

# THE UPDATE



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#### ABBREVIATIONS

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

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## ARBITRATION

### ARBITRATION BY INCORPORATION

In *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd*<sup>1</sup>, R (or PIL) and A had dealt with each other for a long time where A had regularly purchased from R palm oil products. In this instance, R had issued and faxed to A four sales contracts which were unsigned. The contracts contained a caption 'ALL OTHER TERMS AND RULES NOT IN CONTRADICTION WITH THE ABOVE AS PER PIL'S TERMS AND CONDITIONS'. Dispute arose between the parties whereupon R referred it to Palm Oil Refiners Association of Malaysia (PORAM) for arbitration. A however contended that in the absence of a written arbitration agreement between the parties, PORAM had no jurisdiction to adjudicate the dispute, reference being made to s.9(5)<sup>2</sup> of the Arbitration Act 2005 (the Act). R however produced its standard terms and conditions of sale (STC) which allegedly contained the arbitration clauses, to which A argued that the STC was a separate document which A had neither seen nor agreed to whereas the sales contracts themselves did not contain any specific dispute resolution clause.

All four panels, namely the PORAM Arbitral Tribunal, High Court, Court of Appeal and Federal Court (FC) came to the same conclusion that the tribunal had jurisdiction to hear the dispute. At the final appeal before the FC, it was held that the sales contracts, though

not signed, were valid and enforceable contracts on the evidence adduced. As they prominently incorporated the STC, the intention of the parties was clear that the arbitration clause would also be applicable. There was no requirement under the Act that where an agreement made reference to a document containing an arbitration clause, that agreement must be signed. In the instant case, the sales contracts were in writing and satisfied the requirement of s.9(4) of the Act. That agreement in writing incorporated the STC which contained the arbitration clause and that satisfied the requirement of s.9(5) of the Act.

Further, s.9(5) of the Act addressed the situation where the parties, instead of including an arbitration clause in their agreement, included a reference to a document that contained an arbitration agreement or clause. Thus, s.9(5) did not require the STC, which contained the arbitration agreement, to be attached or published. It was sufficient that the incorporation was by notice in the document.

The mere fact the arbitration clause was not referred to in the sales contracts and that there was a mere reference to standard conditions which were neither accepted nor signed, was insufficient to exclude the existence of the valid arbitration clause. There was no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein was required.

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<sup>1</sup>[2013] 5 MLJ 625

<sup>2</sup>S.9(5) reads: A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

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## BANKING LAW / GUARANTEE

### NOT A MUST TO STATE PRECISE AMOUNT IN DEMAND ON GUARANTOR

Though the law on loan recovery is quite certain, a recent Federal Court decision provides further clarifications on some related aspects. In *Hong Leong Bank Berhad v M Muthiah @ Nagappan & Anor (and Another Appeal)*<sup>3</sup>, the pinnacle court ruled that there was no requirement for a notice of demand, where a guarantee is made payable upon demand, to state the precise amount due and owing by the surety/guarantor to the creditor. The purpose of the demand was only to give notice to the debtor that the creditor was demanding repayment of the sum borrowed<sup>4</sup>. On a separate issue, it was provided in the guarantee that the guarantors would jointly and severally guarantee payment on demand of all monies and liabilities owing or incurred to the bank from or by the borrower. There was a proviso that stated that the total sum recoverable from the guarantors was to be limited to RM5.6m (the proviso) “together with such further sum for interest thereon and other commission banking charges and legal and other costs charges and expenses...”. The court held that the proviso must not be read in isolation. The expression “together with such further sum for interest...” in the proviso clearly indicated that the extent of the guarantors’ liability was not limited to the sum of RM5.6m but should also include other sums comprising interest on the loan, commission or other charges named therein. As it was also specified as a continuing guarantee, the liability of the guarantors was not confined to the principal sum alone but should include interest arising

<sup>3</sup>[2013] 6 AMR 535

<sup>4</sup>*Nik Chee Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328, *Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpaya* [1995] 3 AMR 2337. Indeed, in *Shell Marketing Co of Borneo Ltd v Wee Boon Ping* [1990] 1 CLJ 564, even though the amounts stated in the letters of demand were more than the amount finally claimed, summary judgment was entered for the plaintiff.

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from the loan plus other charges. As principal debtor too, the guarantors’ liability was not restricted to the sum of RM5.6m but the whole sum due and owing to the bank by the borrower. Therefore, considering all such provisions, it was clear beyond doubt that the guarantors’ liabilities could not be limited to RM5.6m as contended. The appeal of the bank against the dismissal of its claim by the Court of Appeal was thus allowed.



## COMPANY LAW

### PRE-EMPTIVE RIGHTS APPLICABLE FOR INTERNAL TRANSFERS TOO

Where there is a provision in the articles of association (AA) of a company which prohibits the transfer of shares by a member of the company to any non-member unless the pre-emptive rights of existing members to purchase the shares have been observed, does such restriction apply only to external transfer, *ie.* to non-members or it also applies to include internal transfer, *ie.* from one existing member to another? That was the pivotal question in the High Court case of *Durable Portfolio Sdn Bhd & Anor v Pang Kee Hwi Realty Sdn Bhd & 2 Ors*<sup>5</sup>.

The shareholding of the company (D1) was as follows:

D2	26.7%
WL & Daughters S/B	9.7%
P1	21.21%

<sup>5</sup>[2013] 2 AMCR 877

P2	21.21%
UM S/B	21.21%

D2 intended to transfer her shares to WL & Daughters S/B and she gave the requisite notice to the company secretary (D3). P1 and P2 (the Plaintiffs) objected to the transfer on the ground that any shareholder intending to transfer his shares must abide by Article 37 of the company's AA which required him to make a general offer to existing shareholders on a pro rata basis. The relevant provision of Article 37 read:-

“Transfer of shares  
37. ...*(b)* Save as herein otherwise provided, no share shall be transferred to any person who is not a member of the company so long as any member or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership is willing to purchase the same at the fair value, which shall be determined as hereinafter provided.”

Citing a Court of Appeal decision in *Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Anor*<sup>6</sup> where an identical article was interpreted by the appellate court, the High Court held for the Plaintiffs. Article 37(b) had to be liberally interpreted to serve the purpose for which it was intended: the restriction on transfer of shares included internal transfer between one existing shareholder to another and was not confined to external transfer. Accordingly, no direct transfer of shares was permitted from one member to another unless the transferor made a general offer to other members or persons selected to purchase the shares at fair value. Such offer should be in the form of a notice in writing to the company called the “sale notice” and issued in accordance with Article 37(3) of the AA. The purported transfer by D2 to WL & Daughters S/B was thus declared as invalid and of no effect.

<sup>6</sup>[2002] 2 MLJ 253

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As to the 2<sup>nd</sup> prayer to order D2 to offer her shares in D1 to all the existing shareholders on a pro rate basis according to their shareholding at fair market value, the learned judge declined to make such an order as its effect would be to compel D2 to dispose of her shares whether or not she was desirous of doing so. Nowhere in the AA was there a provision for a member of the company to be compelled to dispose of his shares.

In our considered view, a literal interpretation of Article 37(b) does not support the decision. However, in fairness to the learned High Court judge's, his hands were tied as he was bound by the decision of the higher court of *Loh Eng Leong*. However, the refusal to grant the 2<sup>nd</sup> prayer was a fair and just decision.

**COMPANY LAW**

**STATUTORY DERIVATIVE ACTION AT LEAVE STAGE**

One of the elementary principles of company law is that a member (A) of a company (C) cannot, as a general rule, bring an action against a wrongdoer (B) to recover damages or secure other relief on behalf of C for an injury done by B to C, since C is the proper plaintiff because C is the party injured and therefore the person in whom the cause of action is vested<sup>7</sup>. This ‘proper plaintiff rule’ is also commonly known as ‘the rule in *Foss v Harbottle*’. However, strict adherence to this rule will put the majority members of the company in a formidable position as they may choose not to commence action in the name of the company on wrongs that have benefitted them. This will invariably lead to injustice. Thus, common law has established several exceptions to the rule<sup>8</sup>.  
(i) *ultra vires* or prohibited acts --- where the act of the company is *ultra vires*; (ii) fraud on the

<sup>7</sup>*Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No.2)*[1982] 1 All ER 354

<sup>8</sup>*Edwards & Anor v Halliwell & Ors* [1950] 2 All ER 1064, 1067, applied in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487, 502

minority --- where 'fraud'<sup>9</sup> was committed by wrongdoers who themselves being in control of the company prevented the company itself from bringing an action in its own name; (iii) special majority --- where the Companies Act 1965 (the Act) or the articles of association of a company require an act only to be done with the sanction of some majority, the rule cannot be used to override these requirements; (iv) personal rights --- where the personal rights of members have been invaded, the individual members may bring an action themselves; and (v) where justice of the case requires<sup>10</sup>. Following from this, a procedural device was created called 'derivative action' whereby a minority shareholder may bring an action on behalf of himself and all other shareholders of the company against the wrongdoers who together with the company must be cited as defendants. A typical derivative action is "AB (a minority shareholder) on behalf of himself and all other shareholders of the Company" against the wrongdoing directors and the Company.

In Malaysia, there is now available 'statutory derivative action' in s.181A to E of the Act. These provisions came into focus in *Lembaga Tabung Angkatan Tentera v Prime Utilities Bhd*<sup>11</sup>. The plaintiff, LTAT a minority shareholder in the defendant company, PUB, filed an application pursuant to s.181A, 181B and 181E of the Act for leave of the Court to commence a derivative action on behalf of PUB against its

former and current directors to, *inter alia*, hold them accountable for PUB's failure to recover the balance of an investment sum it had placed in a foreign asset management company, Boston Asset Management Pte Ltd (Boston). It was LTAT's contention that PUB had negligently failed to take necessary steps to recover the balance investment sum without giving any reasonable explanation and following Boston's winding up, PUB had also failed to file a proof of debt despite being requested to do so by LTAT.

The High Court pointed out the requirements of s.181B must be satisfied, namely giving 30 days written notice to the directors of the company of the plaintiff's intention to apply for leave, the plaintiff is acting in good faith and it appears *prima facie* to be in the best interest of the company that the application for leave be granted. The test of good faith is two-fold, one is the honest belief on the part of the plaintiff and two is that the application is not brought for a collateral purpose<sup>12</sup>. Upon evaluating affidavits, it was held that the plaintiff had fulfilled all the procedural requirements and leave was accordingly granted.

## COMPANY / CONTRACT LAW

### WINDING UP 'ALI BABA' COMPANY

In Malaysia, it is not uncommon that the actual control and ownership of a company do not vest in the person(s) appearing on the register of members of the company but in other person(s) through a scheme. Indeed, such type of company is popularly called an 'Ali Baba' company. An elaborate scheme to create such a company took place in *Norman Disney & Young Sdn Bhd*<sup>13</sup>. The intention was to circumvent the statutory requirements of the Registration of Engineers Act 1967 (REA) whereby a company is allowed to practice as consulting engineers in Malaysia if it has a

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<sup>9</sup>'Fraud' in this context does not mean fraud at common law in the sense of 'deceit' but embraces all cases where the "majority are endeavouring to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate.", see *Burland v Earle* [1902] AC 83; also see *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417

<sup>10</sup>The position in United Kingdom differs from that in Australia. Malaysian courts appear to prefer the latter, see *Abdul Rahim bin Aki, ibid* where the Court of Appeal "inclined to agree" to the approach taken in *Biala Pty Ltd & Anor v Malina Holdings Ltd & Ors (No.2)* (1993) 11 ACLC 1082

<sup>11</sup>[2013] 8 CLJ 38

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<sup>12</sup>*Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808

<sup>13</sup>*Haji Afifi Haji Hassan v Norman Disney & Young Sdn Bhd & 3 Others* [2013] 1 LNS 339

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Board of Directors comprising professional engineers who must be citizens or permanent residents. The scheme consisted of the following agreements:

- (i) a sale and purchase agreement between LYS and P for the sale of 60,000 shares held by LYS in the R1 company (the Shares) to P;
- (ii) a loan agreement between P (as borrower) and LYS (as lender) in respect of the Shares;
- (iii) a shareholders agreement between LYS, P and R2;
- (iv) a call and put option agreement between P and Norman Disney & Young of Australia (NDYA) which gave NDYA an option to purchase the Shares;
- (v) a deed of novation executed by LYS, P and NDYA whereby LYS assigned all his rights under the loan agreement to NDYA;
- (vi) a power of attorney given by P appointing NDYA as P's lawful attorney over the Shares;
- (vii) a sale and purchase agreement between LYS and P for the sale of 5,000 shares for RM62,400 which constituted a debt owing by P to NDYA and secured by a charge over the 5,000 shares;
- (viii) a loan agreement between P (as borrower) and NDYA in respect of the 5,000 shares;
- (ix) a Call Option for the purchase of the 5,000 shares between P and NDYA;
- (x) a Call Option Agreement between P and NDYA in respect of 50,000 shares;
- (xi) power of attorneys given by P appointing NDYA as the lawful attorney in relation to the 5,000 shares, 10,000 shares and 50,000 shares respectively.

From the above agreements, P acquired 65% of the shares of R1 but NDYA retained control over the shares through Powers of Attorney, and NDYA had placed call options over the shares which allowed them to call for

the shares to be retransferred to them or to their nominee at any time. As such, the 65% shares held by P were actually held on trust for NDYA.

Against such background, P applied to wind up R1 under s.218(i) of the Companies Act 1965 (CA) on the basis that it was just and equitable to do so. The High Court allowed the petition. The said agreements were illegal *ab initio* under s.24(a), (b) and (e) of the Contracts Act 1950, hence the continuing carrying on of the business was illegal. The elaborate scheme created an 'Ali Baba' type of company where control of the company was still vested in the hands of foreigners; P was nothing but more a facade. Such type of companies was illegal and against public policy in Malaysia.

The court rejected the contentions of the respondents that by allowing the petition, the court would be supporting P's case based on illegality and that the court ought not to assist P as he was a party to the fraudulent arrangement. Instead, the court held that it would not shut its eyes to illegal acts, regardless whether the fraudulent party was set to be the ultimate beneficiary. The court must act on the illegality and if the illegality could be terminated through winding up proceedings, so be it. Since 19<sup>th</sup> century, the 'just and equitable ground' to wind up a company was sufficiently wide to encompass situation where the business of a company was carried on for illegal purpose<sup>14</sup>. Thus, a winding up order was made<sup>15</sup>.

## COMPANY / SECURITY LAW

### NON-REGISTRATION OF CHARGE UNDER COMPANIES ACT

Under the Companies Act 1965 (the Act)<sup>16</sup>, it is a statutory requirement to register a statement of the prescribed particulars of a

<sup>14</sup>See *Re Thomas Edward Brinsmead & Sons Ltd* [1897] 1 Ch 406

<sup>15</sup>See also *Norman Disney & Young v Affifi Hj. Hassan* [2011] 1 CLJ 210

<sup>16</sup>S.108(1) of the Act. In Singapore Companies Act (Cap 50, 2006 Rev Ed) [the Singapore CA], the equivalent provision is s.131.

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charge created as security over a company's property or undertaking within 30 days after the creation of the said charge. Failing such registration, "the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company". Coincidentally, two decisions on the same provision was reported about the same time in law reports in Malaysia and Singapore.

### Decision of the High Court in Malaysia

In *Malayan Banking Bhd v Pusat Membeli Belah Pelangi Sdn Bhd*<sup>17</sup>, both the chargor (respondent, R) and the chargee bank (applicant, MBB) did not register the loan agreement cum assignment executed by R in favour of MBB over shop-lots acting as security for the loans from MBB to R. MBB only came to know about the non-registration of the charge when it wanted to foreclose the properties after R was wound up. MBB subsequently applied for extension of time to register the charge under s.114 of the Act by which time it was more than 10 years after the charge was executed.

The liquidators of R opposed the application. Both the High Court in Kuantan and the Court of Appeal agreed with the liquidators and dismissed MBB's application. In their view, there was no satisfactory explanation for the delay in applying for an extension of time; when it became apparent that there was already a claim by the liquidators for the properties as far back as 2003 and it was in possession of the titles since then, MBB waited for another 6 years to make the application for extension of time. An application of such nature is not granted as a matter of course but at the discretion of the court upon it being satisfied that the omission to register the charge was: (a) accidental; (b) due to inadvertence; (c) due to some other sufficient cause; (d) not of a nature to prejudice the position of creditors or shareholders; or (e)

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<sup>17</sup>[2013] 8 CLJ 28

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on other grounds that it is just and equitable to grant such relief<sup>18</sup>. MBB did not offer any satisfactory explanation for the long and inordinate delay. Further, an application for an extension of time would not be granted once the company has gone into liquidation save only in exceptional circumstances<sup>19</sup>. The MBB's application, if granted, would be prejudicial to the creditors or shareholders of R and detrimental to the liquidators' claims to the titles in respect of the properties and their accrued right. By its failure to obtain an extension of time, MBB was left with a mere 'paper security' without any real remedy insofar as security was concerned.



### Decision of the Court of Appeal in Singapore

Across the causeway, its highest court upheld an order granting an application for extension of time to register a charge pursuant to s.137 of the Singapore CA<sup>20</sup> but subject it to two provisos. In *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd*<sup>21</sup>, the delay of the foreigner charge (applicant) in making the application was not inordinate, only about 5 months from the last date the charges were to be registered and 2 months upon being advised that registration of the charges was required. The High Court was satisfied that the

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<sup>18</sup>*In re Ashpurton Estate Ltd* [1983] 1 CH 110, 119

<sup>19</sup>*JJ Leonard Properties Pty Ltd v Leonard (WA) Pty Ltd (in Liq) & Anor* [1987] 5 ACLC 575

<sup>20</sup>The Malaysian equivalent is s.114 of the Act.

<sup>21</sup>[2014] 1 SLR 733

omission to register the charges was due to inadvertence and also that it would be just and equitable to grant the applicant relief (since the chargors had both the statutory and contractual obligations to register the charges and it would not be just and equitable for the applicant to be prejudiced by the chargors' failure to do so). The order sought for was thus granted subject to: (a) in the event that either of the chargors was wound up subsequently, its liquidator would be at liberty to apply to set aside the court's orders within 12 weeks of his appointment or such extended period as the court may order; and (b) the extension of time would be without prejudice to the rights of any person claiming any interest in the property charged pursuant to any of the charges if such interests had been acquired before the time of registration of the relevant charge. The order was made although at the time of hearing, there was a real possibility that the chargor would be wound up. The fact that liquidation was imminent did not preclude the court from granting such an extension of time.

In affirming the decision of the High Court, the appellate court discussed and laid down several principles that, in our considered view, apply in equal force in Malaysia:

- (i) S. 131 of the Singapore CA invalidated an unregistered charge as against the liquidator and any creditor of the company. The word 'creditor' was not defined but the apex court ruled that "creditor" in s.131(1) meant a creditor who had acquired a proprietary right to or an interest in the subject matter of the unregistered charge.
- (ii) Prior to the onset of liquidation, a chargor could not object to the enforcement of an unregistered charge. Nor could the unsecured creditors complain because they had no proprietary interest in the company's assets.
- (iii) It was contended that, on the authority of an earlier decision of the same court in *Ng Wei Teck Michael v Oversea-Chinese*

*Banking Corp Ltd*<sup>22</sup>, on the presentation of a winding-up application, a statutory trust in the nature of a *cestui que trust* with beneficial interests over the company's assets came into place to preserve the assets in favour of the unsecured creditors, hence an unsecured creditor acquired sufficient interest in the subject matter of an unregistered charge to qualify as "creditor" for the purposes of s.131 of the Singapore CA. The apex court held that the proposition that a statutory trust was impressed on the assets of the company on the presentation of a winding-up application was incorrect. Instead, it was only upon the making of the winding-up order (in a compulsory winding-up) that the assets of the company were impressed with a statutory trust for the purpose of discharging the company's liabilities. Thus, an unsecured creditor could not claim the standing to avoid an unregistered charge on a winding-up application being made since the statutory trust did not then arise to confer beneficial or proprietary interests on such creditor.

## COMPANY / CONTRACT LAW / EVIDENCE

### BOARD REPRESENTATION FOR MINORITY

The Singapore Court of Appeal decision in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*<sup>23</sup> is a highly important and relevant one in making clear legal terminology such as interpretation, construction and implication and the related law in the process of arriving at its decision. It is highly analytical but here, due to constraint of space, only the key parts will be stated and

<sup>22</sup> [1997] 2 SLR(R) 374

<sup>23</sup> [2013] 4 SLR 193

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readers will have to refer to the full judgment for details.

## The Law

Delivering the judgment of the pinnacle court, the Chief Justice of Singapore distinguished the three terms. “Interpretation” is the process of ascertaining the meaning of expressions in a contract. In other words, interpretation concerns the meaning of *words*, so that where there is a gap in a contract arising from its silence on a certain issue, there will be no language to which an appropriate meaning can be ascribed and the interpretative process fell short. In such situation, the law provides for “implication of terms”, which is the process by which the court fills the gap in the contract to give effect to the parties’ presumed intention. On the other hand, “construction” of a contract refers to the composite process that seeks to ascertain the parties’ intention, both actual and presumed, arising from the contract *as a whole* without necessarily being confined to the specific words used. Construction encompasses both the interpretation of express terms as well as the implication of terms to fill gaps.

Evidence Act (EA) only governs the *admissibility* of evidence but does not concern with rules of contractual construction, *ie.* how a contract should be interpreted and construed. With that preface, the learned Judge dwelled on the “contextual” approach to the interpretation of terms as encapsulated by Lord Hoffmann’s five principles in UK in *Investors Compensation Scheme Ltd v West Bromwich Building Society*<sup>24</sup> (ICS)<sup>25</sup>. The Singapore apex court has on an earlier occasion largely adopted this contextual approach in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*<sup>26</sup>

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<sup>24</sup>[1998] 1 WLR 896

<sup>25</sup> In brief, in this approach, the factual matrix to be considered when construing a contract could include “absolutely anything” other than evidence as to previous negotiations and declarations of subjective intent.

<sup>26</sup>[2008] 3 SLR (R) 1029

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(*Zurich*). New Zealand has gone even further by holding that evidence of both pre-contractual negotiations and subsequent conduct may be admissible to aid in contractual interpretation<sup>27</sup> (robust approach). The question was whether Singapore ought to follow suit. Whilst s.94(f) of the EA<sup>28</sup> embodied the contextual interpretation approach (as decided in *Zurich*), did it also afford the latitude in the admissibility of extrinsic evidence that would be necessary in order to give full mileage to the robust approach? The CJ went on to supplement their earlier rulings in *Zurich* in this regard. The EA through s.94(f) permitted the admissibility of extrinsic evidence of surrounding circumstances which were (or ought to have been) in the mind of the drafter when he used those words in the contract. However, parol evidence of the drafter’s subjective intention did not constitute such surrounding circumstances. The CJ reiterated that the contextual approach was not a licence to admit all manner of extrinsic evidence and proceeded to lay down four requirements on pleadings and adduction of evidence before the court would consider the contextual approach to contractual construction.

The implication of terms in fact was next discussed. The Singapore apex court had earlier in *Foo Jong Peng v Phua Kiah Mai*<sup>29</sup> declined to follow the new “interpretative” approach to the implication of terms propounded by UK courts in *Attorney General of Belize v Belize Telecom Ltd*<sup>30</sup>. The CJ reaffirmed their disagreement with using “reasonableness” as the standard for the implication of terms and maintained “necessity” as the standard. As to the conventional tests of “business efficacy”<sup>31</sup> and “officious bystander”<sup>32</sup>,

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<sup>27</sup>*Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444

<sup>28</sup>*in pari material* with s.92(f) of the Evidence Act 1950 of Malaysia

<sup>29</sup>[2012] 4 SLR 1267

<sup>30</sup>[2009] 1 WLR 1988

<sup>31</sup>The business efficacy test is applied to identify gaps in the contract that need to be filled for it to be

they remained the prevailing approach for the implication of terms under Singapore law. While business efficacy was the normative basis for the implication of terms and the test was helpful in identifying the existence of a *lacuna*, it did not assist in identifying just what more was needed on the basis of the parties' presumed intentions to fill the gap with any degree of precision. That was where the officious bystander test served an instrumental function. In other words, the 'officious bystander' test is the 'practical mode' by which the 'business efficacy' test is implemented<sup>33</sup>. The CJ also identified at least 3 ways in which a 'gap' could arise in a contract and held that the court would only imply a term if the gap arose because the parties had not contemplated the issue at all and so left a gap<sup>34</sup>.

## The Facts

Semcorp and PPL Holdings were initially joint venture partners owning 50% of the joint venture company, PPL Shipyard. Under the terms of the joint venture agreement (JVA) and PPL Shipyard's articles of association (the Articles), Semcorp and PPL Holdings were entitled to appoint 3 directors each, so long as

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commercially workable, see *The Moorcock* (1889) 14 PD 64.

<sup>32</sup> A term can only be implied if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said of the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'. See: *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Dyeing Company, Limited* [1918] 1 KB 592, *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206.

<sup>33</sup> See Phang JA and Asst Prof Goh in *Contract Law in Singapore* (Wolters Kluwer Law and Business, 2012) at para 1063

<sup>34</sup> The other two ways are where the parties contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it and where the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution.

they both held 50% of the shares in PPL Shipyard. Semcorp subsequently increased its stake to 85% by purchasing 35% from PPL Holdings under a supplemental agreement (SA). Three more Semcorp-nominated directors were then appointed, hence six Semcorp-nominated directors on PPL Shipyard's board. Sometime later, PPL Holdings' parent company received an offer from a 3<sup>rd</sup> party to purchase its remaining 15% stake in PPL Shipyard which it accepted. The six Semcorp-nominated directors then took a number of steps, including passing several resolutions, which had the effect of reducing PPL Holdings' board influence and executive control in PPL Shipyard. Semcorp sued PPL Holdings alleging breach of certain terms in the JVA and SA. One of the contentions was that the JVA and the Articles contained an implied term which has the effect of disapplying certain clauses relating to board representation and control once the 50-50 joint venture proportion changed (the Equality Premise Clause). PPL counterclaimed, among others, that the resolutions passed were invalid against quorum requirements.

## The Decision

It was held that the Equality Premise Clause<sup>35</sup> (in a more limited form than contended for) was an implied term of the JVA and the Articles. On a true construction of the JVA, a

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<sup>35</sup> That such of the provisions of the JVA and SA, as were premised upon the existence of the equal shareholding of Semcorp and PPL Holdings in PPL Shipyard (the Consequential Articles), would cease to subsist or apply upon either party acquiring a majority of the paid-up share capital in PPL Shipyard, and the JVA itself would terminate and the Consequential Articles would no longer subsist or apply upon either party ceasing to hold any beneficial interest in PPL Shipyard. In the course of arguments, the scope of the Equality Premise Clause was confined to (a) the composition of the board; (b) the number of votes each party would have in board meetings; (c) the quorum requirement for board meetings; and (d) the appointment of chairman, deputy chairman, managing director and deputy managing director.

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party who ceased to hold an equal proportion of shares ceased to have any *right* to have a nominee director on the board of PPPL Shipyard. On that premise, if the parties were asked at the time of contracting whether other provisions relating to board representation and control would cease to apply if one party no longer had the right to appoint any director, the only answer they could have given would be an emphatic affirmation. The respective resolutions and actions taken by the Sembcorp-nominated directors were valid as the implication of the Equality Premise Clause meant that the quorum requirements cease to apply.

## CONTRACT LAW

### IMPLIED REPUDIATION FROM BREACH OF CONTRACT

In *Ampurius Nu Homes Holdings Ltd v Telfor Homes (Creekside) Ltd*<sup>36</sup>, the UK Court of Appeal has the occasion to revisit the seminal case on repudiation of contract, *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*<sup>37</sup> and restated with clarity some of the points. D was to construct commercial and residential properties consisting of 4 blocks (A-D) by target dates and lease the same on a 999-year lease to C. The target dates were 21.7.2010 for blocks C & D and 28.2.2011 for blocks A & B, a gap of 7 months.

In June 2009, due to economic reasons, D stopped work on blocks A & B. In the ensued communications, C stated that D was in breach of its obligation to carry out works on blocks A & B by the target date. On 15.9.2010, D told C that work would recommence on 4.10.2010 and it did on that date. Further negotiations were unsuccessful. On 22.10.2010, C purported to terminate the agreement on the ground that D's failure to commence works on blocks A & B in any meaningful way had amounted to a repudiatory breach. At that date, there was still

4 months before the target date for blocks A & B. D submitted that there had been no fundamental breach. D continued with the development and the development of block C & D was completed approximately 9 months later than the target date. Had C not purported to terminate the contract, practical completion would have been achieved for block A & B by end February 2012, just under 1 year later than the target dates. The gap between handover of blocks C & D and that of blocks A & B would have increased to about 13 months (instead of 7 months). C sued D for repudiatory breach of contract and sought damages. The trial judge ruled for C.

On appeal, the decision was overturned. The 2 major flaws of the judge were that: (i) he had not adequately analysed the benefit C was intended to receive under the contract in order to decide whether the breaches of the contract had deprived C of at least a substantial part of that benefit; and (ii) in assessing whether the breaches were repudiatory, he had not taken the right date which was the date when C (the injured party) had purported to terminate the contract (October 2010), not the date of the initial breach by D (June 2009).

It was thus held that:

- (i) The court was to look at the position as at the date when the injured party purported to terminate the contract, regardless in the case of actual or anticipatory breach.
- (ii) The court had to take into account any steps taken by the guilty party to remedy accrued breaches of contract.
- (iii) The court had also to take into account of likely future events, judged by reference to objective facts as at the date of purported termination.
- (iv) In carrying out task (1), it was to bear in mind that a breach of contract, although serious, could be capable of remedy. If it was remedied before the injured party purported to terminate the contract, then the fact that the breach had been remedied was an

<sup>36</sup>[2013] 4 All ER 377

<sup>37</sup>[1962] 1 All ER 474

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important factor to be taken into account.

The starting point was to consider what benefit the injured party was intended to obtain from performance of the contract and the effect of the breach on the injured party. In this case, the benefit that C was intended to obtain was a leasehold interest of 999 years duration in 4 blocks and the right for a like period to exploitation of the rents and profits to be derived from them. The trial judge had not given adequate weight to that ultimate objective and had erred in concentrating on the expected effects on the marketing period<sup>38</sup>. Further, it overstated the case to say that the consequences of *any* gap between the two handover dates had to be so serious as to amount to a repudiatory breach. The effect of the breach had been to increase the gap from 7 months to 13 months; an increase of 6 months, and the judge had failed to address what difference that had made given that the contract itself had contemplated a gap of 7 months.

On the date of the purported termination, it had not been possible to say that the actual and reasonably foreseeable effects of D's breaches had been such as to deprive C of a substantial part (let alone substantially the whole)<sup>39</sup> of the benefit of the contract. Nor was

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<sup>38</sup>The trial judge had found that it had been uncertain to C at the date of initial breach in 2009, that the works to blocks A & B would ever have been started, and those blocks had been important for the purpose of marketing the commercial units in blocks C & D and that C had wanted to avoid having to take leases of some blocks while building works continued on others, since that might have interfered with sub-letting of the premises.

<sup>39</sup>The test on how to decide whether the occurrence of an event discharged the parties to a contract from further performance of their obligations where the contract itself was silent was formulated as "whether the breach has deprived the injured party of 'substantially the whole benefit' of the contract" by Diplock LJ in *Hong Kong Fir Shipping Co* case. In the same case, Upjohn LJ stated the question as "does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or, in other

it possible to say that the delay had had the effect of frustrating the contract, whose overall objective was the grant of a 999-year lease. Uncertainty caused by delay was a commercial problem, but the delay (absent any attempt to make time of the essence), even with its attendant uncertainties, would only have become a repudiatory breach if and when the delay had been so prolonged as to frustrate the contract. In the context of an agreement to grant a series of 999-year leases, this case had been a long way from that.

## CONTRACT LAW

### RESTRICTIVE COVENANTS IN COMMERCIAL CONTEXT

The legality and interpretation of restrictive covenants were in focus in *Payette v Guay inc.*<sup>40</sup>, a decision of the Supreme Court of Canada. Restrictive covenants relating to employment and competition generally take the form of non-competition and non-solicitation clauses. Their interpretation depends on whether they are found in commercial agreements or in contracts of employment. The applicable rules are more generous in the former context but much stricter in the latter context. The law takes into account of the imbalance of power that generally characterizes an employer-employee relationship, hence interpretation of such covenants is more protective of employees. On the other hand, in relationships between

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words, is the whole contract frustrated?" Over the years, there has been a number of different formulations of the test, which on the other end is represented by the test of a deprivation of 'a substantial part of the benefit' in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216. These differences were pointed out by Lord Wilberforce in *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] 1 All ER 307 as representing applications to different contracts of the common principle that to amount to repudiation a breach must go the root of the contract.

<sup>40</sup> [2013] 3 S.C.R.95

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vendors and purchasers in the commercial context, there is ordinarily – with some exceptions – no such imbalance, hence much more flexibility and latitude in interpreting such covenants in order to protect freedom of trade and stability of commercial agreements.

In *Payette*, G, a commercial enterprise, acquired assets belonging to corporations controlled by P. The agreement for the sale of assets (SPA) contained non-competition and non-solicitation clauses. To ensure smooth transition in operations following the sale, a provision was included whereby P undertook to work full time for G as a consultant for 6 months. At the end of the transitional period, the parties agreed on a contract of employment, originally for a fixed term and subsequently for an indeterminate term. A few years later, G dismissed P without a serious reason. P then started a new job with M, competitor of G. G applied for an injunction compelling P to comply with the restrictive covenants in the SPA.

The Supreme Court upheld the decision of its Court of Appeal to grant permanent injunction against P, requiring P to comply with both clauses. It was remarked that the rules applicable to restrictive covenants relating to employment differed depending on whether the covenants were linked to a contract for the sale of a business or to a contract of employment. Parties negotiating the sale of assets had greater freedom of contract than parties negotiating a contract of employment. Thus, the rules for restrictive covenants relating to employment did not apply with the same rigour or intensity where the obligations were assumed in the context of a commercial contract. To determine whether a restrictive covenant was linked to a contract for the sale of assets or to a contract of employment, the reason why the covenant was entered into must be identified. The “bargain” negotiated by the parties must be considered in light of wording of the obligations and the circumstances in which they were agreed upon. The goal of the analysis was to identify the nature of the principal obligations under the

master agreement and to determine why and for what purpose the accessory obligations of non-competition and non-solicitation were assumed.

In light of the wording of the clauses and the factual context that led to their being accepted, the court ruled that the clauses could not be disassociated from the SPA. Thus, the scope of the clauses must be interpreted on the basis of the rules of commercial law. In commercial context, a restrictive covenant was lawful unless it could be established that its scope was unreasonable having regard to the context in which it was negotiated.

A non-competition covenant would be found to be reasonable and lawful provided it was limited, as to its term and to the territory and activities to which it applies, to whatever was necessary for the protection of the legitimate interests of the party in whose favour it was granted. On the present facts, there was no evidence that the 5-year period was unreasonable having regard to the highly specialized nature of the business's activities. Moreover, in light of the unique nature of the crane rental industry, the territory to which the non-competition covenant applied was not broader than was necessary to protect the legitimate interests at issue.

In the case of a non-solicitation covenant, a determination that such a clause was reasonable and lawful did not generally require a territorial limitation. Thus, the failure in the instant case to include a territorial limitation in the non-solicitation clause did not render it unreasonable, which meant that it was lawful.

P's appeal was therefore dismissed with costs.

## CONTRACT LAW

### “SUBJECT TO FURTHER TERMS AND CONDITIONS TO BE MUTUALLY AGREED” VS “SUBJECT TO CONTRACT”

Does the phrase “*subject to further terms and conditions to be mutually agreed*” have the same

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meaning as the stock phrase “*subject to contract*”? That was the main question raised in the Singapore High Court case of *Rudha Minerals Pte Ltd v MRI Trading Pte Ltd*<sup>41</sup>. In that case, P entered into negotiations to purchase coal from D at a conference. During the conference, P requested D to check whether its coal supplier would be agreeable to changing the load port surveyor. Shortly after the conference, D sent to P a ‘Full Corporate Offer’ (FCO) which stated that D was “ready, willing and able to offer for sale steam coal in accordance with the terms and conditions set out as follows”. The FCO also stated that it was “subject to further terms and conditions to be mutually agreed” and that the surveyor was “[t]o be mutually decided”. P replied to acknowledge receipt of the FCO and to “confirm purchase” of the coal. Subsequently, D sent a draft contract asking P to “sign and revert”. P replied that the draft contract did not reflect its request to change the load port surveyor and also requested for rejection limits for the coal. P then sent back an amended draft contract. D did not reply until P sent an e-mail asking for the signed contract, to which D replied that it was facing “quality issues” with its supplier and could not make further shipments in the meantime. Eventually D did not carry out the sale and P sued D for damages. The issue was whether there was a binding legal contract between the parties.

The trial judge held that the parties had intended to enter into a binding contract through P’s acceptance of the FCO. Various evidential indications (including parties reaching agreement on most of the major terms of the transaction) and the language used by the parties in their e-mails and the FCO pointed to a case of offer and acceptance. On D’s contention that the FCO was “subject to contract” such that parties were only bound when a formal written contract was executed, the actual phrase “subject to further terms and conditions to be mutually agreed” did not have the same meaning as “subject to contract”. It referenced the fact that there was an existing

agreement on the terms and conditions stated in the FCO, to which *further* terms and conditions could be added by mutual agreement. It is the 4<sup>th</sup> class of cases identified in the Australian courts as “...one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms...”<sup>42</sup>. Further, the words “to be agreed” have to be construed in their context and their mere presence in an agreement did not mean that *ipso facto* no concluded contract was formed. In every case, all the circumstances must be considered.

Parties might conclude a binding contract *even though there were some terms yet to be agreed*. The important question was whether the parties, by their words and conduct objectively ascertained, have demonstrated that they intended to be bound despite the unsettled terms. It was for the parties to decide whether they wished to be bound and, if so, by what terms. The fact that the load port surveyor was “[t]o be mutually decided” as stated in the FCO did not detract from the parties’ intention to be bound. It was unlikely that either party considered the consequences of failing to agree on the load port surveyor as they had already agreed that D would request its supplier to change the load port surveyor to either one of P’s two preferred surveyors. As for rejection levels, parties could not have intended to defer legal relations until this issue had been agreed upon because this point had only surfaced after P accepted the FCO.

The next question was whether the parties had reached agreement on the unsettled terms. If they had not, the existing contract would not be invalidated unless the failure to reach agreement on such terms rendered the contract unworkable or void for uncertainty<sup>43</sup>.

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<sup>41</sup> [2013] 4 SLR 1023

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<sup>42</sup> *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622

<sup>43</sup> *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep 601

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The choice of load port surveyor<sup>44</sup> was a term without which the contract could not be enforced. There was no evidence that the result of analysis by any professional, independent and established surveyor would be largely similar or equally satisfactory. On the evidence, it was unlikely that parties had agreed on a default load port surveyor if P's request to change the load port surveyor could not be accommodated. Therefore, since the choice of load port surveyor was essential to the contract but not agreed upon, the contract was void for uncertainty or incompleteness.

## CONTRACT / LAND LAW

### SELLING PROPERTY YET TO BE ALIENATED

In *Saw Siew Tuan v Omicrast Manufacturers Sdn Bhd*<sup>45</sup>, D's deceased husband was the holder of a lease of land (the property) which had expired on 20.5.1982. On 15.11.1995, D entered into a sale and purchase agreement (SPA) to sell the property to P. Subsequent to that, P had assisted D to apply for a lease of the property. The application was successful and a new lease commencing 14.11.2004 was issued. D however refused to take steps to apply to the state authority for consent to transfer the property to P within 3 months from the date of receipt of the document of title. P sued D for specific performance of the SPA, which was allowed at the High Court.

On appeal, the Court of Appeal held that at the time of execution of the SPA, D had no good title to the property as the lease had expired 13 years earlier. D might have had the intention to sell the property but she had no interest or title in the property at the material time which she could covenant to convey to P. Alienation of state land took effect upon registration of a register document of title and

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<sup>44</sup> The role of a load port surveyor was to analyse samples of the cargo using international standards for the purposes of ascertaining whether the cargo conformed to the contractual specifications.

<sup>45</sup>[2013] 6 MLJ 189, [2013] 9 CLJ 111

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notwithstanding its alienation had been approved by the State Authority, the land would remain state land until that time and there could be no intervention by equity in the face of specific legislative provisions of the National Land Code.

The SPA provided that the sale was subject to the approval of the relevant authorities being obtained. Thus, the completion of the SPA was predicated on the occurrence of certain events. Taking into account (i) that D had no good title to the property; (ii) that the SPA did not provide for any time period for D to obtain approval for alienation of the property in her favour; and (iii) that there was no certainty that the State Authority would approve D's application, the completion of the sale and purchase transaction was thus uncertain and the SPA was void for uncertainty. The appeal was allowed and the decision of the High Court was set aside.

## COURT PROCEDURE / LAND LAW

### LEAVE TO APPEAL TO FEDERAL COURT IN LAND ACQUISITION MATTERS

Ordinarily, for a civil suit which is filed at the High Court (HC), any party who is dissatisfied with the decision of the HC is entitled to file an appeal against such decision to the Court of Appeal (COA). Thereafter, if any party in the appeal is dissatisfied with the decision of the COA, it will need to apply for leave (or in laymen terms, permission) of the Federal Court (FC) (which is the highest court of the land) to appeal to this apex court. Only when leave is granted, then an appeal can be lodged to the FC against a decision of the COA. It is not often that leave is granted, probably only about 20% of applications for leave to appeal succeed, based on an estimate revealed by a FC Judge at a law conference. Essentially, the hurdle that needs to be crossed by an applicant for leave to appeal is to show that the question formulated for a ruling involves a question of general principle decided for the

first time or involves a question of importance upon which further argument and a decision of the FC would be to public advantage --- see Section 96(a) of Courts of Judicature Act 1964 (CJA)<sup>46</sup>. However, there are exceptions in statutes which allow an aggrieved party an automatic right to appeal to the FC from the decision of the COA without the necessity of obtaining leave under s.96(a) of the CJA. In the recent Federal Court case of *Syed Hussain bin Syed Junid & 9 Ord v Pentadbir Tanah Negeri Perlis (and Another Case)*<sup>47</sup>, it was contended that the Land Acquisition Act 1960 (LAA) was one of such statutes that was exempted from compliance with s.96(a). The relevant provision, s.49(1) reads:

*“Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court. Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.”*

In the instant case, the landowners were not satisfied with the amount of compensation awarded by the Land Administrator and upon reference to the High Court, it was increased. Still, aggrieved with such additional amount of compensation, they appealed to the COA which dismissed the appeal. They then appealed to the FC, contending that due to the wordings of the said s.49(1), an appeal lay automatically to the FC against the decision of the COA without having to obtain leave. The FC agreed with such contention, so there was no requirement under s.49(1) of the LAA that leave to appeal must first be obtained before an appeal could be lodged in the FC. Although the landowners won

on this point, they ultimately lost the appeal. This is because another provision, s.40D of the LAA restricts the ambit of an appeal against a decision of the HC to the COA. S.40D(3) clearly provides that any decision as to the amount of compensation awarded shall be final and there shall be no further appeal to the higher court on the matter. In the view of the FC, the intention of the Parliament was very clear, i.e. to preclude any party from appealing against any order of compensation made by the HC. Therefore, the apex court refused to entertain the appeal which was against the amount of compensation awarded. The landowners' valiant attempt to couch the appeal as one that was against the wrong principle of law applied by the HC in its assessment rather than against the quantum of compensation was rejected by the FC.



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<sup>46</sup>See also *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co. Ltd. & Anor & Other Applications* [2011] 1 MLJ 25

<sup>47</sup>[2013] 6 AMR 470

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## DIGEST OF EMPLOYMENT LAW CASES

### 1. TESTIMONIAL LETTER NEGATING FORCED RESIGNATION

The issue of “forced resignation” was in focus in the Industrial Court case of *Roslina Abdul Rahman v Transocean Drilling Sdn Bhd*<sup>48</sup>. On one hand, the claimant asserted that after she had expressed dissatisfaction with the appraisal process conducted, she was requested to prepare her resignation letter, which she did. The company, not being happy with the contents of her letter, requested her to re-issue another one. She claimed that the letter was prepared under duress. She lodged police reports and did not report to work. Neither did she sign the Deed of Release and Covenant prepared by the Company nor accept the compensation. On the other hand, the company contended she resigned voluntarily. She wrote and signed her resignation letter without any qualification or writing her protest. She requested for a payment package. She also requested for a testimonial letter. The court held her request for testimonial as showing a cordial and friendly closure to the employment. On the evidence tendered, the court could not find any proof of the company offered the claimant the alternatives of ‘resign or be sacked’. The claimant’s complaint was an afterthought in bad faith with the ulterior motive of wrongfully claiming against the company. Her claim was dismissed.

### 2. MISUSING CREDIT CARD

In *Adryan Stanley v Firefly Sdn Bhd*<sup>49</sup>, the claimant was a Duty Manager who had been alleged to have misused the credit card of his colleague. He had made flight bookings for passengers on several occasions. Those passengers had actually paid cash for the tickets but the claimant had paid for them using the credit card, so that he could utilise the cash. By

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<sup>48</sup> [2013] 4 ILR 18

<sup>49</sup> [2013] 4 ILR 68

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such action, the company had incurred losses due to the transaction fee imposed. The Industrial Court thus unhesitatingly held the claimant’s action as fraudulent to the company amounting to a misconduct and dismissed his claim for unlawful dismissal.

### 3. S176 RESTRAINING ORDER INAPPLICABLE TO INDUSTRIAL COURT PROCEEDINGS

Is a restraining order made by a civil court pursuant to s.176(1) of the Companies Act 1965 applicable to proceedings in Industrial Court? Such an order had been made for a period of 90 days to restrain further proceedings in any action or proceeding against the employer company where a compromise or arrangement had been proposed. On this basis, the employer in *Ching Siew Cheong & Yang Lain lwn. Silver Bird Group Berhad*<sup>50</sup> contended that the Industrial Court ought not to carry on with the claim brought by the claimant employee. However, the Chairman relying on past precedents ruled that any action or proceeding or further proceedings does not include proceedings in the Industrial Court as defined under s.3 of the Court of Judicature Act 1964.

### 4. ACTUAL REDUNDANCY, NOT MERELY REORGANIZATION

The difficulty of proving a situation of redundancy is recently borne out in the Industrial Court decision in *Aravindakshan Achyuthan Nair & Ors v Linfox M Logistics (M) Sdn Bhd*<sup>51</sup>. Whilst the law remains unchanged in Malaysia since 1999 when the Court of Appeal laid down the principles in *Bayer (M) Sdn Bhd v Ng Hong Pau*<sup>52</sup> which was subsequently affirmed by the apex Federal Court in *Dynacraft Industries Sdn Bhd v Kamaruddin Kana Mohd Sharif & Ors*<sup>53</sup>, it served as a good reminder to companies which

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<sup>50</sup> [2013] 4 ILR 182

<sup>51</sup> [2013] 4 ILR 194

<sup>52</sup> [1999] 4 CLJ 155

<sup>53</sup> [2012] 9 CLJ 21

planned to embark upon a retrenchment exercise on the ground of redundancy. An employer has to prove actual redundancy. Merely showing evidence of reorganization is not sufficient. Thus, in *Bayer*, although sales were reduced, the workload of the claimant had remained the same and even after his dismissal, the work was taken over by other colleagues. Likewise, in supporting *Bayer*, *Dynacraft* stated that the employer must show evidence that the functions of the employee had in fact been reduced to such an extent that he was considered redundant. The employer in *Aravindakshan Achyuthan Nair* had only shown that the claimants' functions had been performed by other employees of the organisation on the purported reasoning that their positions in the company had been in excess of its requirements. This was insufficient. Further, the reason that the claimants' duties were given to individuals from a sister company to avoid duplication of duties could not be accepted as the claimants' subordinates had not been dismissed. The court regarded this as showing that the claimants' workloads and thus their duties to supervise their workers under their care or to make decisions in their respective departments had remained. Finally, the so-called 'offers' of alternative employment by the company to the claimants had been nothing more than red herrings to disguise the fact that the company had already taken a decision to dismiss them. The court therefore ruled that the retrenchment was *mala fide* and the claimants succeeded in their claim.

## 5. PROCEEDING AGAINST A WOUND-UP COMPANY

In *Isuta International Sdn Bhd & Ors v Mahkamah Perusahaan Malaysia & Anor*<sup>54</sup>, the employee claimant was dismissed on 9.10.2008 by the company. On 17.6.2010, the company was wound-up by way of a creditors' voluntary winding-up and two liquidators were

appointed. Two issues arose from this development. Firstly was the restriction pursuant to s.263(2) of the Companies Act 1965 (the CA), namely that after the commencement of the winding-up, no action or proceedings shall be proceeded with or commenced against the company except by leave of the High Court applied for and obtained. On this, the High Court held that the words 'action or proceeding' in s.263(2) and (3) of the CA should be given their natural and ordinary meaning not in isolation but in the context of the totality of the subject provision. These words had a wide reach to encompass and cover all types of processes before a court, a tribunal or similar adjudicatory body vested with judicial or quasi-judicial powers. The common denominator was whether that forum in question was discharging duties to settle disagreements or complaints properly brought before it in accordance with relevant laws. The Industrial Court being statutorily entrusted to deal with industrial relations complaints was such an adjudicatory body and caught within those provisions. Thus, a clearance from the High Court by way of leave was necessary to commence or proceed with that action or proceeding when it was brought against a company where a creditors' winding up was underway. Secondly was whether the claimant was justified to add or join the liquidators as further parties. The liquidators contended that as they were appointed long after the dismissal of the claimant, they were not privy to the facts or circumstances surrounding his dismissal. The court agreed with this. Further, the claimant failed to explain how the inclusion of the liquidators even in their official capacity would make the enforcement of the award more realisable for him. In the judge's view, the enforcement of any such eventual award of the Industrial Court could only be processed by filling the relevant proof of debt with distribution subject to consequential procedures for applying the available funds of the company. In addition, it is interesting to note the claimant's attempt to rely on s.30(5) of the Industrial Relations Act

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<sup>54</sup> [2013] 4 ILR 246

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1967<sup>55</sup> to urge the court to be flexible and to hold that strict compliance with s.263(2) of the CA was not required was rejected. The High Court cited the Federal Court decision in *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*<sup>56</sup> to state that the provision was not a license to commit a breach of or to neglect the express applicable provisions of the CA.

## 6. SUSPENSION WITHOUT LEAVE INDEFINITELY PENDING INVESTIGATION

Facts: the Claimant (Assistant Manager-Car Park) in *Ishwaran T Rasiah v Sunway Pyramid Sdn Bhd*<sup>57</sup> was issued a suspension letter and suspended for further investigation. He was also detained by the police to facilitate investigations in a case related to the misappropriation of money from the autopay machine at the car park. A month after his suspension notice, he was issued a Notice of Unpaid Leave whereby he was granted unpaid leave until the outcome of the case against him was known. The claimant sent a letter to the company seeking clarification to the second letter but there was no response. Thus he claimed constructive dismissal. Decision: Dismissal without just cause or excuse. The company had breached the employment contract by deliberately suspending him without pay for an indefinite period. The letter of employment had not stated that the company could suspend any employee without salary for an indefinite period. Further, the claimant was never named as a suspect in the company's internal investigation on the misappropriation of monies from the car park and the investigation report had not proven his guilt. There had not been any domestic inquiry held. Evidence also showed that the claimant's duty was merely to ensure that his subordinates took

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<sup>55</sup>It reads: "The court shall act according to equity good conscience and substantial merits of the case without regard to technicalities and legal form."

<sup>56</sup> [2010] 8 CLJ 629

<sup>57</sup> [2013] 4 ILR 412

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out the safes and transported them to the treasury department. There was no evidence to suggest that the claimant had been negligent in carrying out his duties. His claim for unfair dismissal was established.

## 7. POWER TO DECIDE ON PROPORTIONALITY OF PUNISHMENT

There have been divergent views on whether Industrial Court could substitute its own view, in place of employer's view, as to the appropriate penalty for an employee's misconduct<sup>58</sup>. The Federal Court put the uncertainty to rest in *Norizan Bakar v Panzana Enterprise Sdn Bhd*<sup>59</sup>. The pinnacle court answered the question "whether the Industrial Court has the jurisdiction to decide that the dismissal of an employee was without just cause or excuse by using the doctrine of proportionality of punishment and/or that the punishment of dismissal was too harsh in the circumstances, when handing down an award under s.20(3) of the Industrial relations Act 1967" in affirmative. The Industrial Court could substitute its own view, in place of the employer's view, as to what should be the appropriate penalty for an employee's misconduct. However, on the facts of the case, the Industrial Court had directed its mind only to factors that favoured the employee(appellant), disregarding the very important consideration that the employee was holding the position of Special Assistant to the employer(R)'s Chairman and the employee's misconduct (failure to declare that he was at all material times a director of another company [albeit non-competitor and dormant] whilst he was under the employment of R) had destroyed the trust and confidence which R had placed in him. The appellant was dishonest and had knowingly made a false declaration that he was not serving on the board of directors of any other company whilst in R's employment when, in fact, he was. This was not a minor

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<sup>58</sup> See the write-up titled "Interference with Employer's Decision on Punishment" in Issue Q3 of 2013.

<sup>59</sup> [2013] 6 MLJ 605, [2013] 6 AMR 338

misconduct considering that he had signed and accepted the Code of Conduct which prohibited him from being employed, engaged or concerned in any kind of trade or business or serving on the board of directors of any other company while in the employment of R.

#### 8. EMPLOYER'S "DUTY" TO BE READY WITH WORK FOR NEWBIES

The claimant in *Yip Kwai Hing v FACB Industries Incorporated Bhd*<sup>60</sup> started as Group Financial Controller in the company and was promoted to be Chief Operating Officer of its subsidiary five years later. About a year later she was transferred back to the Head Office as the Head of Corporate Affairs. This was a new department. There was no supporting staff apart from the claimant's secretary and a driver. For the next 5 years, she was assigned, mainly on *ad-hoc* basis, to numerous companies. Eventually she was assigned to work in a subsidiary in China as the company felt that there was little or no work on the part of the claimant as Head of Corporate Affairs whilst she had the experience and capability to handle the problems encountered there. She declined. The company subsequently terminated her services on the ground of redundancy based on the fact that there was little work available to justify continuance of the role as Head of Corporate Affairs and offered her retrenchment benefits. She claimed that she had been unlawfully dismissed. The Industrial Court ruled in her favour. Whilst it was obvious that there had not been any work for the claimant in her position, it was the duty of the company to be ready with plans and the claimant's job description when the new department was set up. Under such circumstances, it was not the claimant's fault. She had followed all the company's orders and moved around from one company to another company without any objection for almost 5 years and yet, the issue of her having little or no work had only been brought up much later. She had also proven that

there were still unfinished assignments that involved her in those companies. On the issue of assignment to China, she had agreed to go but with a condition which was acceptable in view of her family circumstances and her age. The court did not dwell into this since the ground of dismissal was on redundancy and not insubordination. In conclusion, the company failed to prove a redundancy situation had arose that necessitated retrenchment. The claimant succeeded. In our considered view, this case is peculiar on its facts and the decision and application of the principles on redundancy ought to be viewed in this context.

#### 9. UNDER-PERFORMING SENIOR EMPLOYEE

The advised course of action to be taken before dismissing an employee on the ground of poor performance is to give guidance and warning letter(s) to such employee to establish that he/she has been given opportunities to improve before the drastic decision is taken. However, it is not necessarily so when the employee concerned is a senior personnel. Thus, in *Karen Liew Pui Leng v LYL Capital Sdn Bhd*<sup>61</sup>, the claimant was a probationer who had not been confirmed at the end of her extended probation period. On her contention that there was no warning letter to her, the court noted that she was a Chartered Accountant and a member of the Malaysian Institute of Accountants. As the Finance Manager which was a senior position in the company, she was the head of department and had 4 subordinates working under her. With her professional qualifications and about 10 years of working experience, she need not be counselled and evaluated like a young probationer. It had been sufficient that the Chief Operating Officer, her immediate superior, had from time to time advised her and told her of her weaknesses. The principle laid down in the English case of *James v Waltham*<sup>62</sup> that for "those employed in senior management, the

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<sup>60</sup>[2013] 4 ILR 499

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<sup>61</sup>[2013] 4 ILR 569

<sup>62</sup>[1973] ICR 398

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*need for warning and an opportunity for improvement is much less apparent*” was applied. The standard of proof as stated in *Alidair Ltd v Taylor*<sup>63</sup> that “*whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent*” was also called into play. The court thus found that the company had discharged its onus of proving the ‘under performance’ of the claimant.

#### 10. MERE ABSENCE NOT ABANDONMENT OF JOB

Mere absence from work would not necessarily lead to the conclusion of abandonment of job and an automatic termination of service. In *Wan Madzrina Ali Mat v Affin Bank Berhad*<sup>64</sup>, C was an Executive in the Corporate Communications Department and was absent from work from 17 June till 22 June (4 working days). Upon her return, she was served with a letter entitled “Abandonment of Service”. She appealed to the bank, apologising for her misdemeanour and explaining reasons for her absence. The bank rejected her appeal. She thus lodged a claim of wrongful dismissal against the bank. The court stated that the question of abandonment of a job was a matter of intention and could not be inferred from a mere absence without leave unless the period was of an exceptionally long duration. The court held that C had never abandoned her employment and it was the bank which had terminated her employment. The perception of the bank that C had abandoned her employment merely from her absence had been unreasonable and unjustified, especially when this had been the first time she had been absent without acceptable reasons or had failed to contact her superior. The court had come to such conclusion despite an expressed provision in the bank’s Rules and Regulations that an employee who was absent on sick leave without

informing or attempting to inform the bank for more than 2 consecutive days shall be deemed to absent himself from work without the permission of the bank and without reasonable excuse. The bank took the position that her absence without leave was a violation of discipline and a misconduct. Yet, the bank had never taken any disciplinary action against her except to accuse her of abandoning her employment. The termination had been done in haste without a show cause letter, inquiry or a proper manner for her to appeal under the bank’s guidelines and the collective agreement. The dismissal was without a just cause or excuse.

The above decision can be contrasted with the decision in *Sandran Perumal v Nestle Manufacturing (M) Sdn Bhd*<sup>65</sup> made by another Industrial Court Chairman 4 days later. There, the claimant was also absent from work for 3 consecutive days without leave, purportedly to attend to family matters. However, the company did not rely on abandonment of job to terminate his employment. Instead, a show cause letter was issued to him and thus, the company had, in the opinion of the court, discharged its reciprocal duty to investigate his absence from work<sup>66</sup> by providing him an opportunity to explain his absence. The company however was not satisfied with his explanation and sacked him. The court ruled in favour of the company. The past disciplinary record of the claimant had also been taken into account and it was noted that he had been warned before for being absent from work without leave. His current absence was a repeated misconduct.

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<sup>63</sup>[1978] ICR 445

<sup>64</sup>[2013] 4 ILR 622

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<sup>65</sup> [2013] 4 ILR 633

<sup>66</sup> *CK Lee & Associates v Goh Shaw Yuh* [2002] 3 ILR 645

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## II. ON TRANSFER DIRECTIVE AND REFUSAL TO COMPLY

In *Nestle Products Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor*<sup>67</sup>, the High Court in hearing a judicial review application to quash an award of the Industrial Court restated several principles relating to transfer of a workman. Transfer of a worker is a managerial prerogative which can be executed *bona fide* in the interest of the employer's business. It is *prima facie* valid unless vitiated by proof of *mala fide*. The burden of proof lies on the workman. He must prove that the order of transfer was *mala fide* or was a measure of victimisation or unfair labour practice. There should be concrete materials to meet such proof on the balance of probabilities. Transfer can be effected so long as there is no change to terms and conditions of service. The nature of disadvantage or detriment that would impugn a transfer order must pertain to the terms and conditions of employment of the transferred employee and to matters which affect the preference or the wishes of the employee. Entailed inconvenience is a normal consequence or any relocation as long as no proof of *mala fide* or improper motive. Wilful refusal to proceed on transfer instruction is insubordination warranting dismissal. Appeal against transfer does not excuse an employee from complying with the transfer order. There was no obligation or requirement for the employer to consult with employee prior to a transfer.

In the instant case, the employee refused to accede to his employer's directive to transfer but his assertion that he was being victimized was bare without probative value. On the other hand, the employer had produced evidence that the transfer was for genuine business reasons to utilize his experience and develop the branch. The court thus ruled that the act of transferring the employee was *bona fide* and his persistent refusal to comply with the transfer constituted an act of insubordination. The reasons of appeal, *ie.* his personal problem,

family reason and health reason were personal in nature and had nothing to do with the terms and conditions of employment. In the learned Judge's view, it was inevitable that some inconvenience might be caused when one was required to move from one place to another. Whilst the employer should take this into account, this consideration must be balanced against the employer's right to manage its business. The award of the Industrial Court was thus irrational and set aside.



## EMPLOYMENT LAW

### IS HAVING SEX AN ACTIVITY IN THE COURSE OF EMPLOYMENT?

The above title sounds rather cheeky but seriously, this question arose in the Australian case of *Comcare v PVYW*<sup>68</sup>. Was the employer liable to pay compensation to its employee who, whilst staying overnight on a work-related trip, suffered injuries during sexual intercourse in the motel room her employer had booked for her?? This issue went all the way up to its highest court. The facts are fairly straight-forward. R was sent by her employer (Comcare) to visit a regional office to undertake certain tasks. For that purpose, she stayed overnight at a local motel booked by her employer. Whilst at the motel, she engaged in sexual intercourse with an acquaintance. In that process, the glass light fitting above the bed was pulled from its mount by either of them and it

<sup>67</sup>[2013] 8 CLJ 586

<sup>68</sup> [2013] HCA 41

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struck R on her nose and mouth, resulting in her suffering physical and psychological injuries.

The Safety, Rehabilitation and Compensation Act 1988 (the Act) provides that Comcare was liable to pay compensation in respect of an “injury” suffered by an employee; such an “injury” includes a physical or mental injury “suffered by an employee...arising out of, or in the course of, the employee’s employment”. Thus, the question was whether R’s injuries were suffered “in the course of” her employment. It was contended that because R was at a particular place – motel – at the instigation of her employer, her injuries were suffered in the course of her employment and were compensable.

The Administrative Appeals Tribunal held that R’s injuries were unrelated to her employment. This decision was set aside by the Federal Court which decision was then upheld by the Full Court of the Federal Court. The principle in *Hatzimanolis v ANI Corporation Ltd*<sup>69</sup> was applied where it stated the circumstances in which injuries to employees, which did not occur during periods of actual work, would nevertheless be treated as arising in the course of employment. Comcare appealed to the High Court and succeeded.

The High Court ruled that in order for an injury sustained in an interval or interlude during an overall period of work to be regarded as in the course of an employee’s employment, the circumstances in which the employee was injured must be connected to an inducement or encouragement by the employer. The two circumstances identified by *Hatzimanolis* were where an injury was suffered by an employee whilst engaged in an activity in which the employer had induced or encouraged the employee to engage; or where the injury was suffered at and by reference to a place whether the employer had induced or encouraged the employee to be. If the employee was injured whilst engaged in an activity at a certain place, that connection did not exist merely because of

an inducement or encouragement to be at that place. When the circumstances of an injury involve the employee engaging in an activity at the time of the injury, the relevant question was: did the employer induce or encourage the employee to engage in that activity? On the fact of the case, the majority held that the answer to that question was ‘no’.

LAND LAW

## CHARGES IMPOSABLE BY MANAGEMENT CORPORATION

Entitlement of management corporation to levy charges on strata title unit owner was the subject of the appeal in *Perbadanan Pengurusan Endah Parade v Magnificent Diagraph Sdn Bhd*<sup>70</sup>. The appellant (A) was the management corporation for a commercial complex formed under the Strata Titles Act 1985 (the Act) whereas the respondent (R) was the proprietor operating the Carrefour Supermarket in two strata title parcels within the complex. The dispute revolved around the legality of certain charges imposed by A on R which comprised the following: signage charges, administrative charges for water meter reading, electricity for extended hours, fire insurance, legal fees, cleaning charges for cleaning of water and oil, quit rent, sinking fund, service charges, sewerage charges (fixed and consumption) and water charges. The High Court ruled that s.41(3), (5)(b) and (ba) of the Act only allowed A to levy one payment/contribution from unit owners *ie.* a contribution to the management fund and out of that payment a portion would be contributed to the special account<sup>71</sup>. The rate of contribution must also be determined at the general meeting of A. Thus, he only allowed signage charges, electricity charges for extended hours and

<sup>70</sup>[2013] 6 MLJ 343

<sup>71</sup>The special account is to be maintained to meet the actual and expected liabilities in relation to, among others, painting or repainting any part of the common property, acquisition of any movable property for use in relation with the common property.

<sup>69</sup> [1992] 173 CLR 473

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service charges, the former two appeared to be rested on a contractual arrangement between the parties.

On appeal, the Court of Appeal affirmed the decision. A contended that there was a distinction between administrative expenses (covered by s.45 of the Act) and consumption-based expenditure (such as sewerage charges, covered by s.43 of the Act), as such the latter could be properly covered under the bye-laws of the management corporation and recoverable from the unit owners. The appellate court disagreed, holding that the Act only allowed the levying of one payment/contribution from unit owners approved at general meeting. The term “consumption-based expenditure” was nowhere to be found in the Act. S.45(1) was comprehensive in providing the management fund to be established to meet the administrative expenses for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation. Thus, A was not entitled to charge any other item beyond the “service charges” (the term used by A to described ‘contributions’ to the management fund).

On sinking fund, A could not impose an additional levy as sinking fund over and above the contribution to the management fund. The court also rejected A’s contention that levies could be imposed under the bye-laws under the Schedule to the Act since bye-laws being subordinate legislation could not override the main provisions in ss.41 and 45 of the Act. Likewise, A could not hide behind deed of mutual covenants between parties to empower A to impose “all other charges which are properly chargeable”.

It was also held that in fixing the contribution to be paid by each unit owner, the management corporation should budget for its approval at the general meeting. It was too important to be left to the management corporation or the council to decide as a matter of discretion.



## LAND LAW

### CONSTRUING EXPRESSED CONDITION ON TITLE OF LAND

In *Lembaga Kemajuan Johor Tenggara v Pantai Maju Sdn Bhd*<sup>72</sup>, P had leased two pieces of land to D. The issue document of title to the lands were issued which were subsequently replaced by computerized document of titles that carried express condition i.e. “*Tanah ini hendaklah ditanam dengan Tanaman Campuran untuk dusun and koko.*” D cultivated oil palm trees on a major portion of the lands which resulted in P issuing a 6-months’ notice for D to remedy the breach. D failed to do so whereupon P issued a termination notice followed by an application pursuant to s234 of the National Land Code to forfeit the lease.

At the High Court, the learned JC ruled that the phrase “mixed farming” referred to different kinds of farming or agricultural activities which encompassed planting of trees such as rubber, oil palm, coconut and others. Therefore, the cultivation of oil palm trees was covered by the term mixed farming. P’s claim was dismissed.

On appeal, the Court of Appeal by a majority of 2-1 allowed the appeal. In the majority view, the phrase “*Tanah ini hendaklah ditanam...*” in the computerized document of title was a positive stipulation of what was to be cultivated on the lands and was not capable of

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<sup>72</sup>[2013] 6 AMR 13

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being construed to mean what was not expressly prohibited was allowed. Further, the phrase “*tanaman campuran*” or mixed farming should be read in conjunction with “*untuk dusun*”. It was plain and clear that the kind of mixed farming allowed on the lands must be for the purpose of an orchard and hence would be confined to fruit farming. Mixed farming for an orchard would denote that it was a mixed farming of fruit trees and could not include oil palm trees. The conclusion of the learned JC that oil palm cultivation was not expressly prohibited and therefore was allowed ran foul of interpretation of an express condition on document of title adopted by the Federal Court in *Collector of Land Revenue Johor Bahru v South Malaysia Industries Bhd*<sup>73</sup>. In interpreting special condition endorsed on document of title, the condition must be construed as a whole to see the clear intention; one must be vigilant in not interpreting it by giving extended meaning, which was not expressed. By his decision, the learned JC was putting in a new condition on the document of title and not interpreting it. The appellate court thus reversed his decision and held that the cultivation of oil palm trees by D was a breach of the expressed condition on the titles which entitled P to the remedy sought.

## LAND LAW

### UNILATERAL CHANGE OF LAND TENURE

P in *Ngo Ong Chung & Ors v Pengarah Tanah dan Galian Perak Darul Ridzuan*<sup>74</sup> had applied to the land authority, D for conversion and subdivision of its freehold land for development into a housing scheme. When the application was approved, D imposed a condition that the tenure of the land would be reduced to leasehold for a term of 99 years and leasehold titles were issued accordingly. P challenged the act of D as contravening the National Land

Code (NLC) and art.13 of the Federal Constitution (FC) and thus null and void.

Relying upon past high authorities in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*<sup>75</sup> and *Ipoh Garden Bhd v Pengarah Tanah dan Galian, Perak, Ipoh*<sup>76</sup>, the High Court reiterated the right to one’s property as enshrined in art.13(1) of FC and held that a mere administrative act could not deprive a person of his property. An act to deprive a person of his property must be based on law and in accordance with the procedure prescribed by that law. In the instant case, there could be little doubt that the act of reducing the tenure of the land from freehold to leasehold was not based on any law, thereby *ultra vires* the NLC and contravening the FC.

On D’s contention that P’s application was time-barred by virtue of s.2(a) of the Public Authorities Protection Act 1948 (PAPA), it was held that the protection was limited to only an “*intra vires*” act done in pursuance or execution or intended execution of any written law or of any public duty or authority. D’s action being *ultra vires* the NLC and void of jurisdiction was invalid from its very inception. Thus, s.2(a) of PAPA was not applicable in the instant case.

On D’s argument that P had consented and accepted the condition that the land tenure would be reduced in return for the approval for subdivision, hence P stopped from going back on their agreement, the court pointed out that in public law, the doctrine of estoppels could not be invoked so as to give an authority powers it did not in law possess. An action which was *ultra vires* could not be legitimised by estoppels. Consent, waiver or estoppels could not prevail over the principle of *ultra vires*.

<sup>73</sup>[1978] 1 MLJ 130

<sup>74</sup>[2013] 10 MLJ 879

<sup>75</sup>[1979] 1 MLJ 135

<sup>76</sup>[1979] 1 MLJ 271

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## LEGAL PROFESSION

### ACTING AGAINST CURRENT CLIENT ON MATTER UNRELATED TO CLIENT'S FILE

The Canadian Supreme Court decision in *Canadian National Railway Co. v McKercher LLP*<sup>77</sup> resolved a very interesting question: Can a law firm accept a retainer to act against a current client on a matter unrelated to the client's existing files? Indeed, in that case, the firm, McKercher LLP (McKercher), brought a lawsuit on behalf of another client against a current client. In late 2008, McKercher was acting for the applicant (CNR) on a variety of matters. At about the same time, McKercher accepted a retainer from Gordon Wallace (GW) to file a suit against CNR in a \$1.75 billion class action. It was not disputed that the Wallace action was legally and factually unrelated to the ongoing CNR retainers. CNR first learnt that McKercher was acting against it in the class action when it was served with the statement of claim. McKercher hastily terminated all retainers with CNR, except for one which CNR terminated. CNR then applied to strike out McKercher as the solicitor on record in the class action due to an alleged conflict of interest.

The Chief Justice, delivering the unanimous judgment of the court, first set out the paramount *duty of loyalty* owed by a lawyer, and by extension a law firm, to clients which comprised three salient dimensions: (i) a duty to avoid conflicting interests; (ii) a duty of commitment to the client's cause; and (iii) a duty of candour<sup>78</sup>. His Lordship then cited principles pertaining to the conflict of interest and described the appeal as concerning the risk to effective representation when a lawyer acted concurrently in different matters for clients whose immediate interests in those matters were directly adverse. It had been held that concurrent representation of clients directly adverse in interest attracted a clear prohibition:

*the bright line rule*. This rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without first obtaining their consent. This rule is based on the inescapable conflict of interest inherent in some situations of concurrent representation and it reflects the essence of a fiduciary's duty of loyalty: a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position<sup>79</sup>. It cannot be rebutted or otherwise attenuated and it applies to concurrent representation in both related and unrelated matters. However, the rule is limited in scope. It applies only where the *immediate* interests of clients are directly adverse in the matters on which the lawyer is acting and it applies only to *legal interests*, as opposed to commercial or strategic interests. It cannot be raised for mere *tactical* reason (but for legitimate protection on a principled basis). Thus, clients who intentionally create situations that will engage the bright line rule, as a means of depriving adversaries of their choice of counsel, forfeit the benefit of the rule. The rule is also inapplicable where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. When the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or the lawyer's duties to another current client, a former client, or a third person.

On the present facts, McKercher's conduct fell squarely within the scope of the bright line rule. CNR and the class suing CNR were adverse in legal interest. The fact that the GW and CNR retainers were legally and factually unrelated did not prevent the application of the rule. CNR did not tactically abuse the rule; and it was reasonable in the circumstances for CNR to have expected that McKercher would not concurrently represent a party suing it for \$1.75 billion. McKercher's failure to obtain CNR's consent before

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<sup>77</sup> [p2013] 2 S.C.R.649

<sup>78</sup> *R. v. Neil* [2002] 3 S.C.R. 631

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<sup>79</sup> *Bolkiah v. KPMG* [1999] 2 AC 222

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accepting the class action retainer breached the rule. Thus, consequently, McKercher breached its duty to avoid conflicting interests when it accepted to represent GW without first obtaining CNR's informed consent.

It was further held that McKercher's termination of the retainers with CNR breached its duty of commitment. Its failure to advise CNR of its intention to accept the GW's retainer and to represent the class breached its duty of candour. However, McKercher possessed no relevant confidential information that could be used to prejudice CNR in the class action. The real estate, insolvency and personal injury files of CNR on which McKercher worked were entirely unrelated to the GW's action.

Having ruled on breaches of duties, the CJ proceeded to determine the appropriate remedy. Should McKercher be disqualified from representing GW because its acceptance of the GW's retainer breached the duty of loyalty it owed to CNR?

Disqualification might be required to avoid the risk of improper use of confidential information, to avoid the risk of impaired representation, or to maintain the repute of the administration of justice. In the instant case, the only concern that would warrant disqualification was the protection of the repute of the administration of justice. Whilst a breach of the bright line rule normally attracted the remedy of disqualification, factors that might militate against it must be considered. These factors might include: (i) behavior disintitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule or applicable law society rules. As the motion judge did not have the benefit of these reasons, the matter was

ordered to be remitted back to the first instance court for redetermination of the appropriate remedy.

## TORTS (DEFAMATION) / EMPLOYMENT

### "DEFAMATORY" SEXUAL HARASSMENT COMPLAINT

Can complaints of sexual harassment against one's superior be a cause of action in defamation? That is the question before the High Court in *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor*<sup>80</sup>. P was the head of division in Lembaga Tabung Haji (Tabung Haji) whilst D was working under the direct supervision of P. D lodged a formal complaint about P's sexual harassment of her, where he was alleged to have uttered vulgar words to her and making sex oriented jokes in her presence. The letter was addressed to the CEO of Tabung Haji (P's superior). An inquiry was carried out. Numerous staff were involved in the inquiry either as members of the panel or as witnesses. Eventually, Tabung Haji found that there was insufficient evidence to warrant a disciplinary action against P. However, he was issued with a serious administrative warning.

P claimed that D's remarks in her letter of complaint were defamatory of him and had caused his term contract not renewed and also affected his employment prospects. D in turn counter-claimed against P for sexual harassment for damages for the mental and emotional pain and suffering.

Interestingly, the trial judge did not appear to have attached much weight to the actions taken by Tabung Haji, perceiving them as 'somewhat contradictory'. The learned Judge remarked that the inquiry carried out was more a preliminary inquiry than a disciplinary proceeding. And, in her view, Tabung Haji was seeking to resolve a potentially embarrassing situation.

P relied heavily on the finding by the investigative panel, contending that it

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<sup>80</sup>[2013] 9 CLJ 243

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supported his claim that the defamatory remarks were “likely to be untrue”. However, the learned Judge did not accede to such an approach and embarked on evaluating evidence adduced by both parties on each and every specific instance of sexual harassment that had been particularized in the letter of complaint. It was held that D had on the balance of probabilities proven the truth of her complaint against P for making sex oriented dirty jokes in front of his subordinates. P was also held to have uttered vulgar remark, ‘F\*\*\* Off’ to D which constituted harassment. P’s witnesses had also corroborated D’s claim that P had invited D to be his second wife, another instance of sexual harassment. In short, the various complaints as set out in D’s letter of complaint were true. Further, D’s complaint to the CEO had complied with the proper procedure for lodging complaints, hence no malice.

Concurrent with such finding of truth in the sexual harassment remarks by P, D’s counterclaim succeeded. Damages was awarded to D for her emotional and mental pain and suffering, holding that there was a direct link between such pain and suffering and the sexual harassment committed by P.

Perhaps, the words of the learned Judge are apt to sum up the lesson given by this decision: “An employee with a valid and legitimate complaint against his/her immediate superior should be able to lodge a complaint to seek redress without fear of a legal action for defamation.”<sup>81</sup>



<sup>81</sup>See also *Ernest Cheong Yong Yin v Low Kim Yap & Ors* [2006] 6 CLJ 608

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**TORTS (MALICIOUS PROSECUTION) / DAMAGES**

By coincidence, two decisions on malicious prosecution were reported in the same volume of the 4<sup>th</sup> volume of All England Law Reports year 2013. The first one was on measure of damages in particular reference to loss of reputation of a homeless claimant who had been living in an abandoned shed prior to him being charged with 2 serious criminal offences. The other case was a landmark case which revived the scope of the tort of malicious prosecution.

**1. RECLUSE SCAVENGER’S REPUTATION NO LESS VALUABLE**

In *Calix v Attorney General of Trinidad and Tobago*<sup>82</sup>, C was charged on 2 counts: robbery and rape. On the first charge, he was acquitted at the close of prosecution case on no case to answer due to the fleeting and unpropitious circumstances in which the identification had been made and on deficiencies in the identification parade. Notwithstanding this, and despite same evidence against him on the charge of rape and recommendation from the officer in charge of the prosecution that the charge of rape be discontinued, he stood trial on that charge. Similarly, his application for no case to answer was granted and he was acquitted.

On C’s claim for malicious prosecution, it was held that after the robbery charge had been dismissed, C should not have been prosecuted on the rape charge. His trial on that charge amounted to malicious prosecution. On the quantum of damages, the trial judge took into account ‘*the peculiar character and reputation of C...who had been living as a homeless person in an abandoned shed...Notwithstanding his high school education and his training... as a machinist, he deliberately withdrew from society and the labour force...He was a recluse, choosing to live in unhygienic*

<sup>82</sup>[2013] 4 All ER 400

conditions, eking out a living as a scavenger of copper...I marked him as an odd man...his reputation and social standing did not amount to much. Save for some unnamed friends that also scavenged...he appeared to have no social contact with any person.' C was awarded \$38,000 for damage to his reputation. This finding was endorsed by the Court of Appeal of the Republic of Trinidad and Tobago. On final appeal to the Privy Council (the PC), the decision was overturned.

The PC held that oddity of personality or eccentricity did not of itself diminish the value of a person's good character. Simply because he had chosen an unconventional path, it should not be supposed that his good character was any less valuable in objective terms or any less cherished by him. Being prosecuted for the extremely serious offence of rape was a substantial matter; it was something that, for a man of good character, ranked highly in terms of reputational damage.

That he might be regarded as occupying a lowly status could not of itself reduce the compensation to which he might otherwise be entitled. The damage to his reputation, judged on objective basis, could not be influenced by considerations as to his personal circumstances. This was to be measured by reference to the fact that C was previously of good character and that he was maliciously prosecuted for the very serious offence of rape. Further, C's reputation was not of any less significance than the reputation of high-ranking members of society. The PC also considered past wards in cases decided in Trinidad and Tobago and concluded that the ward of compensation was inordinately low. Thus, both by reason of the errors of principle and in the manifestly low quantum of damages, the award was thus quashed and the matter remitted to the Court of Appeal.

## 2. RENEWED RECOGNITION OF LIABILITY FOR MALICIOUS PROSECUTION TO CIVIL PROCEEDINGS

Does the tort of malicious prosecution extend to civil proceedings? This was the

question before the Privy Council in *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another*<sup>83</sup>.

As commonly understood, the case for malicious prosecution was usually brought in the wake of unsuccessful criminal proceedings and as late as .....it was still the law in Malaysia when the ...held that ..... The legal elements of this tort as defined in *Clerk & Lindsell on The Law of Torts*<sup>84</sup> are that:-

*"the claimant must show first that he was prosecuted by the defendant, that is to say the law was set in motion against him by the defendant on a criminal charge; secondly, that the prosecution was determined in his favor; thirdly that it was without reasonable and probable cause; fourthly, that it was malicious."*

On the other hand, the tort of abuse of process applies to the initiation or conduct of civil proceedings. In the words of the dissenting judge Lord Sumption in *Crawford Adjusters*:-

*"...It is not necessary to prove malice. It is not necessary to show that the proceedings have gone to judgment. It is not even necessary to show that they were baseless, although in practice they often will be. The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought. ... Such cases are extremely rare... there are only two*

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<sup>83</sup>[2013] 4 All ER 8

<sup>84</sup>20<sup>th</sup> edn, 2012, para 16-09. This definition was adopted by the House of Lords in *Martin v Watson* [1996] 3 All ER 559 at 562, *Gregory v Portsmouth City Council* [2000] 1 All ER 560 at 565

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*reported cases in England<sup>85</sup> in which the action has succeeded ... No case has succeeded in England since 1860, although Australian litigants appear to have been both more persistent and more successful.”*

In *Crawford Adjusters*, an insurance company (Sagicor) for which P had acted as a loss adjuster had brought a claim against P and two building companies for deceit (ie. fraud) and conspiracy. After discovery of documents, Sagicor discontinued its claim but P continued with its counterclaim for damages for abuse of process and/or malicious prosecution. The trial judge made certain findings about the motives of D, an officer of Sagicor, which were to be imputed to Sagicor. The dominant factor which had led to Sagicor to make allegations against P had been D's strong dislike and resentment of P, D's wish to gain revenge on him and D's obsessive determination to destroy him professionally. However, the court concluded that Sagicor was not liable for abuse of process because it had not sued P in order to secure an object for which legal action was not designed, and the fact that P's dominant motive in making the allegations against P was improper did not convert its use of the legal process into an abuse. In relation to malicious prosecution, whilst P had succeeded to establish four elements of the tort<sup>86</sup>, the court was bound by authority of House of Lords<sup>87</sup> and precluded from holding Sagicor liable as this tort did not extend to civil proceedings.

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<sup>85</sup>*Grainger v Hill* (1838) 132 ER 769, *Gilding v Eyre* (1861) 142 ER

<sup>86</sup>(i) The prior proceedings had been determined in favour of P; (ii) the allegations of fraud and conspiracy made against him in the prior proceedings had been made without reasonable cause; (iii) the allegations had been made maliciously; and (iv) as a result of the allegations he had suffered substantial financial loss and significant other damage.

<sup>87</sup>*Gregory v Portsmouth City Council*, *supra*.

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The Cayman Islands Court of Appeal affirmed this decision.

On final appeal, the PC by a majority of 3 to 2 held that the tort of malicious prosecution covered civil proceedings. In the majority's view, the common law had originally recognized that the tort extended as much to the prosecution of civil as to criminal proceedings and that extension should be recognized anew. The tort had become mainly focused on criminal proceedings because a successful defendant in civil proceedings had often been unable to prove damage because of the availability of an order for costs. Limitation on the scope of the tort had been justified by reasoning. However, such reasoning was no longer valid in the present times. There were no policy arguments sufficiently strong to override the rule of public policy that wrongs should be remedied. Today, the reasoning that the bringing of a civil action could not, prior to trial, damage a defendant's reputation<sup>88</sup> no longer held true, in the light of the right of the public in relation to most proceedings to inspect and make copies of the pleadings. Substantial damage to the reputation of a defendant could thus be caused by false allegations made in civil proceedings long before it was restored, if full restoration was then possible, by his vindication at trial.

On the facts, Sagicor did not commit the tort of abuse of process but it committed the tort of malicious prosecution. The predominant purpose of D amounted to malice. Moreover the fact that D believed that P had defrauded Sagicor counted for nothing because of the absence of reasonable cause of any such belief. As such, the appeal was allowed and judgment be entered for P in the sum of C1\$1.335m.

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<sup>88</sup>*Quartz Hill Consolidated Gold Mining Co v Eyre* (1881-5) All ER Rep Ext 1474

## APPEAL UPDATE (BANKING)

### ADVISORY RELATIONSHIP AND ACCOMPANYING DUTY OF CARE

The Singapore High Court decision in *Deutsche Bank AG v Chang Tse Wan*<sup>89</sup> [as featured in Issue Q1 of 2013 of THE UPDATE under the title “Pre-Contractual Duty of Care in Private Banking Relationship”] was over-ruled by its Court of Appeal as recently reported<sup>90</sup>. The pinnacle court disagreed with the trial judge’s finding of negligence, holding that a duty of care did not arise between the parties. Whilst the trial judge was correct in referring to the unified three-staged test to determine the existence of a tortious duty of care<sup>91</sup>, he was wrong on application of facts.

Firstly, the appellate court held that his finding that a duty of care came into existence on and from 15.3.2007 based on ‘unusual facts’ occurring after that date was incorrect for the duty could not logically have arisen on a particular date by reason only of facts that came into being after that date. In any event, it was not apparent why the facts he relied on were ‘unusual’ as they seemed to revolve around a commonplace instance of a bank employee soliciting a high net worth individual to open an investment account with the bank.

Secondly, the question, whether a duty of care had arisen, had to be assessed by reference to the sequence of relevant facts and events up to the time the alleged duty was said to have been breached. On whether it was factually foreseeable that a failure by the bank (DB) to exercise reasonable care would harm

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<sup>89</sup> [2013] 1 SLR 1310

<sup>90</sup> [2013] 4 SLR 886

<sup>91</sup> *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100, *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146. The test : (a) a threshold issue of factual foreseeability; (b) whether there is a sufficient legal proximity for a duty of care to arise; and (c) any policy considerations either to negate or support the imposition of a duty of care.

the respondent (Dr Chang), it was necessary first to establish just what DB undertook to do, and that, as contended, which DB was required to do with reasonable care. Beginning from the date of meeting between Dr Chang and the relationship manager of DB, Mr Wan on 15.3.2007, it was impossible on the facts to see that DB had in fact undertaken to do *anything*, at least at that time. No agreement was reached at that meeting as to any services that *would* be carried out by DB for Dr Chang. On the contrary, prior to August 2007 when the DB account was opened: (a) DB had not undertaken to do anything; (b) Dr Chang had no expectation that DB would do anything; (c) consistent with this, DB had no duty to do anything; and (d) DB in fact did nothing on its own initiative for Dr Chang. In the circumstances, prior to August 2007, even the inquiry of factual foreseeability could not be resolved in Dr Chang’s favour.

Thirdly, on legal proximity. As established in an earlier case<sup>92</sup>, to determine this, the particular facts of a case should be examined to determine the closeness and directness of the relationship between the parties; and the twin criteria of voluntary assumption of responsibility and reliance might be used to demonstrate proximity. Where a person had voluntarily assumed a responsibility to give (and did give) financial or investment advice to another who then relied upon that advice, it might ordinarily be concluded that an advisory relationship had arisen between them. The existence of such a relationship would in turn give rise to the accompanying duty of care in tort. However, the non-existence of an advisory relationship on the facts would not *by itself* mean that the requisite legal proximity as would give rise to a duty of care was absent. The court would ultimately have regard to all the circumstances. Having evaluated the evidence, the appellate court held that the circumstances prevailing from late July to November 2007 plainly failed to establish an advisory relationship between DB and Dr

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<sup>92</sup> *Spandek, ibid*

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Chang, along with its consequential duty of care. The facts did not bear out any suggestion: (a) that DB or Mr Wan had assumed any responsibility to render investment or wealth management advice to Dr Chang; or (b) that Dr Chang was relying on DB to provide such advice, and that DB knew this and went along with it. The totality of circumstances did not lead to the conclusion that the requisite legal proximity had been established such as would give rise to a duty of care on DB's part.

Fourthly, even if DB had been found to owe a duty of care, Dr Chang would not have succeeded (on the facts) showing that such a duty had been breached. He was aware and was in fact warned of the overconcentration risk. He was or ought to have been aware of the scale of his total exposure. And he knew he was trading on margin and fully intended to exploit the full extent of his leverage.

The appeal of DB was therefore allowed. The order for damages was set aside and substituted with an order against Dr Chang to pay the contract sum due and payable to DB. Perhaps the departing words of the appellate court serve as timely reminder to banks and financial institutions operating in a competitive marketplace which at times present themselves to their clients as extremely accomplished and capable one-stop shops able to service every need of their customers.

“...bank would do well to recall that the services they do hold themselves as capable of providing may not always be accepted by the client. Cleaning up the paperwork and communicating in clear terms with customers after the initial discussions to identify with precision just what is and is not being provided might well be a worthwhile

exercise for banks to undertake.”

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