apartments in the project. The plaintiffs vacated the premises. However, the housing project could not be implemented for some reason whereupon D notified the plaintiffs that it was rescinding the compensation agreements. The plaintiffs thus sued D for, among others, specific performance of their sale and purchase agreements. D having discovered that the plaintiffs were squatters pleaded illegality as a defence.

The High Court dismissed the plaintiffs' claim. The compensation agreements were void and unenforceable due to illegality. The plaintiffs' use of the premises as consideration, when they were squatters who had no right in law or equity, was forbidden by s 425 of the National Land Code, an offence for illegal occupation of state land. The consideration was thus unlawful under s 24(a) of the Contracts Act 1950 (the Act). Since the SPAs were consideration for the compensation agreements, the SPAs were ineffective and unenforceable.

D also succeeded in their plea of misrepresentation. The plaintiffs had executed the compensation agreements either as 'Licensee' or 'sub-tenant to the Licensee'. To assert and sign in those capacities when they did not possess a valid TOL was a clear assertion of untruth which made their

representations a misrepresentation under s 18 of the Act.

CONTRACT / TORTS

SIGNING WAIVER OF LIABILITY IN BLIND

In *Arndt v Ruskin Slo Pitch Assn*²⁴, D operated a recreational softball league. At the beginning of the season, the president of D held a meeting of team captains where he provided a document to them. He informed them that each player on the team needed to read and sign the release and team roster in order to participate in softball games. P signed up to play for a team. She understood that she needed to sign a team roster in order to play. She thought that she was signing a team roster. However, she claimed that it was never explained to her that the team roster included a waiver. She was injured in a game. She claimed that she did not see the reverse side of the form that contained the contents of waiver until after she was injured.

The document was entitled [italics used to indicate red type on the original document]: SLO-PITCH NATIONAL SOFTBALL INC. – *RELEASE OF LIABILITY, ASSUMPTION OF RISK AGREEMENT AND TEAM MEMBERSHIP/ROSTER APPLICATION FOR YEAR 20__*

Just above the middle of the page, the following words appear in red font about 1/8" high:

****READ AND UNDERSTAND THE BACK OF PAGE BEFORE SIGNING**RELEASE AND ASSUMPTION: IN SIGNING THIS FORM, I DECLARE THAT I HAVE READ AND UNDERSTAND FULLY THE DETAILS OF THE "RELEASE AND ASSUMPTION AGREEMENT" ON THE REVERSE AND AGREE TO RELEASE FROM LIABILITY AND WAIVE ALL CLAIMS.**

Under these words was a box with lines for 20 names, requiring the following information: name, sex, date of birth, full address, telephone number and signature. Under the portion allowed for the signature, the words "I agree to waiver" appeared in very faint small red type.

²³[2013] 8 MLJ 109

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²⁴(2011) 343 D.L.R.(4th)

On the other side of the form is the release, in black type. It is headed:
PLEASE READ COMPLETELY AND
UNDERSTAND FULLY BEFORE SIGNING
RELEASE OF LIABILITY AND ASSUMPTION
OF RISK AGREEMENT
VOLUNTARY DISCLOSURE CONSENT

A paragraph on disclosure consent in details followed and thereafter, a box containing the words: **WAIVER OF RESPONSIBILITY, RELEASE OF LIABILITY AND ASSUMPTION OF RISK, and the substance of waiver which, it was agreed, covered D and her injury.

The law of Canada on a party being bound by a document that he had signed is subject to three exceptions: (1) *non est factum* (the document was signed in circumstances which made it not his act; (2) it was induced by fraud or misrepresentation; and (3) where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, those terms should not be enforced. The first two exceptions were inapplicable to the instant case. On exception (3), there was no general requirement that a party tendering a document take reasonable steps to notify the party signing it that it contained onerous terms or to ensure that he read and understood them. It was only where a reasonable person should have known that the party signing was not consenting to the terms in issue that such an obligation arose.

The British Columbia Supreme Court framed the issue, in the circumstances of the case, as whether a reasonable person would know that P did not intend to agree to a liability release. If so, the waiver's enforceability depended on whether reasonable steps were taken to bring the waiver to P's attention.



The court made the finding that the document concerned had a dual purpose, that D did not have a method in place to ensure that the document was presented in such a way as to facilitate understanding of its terms, and that D did not have any system in place to check to see that the coaches or managers told the players about the document. Further, there was no evidence about the circumstances under which P signed the document or what was said at the time or that the coach or manager did anything more than attach the document to a clipboard and have the players sign it as a roster. It was thus held that a reasonable person in D's position would not conclude that P was agreeing to sign a release of liability.

D did not take reasonable steps to bring to P's attention the nature of the document as a waiver. On its face, the document appeared to be a roster, not a waiver. No direction or information was given by the coach who presented it. The words "I agree to waiver" were very faint and almost undetectable. The release was not on a separate sheet and the waiver and signature were not on the same page. D could have prepared individual release forms signed by each player if D wanted to ensure that it was released from liability. The form of the document and the circumstances under which it was signed were not such that a reasonable observer would understand its nature. Thus, the waiver was not enforceable against P.

With due respect, we doubt the correctness of the decision. While the judge had correctly framed the issue as "whether a reasonable person would know that P did not intend to agree to a liability release", he had in our view wrongly applied the facts and came to the wrong conclusion by saying that "*I am not persuaded that a reasonable person in D's position would conclude that a plaintiff was agreeing to sign a release of liability*". The test that "whether a reasonable person would know that P did not intend to agree to a liability release" is different from the test "whether a reasonable person would conclude that P was agreeing to a liability release". The former requires evidence to show knowledge that P did not intend to agree to a waiver; the latter requires evidence to show knowledge that P agreed to a waiver. The learned judge had in his

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appreciation of the facts unfortunately and effectively cast a positive duty onto D to prove that P was agreeing to a waiver. This is wrong because in actual fact, D is not under such a duty, for 'there was no general requirement that a party tendering a document (which is D) take reasonable steps to notify the party signing it (P) that it contained onerous terms or to ensure that he read and understood them'. It was only where a reasonable person should have known that the party signing was not consenting to the terms in issue that such an obligation arose. The facts and evidence in our view do not support a conclusion that D ought to have known that P was not consenting to a waiver. If the answer to the issue is negative, *ie*. D would not know that P did not intend to agree to a liability release, the next question of whether D had taken reasonable steps to bring the waiver to P's attention would not arise. D in our respectful view ought to have been held not liable.

COURT PROCEDURE

BILLED UNASSESSED LAWYER'S COSTS AN ACKNOWLEDGEABLE DEBT

In *Phillips & Co (a firm) v Bath Housing Co-operative Ltd*²⁵, D had retained its solicitors, P to act in possession proceedings which were concluded, at the latest, by December 2003. In September 2004, P wrote to D informing it of the amount which P claimed was due by way of professional fees, yet to be fixed by agreement or assessment. By letter of 20.9.2004 (September 2004 Letter), D replied protesting about the amount but not about the fact of there being a claim at all. On 8.9.2010, P issued proceedings seeking payment of their fees. D applied to strike out the claim on the basis that six years had passed since the work had been completed and thus it was time-barred. P contended that D's September 2004 Letter was an acknowledgment within s.29(5) of the Limitation Act 1980 (the Act)²⁶. The said subsection provided that where any right of

action had accrued to recover 'any debt or other liquidated pecuniary claim' and the person liable or accountable for the claim acknowledged the claim, the right would be treated as having accrued on and not before the date of acknowledgment. This had the effect that the six-year limitation period started to run again at the date of acknowledgment which caused the claim not statute-barred, having been issued within six years of the date of the September 2004 Letter.

In ruling for P, the UK Court of Appeal held that a solicitor's claim for professional fees as in this case, though billed but not yet fixed by agreement, assessment or otherwise, was a claim in debt in the nature of a *quantum meruit*, as opposed to damages. Thus, it fell within the phrase 'debt or other liquidated pecuniary claim' in s.29(5) of the Act and it was open to be acknowledged. Since the September 2004 Letter did not take issue with the principle that something was payable, P's claim had been acknowledged. Accordingly, the relevant limitation period had begun to run afresh less than 6 years before the suit had been filed. P's claim was thus not barred by limitation.

COURT PROCEDURE

HARASSMENT & THREATENING TACTICS TO RECOVER DEBT

There was an ongoing dispute between the parties in *Vivamall Sdn Bhd & Ors v TDC Construction Sdn Bhd & Ors*²⁷. The 1st plaintiff (P1) was the contractor for a project of the 1st defendant (D1). The 2nd plaintiff (P2) was the shareholder and director of P1 while the 3rd plaintiff (P3) acted as the project manager of P1. The 2nd defendant (D2) was a shareholder and director of D1 while the 3rd defendant (D3) was a representative of D1. When D1 failed to complete the project on time, P1 appointed another contractor. D1 and P1 had a dispute over the outstanding amount for the project which went to arbitration. Pending the resolution, the defendants (DD) started creating nuisance and harassed the plaintiffs (PP).

²⁵[2013] 1 WLR 1479

²⁶Section 26(2) of the Limitation Act 1953 of Malaysia is almost identical to this UK provision.

²⁷[2013] 8 MLJ 1

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Negotiations and meetings were unsuccessful. During meeting, there were quarrels and D2 and D3 uttered threatening words against P3 and P1's employees. Upon police report lodged by P3 out of fear for his own safety, a magistrate found 'ugutan jenayah' which resulted in further police investigation. D2 continued to harass P2 with phone calls (20-30 calls per day for a 4-day period), SMS-es and visits to P2's house. On 2 occasions, D2 brought along several people to P1 and P2's office and house and demanded for payment. Allegedly, DD said they would come back 'in another way' if PP refused to see them for payment.



Armed with such facts, PP filed a suit and applied for injunction to restrain DD from approaching, interfering, contacting and harassing PP and their respective family members for payment and to preserve status quo pending disposal of the suit and arbitration. The High Court granted the injunctive reliefs as prayed but limited to 500 meters distance. Based on past incidents, there was a real risk that DD were likely to come back to harass and/or disturb PP pending arbitration proceedings if a restraining order was not granted. PP were justified of being fearful for their safety. DD would not be prejudiced by such an order as they would only have to distance themselves from PP pending disposal of the suit. An order to distance DD from PP would not

have any effect on DDs' reputation, contrary to DD's contention.

COURT PROCEDURE / BANKING LAW

UNLIMITED RIGHT FOR UNLIMITED DURATION TO SUE GUARANTOR ?

The time the cause of action arises against a defaulting guarantor was in issue in *EON Bank Berhad v Hamzah Mat Sah & Anor*²⁸. The breach of facility occurred on either February or April 2001 but the claim was filed on 25.2.2010, well outside the 6 year limitation period under s 6(1) of the Limitation Act 1953. The High Court recognized that the cause of action in that case against guarantors was only perfected after a valid demand was sent. However, it held that the plaintiff did not have an unlimited right for an unlimited duration to send a letter of demand to the guarantors. To quote the learned Judge in verbatim:

"...it cannot be the law that this letter of demand can be sent at any time of the lender's choosing, even though the period of 6 years from the breach of the banking facility has passed. If a letter of demand is found invalidly sent, the Plaintiff can of course dispatch a second to the correct address and ensure compliance with the contractual requirements, but it should be sent within the 6 years."

The learned Judge acknowledged that he was taking a different path from earlier decisions such as *Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors*²⁹ and *United Malayan Banking Corporation Berhad v Datin Theresah bte Abdullah & Anor*³⁰. His reasoning was that it would be inequitable if the law was taken to tolerate a less favourable position for a guarantor as against the principal borrower. It is, in our view, a sensible and logical reasoning. The upshot was the plaintiff's claim was struck out for being frivolous and vexatious.

²⁸[2010] 1 LNS 1833, decision on 10.11.2010.

²⁹[1991] 2 MLJ 202

³⁰[1994] 4 CLJ 1074

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CRIMINAL LAW

JAILED FOR ANIMAL CRUELTY

About 2 years ago, there was a headlined report on a cattery which ignored cats left with them over the 2011 Hari Raya festive period in which 8 cats were subsequently found dead from undernourishment whilst the ones survived were in deplorable condition -- dirty and emaciated and suffered from a variety of health problems. The owners of the said cat-boarding business (R) were eventually charged with 30 counts of animal cruelty under s 44(1)(d) of the Animals Act 1953 (the Act). R pleaded guilty at the Magistrate Court and were fined RM200 in default a month's jail on each charge. The Magistrate held the view that the proviso in s 44(2) of the Act which read "where an owner was convicted of permitting cruelty within the meaning of the Act...he shall not be liable to imprisonment without the option of a fine" did not empower her to impose a custodial sentence. Against such leniency of the sentence, the prosecution appealed to the High Court.

In hearing the appeal in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor*³¹, the learned High Court judge held that the Magistrate had misconstrued the said proviso which only applied to owners of animals and not to others and certainly not to R who were in the business of looking after people's cats for a fee. The sentence was manifestly inadequate and did not reflect public abhorrence for this type of criminal behaviour. 8 cats starved to miserable death. Despite being paid for their services, R did not even bother to feed the cats, let alone take care of them, while allowing them to remain caged throughout the duration of their stay at the cattery. Despite mitigating factors (such as being 1st offenders, remorseful and guilty plea), a line must be drawn between sympathy for R and the need to deter others from becoming copycats especially where, as in this case, there was no mitigation towards the crime itself. In cases involving cruelty to animals, it must be made clear to the public that such acts were a crime that would not be tolerated by the courts. The court thus ordered

R to be sentenced to 3 months imprisonment for each offence to run concurrently, in addition to the sentence of fine already imposed by the lower court.

DATA PROTECTION / TORTS

ON DATA PROTECTION ...

The decision of UK High Court in *Smeaton v Equifax plc*³² will certainly generate interest particularly to credit reporting/reference agency in the light of the impending introduction of Personal Data Protection Act 2010 (PDPA) that is expected to come into force by the end of 2013. The law applicable to *Smeaton* is the Data Protection Act 1998 of UK (DPA) but there are similarities in both the statutes, hence the relevance of *Smeaton* to our jurisdiction.

In *Smeaton*, the claimant was adjudicated bankrupt on 1.3.2001. However, the bankruptcy order was stayed on 12.3.2001 and then rescinded on 22.3.2002. The defendant was a credit reference agency. It collects and holds information about consumers that is relevant to any assessment of that consumer's financial status which may be consulted by its customer when deciding whether to provide credit to that individual. The bankruptcy order had been registered on the claimant's credit file held by the defendant on or about 7.3.2001 and the entry was only removed on 17.7.2006 when the defendant was informed that the bankruptcy had been "discharged or annulled".

In 2006, the claimant had applied to a bank on behalf of his company, Ability Records Ltd (Ability Ltd) for a Small Firms Loan Guarantee Scheme Loan, to open a business account and for associated overdraft facilities and on his own behalf, to guarantee both this loan and the associated business account and overdraft facilities (Credit Facilities). The claimant's application for the Credit Facilities was rejected because of the adverse bankruptcy data on his credit file.

Thereafter, the claimant was evidently beset by financial problems and significant stress-related illness. The claimant lost his flat and was homeless and living on the street from

³¹[2013] 8 MLJ 70

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³²[2012] 4 All ER 460

8 months in 2007. As a result, the claimant brought a claim against the defendant under the DPA and in negligence, for compensation for the loss and damage³³ caused by an inaccurate entry on his credit file between 12.3.2001 and 17.7.2006 that he was subject to a bankruptcy order.

Section 13 of the DPA, so far as material, provides:

“(1) Any individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage ... (3) In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned.”

It was held that the defendant was in breach of the statutory duty³⁴ to ensure that the claimant's personal data was accurate and kept up to date. It had taken no steps to ensure continuing accuracy of the bankruptcy data other than to respond to customer information that it received. It had also not taken the vital first step of regularly considering whether the class of those subject to rescinded bankruptcy orders could proactively be monitored. Significantly, it was held that the defendant also owed to the claimant a duty of care at common law. The duty was co-extensive with the defendant's duties under the DPA in respect of which the defendant was in breach.

The Court further held that under the DPA, the defendant has positive obligations to take reasonable steps to ensure the accuracy of the data. It is not sufficient for the data controller to do nothing and undertake no assessment or

analysis of the accuracy of the data and of the steps that would be available to ensure its continuing accuracy and then seek to rationalize its inaction subsequently. Furthermore, the burden is laid squarely on the shoulders of the data controller to prove that it has taken reasonable steps to ensure the accuracy of the data. Such steps include undertaking at regular intervals an assessment, review or audit of the measures it had in place to ensure that the credit data it held is accurate. It needs to keep under regular review whether its data control procedures could be improved with the use of reasonable measures and where necessary, to undertake any necessary improvements.

Be that as it may, *Smeaton* may be of limited implication in the context of our own PDPA for several reasons. Firstly, there is no corresponding provision as s.13 of DPA in our PDPA. In the absence of a specific provision which expressly creates a civil liability for a breach by a data controller of a provision in the statute, a person who suffers as a consequence of a breach of the statute can only fall back on the general tort of breach of statutory duty to seek redress. In this regard, s.11 of PDPA is noteworthy. It reads :

“data user shall take reasonable steps to ensure that the personal data is accurate, complete, not misleading and kept up-to-date by having regard to the purpose, including any directly related purpose, for which the personal data was collected and further processed.”

Secondly, PDPA explicitly takes out from its ambit information for the purpose of credit reporting. The definition of “personal data” does not include any information that is processed for the purpose of a credit reporting business carried on by a credit reporting agency under the Credit Reporting Agencies Act 2010 (CRAA) which has been gazetted on 10.6.10 but has yet to come into force. S.76 of CRAA also provides that the provisions of the PDPA shall not apply to the processing of credit information by a credit reporting agency. On the other hand, it is pertinent to take note of s.29 of CRAA which states “A credit reporting agency shall not use or further process any credit information without taking such steps as are in

³³The claimant's claims are essentially for the recovery of his financial outlay in Ability Ltd, the loss of his share in the trading profits in the years 2006 – 2009, the loss of the appreciation in the value of his shareholding in Ability Ltd and of the value of a house that he was unable to buy, small further items and consequential expenditure and damages for the loss of his home, distress, trauma and depression and the loss of his business and financial reputation.

³⁴See Principle 4, Part I, Schedule 1 of DPA which states “personal data shall be accurate and where necessary, kept up to date”.

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the circumstances reasonable to ensure that the credit information is accurate, up-to-date, complete, relevant and not misleading.” How our courts will reconcile and apply the laws as prescribed under these two statutes remain to be seen.



DIGEST OF EMPLOYMENT LAW CASES

1. MISCONDUCT OR POOR PERFORMANCE ?

Was it misconduct? Or was it poor performance? That was one of the issues that the Industrial Court Chairman had to decide in *Saw Choon Hooi v Isyoda Corporation Berhad*³⁵. The claimant was engaged as a mechanical and electrical coordinator but was subsequently transferred to assist in the urgent completion of a certain project of the company. The company contended that the claimant had

failed to carry out duties entrusted upon him and issued him a show cause letter. Dissatisfied with his reply, the company held a domestic inquiry (DI) and he was found guilty of all the charges. His employment was terminated. He claimed he had been dismissed without just cause or excuse.

Firstly, the claimant successfully challenged the validity of the DI on the grounds, among others, that one same person held four roles in the DI proceeding, *ie* investigator, chairman, prosecutor and panel member. However, this did not carry him far as such irregularity could be and was cured by the Industrial Court by hearing the matter *de novo*. Secondly, the charges against him included failure in responding to his superior's instructions in providing reports on work progress, follow-up work progress, work defects and monitoring of works promptly; uncooperative attitude towards his colleagues and superior by not helping together by working longer hours to complete the works for handing over of a building block during critical period; poor management of sub-contractors resulting in incomplete works and defects in the said block; and misuse of computer during office hours. The claimant contended that these complaints were based on poor performance and the company had failed to prove that it had given claimant warning and sufficient opportunity to improve. The company rebutted that the dismissal was premised on misconduct specifically insubordination and not poor performance. The court found in favour of the company. Though the warning letter was titled "Warning Notification on Unsatisfactory Work Performance", the issues laid down above referred to multiple misconduct and it was more a case of poor attitude than performance. Further, both the company and the claimant himself had pleaded their case on grounds of misconduct.

Based on evidence, particularly that of the claimant's colleagues who had a good working relationship with him, the company had succeeded in establishing *misconduct*. And it was justified in releasing him early based on the nature of the business of the company and the lack of the requisite qualities in the claimant to contribute effectively to the company.

³⁵[2013] 2 MELR 50

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2. 'EMPLOYEE' OR 'WORKER' ON ASSIGNMENT BY ASSIGNMENT BASIS

The meaning of 'employee' was the focal of attention in the UK Employment Appellate Tribunal (EAT) case of *Drake v Ipsos Mori UK Ltd*³⁶. A research company employed the claimant as an interviewer on an "assignment by assignment" basis. He was responsible for visiting members of the public in their home, identifying somebody who fitted the company's criteria, persuading that person to be interviewed and carrying out the interview. It was explained to him that he would be engaged on the assignment basis only and that there was no obligation on him to accept work and on the company to offer assignments. No contract of employment nor any statement of terms and conditions of employment was issued. A document entitled "Finance and Administrative Guidance for Freelance Interviewers" stated that an interviewer was "not an employee but a 'worker'". A document entitled "Interviewer Handbook" stated that once an interviewer had accepted an assignment, it was considered as a "verbal contract" that they would "complete the job within the deadline and according to the survey specifications". In practice, the claimant typically completed his assignments. He was occasionally asked to complete assignments of other interviewers who had failed to complete. Interviewers who did not complete their assignments or carried out their assignments in an unsatisfactory manner were not subject to the company's disciplinary procedure. The employment tribunal dismissed the claim of unfair dismissal, holding that he was not an employee because "there was no mutuality of obligation either from one assignment to another or during the course of any individual assignment", with emphasis that either party could withdraw from a particular assignment prior to its completion --- in effect, that the contract was terminable at will. On appeal, the EAT held for the claimant. There was a contract in place – and the requisite mutuality – when the claimant was actually undertaking an

assignment for the company. The fact that the assignment could be brought to an end at will did not mean that there was no contract in existence while the assignment was continuing. Plainly, there was an agreement to undertake work in return for payment. Further, agreements to do work personally in exchange for remuneration were of many kinds; casual agreements might be less common now than they once were but there was no doubt that casual labour, which might quite often be terminable at will, could be provided pursuant to a contract of employment. The EAT thus set aside the employment judge's decision and remit the case to the employment tribunal to consider whether the assignments were carried out under a series of contracts of employment or merely under a series of contracts for services.

3. ILLEGALLY OBTAINED EVIDENCE INADMISSIBLE IN INDUSTRIAL COURT

In our last issue Q1 of 2013, we wrote on how the rule of hearsay was disregarded in a Industrial Court case due to s.30(5) of the Industrial Relations Act 1967 which required the court to act according to equity and good conscience and not to be bound by technicalities such as strict hearsay rule as applied in ordinary civil courts. The same provision was again called to aid in *Andrew Phuah Khim Peik v HLG Capital Berhad*³⁷ but this time, to exclude highly confidential e-mail correspondences between various management personnel. The claimant had obtained the said e-mails by improper means. He was not copied at all the said e-mails. The court observed that in civil courts, the test to be applied on illegally obtained documents was whether they were relevant to the matters in issue and the court was not concerned with the way in which they had been obtained. However, in industrial court which was a court of equity and good conscience, the party seeking relief had to come to court with clean hands. Thus, to allow the claimant to admit the said e-mails would be

³⁶[2012] IRLR 973

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³⁷[2013] 2 ILR 78

highly unconscionable. The said e-mails were held to be inadmissible.

4. IS THERE A CHANGE OF OWNERSHIP IN THE BUSINESS?

In *Mohd Mazlan Mohd Yunus v Malaysia Airline System Bhd*³⁸, C was employed by the MAS Bhd as an Operations Officer in its Catering Services Department since July, 1995. Then, the department was incorporated as MAS Catering, a wholly owned subsidiary of MAS Bhd and C held similar position. Indeed, C had on 1.2.1996 expressly accepted employment with MAS Catering. In his new position, however, he continued receiving all benefits and perks under the collective agreement of MAS Bhd (CA) and all letters in relation to C's employment were issued by MAS Bhd. Subsequently, 70% of the shares in MAS Catering were sold to Brahim's LSG Sky Chefs Holdings Sdn Bhd and the name of MAS Catering was changed to LSG Sky Chefs Brahim Sdn Bhd (LSG). C then received a letter from LSG wherein he was informed that he was no longer an employee of MAS Bhd and that he lost all his perks and benefits under the CA. C claimed that MAS Bhd had unilaterally terminated his services by unlawfully transferring him to LSG without his consent and knowledge. MAS Bhd contended otherwise that C had never been dismissed. The Industrial Court relied on the Court of Appeal decision in *Barat Estates Sdn Bhd & Anor v Parawakan Subramaniam & Ors*³⁹ that when a change of ownership of the business occurred, the 'selling employer' must give the employees appropriate notice to enable them to exercise their right to choose their employer. The employee could not be transferred at the whim of the employer. Therefore, in the court's view, there was a termination of service of C when MAS Bhd sold 70% of its shares in MAS Catering to LSG, without issuing a notice to C. MAS Bhd had dismissed C without just cause or excuse from the date C had become aware of the change of the ownership of MAS Catering.

³⁸[2013] 2 ILR 85

³⁹[2000] 3 CLJ 625. See also *Radtha Raju & 358 Ors v Dunlop Estates Bhd* [1996] 1 CLJ 755

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With due respect, the soundness of the decision is debatable. In our considered view, there was no change of ownership in the business. The ownership of the catering business continued to be belonged to MAS Catering albeit in its new name, LSG. The entity which engaged C remained the same, LSG (formerly known as MAS Catering). The change in the shareholding in MAS Catering (of 70%) from MAS Berhad to Brahim's LSG Sky Chefs Holdings Sdn Bhd does not, in our view, constitute a change of ownership in the business. In *Barat Estates*, Barat Estates Sdn Bhd sold both estates it owned to Prospell Enterprise Sdn Bhd whereas in *Radtha Raju*, the estate(the business) was sold by a company (Dunlop) to another company (IOI-Dynamic). In both instances, there was clear change of ownership of the business. We have been made to understand that an application for judicial review had been filed by MAS Bhd and is pending at the High Court. Whether such view of ours will be accepted by the High Court remains to be seen.

5. OF EPF CONTRIBUTIONS TO BACKWAGES AWARDED

Does the backwages awarded by the Industrial Court attract EPF contributions? The claimant in *Ng Chee Wan v Ranhill Bersekutu Sdn Bhd*⁴⁰ contended that the EPF contribution awarded by way of backwages was not on the exemption list of the Employees Provident Fund Act 1951 (EPF Act) and that the word “otherwise” as contained in the definition of “wages” under s 2 of the EPF Act was a widely cast net which would encompass an award of backwages. However, bound by precedents, the court applied the law as laid down by the High Court in *Association of Bank Officers, Malaysia v Oversea-Chinese Banking Corporation Ltd*⁴¹ to hold that the sum awarded, although computed based on his last drawn salary, had not been wages as defined in the EPF Act. Thus, it did not and could not attract EPF contributions. On another claim for salary adjustments and increments, bonus and other benefits, the court ruled that such claims could only be considered where an order for reinstatement was granted. Here, the court had not ordered reinstatement but monetary compensation, hence no basis for claims under these heads.

6. PERSISTENT REFUSALS TO RECEIVE WARNING LETTERS

In *Lim Chean How v BIC-GBA Sdn Bhd*⁴², due to below expectation performance, an employee was issued with a show cause letter. He refused to acknowledge receipt of the letter. A month later, the company issued him another letter indicating that he would be put on performance improvement plan (PIP). Once again, he refused to acknowledge receipt of the letter. 2 months later, another letter was dispatched to him in relation to his poor performance and the PIP. He once again refused to acknowledge receipt of it. The last

letter was finally handed to him where he indicated that he needed time to think about the PIP. Subsequently he informed his superiors that he was not agreeable to be put on the PIP. The company decided to terminate his employment. Once again, he refused to acknowledge receipt of the termination letter. On his claim for wrongful dismissal, the Industrial Court made a scathing remark on his behaviour in repeatedly ignoring warning letters from his employer by refusing to acknowledge them. Such action amounted to obstinacy, defiance and insubordination. His further act of rejecting the PIP had been the final blow which had led to his termination. In the court’s view, if he had personal problems, he should have left them at home and concentrated on his work rather than letting them affect his productivity and attitude at work. The relationship of mutual trust and confidence implied in every contract of employment had been eroded. The dismissal was held to be justified.

7. NEW STANDARD OF PROOF – “REASONABLE BELIEF” IN THE EMPLOYER’S MIND

What is the standard of proof on the employer to establish misconduct committed by its employee? Is it on a balance of probabilities, as laid down by our Court of Appeal in *Telekom Malaysia Kawasan Utara v Krishan Kutty Sangunai Nair & Anor*⁴³? Or is it sufficient to show that the employer had reasonable grounds for believing in the guilt of the employee and that they had investigated the matter, an approach propounded in *British Homes Stores Ltd v Burchell*⁴⁴? In *Nagarajah Bathumalai v Perbadanan Urus Air Selangor Berhad*⁴⁵, the Industrial Court pointed out that the Court of Appeal had subsequently in *K.A.Sanduran Nehru Ratnam v I-Berhad*⁴⁶ departed from *Telekom Malaysia Kawasan Utara* and applied the “reasonable belief” approach. This entails a lower standard of proof whereby an employer does not have to prove that the misconduct had

⁴⁰[2013] 2 ILR 203

⁴¹[1994] 3 CLJ 169

⁴²[2013] 2 ILR 373

⁴³[2003] 3 CLJ 314

⁴⁴[1978] IRLR 378

⁴⁵[2013] 2 ILR 507

⁴⁶[2007] 1 CLJ 347

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been committed on a balance of probabilities. The employer is only required to show that he has reasonable grounds for believing in the guilt of the employee and that he had carried out as much investigation into the matter as was reasonable in the circumstances.



8. WAS HE A VOLUNTEER OR WAS HE AN EMPLOYEE ?

What started out as a volunteer situation ended up as an employment relationship. That basically sums up the case of *Thesigan Nadarajan v Kumpulan A.C.T.S. Bhd*⁴⁷. C was engaged by the company as a Medical Services Coordinator. The company was a non-governmental and non-profitable organization which provided free medical

services and care for the disadvantaged refugees at various immigration detention centres and camps. After about 17 months, the company offered its “employees” including C a new fixed term contract of service. C rejected it on the basis that it was less favourable to him. To him, it was an attempt by the company to change an ongoing employment to a 6 months contract. The company then replied that at all times C had not been their employee but merely a volunteer and since he had rejected their offer of a fixed 6-month term employment, he would be deemed no longer be with them. C claimed constructive dismissal. In the absence of a written contract of employment, the court considered the conduct of both parties and other relevant evidence to show a binding contract of employment. Here, C had been paid a fixed monthly sum even though he was off sick or had to leave early and also during all public holidays. There had not been traveling or subsistence allowances or any disbursements which would have been incurred by a volunteer in the course of voluntary work. Further, when the company issued the new contract of employment to C, it had referred to his remuneration as “current all-in monthly salary” which had indicated that there had been an employment situation already in existence at that material time. The court also held that non-payment of EPF contributions was inconclusive. On the issue of degree of control exercised by the company, C’s designation as “Medical Services Coordinator” in the minutes of the staff meetings clearly showed that there had been certain hierarchy in the company. C had to give reports of his work during these staff meetings. He had been given his own space to work, a filing cabinet, a computer, a printer and a scanner with internet connection and he was in charge of all the computer equipment. For all these reasons, he was an employee or a “worker” as defined in s.2 of the Industrial relations Act 1967, albeit under an oral agreement. By the company’s unilateral action in issuing C a new fixed term contract for 6 months, C had been constructively dismissed.

⁴⁷[2013] 2 ILR 530

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9. RUSHED INTO RESIGNING & OFFER TO REINSTATE

The employee in *Lipo Corporation Berhad v Mahkamah Perusahaan, Malaysia & Anor*⁴⁸ claimed that he had been forced to resign after meeting with the CEO of the employer. He was pressured into leaving immediately and no time was accorded to him to think through his other options. The threat was “resign or face a domestic inquiry and be embarrassed”. The Industrial Court (with whom the High Court agreed) ruled that this amounted to a forced resignation. There was no evidence led to show that the actual causation⁴⁹ was not the threat but other consideration in the mind of the resigning employee that it was beneficial for him to resign. However, the employer contended that it was not enough to conclude that the “resignation” was not voluntarily made. The Industrial Court should have proceeded to rule on whether there was misconduct on the part of the employee. The High Court disagreed with such contention. This is because the CEO of the employer had in his testimony acknowledged that there was no intention to institute disciplinary inquiry proceedings against the employee and that it was willing to reinstate the employee to his previous position. Undoubtedly the employer was conceding that the employee’s dismissal/forced cessation of employment was without just cause or excuse. Accordingly, there was no need for the Industrial Court to determine the allegation of misconduct.

EMPLOYMENT LAW

EMPLOYER OWING DUTY OF TRUST AND CONFIDENCE TO EMPLOYEE

In *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*⁵⁰, P was employed by D as its CEO whose responsibilities included

taking over the management and operations and revamping D’s operation model. In early May 2009, P rolled out a series of organizational changes purportedly with approval of D’s founder and executive director, N. The implementation of the changes was, however, unsmooth. In August, a series of meetings were held with the board and senior management staff to discuss P’s changes and leadership. P was absent from these meetings. D claimed that P’s presence was unnecessary while P claimed that he had asked to attend these meetings but had been turned down by N. During a board meeting on 12.8.2009, N was appointed joint-CEO pursuant to cl 3.4 of P’s employment agreement (the Agreement). On 18.8.2009, the board reversed P’s changes without discussing with P. The next day, N allegedly informed the staff that he would be taking over day-to-day operations and reversing P’s changes. On 20.8.2009, N moved into P’s office and P found that he was unable to log onto his e-mail account. The company car for P was also withdrawn. Then, N offered P three months salary in lieu of termination. On 24.8.2009, P sent in a notice of resignation. Thereafter, P sued D for breach of implied term of mutual trust and confidence and claimed that he was constructively dismissed. D relied on cl 11 of the Agreement which permitted D to terminate P for any gross default or grave misconduct affecting the business of the Group.

The Singapore High Court ruled in favour of P. Firstly, on the law, unless there were express terms to the contrary or the context implied otherwise, an employer owed the employee a duty, implied in law, not to undermine or destroy *mutual* trust and confidence. However, the implied term of mutual trust and confidence (which included a duty of fidelity, *ie*, a duty to act honestly and faithfully) was not to be confused with a duty of good faith. The duty of mutual trust and confidence, through long use, had acquired a clearer meaning and application than that of good faith. A duty of good faith was a more far reaching concept which might impose positive duties, fettered parties’ freedom to contract and might conflict with written terms. In the learned Judge’s view, there was no implied duty (in law) of good faith.

⁴⁸[2013] 3 AMR 347

⁴⁹See *Harpers Trading (M) Sdn Bhd, Butterworth v Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan* [1988] 2 ILR 314

⁵⁰[2013] 2 SLR 577

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Back to the facts of the case, there was nothing in the Agreement that negated the implied term of mutual trust and confidence or modified its content. Clauses 3.1 and 3.3 granted overall managerial autonomy to P for daily operations and organizational structure. The overriding control which the board exercised by way of general governance and cl 3.2 and 3.3 were not incompatible with the implied term but qualified the powers of the board to include a duty not to undermine P's position as CEO so as to destroy the relationship of mutual trust and confidence.

The exclusion of P from meetings held to discuss P's decisions as CEO was a clear breach of the implied term of mutual trust and confidence. A relationship of mutual trust and confidence required the employer to inform the employee of charges leveled against him and to give him the opportunity to rectify any problems or clarify any misunderstandings. This was particularly so where the employee was in a high executive role and made complex decisions on behalf of the company. The more complex an issue, the more discretion was needed and hence the greater the need to clarify an issue with the employee. The board's reversal of P's changes in manner they did was likewise a breach of cl 3.3.3, which stated that the board's power had to be exercised reasonably, and of the implied term of mutual trust and confidence.

The power to appoint a joint-CEO under cl 3.4 was not incompatible with the implied term as the word 'joint' indicated that the appointment of another CEO should complement, and not replace, P's functions as CEO. However, the facts showed N's appointment as joint-CEO was a taking over, rather than sharing, of the role of CEO. Although P's exclusion from the day to day operations of the company did not *in itself* point to a breach of the implied term of mutual trust and confidence, it was part of a cumulative series of events⁵¹ amounting to such breach. The withdrawal of the company car and N's taking over of P's CEO office were calculated to

embarrass P and undermine his position in D. Taken together, these actions were part of a systematic undermining of P's position as CEO.

The totality of circumstances showed that D, mainly through the person of N and other senior officers who owed their allegiance to N, deliberately and systematically undermined P's position in the company in a way which was calculated and likely to destroy or seriously damage the relationship between employer and employee. In the court's view, the reversal of the changes although legitimate itself was the "final straw"⁵² which had the essential quality of contributing significantly to the breach of an implied term of mutual trust and confidence. There was thus a breach of the implied term of mutual trust and confidence by D which amounted to repudiation that P had accepted through e-mail that outlined his grievances. He was right to consider himself as having been constructively dismissed. In accordance with cl 2.2.1 of the Agreement, he was awarded damages in the sum of his salary for the remaining 33 months of his 36-month fixed term contract.

FAMILY LAW

DNA TEST TO CONFIRM PATERNITY

Could the court compel a person to undergo DNA testing to ascertain whether he was the natural father of a child? In 2000, our High Court had in *Peter James Binstead v Juvencia Autor Partosa*⁵³ decided that based on the existing law in Malaysia, no one could be compelled to undergo DNA test to determine paternity. In the view of the learned Judge then, such compulsion constituted an offence of voluntarily causing hurt (bodily pain, disease or infirmity) under s 322 of the Penal Code (the Code). A court could not, in the absence of a specific legislation, order any person to submit himself to an unlawful act to be committed on his person. It was not until February this year that the same issue came up again for

⁵¹Events such as the sharp drop in the number of e-mails sent to him which was indicative of diversion of channels of communication and approval to N who did not consult with P as joint-CEO, P's exclusion from the meetings in August, the general tenor of the meetings and the reversal of the changes.

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⁵²The "last straw" doctrine was restated in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481

⁵³[2000] 2 MLJ 569

determination in the High Court at Penang in *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik*⁵⁴. In a suit brought by the plaintiff as the natural mother of the minor, the defendant had denied that he was the father of the minor and had refused to undergo a deoxyribonucleic DNA test.

The court departed from the earlier decision by distinguishing it from the instant case in that the court in the earlier decision had not considered whether it was in the best interest of the child that DNA test be ordered. In this regard, the court referred to the United Nations Convention on the Rights of the Child (CRC) which the Government of Malaysia had acceded to in 1995, particularly article 3(1) which made the best interests of the child as a primary consideration in all actions concerning children as undertaken by, among others, public or private social welfare institutions or courts of law. The court also drew inspiration from article 7 of the CRC which provides that the child shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. This article was, in the view of the learned Judge, consistent with the provisions of fundamental liberties as provided in our Federal Constitution. The minor thus has a right to know whether the defendant was his father.



Lastly, the learned Judge referred to Wikipedia, the free encyclopedia on the paternity testing in other countries such as US, Canada, UK, France, Germany, Israel and China. With

varying degree of requirements and stipulations, the paternity testing may be ordered by the courts in such jurisdictions. The judge remarked that our country must not be lagging behind but be robust and cannot allow our criminal or civil jurisprudence be shackled by the ghost of *Peter James Binstead*. The defendant was thus ordered to undergo DNA testing to determine the child's paternity.

GENDER

GENDER REASSIGNMENT

"Gender is a multi-faceted question, and not involving the desire of the applicant alone, but involving consideration of chromosomal, gonadal, genital and psychological factors"

*Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara*⁵⁵ is a rare case. The applicant is a person who was born a male. He had made "his" application (under s 27 of the Registration of Births and Deaths Act 1957 (the Act)) to change the gender stated in his national registration identification card (NRIC) from 'male' to 'female'. On the facts, "he" was diagnosed with a gender identity disorder and had consequently undergone a "sex reassignment surgery" in Thailand in December 2006 and had succeeded in changing his physical gender from "male" to "female". "He" complained that the unchanged gender detail in his NRIC had cause difficulty in seeking employment and facing immigration in overseas, continuing studies and being looked down upon by certain quarters.

The Court of Appeal rejected his application. The court was not satisfied on the proof submitted by the applicant on his change of gender. The documents on sex reassignment were from Thailand and Hong Kong but there was no affidavit from the makers of such documents. The fact that

⁵⁴[2013] 2 AMR 628, [2013] 4 MLJ 272

⁵⁵[2013] 4 CLJ 627

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the applicant had difficulty with immigration in Thailand raised the question whether the sex reassignment surgery was recognized. Further, there was no evidence, medical and psychiatric, from experts in Malaysia as to what was gender, what made a person a male or female or whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card. The court was not prepared to allow a change in the gender description in our system of identity registration to facilitate obtaining employment, travel, education and other personal issues.

With due respect, we have doubts on the correctness of the decision. The applicant had already produced a medical certificate from the hospital in Thailand that carried out the sex reassignment surgery on him, together with a copy of the operative record describing the surgery. He also produced a medical certification from his doctor in Hong Kong who had stated that the applicant had complete feminine outlook and behaviour. The respondent being the National Registration Department did not challenge these documents. Such being the case, there was no justification why the makers of such documents must still make a sworn statement. It is, in our view, an uncalled for requirement imposed on the applicant.



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LAND LAW

FORECLOSURE AFTER 15 YEARS OF LOAN DEFAULT NOT FATAL

In *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd & Anor Appeal*⁵⁶, the plaintiff/lender(P) had in December 1994 granted loan facilities to the defendant/borrower(D) which were secured by two properties. In March 1996, D defaulted in the repayment of the loans and notices of default were issued on 10.3.1996. However, it was only in May 2011 that P issued Form 16D notices (the default notices) pursuant to s.254 of the National Land Code (NLC). As D failed to remedy the breaches specified in the default notices within 30 days statutory period, P commenced foreclosure proceedings with a view to obtain order for sale. In opposing P's application, D raised the issue that the cause of action was time-barred since P only initiated the foreclosure proceedings some 15 years after the loan default. It was submitted that P was deliberately intending to exploit the circumstances of default and to unjustly obtain huge amounts of snow balling interest against D. It was argued that this constituted 'cause to the contrary' under s.256 of the NLC which is required to be established in order to defeat a foreclosure action.

In rejecting D's argument, the Court of Appeal reiterated the law as settled by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd*⁵⁷. The court would only be concerned with the three categories of 'cause to the contrary' as laid down in that case. It is trite that the cause of action by a chargee does not accrue from the date of default of repayment of the loan but from the time the chargor fails to remedy the default as specified in the default notice⁵⁸. As such, the cause of action accrued on 10.6.2011 upon expiry of the 30-day notice period under the default notices, and not from the date of the notice of default ie 10.3.1996. D's argument was thus unsustainable. The mere fact that P had filed the foreclosure proceedings some 15 years later did not signify the intent on

⁵⁶[2013] 3 MLJ 61

⁵⁷[1997] 1 MLJ 77

⁵⁸*Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470

P's part as submitted by D. There was nothing to prevent D from repaying the whole or any part of the loans at any time to avoid the accumulation of the so-called 'snow balling interest'. Equity had no bearing in a case of foreclosure and it could not be said that the order for sale was contrary to the rule of law and equity.

D's further argument that P's claim for interest was time-barred was also rejected. There was provision under the charge which capitalized the interest which was treated as part of the principal. Therefore, P's claim for interest was not caught by s.21(5)⁵⁹ of the Limitation Act 1953 as it fell within the proviso of s.21(5)(b). With due respect, we do not see how the said proviso should aid P. The proviso reads:

"Provided that ---...

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued."

On the facts, it is not entirely clear whether the properties concerned comprise any future interest or life insurance policy so as to attract the application of the said proviso. Even if it is applicable, arguably interest would have been deemed to become due since the right to receive the principal sum of money would have already accrued or deemed to have accrued in 10.3.1996 when notices of default were issued, unless such notices of default were not notices to recall the entire loan. Unfortunately, this aspect is not clearly stated in the grounds of decision.

⁵⁹S.21(5) reads: "No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due;".

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HIT BY FALLING TREE WITH NO LEAVES

A tree fell on a car which was traveling along a public road on a rainy day. The incident caused severe injuries to the driver, R and his car. R sued the Dato Bandar Kuala Lumpur (A) which was the body entrusted to administer the city of Kuala Lumpur for breach of statutory duty and negligence, claiming that under s 101 of the Local Government Act 1976 (the Act), A's duty was not limited to overseeing trees planted by A but extended to all trees in the city. It was contended that A was duty bound to ensure that trees were properly trimmed or removed if they posed a danger to the public.

The High Court in *Dato Bandar Kuala Lumpur v Ahmad Jaafar Abdul Latiff*⁶⁰ allowed R's claim. On appeal, the decision was overturned. The trial judge did not make a finding on the exact location of the tree but held that the tree posed a danger to the public being on a slope at 25 metres in height and without leaves. This was erroneous as in the view of the Court of Appeal, there could be no finding of fact that the tree posed a danger to the public when there was insufficient evidence as to its precise location. Not every tree that was located on a slope posed a danger. There was no evidence of the gradient and soil structure of the slope or any evidence that the tree was unstable due to its location on the slope. Likewise, not every tree that had no leaves posed a danger. No expert evidence had been led to show that a tree of the 'Batai' specie was normally diseased if it had no leaves.

R had unfortunately adopted the erroneous position at the trial that he was entitled to rely on the doctrine of *res ipsa loquitur* to shift the burden of proving that the tree did not pose a danger to the public from the claimant, R to the defendant, A. The burden remained on R to prove negligence on the part of A or that there was a breach of statutory duty by the same. R had failed to discharge such burden and A's appeal was allowed with costs and R's claim was set aside.

⁶⁰[2013] 3 CLJ 987

NEGLIGENTLY DAMAGING UNDERGROUND CABLES

Do not simply carry out underground works in the city without checking whether public utility companies had laid underground pipes/cables. That is the lesson to be learnt from *Telekom Malaysia Bhd v Daya Timur Construction Sdn Bhd*⁶¹. In that case, P was a telecommunications provider while D was a contractor engaged to perform certain renovation works by PFM which was the owner of a premises known as Medan Pelita. P claimed that D had negligently damaged their underground cables while performing piling works which resulted damage to the copper cables and fibre optic cables. The telecommunications services in the vicinity of Medan Pelita were consequently disrupted.

The court held that the defence that P had committed an act of trespass was not available to D as: (i) the land was neither owned nor in the possession of PFM when the underground cables were laid; (ii) even if there was trespass, it could only be committed against one who had exclusive possession of the land. D was only a contractor commissioned to do renovation works while the possessor of the land was PFM, the only party that could assert the right of possession and not D. In any event, there were sufficient statutory provisions⁶² which empowered a public utility body to legally encroach upon any land to lay cables or pipes for a public purpose and thus, any argument that P had committed trespass by laying underground cables did not hold water.

It was remarked that contractors who undertook works in the city should have foreseen that public utility companies could have laid underground pipes/cables. D was conducting piling works in an urban area which was formerly not within the compound of his employer, PFM. The area in question was in the middle of the city and piling was done near a public road. A reasonable contractor would have

foreseen that the pipes and cables could have been laid underground and would have made enquiries with his employer or the relevant public utility bodies before proceeding with its piling or drilling works. No such inquiry was made. Neither was any wayleave application (a standard practice) made to P to find out about underground cables. This omission constituted a breach of duty of care owed to P. D was thus liable to P.



REVENUE LAW

TAX-DEDUCTIBILITY OF LOSS DUE TO DEFALCATION BY EMPLOYEE

The ex-managing director (Ex-MD) of the taxpayer company (AQP) was convicted of a criminal breach of trust in 2001 when he was found to have falsely claimed to have paid money to AQP's suppliers and customers, and then 'reimbursed' himself from AQP's funds. Due to these misappropriations, AQP lost about \$12m (the Loss). Although AQP in 2003 obtained judgment against him for the money misappropriated, it could not recover anything

⁶¹[2013] 3 CLJ 467

⁶²Section 215 of the Communications and Multimedia Act 1998 and s 37(a) of the Sarawak Land Code.

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since he was subsequently declared a bankrupt. Two years later, AQP applied to the Comptroller of Income Tax (R) for relief under s 93A of the Income Tax Act (Cap 134, 2008 Rev Ed) of Singapore (the Singapore ITA) on the basis that it had made an error or mistake within the meaning of that section by not claiming a deduction for the Loss under s 14(1) of the Act in its income tax return for YA 2000. R refused such relief which determination was upheld by the Income Tax Board of Review (the Board) and the High Court. The decision was upheld on its final appeal as reported in *AQP v Comptroller of Income Tax*⁶³.

We decided to feature this case as the relevant provision in the Singapore ITA, s 14(1) is substantially identical to s 33 of the Income Tax Act of Malaysia (Malaysia ITA). The said s 14(1) provides:

"For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Act (referred to in this Part as the income), there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of income ..."

The said s 33 provides:

"...the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source ..."

Therefore, this decision from the highest court in Singapore is highly relevant to the interpretation and application of the said s 33 in Malaysia. At first blush, the said s 14(1) was deceptively simple. A plain reading of the said s 14(1) would suggest that the Loss would not fall within its ambit, since defalcations by an employee would not usually be considered an "outgoing" or an "expense" which is "wholly and exclusively incurred ... in the production of income" within the meaning of s 14(1). However, as pointed by the apex court, this was not the

approach adopted by the courts of the various jurisdictions.

At the appeal, AQP had contended the test to determine the tax-deductibility of loss incurred by a company as a result of defalcation by its employee was the "in the course of normal income-earning activities" test. This was rejected as too broad since, if adopted, any and every defalcation by any and every employee would almost always be a permissible deduction pursuant to s 14. The correct test was the "overriding power or control" test.

Firstly, where it was clear that the employee committing the defalcation of the taxpayer's funds had no overriding power or control (such as subordinate employees) and where it would therefore be impractical to institute a sufficient set of checks and balances to prevent defalcations by such employee, deductions for defalcations would be allowed pursuant to s 14(1).

On the other hand, where the employee concerned possessed an "overriding power or control" in the taxpayer company (*ie*, in a position to do exactly what he liked), then the question was whether a sufficient system of checks and balances had been put in place by the taxpayer. If affirmative and defalcations nevertheless occurred as a result of the employee still managing to abuse his position of overriding power and control, a deduction for such defalcations would be permitted. On the converse, if the taxpayer concerned did not put in place a sufficient set of checks and balances with the result that overriding power or control was abused by the employee concerned, then it was logical, fair and commonsensical for R to refuse the taxpayer concerned a deduction for such defalcations.

What constituted a sufficient system of checks and balances would naturally be fact-sensitive and would therefore vary from situation to situation, depending on the precise factual matrix and context concerned. In the instant case, the lower courts were relying upon the findings in the criminal proceedings against the Ex-MD in holding that the Ex-MD was in fact in a position of overriding power and control. These findings, while relevant, did not furnish a full picture of the proceedings. In particular, AQP was not a party to the criminal proceedings and

⁶³[2013] 2 SLR 155

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thus did not have the opportunity to proffer evidence as to whether or not it had, in fact, instituted a proper system of checks and balances. Apart from this, AQP should also be given the opportunity or choice to challenge the findings of the court in the criminal proceedings to the effect that the Ex-MD did in fact possess overriding power or control in the organization in the first place. In the circumstances, the court remitted the matter to the Board for the necessary evidence to be adduced.

TENANCY

RE-ENTRY OF PREMISES IN ABANDONED STATE

In *Mas Anita bt Abdullah v Lew Wai Koung (No 2)*⁶⁴, the landlord (L) had obtained a judgment in default (JID) against his tenant (T) for arrears of rentals and vacant possession of the tenanted premises. The JID was served on T on 14.10.2011. When L went to the premises, the premises were locked. The neighbours informed L that T was seen leaving the premises with big bag some time in September 2011 and she did not return. By a letter dated 14.10.2011, L gave T seven days' notice before re-entry into the premises. L then lodged a police report and on 21.10.2011, accompanied by some police officers, he re-entered the premises. L found the premises in an abandoned state. T filed action to claim for loss of her personal possessions. An issue arose as to whether a writ of possession was required to get vacant possession of the premises. T contended that under O 45 r 3 of the Rules of Court 2012 a writ of possession was required before L could recover vacant possession, whereas L contended that he proceeded under s 234(2) of the National Land Code (NLC) and thus, a writ of possession was not required.

The High Court held that by the use of the word 'may' in O 45 r 3(1), there could be more than one way for L to enforce the judgment for possession of his immovable property. Thus, L could elect to proceed under the NLC, when T had breached the tenancy agreement by non-payment of rentals, by re-entry onto the premises. As stated in the said s

234(2), L's re-entry onto the land was subject to the provisions of any other written law for the time being in force. In this regard, the relevant laws were the Rules of Court and the Specific Relief Act 1950 (SRA). Section 7(2) of the SRA read together with s 7(3) meant that if a tenancy was determined or had come to an end, and if the occupier continued to remain in occupation of the property, then L shall not be entitled to possession of the property without court proceedings and getting a court order. However, here, L had already obtained the judgment against T, and the tenancy had been terminated, but T still failed to pay the rentals owed and yet continued to occupy the premises unlawfully. Since T was not a lawful occupier at the material time under s 7(3), it followed that s 7(2) could not be invoked by T. The result was that L was not required to get a court order or a writ of possession before re-entry into the premises.

TORTS (DEFAMATION)

UTUSAN'S DEFAMATORY MISREPORTING ON ANWAR

Local daily, Utusan Melayu, was found liable for defaming opposition leader, Datuk Seri Anwar Ibrahim (DSAI), by publishing 2 articles on statements made by a politician which were defamatory of DSAI. The two statements were supposedly based on a statement given by DSAI during an interview with the British Broadcasting Corporation (BBC). DSAI's statement is as follows:

We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public

⁶⁴[2013] 8 MLJ 815

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sphere or domain. I don't think we even need to make apologies towards that but I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

The first of the two articles appeared on the front page of the Utusan Melayu newspaper on 17.1.2012 and reads:

'TOLAK ANWAR-HASSAN'

Bekas Pesuruhjaya PAS Selangor, Datuk Dr. Hassan Ali (DW1) membidas Datuk Seri Anwar Ibrahim kerana mempertikaikan undang-undang berkaitan homoseksual di negara ini.

Menurut beliau, pendirian Anwar tersebut bukanlah baharu kerana itulah pandangan peribadi dan pegangan asasi Penasihat Parti Keadilan Rakyat (PKR) tersebut.

Oleh itu beliau menggesa rakyat menolak perjuangan Anwar kerana kegiatan tidak bermoral itu jika dihalalkan boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam Negara.

The second article published on p.10 of the same newspaper on the same day is as follows:

'PARASIT ANCAM PAS, ANWAR MESTI DITOLAK'

HASAN : Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

In a lengthy judgment, the High Court in *Datuk Seri Anwar Ibrahim v Utusan Melayu (M) Bhd & Anor*⁶⁵ allowed DSAI's claim with costs. The trial judge, VT Singham J held that DSAI had only said that the laws on homosexuality have to be reviewed and had no time said or

raised the issue that homosexual activities in Malaysia had to be legalized. DSAI did give reasons as to why he viewed that there was a need to review the laws on homosexuality and he had also qualified his views for the review. The articles published could not be reconciled nor did it commensurate or was it proportionate with DSAI's statement to BBC but it was rather a distorted and incorrect version and obviously taken out of context thereby giving the readers or the public generally that DSAI by implication wished to legalize homosexual activities which was not true.

The defence of justification and fair comment failed. Whilst Utusan Melayu conceded that there was not truth in the contents of the articles, it tried to shield by submitting that the articles published were the views of DW1. To this, the court held that Utusan Melayu as the publisher and editor owed a duty to the public and to DSAI to have verified the truth of what was said by DW1 in reference to DSAI's statement to BBC before the articles were published and ought not to be influenced by merely publishing the articles under the guise of public interest where the articles might eventually turn it to be untrue or was untrue at the time of the publication. There was no responsible journalism carried out. On the defence of reportage, there ought to be a balancing exercise by the defendants to provide information to the public on matters of public interest which must be the truth as against the need to avoid damaging the reputation of an individual which could be compromised. The fact that the articles were commented by a supposedly reputable politician should make no difference and was an irrelevant consideration in construing the articles in the context of a defamation suit.

⁶⁵[2013] 3 MLJ 534 , [2013] 2 AMR 678

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INTERNET LIBEL

Where, a web page although technically accessible has not been visited by any person other than its author and the defamed person, then publication will not have occurred

The question whether defamatory statements in an Internet blog were published (in the eyes of law) was raised in *Zhu Yong Zhen v AIA Singapore Pte Ltd and Anor*⁶⁶. P had made a number of allegedly defamatory statements of D in her internet blog which was accessible to the public for a period of 25 days. In law, it was insufficient for defamatory material on the Internet to be technically accessible --- it had to actually have been visited by a 3rd party for the requirement of publication to be met. There was no presumption of law of substantial publication in regard to Internet libels.

In the instant case, P had not adduced any evidence to show that the blog was accessed by 3rd parties, whether by means of witness testimony, on the face of the printout of the blog that was in evidence, web analytics data, evidence from which it could be inferred that the blog had been accessed by 3rd parties or by establishing a prominence given to the blog by Internet search engines when relevant search terms were entered⁶⁷.

Given the relatively short period for access to the blog and `absence of evidence on any comments left on the blog, it was probably a dormant page on the Internet that was technically accessible but never visited. Since publication had not been proven, D's counterclaim against P in defamation failed.

PUBLISHING UNSEALED WRIT - PROTECTABLE UNDER PRIVILEGE ?

D had filed a legal suit against P which was subsequently withdrawn. However, prior to the withdrawal, D had through their solicitors caused the contents of the unsealed writ and statement of claim (the writ and SOC), which contained defamatory statements about P, to be published in the newspaper, TV3 and Bernama. Could D rely on the defence of absolute privilege to ward off P's suit in defamation against D ? That is one of the features in the High Court case of *Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor*.⁶⁸

The answer is "No". A fair and contemporaneous report of proceedings publicly heard (in open court) is absolutely privileged⁶⁹. However, the writ and SOC filed in the registry by D had not been used by D in an open court hearing (and indeed, had not been extracted when they were made available to the media). That being the case, the publication of the alleged defamatory statements to the media did not attract any privilege. The defence failed.

For the benefit of our readers, privilege also does not protect publication of extracts from documents prepared for pending legal proceedings⁷⁰. Even a document filed and served is not part of the court proceedings that attracts qualified privilege.⁷¹

⁶⁶[2013] 2 SLR 478

⁶⁷*Steinberg v Pritchard Englefield (a firm)* [2005] EWCA Civ 288

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⁶⁸[2013] 8 MLJ 348

⁶⁹Section 11(1) of the Defamation Act 1957

⁷⁰*Stern v Piper* [1996] All ER 385

⁷¹*Smith v Haris* [1996] 2 VR 335, *Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289

FALSE IMPRISONMENT BY WRONGFUL ARREST

In *Mahfuz bin Omar v Inspektor Mohd Zaid bin Madzizat & 3 Ors (and Another Case)*⁷², M, a member of Parliament and high-ranking official of opposition party, Parti Islam Se-Malaysia (PAS) was arrested by D1 at 11.50am upon alighting from a taxi on his way towards Hilton Hotel KL at which a press conference was being held in connection with a protest march to Istana Negara to present a memorandum concerning the need for free and fair elections. P was taken to and confined in a police station until his release at 9.30pm. The area in which he was arrested (pursuant to s 105 of the Criminal Procedure Code [CPC]) was not covered by the order of the Magistrates' Court that had been obtained by the defendants barring 66 people from being present in designated areas. M was one of the 66 named.

Section 105 of CPC provides:

"Arrest to prevent seizable offences
A police officer knowing of a design to commit any seizable offence may arrest without orders from a Magistrate and without a warrant the person so designing it if it appears to the officer that the commission of the offence cannot otherwise be prevented."

The High Court held that there was no evidence of a design by M to commit an offence and at the time of his arrest, it could hardly be said that the arrest would have prevented the march from taking place. It was the intention of M to attend the press conference only but even if that was not the case, it was premature for M to be arrested. His intention to attend the press conference could not constitute a basis for arrest under the said s 105 of the CPC. There was merely apprehension on the part of D1 (that M might commit an offence) but not knowledge which was the pre-requisite under the said s 105. The arrest under s 105 was unsubstantiated. Further, the fact that PAS supported the march did not *ipso facto* mean that M would have had a design to participate in the march or that M must have been party to the

design or associated with it to move out of Hilton Hotel KL into areas prohibited by the Magistrates' Court order in violation of the same or to take part in a rally without a police permit. The detention of M was thus unlawful and an act of false imprisonment. In assessing damages, the court took into consideration: deprivation of M's liberty in breach of Article 5(1) of the Federal Constitution; M was afforded access to his solicitors; no evidence of physical injury and mental suffering; and existence of an element of disgrace and humiliation by virtue of the wrongful arrest. M was awarded RM70,000 in damages.

TORTS / BANKING LAW

ILL-ADVISED ON NO RISK TO CAPITAL INVESTMENT

In *Rubenstein v HSBC Bank plc*⁷³, the claimant investor wanted to find a safe investment for the proceeds of sale of his home pending the purchase of another property. He wanted to deposit the proceeds where they could be readily accessible, in case of a repurchase. He had researched the defendant bank's deposit rates; he had a significant amount to invest, and thought he might be able to get a better return if he made a direct approach to the bank. M, a qualified financial advisor employed at the bank's private client department attended to the claimant. M was only permitted to recommend products on the bank's approved list. M mentioned an investment in an enhanced variable rate fund (EVRF), which he said was an insurance product. The claimant told M that he was very unlikely to need the account for more than a year, and that he could not afford to accept any risk in the investment of the principal sum. M assured the claimant that the bank viewed the investment as 'the same as cash deposited in one of or accounts', and that the only risk was akin to the risk of default which applied to any deposit account, and that there was not any real risk at all. The EVRF was the only product M recommended to the claimant and he did not discuss any other product such as a deposit

⁷²[2013] 1 AMR 637

⁷³[2013] 1 All ER (Comm)

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account or the more conservative standard variable rate fund. He did not conduct any 'Know your customer' analysis as set out in the Financial Services Authority (FSA)'s Conduct of Business Rules (COB). The claimant duly transferred the sale proceeds into the EVRF.

In truth, an investment in EVRF was not the same as a deposit or even akin to it. It was an investment in the market and subject to market fluctuations. An investor in the EVRF was not entitled to the return of his investment, only to its value at the time of request, which could fluctuate on a daily basis. Value depended on the underlying assets held within the fund. An investor was ultimately entitled only to an aliquot share of those assets. In September 2008, extreme market turmoil occurred, in which there was a run on the EVRF. The claimant withdrew his investment and sustained a significant loss. He sued the defendant bank contending that the advice he obtained from M had been negligent and in breach of various statutory duties under the COB and that he had relied upon that advice.

The trial judge ruled for the claimant on liability but found that the loss suffered by the claimant had not been caused by the bank's negligence or breach of duties but by unprecedented market turmoil (which surrounded the collapse of Lehman Brothers) that had been unforeseeable and too remote. Only nominal damages was awarded.

On appeal, the UK Court of Appeal overturned the finding on remoteness of damage. In their Lordship's view, what connected the erroneous advice given to the claimant and his loss was the combination of putting the claimant into a fund which was subject to market losses while at the same time misleading him by telling him that his investment was the same as a cash deposit, when it was not. It had been the bank's duty to protect the claimant from exposure to market forces when he made clear that he wanted an investment which was without any risk. It was wrong in such circumstances to say that when the risk from exposure to market forces arose, the bank was free from responsibility because the incidence of market loss was unexpected. That position was not affected by the fact that the claimant had originally envisaged that he would not need the

investment for more than a year. The trial judge's finding on remoteness of loss was thus set aside and replaced with damages in accordance with the judge's obiter findings as to quantum.

TORTS / EMPLOYMENT LAW

NOT LIABLE FOR IGNORANCE OF MISUSE OF TRADE SECRETS

In a suit based on breach of confidential information in the UK Supreme Court case of *Vestergaard Frandsen A/S and others v Bestnet Europe Ltd and others*⁷⁴, D6 was employed in late 2000 by the claimant (C) as a sales and marketing assistant and then as a regional sales manager. By clause 8 of her employment contract, D6 agreed to "keep absolutely confidential all information relating to the employment and any knowledge gained in the course of the employment and which inherently should not be disclosed to any third party". In 2004, she left C and, with another ex-employee of C and S, a consultant who had principally developed C's techniques to manufacture and sell long lasting insecticidal nets, started a business manufacturing and selling a new long lasting insecticidal net (new product). The new product was developed by S using C's trade secrets (a fact of which D6 was unaware) in breach of his duty of confidence to C. C sued for misuse of their confidential information against, among others, D6.

As against D6, the Supreme Court ruled that she was not liable for breach of confidence under the express terms of clause 8 of her contract. The confidential information wrongly used by S to develop the new product was neither information relating to her employment nor knowledge gained in the course of her employment. It was knowledge gained by S in the course of his consultancy work for C. To imply a term into D6's contract to the effect that she would not assist another person to abuse trade secrets owned by C, in the circumstances where she did not know the trade secrets and was unaware that they were being misused, would be wrong in principle. Such would be inconsistent with the more limited terms of

⁷⁴[2013] 1 WLR 1556

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clause 8, unnecessary in order to give the employment contract commercial effect and almost penal in nature. Such a term did not therefore satisfy the well established tests (for implication of terms) of obviousness nor reasonableness.



On the ground that D6 was liable for breach of confidence on the basis of common design, the law lord delivering the judgment of the court pointed out that in order for a defendant to be a party to a common design, she must share with the other party(ies) to the design, each of the features of the design which made it wrongful. If, and only if, all those features were shared, the fact that some parties to the common design did only some of the relevant acts, while others did only some other relevant acts, would not stop all of them from being jointly liable. In the instant case, however, D6 did not share one of the features of the design, namely the necessary state of knowledge or state of mind. Thus, although she was party to the activities which might have rendered other parties liable for misuse of

confidential information, she could not be liable under the common design for exploiting with others a product which, unknown to her, was being and had been developed through the wrongful use of C's trade secrets.

Lastly, in the absence of any finding of dishonesty on D6's part, she could not be liable simply on the basis that she had worked for C and then formed and worked for the business responsible for the design, manufacture and marketing of the new product. In the words of the law lord :

"...in a modern economy, the law has to maintain a realistic and fair balance between (i) effectively protecting trade secrets (and other intellectual property rights) and (ii) not unreasonably inhibiting competition in the market place. The importance to the economic prosperity of the country of research and development in the commercial world is self-evident, and the protection of intellectual property, including trade secrets, is one of the vital contributions of law to that end. On the other hand, the law should not discourage former employees from benefiting society and advancing themselves by imposing unfair potential difficulties on their honest attempts to compete with their former employers."

TRUST LAW

WAS THE TRUST DEED A SHAM?

That was the foremost question that sprang into mind in the Singapore case of *Chng Been Kheng and anor (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye*⁷⁵. The plaintiffs were executrixes and trustees of their mother's estate. There was a trust deed executed by their brother, D, who purportedly held a property (which was registered under D's name) on trust for their deceased mother. However, D denied this and asserted that the trust deed was a

⁷⁵ [2013] 2 SLR 715

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sham to let creditors think that the property belonged beneficially to their mother. He claimed that he was the beneficial owner of the property, not their mother.

The High Court judge dwelled at length on the concept of a sham. A sham basically meant “*acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create... all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.*”⁷⁶

The crux of the sham concept was a common intention by, generally, the settlor⁷⁷ and the trustee, to mislead. In the absence of a common intention to mislead, the court would simply construe an agreement according to the actual objective intention of the parties.

In ascertaining whether there was a common intention to mislead, the court looked beyond the objective intentions as demonstrated by the document, and determined the parties’ subjective intentions. In the instant case, since D was the settlor and the trustee of the trust, only his intention was definitive, even if the conduct of others might be relevant in shedding light on D’s intention at the time of the execution of the trust deed.

The findings of the court were that upon taking all the surrounding circumstances at the time of the execution of the trust deed, the deed was intended to protect the property from D’s potential future creditors at that time by giving the beneficial interest in the property to the mother. D was following his father’s intentions at all times and it was more likely that his father intended for the mother to hold the beneficial interest in the property than D. None of the parties at that time intended the trust deed to be a sham in the sense that beneficial ownership of the property was not to vest in the mother but was to remain with D after the deed was signed. No one intended a situation contrary to what

was stated in the deed which was prepared to give effect to a genuine trust. Thus, the strong presumption⁷⁸ that the trust deed meant what it said had not been displaced. The learned judge remarked that the mere fact that the trust deed was intended by all parties as a means to protect the property from D’s potential future creditors did not make the deed a sham. To say the deed was a sham meant that while the deed professed to accord beneficial ownership to the mother, it in fact meant something different in that the true beneficial owner of the property was someone other than the person stated on the face of the deed ie. the mother.

D’s alternative defence in various estoppels⁷⁹ that their mother had represented or conducted herself in such a way as to lead him to believe that he was the beneficial owner of the property was also turned down by the learned judge. The plaintiffs’ claim was thus allowed.

APPEAL UPDATE

ENDGAME OF THE CHRONICLES OF KIMLIN

After more than 2 years, our apex court finally laid to rest the unending saga of seemingly conflicting decisions on the law concerning disposition of landed assets charged by a company as security to a bank by way of registered charge under the National Land Code (NLC) concurrently with a debenture and the company is subsequently placed under receivership or in liquidation. The Federal Court’s decision in January 2013 in *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor*⁸⁰ is long awaited to clear the haze surrounding decisions in *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Sdn Bhd*⁸¹, *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor*⁸², *K*

⁷⁶*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802

⁷⁷A settlor is a person who makes a settlement of property; esp., one who sets up a trust: *Black’s Law Dictionary*, 7th Ed.

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⁷⁸*National Westminster Bank plc v Rosemary Doreen Jones* [2001] 1 BCLC 98

⁷⁹Estoppels by representation (by conduct), estoppels by convention, proprietary estoppels and estoppels by acquiescence.

⁸⁰[2013] 3 MLJ 161, [2013] 3 AMR 760

⁸¹[1997] 2 MLJ 805

⁸²[2003] 2 MLJ 193

*Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd v MBf Finance Bhd & Anor*⁸³ and its own decision at the Court of Appeal⁸⁴. We have covered these decisions in our earlier Special Issue 1 of 2011 of The Update. To shorten and simplify the issues, readers are invited to read that Special Issue and cross-refer it with our write-up here.

Firstly, the Federal Court in *Lim Eng Chuan* upheld the majority decision of the Court of Appeal. It affirmed the finding that the bank (UMBC) sold the land and signed the sale and purchase agreement (SPA) as attorney for the borrower under an irrevocable power of attorney (PA), which meant the sale was carried out by the chargor/borrower and *Kimlin* was not applicable. It emphasized that *Kimlin* must be confined to the narrow issue of whether a receiver and manager, appointed under a debenture but not as an attorney of the borrower (due to the absence of a PA clause therein), could sell land charged under the NLC without taking proceedings under the NLC. The decision in *Kimlin* has nothing to do with an attorney appointed pursuant to a PA clause in the debenture as in *Lim Eng Chuan*. Thus, it is now settled law that a sale by a chargor through its attorney, pursuant to an irrevocable power of attorney given for valuable consideration, of land charged under the NLC, without complying with the procedure under the NLC, is valid.

On the question whether a PA expressed for valuable consideration and irrevocable pursuant to s 6(1)(a) of the PA Act 1949 survived and remained valid upon the winding up of a donor company, the court answered it in the affirmative. The winding up order did not vitiate, nullify or revoke the PA that the borrower had expressly granted to UMBC in the debenture. The borrower was only under winding up order at the time the SPA was entered into but it was not dissolved.

On the question whether leave of the court was required by s.223 of the Companies Act 1965 (CA) in the disposition of property belonging to a company in liquidation which was held as a security, the court relied heavily on a decision of the Supreme Court of New South Wales in *Re Margart Pty Ltd (in liq); Hamilton v*

*Wespac Banking Corp & Anor*⁸⁵ in coming to the decision that said provision did not apply to the realization by a secured creditor of assets of a company charged as security. Thus, the sale of land by the bank as attorney for the borrower was not a disposition within the meaning of s.223 of the CA.

As to the question whether a company could grant a PA, the court ruled that on the strength of numerous provisions in the PA Act 1949 and the CA, a company was competent to create a PA provided that there was scrupulous compliance with the form of authentication of the PA.

So, finally, the law governing powers of debenture holder exercising such powers as attorney granted by a valid PA to sell landed assets by private treaty instead of going through the mechanism of judicial sale as provided under the NLC as understood prior to *Kimlin* was restored. *Kimlin* must be restricted to its peculiar facts. And with this, we hope that there is no more confusion and uncertainty in this area of law.

⁸³[2005] 2 MLJ 201

⁸⁴[2011] 1 AMR 44

⁸⁵(1984) 2 ACLC 709

IMPORTANT

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