

# THE UPDATE



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#### Abbreviations

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

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**APPROPRIATION OF PAYMENT RECEIVED  
TOWARDS LOAN ACCOUNT**

An interesting point came up for determination in the case of *Ambank (M) Berhad v Peter Marajin @ Peter Marazing & 2 Ors*<sup>i</sup>. P had granted a housing loan to D which was repayable by fixed monthly installments over a period of 30 years. P claimed that D was in arrears in the monthly repayment amounting to RM3,992.01 (the Arrears) which resulted in the recall of the loan. On the other hand, D contended that they had duly paid the monthly installments and that it was not open for P to use part of D's installment payments to pay for insurance premium and legal fees incurred by P without giving any notice to D. P relied on s.14.08 of the charge agreement which allowed P to use the monthly installment payment to pay for "other sum" due from D. S.14.08 read:

"Appropriation

The Chargee may apply any payment received from the Chargor(s) or any party towards satisfaction in whole or in part of the principal, interest or other sum then due and payable from the Chargor(s) under this Instrument in any order that the Chargee deems fit, and the Chargor(s) hereby waive his/their right of appropriation under Section 60 of the Contracts Act, 1960."

The High Court of Kota Kinabalu rejected D's contention that s.14.08 was invalid as it contracted out of the provisions of s.60 of the Contracts Act 1950 (CA). Applying the law as established by Privy Council in *Ooi Boon Leong & Ors v Citibank NA*<sup>ii</sup>, the learned Judge held that there was no provision within the CA which prohibited the parties from contracting out of the provisions of the CA. S.14.08 was thus valid.

**BANKING LAW / COURT PROCEDURE**

**BANK TO ACT ON 3<sup>RD</sup> PARTY GUARANTEE  
BEFORE GOING AFTER BORROWER**

The plaintiff (P) in *Malayan Banking Bhd v Doxport Technologies (M) Sdn Bhd & Ors*<sup>i</sup> had granted a loan to the 1<sup>st</sup> defendant borrower (D1) to carry out a project abroad in Cambodia. The

However, D succeeded on the ground that P in calling s.14.08 for aid is duty-bound to disclose with regard to the appropriation intended to be carried out by P (the creditor)<sup>iii</sup>. The right of disclosure must be read into s.14.08. On the facts, the amount of RM1,965 being the legal fees incurred by P had been taken into account in calculating the Arrears but D was not informed of the nature of the legal fees. The right given to P in s.14.08 was clear but it did not give P an open cheque book to debit D's account. D was entitled to know, in the clearest of terms and within the shortest possible time, by written notice that a portion of the agreed monthly installment had been used to pay for other sum due to P. Therefore, the letter of demand for the Arrears was improper and provided no justification for P to recall the entire loan. P's claim was dismissed with costs.



<sup>i</sup>[2013] 1 AMCR 259

<sup>ii</sup>[1984] 1 MLJ 222

<sup>iii</sup>*Nam Joo Hong Chan Feedmills Sdn Bhd v Soon Hup Poultry Farm* [1985] 2 MLJ 206

loan was, among others, guaranteed under a special government scheme (EOGF) which was made available by Bank Negara Malaysia to Export-Import Bank of Malaysia (EXIM) to enable the latter to guarantee a percentage of the financing provided by P for such overseas projects. In the instant case, EXIM guaranteed 80% of the banking facilities of USD3.2m, ie USD2.56m under the EOGF (the EXIM Guarantee) and the D1 paid the guarantee fee of 1.5% of the loan amount before the facilities were released to it. Despite due completion of the project, the Government of Cambodia defaulted in payment

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causing D1 to default in its repayment schedules vis-à-vis P. P sued D1 and the other guarantors (the defendants) to recover the amounts owing.



The defendants pleaded that they were led to believe verbally by P that as it had the EXIM Guarantee which covered political risks, P would not sue the defendants in the event the Government of Cambodia should fail to fulfill its obligations. The trial judge however rejected such defence and held that the documentary evidence was at variance with the alleged oral

misrepresentation and would vitiate such oral misrepresentation even if assuming that there had been one.

On whether P was obliged to exhaust its remedy against EXIM first before suing the defendants, the trial judge took into consideration the special breed of guarantee facility in the form of EOGF. It was granted by the government to encourage local companies to venture abroad in countries of high political risk and to guarantee the participating financial institutions (in this case, P) at certain guaranteed percentage. The default was non-payment by the Government of Cambodia and the whole purpose of the EXIM Guarantee was to cater for such a situation. The loan would not have been given to D1 had it not been for the availability of the EOGF guarantee. Thus, the trial judge resorted to equity and good conscience to order that though judgment be entered against the defendants, that much which EXIM had guaranteed to pay P should be enforced against EXIM before P could proceed with enforcement of that part of the judgment against the defendants.

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[2013] 1 CLJ 137

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## **BANKRUPTCY / GUARANTEE**

### **GUARANTOR'S LIABILITY MORE THAN BANKRUPT BORROWER'S LIABILITY**

#### ***Statutory clamp of interest in s 8(2A) of Bankruptcy Act not applicable to guarantor***

The Federal Court made a landmark ruling in *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd*<sup>1</sup> on the ambit of s 8 (2A) of the Bankruptcy Act 1967 (the Act). S 8 of the Act is on the effect of receiving order. The said s 8(2A) reads:

“Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.”

S 8(2) reads:

“This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed...”

S 8(1) reads:

“On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.”

The issue for determination was whether a secured creditor could claim interest from a guarantor and/or a third party chargor, after the

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date of winding up of a borrower company or of the receiving order against the borrower if it did not realize its security within six months of the winding up order or receiving order, as a consequence of s 8(2A) of the Act read together with s 4(1) of the Civil Law Act 1956.

The facts are fairly straight-forward. R had granted M a loan secured by a charge over two pieces of land and a guarantee & indemnity (the guarantee) executed by A and another person. M defaulted under the loan and was wound up in 2002. R obtained a court order to sell the charged lands in 2006 and sued A under the guarantee. In 2009, the High Court allowed R's claim against A but limited the judgment sum to the amount owing as at the date of M's winding-up order. It held that s 8(2A) of the Act read with s 4(1) of the Civil Law Act 1956 precluded R as secured creditor from claiming interest on the debt after the date of the winding-up order as it had failed to realize the charged properties within six months after the date of the winding-up order. S 8(2A) of the Act applied for the benefit of not only the borrower but also the guarantor. The Court of Appeal however allowed R's appeal, holding that s 8(2A) did not affect the guarantor. At the appeal in the Federal Court, A argued that the Court of Appeal's decision could not be right as it meant his liability to R as guarantor was greater than what M as the borrower was statutorily liable for.

The Court of Appeal's decision was affirmed by the pinnacle court. S 8(2A) of the Act did not apply to A who was a guarantor cum indemnifier. S 8 of the Act dealt with the property or person of a debtor against whom a receiving order had been made. S 8(2) and 8(2A) dealt with what the secured creditor could and could not do in respect of realizing or otherwise dealing with its security where the debtor was concerned. Nothing in these two sections suggested that they governed the properties or persons of parties against whom no receiving order had been made.

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## COMPANY LAW

### A SCHEME OF ARRANGEMENT THAT WENT AWRILY WRONG

#### ***Company ended up being wound up by a non-scheme creditor***

In *UET (M) Sdn Bhd v Geahin Engineering Berhad*, the petition was premised on a judgment for works carried out by P for R. R had obtained an

S 8(2A) applied only when a secured creditor was realizing its security against the bankrupt debtor. The intent and purpose of s 8(2A) was to clamp interest claimable by the secured creditor against the bankrupt debtor to protect both the unsecured creditors of the bankrupt debtor as well as the bankrupt debtor himself. It was to ensure the level of the debt would not increase and the share that each unsecured creditor had on the assets of the debtor would not be diminished.

A was not the 'debtor' envisaged in s 8(1) of the Act. As such, s 8(2) did not apply to him and *a fortiori*, s 8(2A). It was not the Parliament's intention in enacting s 8(2A) to affect the interest of the secured creditor vis-à-vis any guarantor or indemnifier.

The letter of guarantee contained several clauses which clearly showed the intention of the guarantors to undertake liability for the repayment of the loan not merely as sureties but also as principal debtors and indemnifiers. That being the case, A was primarily liable for losses which the principal borrower could not have been made liable for. His liability was not dependent upon or secondary to the liability of the principal borrower. He was a principal debtor himself. The liability under a contract of indemnity did not depend on whether the principal debt was enforceable. It had no reference in law to the obligation of any third person. The liability of the person who had given an indemnity could be more extensive than the liability of the principal borrower<sup>ii</sup>.

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<sup>i</sup> [2013] 1 MLJ 449

<sup>ii</sup> *Yeoman Credit Ltd v Latter & Anor* [1961] 2 All ER 294, *Chung Khiaw Bank Ltd v Soi Huan & Ors* [1986] 1 MLJ 188

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order under s.176(3) of the Companies Act 1965 (the Act) sanctioning a scheme for the restructuring of R (the order). The order provided that the creditors' scheme as set out in the explanatory statement (ES) that had been issued to creditors, and which had been approved by the creditors vide creditors' meeting was approved by the court and bound R, creditors and members of R. No order under s.176(1) of the Act came into play. P was not a scheme creditor. Mention was made of P's claim in the ES but R maintained that the monies were not due and owing and that there was a good defence to P's claim in the civil suit. As it turned out, a full trial proceeded which culminated with a judgment in P's favour. P then served a s.218 notice on R which was followed by a petition.

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The High Court held that P was not a “scheme creditor” who consented to or sanctioned the scheme pursuant to a compromise or settlement. Neither was P a creditor who was promised payment in full for the debt it claimed. On the contrary, the available material disclosed that R refused or neglected or denied the very existence of P’s debt. From a reading of s.176(3), it was to bind all scheme creditors once sanctioned by the court. It could not be read so as to sanction or bind parties who made claim for their debts but whose claims were rejected outright. Since P’s claim was rejected outright, P was not bound by the court’s sanctioned scheme. P was simply not a scheme creditor.

Certainly, if for instance P had been included as a scheme creditor, but being dissatisfied with the composition of its debt, sought

to wind up R, then P might well be estopped as it would be a part of the entire scheme where the majority of creditors had voted in favour of a scheme which would bind even the dissenting minority creditors. In this case, P had simply been left out in the cold and did not comprise a part of the scheme. The court then proceeded to make an order to wind up R.

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<sup>i</sup>[2013] 1 AMR 750

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## COMPANY / TRUST LAW

### CLASSES OF CONSTRUCTIVE TRUST & LIMITATION PERIOD

#### ***Non-employee wife on payroll of company of which husband was director-shareholder***

In *Yong Kheng Leong and anor v Panweld Trading Pte Ltd and anor*<sup>i</sup>, the company brought a claim for breach of fiduciary duty against one of its two directors who was also its 20% shareholder (1<sup>st</sup> director-shareholder) for placing his wife on the company’s payroll and paying her salaries over 17 years even though she was not an employee. The company also claimed against the wife based on dishonest assistance and knowing receipt. The 1<sup>st</sup> director-shareholder and his wife took the stand that the wife was a genuine employee and that the payments were made with the express approval of the only other director-shareholder (2<sup>nd</sup> director-shareholder). A 3<sup>rd</sup> party claim was initiated against the 2<sup>nd</sup> director-shareholder for an indemnity or contribution.

The Singapore Court of Appeal upheld the trial court decision in favour of the company. It was held, among others, that even if the 2<sup>nd</sup> director-shareholder had some knowledge as to the payments, there was no basis (at least on the evidence) to find such an agreement or common understanding as could found a claim to any relief. As to the claim against the wife, it was held that as the wife knew that she was not a genuine employee of the company, she therefore either knew, or wilfully avoided knowing<sup>ii</sup>, that the only

reason the payments were made into her bank account was because her husband was channeling funds from the company to her in breach of his fiduciary duty. This was not a one-off transaction such that it might be said the wife had just been careless or was misled as to the reason she was paid. On the contrary, she received substantial salary payments, filed returns, and paid income tax on the same, for an extended period of 17 years. Significantly, she stood to gain, and did in fact gain, substantial benefits from the arrangement. Thus, the finding that she was liable for the dishonest assistance<sup>iii</sup> she gave to her husband, as well as her knowing receipt of the proceeds of his unlawful actions was upheld.

The dismissal of the 3<sup>rd</sup> party claim was correct. If the 2<sup>nd</sup> director-shareholder had agreed to the salary payment, then the 1<sup>st</sup> director-shareholder would not be liable in the first place. Conversely, if the 2<sup>nd</sup> director-shareholder had not agreed to this, then there would be no basis to seek any recourse against him.

Of more importance is the analysis conducted by the appellate court on the relation between constructive trust and limitation period. Due to space constraint, we can only state the principles by way of summary here. There are 2 types of constructive trusts<sup>iv</sup>: (1) Class 1 constructive trusts: this category covers a person who held property in the position of a trustee and dealt with it in breach of that trust; (2) Class 2 constructive trusts: this covers a wrongdoer who fraudulently acquired property over which he had never previously been impressed with any trust obligation and who might, by virtue of his fraudulent conduct, be regarded as a Class 2 constructive trustee by virtue of equity’s reach. Class 1 constructive trustee would potentially be denied any limitation defence, whereas Class 2 constructive trustee generally could avail himself of any defence of limitation. In the instant case, the

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1<sup>st</sup> director-shareholder as a director of the company had trustee-like responsibility for its assets. He was, by virtue of his directorship, lawfully able to deal with the company assets. When he disposed of the company's assets unlawfully, whether to his wife or to himself through his wife, he was undoubtedly a Class 1 constructive trustee because he had dealt with that property in breach of the trust and confidence that had been placed in him as a director. Only Class 1 constructive trusts fall within the ambit of s.22 of the Limitation Act<sup>v</sup> (the Act), *ie.* the 1<sup>st</sup> director-shareholder was subject to the time bar prescribed in s.22(2) of the Act. However, s.22(1)(a) and (1)(b) may apply to exclude the time bar. By virtue of the finding that he was guilty of fraud, s.22(1)(a) was satisfied and the time bar of 6 years under s.22(2) of the Act was thus excluded. The claim against the 1<sup>st</sup> director-shareholder was not subjected to any limitation period. However, the claim against the wife was caught by the six-year limitation defence under s.6(7) of the Act. Thus, the amount recoverable against her was confined to the funds wrongfully paid out in the six years immediately preceding the action.

<sup>i</sup>[2013] 1 SLR 171

<sup>ii</sup> See *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589, *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020

<sup>iii</sup> See *Banque Nationale de Paris v Hew Keong Chan Gary* [2000] 3 SLR(R) 686

<sup>iv</sup> See *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162, *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2004] 1 BCLC 131

<sup>v</sup>S22(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action --- (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use. (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

## CONTRACT LAW

### CONCLUSIVE EVIDENCE CLAUSE ON ARCHITECT'S DECISION TO EXTEND TIME

#### Extended meaning of *force majeure*

In *Malaysia Land Properties Sdn Bhd (dahulunya dikenali sebagai Vintage Fame Sdn Bhd) v Tan Peng Foo*<sup>i</sup>, P had purchased a serviced apartment from D. There was a delay of 732 days in delivery by D of vacant possession on 1.8.2008, whereas under the sale and purchase agreement (SPA), D was to complete the construction and deliver vacant possession of the unit within 36 months from the date of the SPA, *ie.* by 30.7.2006. This had resulted in P filing a claim for liquidated and ascertained damages against D. D however relied on the architect's certificate (the certificate) which confirmed that pursuant to clause 30 of the SPA, D was entitled to an extension of time until 29.8.2008. The reasons for the extension were stated as delays caused by the contractor(s) involved in the construction, Act of God, inclemental weather, shortage of materials and

any other circumstances of whatever nature beyond the control of D.

Whilst the High Court allowed P's claim, this decision was overturned on appeal by the Court of Appeal. Heavy emphasis was placed on 2 clauses of the SPA. Clause 22.1 of the SPA specifically provided that the architect might grant an extension of time in situations that is deemed appropriate, notwithstanding that time shall be the essence of the SPA. Clause 30 provided, among others, that "D shall not be liable for any loss or damage to P for any failure to fulfil any terms of the SPA if such fulfillment was delayed, hindered or prevented by *force majeure* including but not limited to the appropriate authorities' delay in its approval, permits or licence or to any delays caused by the contractor(s) involved in the construction or development...Acts of God, strikes, lockouts, riots, civil commotion, general chaos, inclemental weather...or any other circumstances of whatever nature beyond the control of D...All decisions of D's Architect as to the reasons for any delay...shall be final and conclusive and binding upon P."

The combined effect of those 2 provisions enabled D to rely on the certificate to the effect that the architect's decision to grant the extension of time was final, conclusive and binding on P. The use of "conclusive evidence clauses" in business and commercial agreements has been recognized

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and upheld<sup>ii</sup>. Thus, the certificate was conclusive of the reasons for the delay in the completion and delivery of vacant possession. The court was not at liberty to go behind the certificate to question its validity in the absence of evidence to suggest that the certificate was issued as a result of, *inter alia*, fraud, misrepresentation, *mala fides* or manifest error.

In actual fact, the architect did attach a summary of the reasons to the certificate for the grant of the extension of time. Despite offering to make available the information upon request, P failed to make any such request. In the face of the conclusive binding nature of clause 30 of the SPA, it was incumbent on P to apply for further and better particulars and/or discovery of documents before the trial in order to show that there was no basis for the architect to issue the certificate. Therefore, no adverse inference ought to be invoked against D for having failed to produce documents in court. The High Court had thus erred in rejecting the certificate as being invalid on the ground that the reasons stated in the certificate could not be substantiated and was not conclusive and final.

On two other small points, firstly, the court disagreed with the contention that the architect's report having been issued about 1 year after the delivery of vacant possession was an after-thought. There was no provision in the SPA which required D to issue the certificate for extension of time before the delivery of vacant possession as well as the architect had explained why it could only be done after the project had been completed. Secondly, the certificate could not be impugned simply because it was in the form of a letter from the architect as there was nothing in the

SPA for the certificate to be in compliance with a certain standard format.

In our view, the presence of the "conclusive evidence clauses" in the SPA made the critical difference to the outcome of the case. But for this clause, the general law is that a party relying on a *force majeure* clause bears the burden to prove the facts bringing the case within the clause<sup>iii</sup>. The other point made in the case, *albeit* obiter dicta, is that the *force majeure* clause in Clause 30 was not limited to the general notion of delay caused by 'Act of God, strikes, lockouts, riots, civil commotion, general chaos and inclemental weather' only<sup>iv</sup>. It would include dislocation of business by various actions and events, although it did not encompass conditions of business or economic climate leading to a depressed economy<sup>v</sup>.

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<sup>i</sup>[2013] 1 AMR 107

<sup>ii</sup>See *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5, *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474

<sup>iii</sup>*Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd* [2004] 1 LNS 537

<sup>iv</sup>*Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd* [1990] 3 CLJ (Rep) 499, *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 CLJ 135, *Getaran Unggul Sdn Bhd v Syed Ahamed b Mohamed Ghani & Anor* [2004] 1 LNS 436

<sup>v</sup>*Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2007] 1 LNS 54

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## CONTRACT LAW

### IS NOTICE FIXING TIME A PREREQUISITE FOR BREACH UNDER S.40 OF CONTRACTS ACT?

In revisiting s.47 and s.56 of Contracts Act 1950 in *Sime Hok Sdn Bhd v Soh Poh Sheng*<sup>i</sup>, the Federal Court provided some clarity on our law relating to time for performance of promise (contract). The facts are of some complexity and called for brevity so as not to lose sight of the core principles arising from the decision. There were 3 parcels of land (the lands), *ie.* Lots 3660, 2100 and 2043 in Mukim Pontian. The lands were subject of

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a joint venture agreement between a company (venturer) and the proprietors of the lands (the JV) but the venturer failed to carry out the JV. The venturer then had an oral agreement with the appellant (App) and the respondent (R) whereby, among others, the venturer would sell the lands to App upon terms (which App fulfilled) whilst App would secure the transfer of Lot 2043 to R upon terms that R obtained the removal of the caveats lodged by the proprietors of Lots 2100 and 3660 (which had been sub-divided into 115 individual lots) and settled the interest of the proprietors in the JV. The oral agreement however did not specify when R must do so. In April 1993, R managed to settle with the proprietors of Lots 2100 and 2043 but was unable to get the proprietors of Lot 3660 to withdraw their 8 caveats over the same. Thus, App was only able to have 107 lots free from encumbrances but not all the 115 lots. App gave two notices to R, one dated 1.5.1997

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and the other dated 28.5.2002, to require R to cause the withdrawal of the caveats on Lot 3660 but to no avail, hence the suit against R filed on 20.9.2002.

Both the trial judge and the Court of Appeal found that it was R's obligation to settle with the proprietors of Lot 3660 ("the App's Obligation") by the end of 1994, by which date a reasonable time for performance had expired. The cause of action having accrued on 31.12.1994, App's action was filed out of time. On appeal, the apex court affirmed such findings but not before discussing at considerable length the operation and relationship between s.47 and s.56 of the Contracts Act 1950 (the Act).

S.47 of the Act reads:

**"47. Time for performance of promise where no application is to be made and no time is specified**

Where, by the contract, a promisor is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time. ... "

S.56 of the Act reads:

**"56. Effect of failure to perform at fixed time, in contract in which time is essential**

(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract.

**Effect of failure when time is not essential**

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promise is entitled to compensation from the promisor for any loss occasioned to him by the failure. ... "

On the facts, as at 31.12.1994, there was no prior notice by the App to R to perform the App's Obligation. Was such notice necessary before there could be a breach of the oral agreement? The App's contention was that under s.47 of the Act, a notice fixing time to perform was a prerequisite for breach and since the earliest such a notice was issued was on 1.5.1997, the suit filed on 20.9.2002 (which was less than 6 years) was not barred by limitation.



The Federal Court disagreed with such contention. Firstly, it is indisputable law that where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The absence of such notice from the plaintiff (party not in default) caused the High Court in *Penang Development Corporation v Khaw Chin Boo & Anor*<sup>ii</sup> to rule against the plaintiff. However, the Federal Court did not regard *Penang Development Corporation* as laying down the proposition that a notice fixing time for performance was pre-requisite before a breach of a promise in which time for performance was not specified could crystallize.

Likewise, the Federal Court did not regard the decision of the Court of Appeal in *Hock Huat Iron Foundry v Naga Tembaga Sdn Bhd*<sup>iii</sup> as advancing such proposition. In their Lordship opinion, *Hock Huat Iron Foundry* merely stated that where a party not in default did not rescind a contract under s.56(1) of the Act but allowed the party in default to complete the work beyond the original completion date, then time was no longer of the essence of the contract, and that when time was at large, the promisor must perform the promise within a reasonable time as provided

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under s.47 of the Act, and if there was unreasonable delay, the party not in default might give a notice fixing a reasonable time for performance after the expiration of which the party not in default would treat the contract as at an end.

Instead, the Federal Court interpreted its earlier decision in *Damansara Realty Bhd v Bungsar Hills Sdn Bhd & Anor*<sup>iv</sup> as providing the answer to the question posed in the instant case. In that case, there was no notice fixing time for performance and time was at large. Yet, it was held that there was still a duty on the plaintiff to commence works within a reasonable time. By failing to do so for 13 ½ years, the plaintiff had breached the agreement in question. In effect, the apex court in *Sime Hok Sdn Bhd* opined that under s.47 of the Act, a prior notice fixing time for performance was not a precursor to breach. The absence of such a notice would not erase breach already committed for notice came after default. With the default, cause of action accrued and time started to run, in this case, from 31.12.1994. The App's suit was thus time-barred.

*Sime Hok Sdn Bhd* case can also be cited for the proposition that notice to a party in default

is not necessary if such party delays performance of a contract for so long and in such circumstances as to amount to repudiation of the contract. At the same time, a notice fixing time for performance may still be advisable to make time of the essence in order to justify rescission of a contract [s.56(1) of the Act] so as to preclude the intervention of s.56(2) of the Act. The practical necessity for such a rule is that the notice operates as evidence of the date by which the promisee considers it reasonable to require the contract to be performed, failure to perform by which is evidence of an intention not to perform.

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<sup>i</sup>[2013] 2 AMR 325

<sup>ii</sup>[1993] 2 MLJ 161

<sup>iii</sup>[1999] 1 MLJ 65

<sup>iv</sup>[2012] 1 AMCR 193

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## CONTRACT / EMPLOYMENT LAW

### EMPLOYMENT CONTRACT IN MERGER EXERCISE

#### Application of 'no less favourable terms' to post-merger contracts

Since 1999, the Malaysian government has been taking steps to merge numerous banking and financial institutions in the country to become a smaller number of anchor banks. It is surprising that after more than 10 years, there is still a lacunae in the law on employment contracts in a merger exercise. The Federal Court decision in November 2012 in *Affin Bank Berhad v Mohd Kasim @ Kamal bin Ibrahim*<sup>i</sup> was the very first time that questions regarding rights and liabilities of employees and employers in a merger scenario were answered.

In the instant case, R was an employee of Affin-ACF Finance Berhad (Affin-ACF). In March 2005, it was announced that the appellant (ABB) would be taking over the business of Affin-ACF which would be integrated with ABB in April 2005. On 26.5.2005, pursuant to a business transfer agreement between Affin-ACF and ABB, a vesting order was obtained from the High Court

transferring all of Affin-ACF's assets and liabilities to ABB with effect from 1.6.2005.

ABB had earlier on 26.3.2005 offered employment to R on terms, among others, that the retirement age would be 55 instead of 60 as stated in the Affin-ACF's handbook. R signed the letter of offer (LO) on 3.6.2005 under protest and worked with ABB under the now 'less favourable terms' for 8 months. Upon attaining his retirement age of 55 on 23.2.2006, R's employment was terminated. Dissatisfied with such treatment, R filed a suit at the High Court for declaratory reliefs, among others, that he was entitled to work until the age of 60, that ABB's retirement at the age of 55 was unlawful and that the LO unilaterally altered the term on retirement which was never agreed by R at any material time and was induced by 'undue influence' as well as damages for breach of contract.

Both the High Court and Court of Appeal ruled in favour of R. Briefly, they held that ABB was bound to honour all of Affin-ACF's contracts including R's employment contract by virtue of order 5 under the vesting order<sup>ii</sup>; the forced retirement of R before he attained the retirement age of 60 was in breach of R's employment contract with Affin-ACF dated 3.1.2000 and was also in breach of the staff handbook of Affin-ACF. Thus, ABB had breached order 5 of the vesting order in imposing a retirement age at 55 thereby effectively offering him a term which was less favourable to what R was enjoying with Affin-ACF.

At the final appeal, however, ABB succeeded, by a majority of 4 against 1. The sole

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question of law formulated for determination was : 'whether in a merger exercise involving a business transfer agreement and a vesting order, a previous employee of the transferor (Affin-ACF) could only be offered employment contract by transferee (ABB) on terms and conditions of employment that were no less favourable than those existing between the employee and the transferor.' In other words, was the transferee obliged to offer employment on 'no less favourable terms' to all employees, particularly with regard to the age of retirement?

The Federal Court pointed out a critical fact, that was, R was not a person who came within the ambit of "employee" as defined under s 2 of the Employment Act 1955 (the EA) (the EA employee), by virtue of his monthly wages exceeding RM1,500<sup>iii</sup> (RM8,950 being his last drawn monthly salary). This is crucial because Clause 7.1 of the business transfer agreement, which imposed an obligation on ABB (the transferee) to offer new contracts of employment on 'no less favourable terms' to employees of Affin-ACF (the transferor), had qualified its application only to 'employees' within the definition of 'employee' as classified under s 2 of the EA. Thus, effectively, the apex court was saying (*obiter dicta*) that the transferee (ABB) was only obliged to offer employment on 'no less favourable terms' to EA employees but not non-EA employees.

The effect of a vesting order is a change of ownership of the business. The trite general principle is that a change of ownership vide a merger exercise terminates a contract of employment<sup>iv</sup>. Thus, since R was a non-EA employee and there was no statute governing the position of a non-EA employee, it was open for the parties to regulate their relationship by entering into a new employment contract. With the former employment contract with Affin-ACF at an end, ABB was at liberty to offer R (which it did) a fresh employment contract, albeit on less favourable terms. ABB was not obliged to offer R continuous

employment on the same terms and conditions previously enjoyed by him with Affin-ACF.

It was noted too that there was no law in Malaysia governing employment contracts in a merger. Applying common law, R's employment could not be transferred to ABB, for no one has the power to transfer any person against his will from the service of one person to another person, simply because one has the right to choose for himself whom one should serve. R's former employment with the transferor had come to an end. Thus, the LO was a fresh offer which, upon acceptance, became a new contract of employment. Although R had signed acceptance of the LO 'under protest' (which qualification constituted a qualified acceptance and tantamount to a counter-offer)<sup>v</sup>, he had commenced employment with ABB under the new terms and continued till he reached age of 55. The apex court regarded that R had, by conduct, accepted the new terms of the contract and he could not be seen to approbate and reprobate from such contract.

The question posed was thus answered in the negative BUT with a rider that it was confined to the facts of the case, and applicable to non-EA employees only. It was not applicable to all merger situations. To that extent, it can be said that the decision is of limited application.

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<sup>i</sup>[2013] 2 AMR 273

<sup>ii</sup>Order 5 reads : On and from the Effective Date, any existing agreement to which [Affin-ACF] was a party to or any [Affin-ACF] Contracts to have effect as if ABB had been a party thereto instead of [Affin-ACF].

<sup>iii</sup>See the definition of an 'employee' in the First Schedule of the EA.

<sup>iv</sup>*Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014

<sup>v</sup>S 7 of Contracts Act 1950

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## COURT PROCEDURE

### SMS AS ACKNOWLEDGMENT OF DEBT

Can a SMS received regarding loan repayment be regarded as an acknowledgment of debt within s.26 of the Limitation Act 1953? It is a short but novel point that came up for a ruling in the Court of Appeal case of *Yee Weng Kai v Yam*

*Kong Seng & Anor*<sup>i</sup>. Ordinarily, a claim based on contract must be filed in court within the period of six years from the date the cause of action arises as prescribed under s.6(1) of the Limitation Act 1953 (the Act). However, s.26(2) of the Act recognizes that the right of action in cases where the debtor acknowledges the claim or makes any payment in respect thereof shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment, as the case maybe. Under s.27 of the Act, the acknowledgment must be in writing and signed by the person making the acknowledgment.

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In *Yee Weng Kai*, P had engaged D1(a company in which D2 was a director) to build a factory. P claimed that they had paid certain amounts of monies in the name of D1 to be withdrawn for progressive payments for the construction works. The factory was completed and P demanded for the return of the outstanding sum. D1 contended that the cause of action first arose either on 7.7.1999 (when the factory was completed and handed over) or on 17.12.1999 (when D1 issued a letter together with the statement of account). The action was filed on 7.3.2008 which was more than 8 years later, outside the prescribed six-year period. P relied on the short messaging service (SMS) that D2 had sent to P on 5.9.2006 which, in the view of the trial judge, amounted to a fresh acknowledgment of the debt. Time started to run afresh from 5.9.2006 and the defence of limitation was unsustainable.

The SMS read: "Eddy sorry to hear ur father death, regarding the loan repayment sorting soon not 2 worry now Im in UK London next week." The Court of Appeal held that the said SMS was not an unequivocal admission of a subsisting debt as it did not quantify the so called debt in figures nor was it capable of ascertainment by

calculation or by extrinsic evidence without further argument between the parties<sup>i</sup>. Further, it was ambiguous for it referred to a 'loan repayment' which was not the pleaded case of P.

The said SMS was an electronic short message and could not be considered to be 'in writing' and was 'not signed' as required under s.27 of the Act. It might have come from D2's handphone but it did not necessarily mean that it was D2 who actually made or wrote the message. Thus, the requirements under s.27 of the Act were not fulfilled. The said SMS could not in law amount to a valid acknowledgment of debt for the purpose of s.26(2) of the Act. P's action clearly had exceeded the six-year period and was therefore, time-barred.

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<sup>i</sup>[2013] 2 MLJ 575

<sup>ii</sup>*Good v Parry* [1963] 2 All ER 59, *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54

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## COURT PROCEDURE

### STATE GOVERNMENT, MENTERI BESAR NO LOCUS TO SUE IN DEFAMATION

Can a state government sue for defamation? Can a Menteri Besar sue for defamation? These questions were answered respectively in the decisions in *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No.1)*<sup>i</sup> [*Dr Syed Azman (No.1)*] and *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No.2)*<sup>ii</sup> [*Dr Syed Azman (No.2)*].

Both the decisions were made in the same suit which was brought by the State Government of Terengganu as the 1<sup>st</sup> plaintiff and the Menteri Besar of Terengganu as the 2<sup>nd</sup> plaintiff against the defendants for defamation, namely, for publishing an article in the publication, *Harakah*, in relation to the aid programme of the 1<sup>st</sup> plaintiff meant to assist poor students in that state. The 1<sup>st</sup> defendant, a member of the Terengganu State Legislative Assembly and writer of the article; the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were respectively the permit-holder, the chief editor and the publisher of *Harakah*.

In *Dr Syed Azman (No.1)*, the Judge drew the distinction between a statutory body/authority and a state government. Both are public authority but a statutory body/authority is incorporated under a statute as a body corporate whereas a state government is not. A state government is a government duly elected by members of the public through the democratic process. Further, a state government is also not a local authority which is a body corporate pursuant to Local Government Act 1976. That said, in the absence of express statutory provisions to enable the federal government or state government to institute civil proceedings for defamation, the court had to resort to common law. Applying the principles laid down by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd And Others*<sup>iii</sup> which held that a local authority could not be allowed to maintain an action for defamation, the Judge ruled that the 1<sup>st</sup> plaintiff was a public authority and thus, did not have a personal reputation to protect. Neither did it have a governing reputation, as in the case of a corporation or statutory body/authority, to protect. As it was duly elected by members of the public through the democratic process, it should be transparent and accountable to electorate. There should be freedom of speech and expression by the public in order to act as a check and balance on the executive and the government. It was thus not in the interest of the public that the state government be allowed to maintain any action for defamation against any person.

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In *Dr Syed Azman (No.2)*, the same Judge made a distinction between suing in the 2<sup>nd</sup> plaintiff's official capacity as the Menteri Besar of Terengganu and suing in his personal capacity. In the heading of the writ, the 2<sup>nd</sup> plaintiff was cited in his name followed by parenthesis "(Menteri Besar Terengganu)". This clearly showed that the 2<sup>nd</sup> plaintiff was maintaining the action in his official capacity. In the Judge's view, the 2<sup>nd</sup> plaintiff had no capacity to sue the defendants for defamation in his official capacity. This was premised on the fact that the Menteri Besar, being the chief executive officer of the state government, and being conferred by law with the executive authority of the State, should not be allowed to use his official position to sue any member of the public regarding any question or comment raised regarding his administration within the state

government. The Menteri Besar though appointed by the State Ruler, acted in the name and on behalf of the state government. Since the state government had been held to have no capacity to maintain the action for defamation against the defendants, it followed that the position of the Menteri Besar was no different from that of the state government. It was remarked that any person, whether he was a chief minister, minister or Prime Minister or any other person in a government executive position, could maintain an action for defamation in his personal capacity, but not in his official capacity.

A few past cases<sup>iv</sup> had been cited by the 2<sup>nd</sup> plaintiff's counsel to convince the court that plaintiffs could sue for defamation in their official capacity. However, in all such cases, the position of Minister was not stated in brackets after the name of the plaintiff at the heading of the civil suits concerned, only the plaintiff's personal name was cited. Thus, there was no issue that the plaintiff in those cases was maintaining the suit for defamation in his personal capacity.

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<sup>i</sup>[2013] 7 MLJ 52

<sup>ii</sup>[2013] 7 MLJ 52

<sup>iii</sup>[1993] 1 All ER 1011

<sup>iv</sup>*Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394, *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807, *Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 3 MLJ 322

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## CRIMINAL LAW

### GUILTY PLEA AS MITIGATING FACTOR

#### Jailed for exporting 95 snakes of endangered species without permit

The accused in *Wong Keng Liang v PP*<sup>i</sup> was convicted and sentenced to the maximum jail term of 5 years for committing an offence under s.10(a) of the International Trade in Endangered Species Act 2008 (the Act) in exporting, without permit, 95 snakes of endangered species. The accused had actually pleaded guilty to the offence. That guilty plea, coupled with his being a first time offender<sup>ii</sup>, both of which constituted mitigating factors, would have generally given rise to a

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reduction of ¼ or 1/3 of the sentence that would have been imposed after a full-trial. Yet, the High Court substituted the original sentence of 6 months imprisonment and fine of RM2,000 for each of the snakes as meted out by the Magistrate with the maximum custodial sentence, without a fine.

On appeal by the accused, the Court of Appeal pointed out that the maximum sentence was legally reserved for the most serious offence, without any mitigating factor. In the instant case, the High Court judge had failed to take into consideration various mitigating factors (apart from the aforesaid two factors) including the accused's repentance and remorse, his apology, lack of aggravating factors, absence of criminal force used and the fact that the snakes were found in good condition. Further, the accused was charged with an offence of exporting the snakes without a permit and not charged with 'trafficking' in wildlife. He had lawfully imported the animals and had not smuggled them into the country. There was no evidence to suggest that he would not have been granted the permit to export the animals by the

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authorities and neither was there evidence to suggest that he intentionally did not apply for the permit because he knew that he would not be granted with one.

The accused had spent 17 ½ months in prison since his conviction. In allowing the appeal, the appellate court set aside the 5-year custodial sentence and substituted it with a sentence of 17 ½ months. The accused walked off as a free man

immediately after the pronouncement of the decision.

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<sup>i</sup>[2013] 1 CLJ 96

<sup>ii</sup>*PP v Jafa Daud* [1981] 1 LNS 28

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## DAMAGES / COURT PROCEDURE

### RM17.9M AWARDED ON UNDERTAKING TO PAY DAMAGES RELATING TO INTERIM INJUNCTIONS

#### ***Deceit, malice and non-disclosure of material facts bordering on fraudulent conduct***

The plaintiff (P) in the case of *Goo Sing Kar v Dato' Lim Ah Chap & 10 Ors*<sup>i</sup> learnt a very costly lesson when he was ordered to pay an amount of almost RM17.9 million in damages to the defendants (D) pursuant to the undertaking given by P as to damages in respect of 4 interim injunctions obtained by P against D in 4 derivative suits. These injunctions were granted on *ex parte* applications on 10.1.2002 but were subsequently set aside on 24.1.2002. In doing so, the court also ordered an immediate inquiry into damages arising from the undertaking to pay damages be assessed. The resulting inquiry by the deputy registrar awarded damages of the aforesaid quantum, which was subsequently affirmed by the High Court save as to a small correction due to a mathematical error.

P's appeal to the Court of Appeal failed. 2 preliminary points were made. Firstly, the appellate court reiterated the law governing an appeal which concerned with damages and its quantum, namely the court is disinclined to reverse the finding of the trial judge as to the amount of damages. The appellate court would not reverse such finding merely because it might be of the opinion that of they had tried the case at first instance, it would have given a lesser sum. Assessment of damages is an exercise of judicial discretion which would seldom be disturbed unless there was clear error on the principles of law or that the amount was erroneous in the sense that it was so extremely high or so very small. Secondly, save in the most exceptional circumstances, an appellate court

would not upset concurrent findings. The court then went on to lay down specific principles in relation to the assessment of damages on an undertaking as to damages as originally set out in the Australian High Court case of *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd*<sup>ii</sup>.

On the facts, the 4 *ex parte* injunctions were obtained by deceit, bordering on the fraudulent conduct and maliciously by P. There was also non-disclosure of material facts --- P had obtained one of the injunctions on the basis of an earlier suit that had in fact been discontinued and such fact together with the fact of a settlement agreement between the parties in the earlier suit were kept hidden from the court at the hearing of the *ex parte* applications. In the court's view, the injunctions were intended to cause maximum damage to the companies in the group in which P had disposed off his interest to the 1<sup>st</sup> defendant (D1). They were couched in extremely wide terms and circulated to the banks, thereby cutting off the credit and banking facilities enjoyed by the companies belonging to D1 and effectively destroying these companies. It was held that damages for deceit (as established in this case) were not limited to those categories which were reasonably foreseeable but could include consequential loss suffered by reason of wide circulation to the banks.

The quantum of damages awarded appeared superficially to be excessive for the short duration of 14 days, but where maximum damage resulted with the intent that it should result as in this case, P must in law be liable on the undertaking for this large sum. While the duration of the injunctions was limited, *i.e.* 14 days, duration per se could not be regarded as the determinant factor. The appellate court also affirmed the award of damages to the D companies for inconvenience, embarrassment and damage to reputation reflected in their goodwill.

For sake of completeness, the complete breakdown of the awarded damages is stated below:

- (a) damages for inconvenience and embarrassment awarded to each of D

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- companies in the sum of RM20,000 each, totalling RM220,000;
- (b) RM15 million as damages to D1 for losses suffered by 5 companies which were within the group of companies initially owned by D1 and P;
- (c) damages for loss of banking facilities to three of the D companies in the respective sums of RM600,000, RM340,000 and RM20,000;

- (d) damages for loss of profits for the development project of a D company in the sum of RM1,667,041.60.

<sup>i</sup>[2013] 1 AMR 200

<sup>ii</sup>[1979] 33 ALR 578. See also *Sunseekers Pte Ltd v Joshua* [1990] 2 MLJ 350.

## DIGEST OF EMPLOYMENT LAW CASES

### 1. INVALID SACKING OF 11-DAY OLD PROBATIONER

A probationer who only worked for 11 days succeeded in his claim for unlawful dismissal in *Tan Seng Lee v Mahkamah Perusahaan Malaysia & Anor*<sup>i</sup>. His probationary period was 2 months but after 11 days of working, the company terminated his services with two weeks' notice vide a letter of termination which set out the grounds of termination being his below expectation performance. The details were, among others, that he was not familiar with the basic construction coordination knowledge that was required of him as Senior Project manager, his arrangement for most of the mobilization items was not up to expectation and his lack of alertness which allowed other contractor dumping waste and rubbish onto the company construction site. The High Court disagreed with the finding of the Industrial Court. It held that the applicant as a probationer was still afforded the right not to be dismissed arbitrary. The company had failed to conduct due process in the dismissal of the applicant. He was not given any warnings nor was any inquiry conducted or opportunity given to him to answer or defend any allegations of impropriety.

### 2. CLEARED FROM CRIMINAL CHARGES BUT SACKING UPHeld

An employee may be charged in a criminal court for commission of a criminal offence and acquitted or discharged not amounting to acquittal but he may still be validly dismissed from his employment on a charge of misconduct based on similar facts. That is the proposition derived from

two Industrial Court awards. First, in *Vasuthevan Athaly v Freescale Semiconductor (M) Sdn Bhd*<sup>ii</sup>, a show cause letter was issued against an employee on an allegation of sexual harassment in that he had touched a female worker's waist when walking past her along the walkway. He was also charged in criminal court for sexual harassment but he was given a discharge not amounting to acquittal (DNAA). The Industrial Court held that a DNAA did not mean that he had not been innocent of the charge. The domestic inquiry (DI) had also found him not guilty of the charge preferred against him but the management of the company, after examining the records of inquiry and the evidence, found the allegation of misconduct proven and thus disregarded the findings of the DI and dismissed him. In the Industrial Court, applying the test "Are we satisfied that the employer had, at the time of the dismissal, reasonable grounds for believing that the offence put up against the employee was in fact committed?"<sup>iii</sup> to the facts and after evaluating the totality of the evidence, the court ruled for the company. The court appeared to have given considerable weight to the fact that there was no reason for the complainant and her colleague to make up the allegations against the claimant.

In the other case, *Prabhdial Singh Dardara Singh v Kempas Edible Oil Sdn Bhd*<sup>iv</sup>, there was a complaint from a supplier of the company that the claimant demanded and received certain sum of money from him every month. Consequently, the claimant was arrested by the Anti-Corruption Agency (ACA) and was charged in the Sessions Court. Concurrently, he was suspended and subsequently sacked (without any show cause letter or domestic inquiry held). The Sessions Court acquitted him without calling for his defence and this decision was affirmed by the High Court and Court of Appeal. The claimant complained that his dismissal from his employment was without just cause or excuse. Citing trite authorities that the Industrial Court was not bound by the findings of criminal court and it should make its own finding based on evidence adduced in court independent

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of the outcome in a court of law<sup>v</sup>, the Industrial Court rejected the submissions of the claimant that the Industrial Court should refrain from arriving at any findings on the same issues contrary to those of the criminal court. The Industrial Court then evaluated the evidence tendered by the company witnesses and came to a conclusion that the claimant was involved in corrupt practices.

### **3. EMPLOYEE ENGAGED IN MONEY LENDING**

The claimant in *Maran Matchap v United More Sdn Bhd*<sup>vi</sup> had been accused of operating an illegal money lending business involving the employees of the company. He had been asked to stop the activity immediately as it was causing undue stress and hardship to the employees. He had also been asked to explain other complaints on his performance. His reply had been defiant. He took the company to task for taking action against him. The Industrial Court, in upholding the company's decision to sack the claimant, remarked that the claimant owed a duty to not to do anything incompatible with the faithful discharge of his duty to his employer *ie*, not to act to the detriment of the company's business. The claimant's moneylending activities had caused distress to the employees concerned. The court in its conclusion reminded those employees accused of serious misconduct not to burn all his/her bridges by being hostile to the company and instead be polite and take all measures to regain the trust and confidence of the company.

### **4. INTRODUCING RETIREMENT AGE INTO EMPLOYMENT CONTRACT**

There was originally no provision on retirement age in the company policy in *Yeoh Yin Ying v Saatchi & Saatchi Worldwide Sdn Bhd*<sup>vii</sup>. The company then sought to introduce a retirement clause that stipulated compulsory retirement age for all employees as 55 years old, in line with the practice in the government service. That was communicated to all company staff vide an email. The policy was circulated as an "Addendum to Terms and Conditions of Employment Contract". About 2 weeks later, the claimant was issued a notice of retirement that she would be retired in 3 months time upon reaching the age of 55 years old. The claimant objected to the said notice and denied receiving any notice of the newly imposed retirement age or having knowledge of it. She considered herself constructively dismissed. The Industrial Court held for the company. On the question whether, in the absence of a retirement clause in letter of

employment, an employee was entitled to continue to work in the company for as long as she was fit to perform her duties, the answer was negative. The Court of Appeal had decided in *Colgate Palmolive (M) Sdn Bhd v Yap Kok Fong & Anor*<sup>viii</sup> that the non-existence of a retirement clause in an employment contract could not mean that no employer could ever bring an employee's service to an end by retiring him at a certain retirement age, or that such an action would tantamount to dismissal without just cause or excuse. In this case, 3 persons had tendered their resignation upon reaching the retirement age by the time the new clause was introduced. Thus, it could not be said that it was not a practice of the company to retire an employee at the age of 55. And there was no basis on her contention that the policy was issued by the company to make her life miserable and to get rid of her. On the question whether the company was justified in unilaterally varying the contract of employment, the court applied the decision in *Sharp-Roxy Sales & Services Co (M) Sdn Bhd v Soo Hing Lin*<sup>ix</sup>. Whilst no one party could unilaterally vary a term of a contract, where the contract of employment was silent on the retirement age, it was not a sensible proposition to assume that a claimant was entitled to be employed for life. When the claimant was claiming that she was under the assumption and truly believed that she would be employed so long as she was fit to perform her task, the claimant was in fact asserting what she contended the company should not do *ie*, impose a new term into her contract to entitle her to remain in employment. She was also unilaterally imposing a new clause in her contract of employment which was silent on the retirement age. Neither party had addressed this court on the normal retirement age for an employee in the same category with the claimant in the industry. However, the company did lead evidence that it was in line with the government service retirement age. The company had also taken great care in communicating the addendum to the claimant. To that end, the company was justified in introducing the retirement age clause. It did not arbitrarily fix a retirement age which was inconsistent with the prevailing norm albeit of a different service. There was also no pre-contract promise made to the claimant that she could work for so long as she was fit to perform her task, unlike the case of *Dr Satwant Singh Gill lwn Hospital Assunta*<sup>x</sup>. All in all, the claimant had left the company on her own volition based on the perceived unreasonableness of the company. The company was not at fault and the claim was dismissed.

#### **IMPORTANT**

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## 5. HEARSAY RULE NOT APPLICABLE IN INDUSTRIAL COURT

The rule on hearsay evidence was thrown out of the window in the case of *Yong Kim Loong & Anor v UMW Toyota Motor Sdn Bhd*<sup>xii</sup>. Ordinarily, in a court of law, hearsay evidence is generally not admissible. An example is that a document is not admissible as evidence unless the maker of the document is called to the court to testify. In *Yong Kim Loong*, two letters of complaint written by 2 car dealers stating that they had paid secret commissions to the claimant formed the basis of the charge of receiving secret commissions from car dealers against the claimant. The 2 car dealers were not called as witnesses and only photocopies of their letters were produced. As such, the letters were hearsay. The court however noted the differences between Industrial Court and civil and criminal courts (the ordinary courts). One of such peculiar features is that the Industrial Court, being essentially an arbitration tribunal and in view of s.30(5) of the Industrial Relations Act 1967, was not bound by technicalities such as the strict hearsay rule as applied in the ordinary courts. The hearsay rule forms no part of the rules of natural justice which govern the tribunal proceedings. Hearsay would be admitted where it can fairly be regarded as reliable and the other side has been given a fair opportunity of commenting on and contradicting it<sup>xiii</sup>. Here, the claimant had been shown the letters. He denied knowing the dealers and having received any secret commissions. The Court however took into account that the writers had identified the claimant as one of the persons to whom they had paid secret commissions. Further, it had been said that giving secret commissions was the business practice of the industry and the claimant did not respond to this. Since the test to meet the burden of proof was not whether the claimant had in fact received secret commissions but whether the company had acted reasonably in thinking that the claimant did it, the court held the view that the company could not be faulted in entertaining a reasonable suspicion amounting to a belief in the guilt of the claimant as regards the charge.

## 6. RECOGNITION OF PAST YEARS OF SERVICE UNDER DIFFERENT ENTITY

In *Dynacraft Industries Sdn Bhd v Kamaruddin Kana Mohd Sharif & Ors*<sup>xiii</sup>, there was a sale of business whereby the assets and business of DSB were sold to MPI on 9.11.1995. However, these assets and business were transferred to a subsidiary of MPI, namely the

appellant (DNI). By letters dated 19.1.1996, DSB informed its employees including R that with the sale of its assets and business to MPI, their employment with DSB would cease at midnight on 20.1.1996. By letters of the same date, DNI made offers of continued employment to all the employees including R. R accepted the offer of continued employment. About 2 ½ years later, due to economic downturn, DNI re-organized its operations and carried out retrenchment exercise whereby R were retrenched due to redundancy. R challenged the dismissal and contended that DNI had ignored R's past services and thereby breached the Last In First Out (LIFO) rule. The Industrial Court ruled for R and this decision was affirmed by the High Court and Court of Appeal. At DNI's final appeal in the Federal Court, it was argued that the dates of commencement of employment as alleged by R were in respect of their employment with DSB but not with DNI. On those dates, DNI had not even come into existence and it was impossible to regard DNI as having employed R. DSB and DNI were two separate legal entities and there were breaks in the service of R. Their service with DSB could not be taken into account for the purpose of LIFO principle. It was further contended that the change of ownership of DSB's business constituted a termination of employment by operation of law<sup>xiv</sup> and as such, the 'artificial' duration of service of R with DSB could not be taken into account.

The apex court scrutinized the sale and purchase agreement and pointed out that there was provision of continued employment of DSB's employees with DNI whereby the period of employment of R with DSB shall be deemed to be employment with DNI. It was also provided that the buyer shall give those employees full credit for past service. Weight was also be given to the fact that DNI was the beneficiary of a ready-made business and workforce enabling it to commence business operation immediately without having to hunt for manpower. In this regard, R's years of service and experience with DSB stood DNI in good stead. Further, the offer of continued employment of R by DNI did not say that the offer was limited only for the purpose of computing benefits and entitlement as contended by R's counsel. The offer was clear and unequivocal --- R were offered continued employment with DNI and the period of their employment with DSB was deemed to be the continuous employment with DNI. Having been assured by DNI of continued employment on the same terms and conditions as under DSB and that the period of employment with DSB shall be deemed to be employment with DNI, R accepted DNI's offer. It would thus be unconscionable for DNI to ignore R's years of

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service with DSB for the purpose of LIFO and retrenchment. Based on the facts, LIFO was correctly applied in that the period of service of R with an entirely separate legal entity was to be taken into account instead of the actual years of service of R with DNI.

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<sup>i</sup>[2013] 1 AMR 846

<sup>ii</sup>[2013] 1 ILR 73

<sup>iii</sup>*Feredo Ltd v Barnes (EAT)* [1976] ICR 439

<sup>iv</sup>[2013] 1 ILR 521

<sup>vv</sup>*Telekom Malaysia Kawasan Utara v Krishnan Kutty Sangguni Nai* [2002] 3 CLJ 314, *Utusan Melayu (M) Berhad v National Union of Journalism, Malaysia* [1991] 2 ILR 840

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<sup>vi</sup>[2013] 1 ILR 162

<sup>vii</sup>[2013] 1 ILR 316

<sup>viii</sup>[2001] 3 CLJ 9

<sup>ix</sup>[2003] 3 ILR 1424

<sup>x</sup>[1998] 4 CLJ 47

<sup>xi</sup>[2013] 1 ILR 444

<sup>xii</sup>*TA Miller Ltd v Minister of Housing And Local Government And Another* [1968] 1 WLR 992, *Menara Panglobal Sdn Bhd v Arokianathan Sivapiragasam* [2006] 2 CLJ 501

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

<sup>xiv</sup>*Radtha Raju & Ors v Dunlop Estates Bhd* [1996] 1 CLJ 755

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## EMPLOYMENT / CONTRACT LAW

### AUTOMATIC THEORY V ELECTIVE THEORY OF TERMINATION OF AN EMPLOYMENT CONTRACT

***Whether a repudiatory dismissal of an employee would by itself terminate the contract of employment even if the repudiation were not accepted?***

The UK Supreme Court made a landmark decision in *Societe Generale, London Branch v Geys*<sup>i</sup>. The core issues were : (1) The repudiation issue --- Does a repudiation of a contract of employment by the employer which takes the form of an express and immediate dismissal automatically terminate the contract (the automatic theory)<sup>ii</sup> or does the normal contractual rule that the repudiation must be accepted by the other party apply equally to that case (the elective theory)<sup>iii</sup>? (2) The termination issue --- When, in the events that happened and having regard to para 8.3 of the handbook, was the contract terminated?

On the facts of *Societe Generale*, it did matter which of the two theories was adopted. G was employed by B. The contract of employment contained provision (para 13) that G's employment could be terminated on the expiry of 3 months' written notice given by either party to the other. Para 5.14 provided on termination, in certain relevant circumstances, that B would within 28 days after such termination make a payment (the Termination Payment) as specified in para 5.15. Para 5.15 provided different methods of calculating the termination payment which depended upon

whether G's employment terminated after 31.12.2006 but before 1.1.2008 or after 31.12.2007 but before 1.1.2009. On commencing employment, G had been provided with the staff handbook. Para 8.3 of the handbook provided that B 'reserves the right to terminate your employment at any time with immediate effect by making a payment to you in lieu of notice (or, if notice has already been given, the balance of your notice period) based on the value of your: Basic annual salary; and flexible benefits allowance; for your notice period (or, if notice has already been given, the balance of your notice period).'

On 29.11.2007, G was called to a meeting at which he was given a letter entitled "Termination of Employment", stating that B had decided to terminate his employment with immediate effect. G was escorted from the building and did not return. On 18.12.2007, B had paid into G's bank account a sum of money equivalent to 3 months' basic salary and flexible benefits allowance. On 2.1.2008, G's solicitors wrote to B stating that G had decided to affirm his contract of employment. Referring to the payment of 18.12.2007, they re-stated what had been said in earlier correspondence, that G's position in relation to those moneys was reserved until it was understood what they constituted. On 4.1.2008, B wrote to G stating that it had given him notice to terminate his employment with immediate effect on 29.11.2007 'and will pay you in lieu of your notice period...Your notice payment was credited to your bank account on 18.12.2007 your final salary slip and a tax form was sent to your home address...' Under the provisions of the handbook, G was deemed to have received B's letter on 6.1.2008. G sued B, claiming a termination payment under para 5.15 of his contract of employment on the basis that he had been dismissed on 6.1.2008 and damages for breach of contract. B considered that G was entitled to a termination payment calculated on the basis that the date of his dismissal was

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29.11.2007 or 18.12.2007. If G's claim was upheld, he would have been entitled to a termination payment of more than Euro 12.5m, whereas a ruling in favour of B's case would allow G to no more than Euro 7m. The High Court found that G had been dismissed on 6.1.2008 whereas the Court of Appeal held that G had been dismissed on 18.12.2007.

By a majority of 4 to 1, the highest court in UK preferred the elective theory, meaning that a party's wrongful repudiation terminates a contract of employment only if and when the other party elects to accept the repudiation. This is in accordance with the general principles of the law of contract. In the majority view, a termination which took place automatically upon repudiation could produce injustice; an employer might be tempted to play the automatic theory to his advantage---by getting in first before a rise in salary or a pension entitlement or as in this case, a substantial rise in the entitlement to bonuses. The party who was in the wrong should not be permitted to benefit from his own wrong. Rather than the decision as to whether the contract was at an end being beyond the control of the innocent party in all circumstances, as would happen upon automatic termination on repudiation (under the automatic theory), it was for the innocent party to judge whether it was in his interests to keep the contract alive (under the elective theory). If there existed a good reason and an opportunity for the innocent party to affirm the contract, he should be allowed to do so.

On the termination issue, it was a necessary incident of the employment relationship that the other party was notified in clear and unambiguous terms that the right to bring the contract to an end was being exercised and how and when it was intended to operate. Thus, it was necessary that G not only received his payment in lieu of notice but that he received notification from B in clear and unambiguous terms that such a payment had been made and that it was made in exercise of the contractual right to terminate the employment with immediate effect. On the facts, although payment was made by B direct to G's

bank account and G's bank was G's agent for the receipt of the payment, G's bank was not without more his agent for the receipt of the notification of what the payment was for. In short, such clear and ambiguous notification had not been given until 6.1.2008, when G was deemed to have received B's letter of 4.1.2008, that the contractual right to terminate under para 8.3 of the handbook by payment in lieu of notice method was validly exercised and G's employment with B had come to an end. B's contentions that (a) the act of making the payment into G's bank account had brought the employment to an end, that there was no requirement of notification, and (b) in any event, G had known from the letter of 29.11.2007 and later correspondence that the bank was sacking him, were rejected by the apex court.

There are strong policy considerations why the elective theory is to be preferred over the automatic theory. See the analysis of Lord Wilson in para [67] till [75] in *competition* and *disciplinary* cases. Also, the crucial factor that swayed the judicial opinion was that the application of the automatic theory might produce an injustice. The majority therefore refused to indorse the automatic theory which would have the effect of causing contract of employment to be an exception to the general rule of the law of contract.

<sup>i</sup>[2013] 1 All ER 1061, [2013] 2 WLR 50

<sup>ii</sup>*Sanders v Ernest A Neale Ltd* [1974] 3 All ER 327

<sup>iii</sup>*Gunton v London Borough of Richmond upon Thames* [1980] 3 All ER 577, *Boyo v Lambeth London BC* [1995] IRLR 50, *London Transport Executive v Clarke* [1981] IRLR 166, *Thomas Marshall (Exports) Ltd v Guinle* [1978] 3 All ER 193, *Bryne v Australian Airlines Ltd* (1995) 131 ALR 422, *Paper Reclaim v Aotearoa* [2007] 3 NZLR 169

## EMPLOYMENT / TORT

### EMPLOYEE LIABLE FOR LOSSES TO EMPLOYER DUE TO BREACHES OF DUTY

The financial controller (D1) of the 1<sup>st</sup> plaintiff in *Amanah Scotts Properties (KL) Sdn Bhd*

& 8 Ors v *Ooi Meng Khin & 6 Ors*<sup>i</sup> and his deputy (D2) were found liable to compensate their employer and its related companies (collectively Ps) for the losses suffered due to their breach of contractual duty and tortious duty of care. For a period of 18 months, there were 173 unauthorized transfers of funds amounting to RM31 million from the plaintiffs' accounts to the 4<sup>th</sup> to 7<sup>th</sup> defendants' bank accounts. The unrebutted evidence pointed to the 3<sup>rd</sup> defendant (D3) as being responsible for the fraud. D3 was the assistant manager, finance of P1. The 4<sup>th</sup> defendant (D4) was a licensed money changer; the 5<sup>th</sup> defendant (D5) was a

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general trader and a commission agent and the 7<sup>th</sup> defendant (D7) was a casino junket or commission agent of Genting Malaysia Berhad.

It was held that as a financial controller, D1 was under a duty to safeguard the assets and monies of the Ps against unauthorized withdrawals. A financial controller was to monitor and manage the financials of the company, to safeguard the monies entrusted to his care and to supervise those assisting in keeping an eye over the income and expenditure of the company. The standard of care would be that of a reasonably competent accountant carrying out the same engagement and professing the skills as D1 and D2.

Both of them had failed in this respect. They had allowed monthly bank reconciliation to be done based on photocopies of bank statements which turned out to be faked and fabricated. The fraudulent and unauthorized transfer out of monies from the Ps' accounts would have been discovered if original bank statements were to be examined. They had compromised their professionalism on account of their friendship with D3 at the expense of their employer. They had failed to thoroughly investigate the concerns raised by an account staff of P1 (M). Instead, they entrusted D3 to investigate! They however relied on *novus actus interveniens*<sup>ii</sup> on the part of Citibank and Public Bank, in that the banks' payments out without mandate was the effective causative act that caused the funds to exit the coffers of the Ps and that D1 and D2's actions or inactions were merely facilitating acts. The learned Judge rejected this defence. The loss to the Ps would not have been possible if Ps' own employees had been careful in checking the original statements and the fraud would have been discovered. Nonetheless, the benefit was given to D1 and D2 up to the point of M's alert. Taking into account all relevant factors, D1 and D2 were ordered to pay damages of RM5 million each.

## **GUARANTEE / BANKING LAW**

### **PRINCIPAL DEBTOR CLAUSE V ON-DEMAND CLAUSE**

#### ***A change in legal position?***

It is not surprising at all that the banking industry was taken aback by the High Court

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As to D4, his suspicion should have been aroused in view of the unusually larger transactions. He had failed to comply with Money Changing Act 1968, Anti-Money Laundering and Anti-Terrorism Financing Act 2001. His failure to inquire further rendered him liable under "knowing receipt" of the monies for which he was held accountable to Ps to the tune of RM22.6 million.

D5 was held to account for the sum of RM400,000 it had received from P4 which originated from D3's plan to siphon off monies from P4 using D5 as the vehicle. As to D7, there was evidence that D7 knew that the gambling debts of D3 were being repaid by means of monies transferred from P1 and P4 to D7's bank account and not from D3's personal account. D7 however chose not to inquire further. In such circumstances, D7 was to account for RM6.25 million to P1 and P4.

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<sup>i</sup>[2013] 1 AMCR 231

<sup>ii</sup>It means that if a particular consequence of the defendant's wrongdoing is attributable to some independent act or event which supersedes the effect of the initial tortious conduct, the defendant's responsibilities may not extend to the consequences of the supervening act or event. See *Clerk & Lindsell on Torts*, 17<sup>th</sup> edn.

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decision in *AmBank (M) Berhad (formerly known as MBf Finance Berhad) v Glorious Holidays Sdn Bhd & Anor*<sup>i</sup> for it appears to have departed from the legal position as generally understood with regard to the time the cause of action against a guarantor in an on-demand guarantee arises.

In *Glorious Holidays* case, P had on 25.11.1993 granted a loan to D1 which was guaranteed by D2 vide an Individual Letter of Guarantee (LOG). The loan was also secured by



an assignment (Assignment) over a property. The few pertinent dates are as follows:

29.11.1997	D1 made its last repayment of the Loan to P. D1 defaulted in further repayments.
17.12.2007	P foreclosed and sold the property by auction.
9.4.2010	P issued a letter of demand to D1 for the shortfall after taking into account the sale proceeds.
23.4.2010	P issued a letter of demand to D2.
29.4.2010	P filed the civil suit against both D1 and D2.

The LOG was an on-demand guarantee. However, clause 2.1 of the LOG provided that D2 irrevocably and unconditionally guaranteed as principal debtor and not merely as surety to repay the loan together with interest and cost in the event D1 defaulted in the repayment of the loan. It was also agreed that D2's liability would be co-extensive with that of D1. Clause 7.03 of the LOG also stated D2's agreement to be the principal debtor of the total indebtedness which D1 might owe to P from time to time. Section 11.05 of the Loan Agreement also entitled P to simultaneously exercise its rights under the Assignment and the Power of Attorney to commence action for the recovery of all moneys owing under the Loan Agreement and the Security Documents, namely the LOG, by way of civil suit against D2 without any notice to him

The High Court held that in a situation where there was a principal debtor clause, the cause of action against D2 guarantor arose immediately upon the default to pay by D1 and no demand on D2 was necessary. Thus, the cause of action against D2 accrued on 29.11.1997 and the claim would have been time-barred by 29.11.2003. In answering P's contention that the LOG was an "on-demand guarantee" and since the demand was only made against D2 on 23.4.2010, time only started from that date and the suit filed on 29.4.2010 was well within time, the Judge cited the English decision in *MS Fashion Ltd and Others v BCCI SA and Others*<sup>ii</sup> for the proposition that the "principal debtor" clauses had the effect of creating primary liability for the purposes of the rule that the debt was not contingent upon demand. Thus, the letter of demand dated 29.4.2010 did not postpone the commencement of the limitation period from 29.11.1997 to 29.4.2010.

Prior to this decision, the legal position was that in an on-demand guarantee, the cause of action against a guarantor did not arise until and unless the making of a valid demand against the guarantor<sup>iii</sup>. Clearly, *Glorious Holidays* does not subscribe to this position. Indeed, the Judge went as far as concluding that the LOG was not an on-demand guarantee upon construing the LOG in its

entirety. The Judge emphasized heavily on the presence of the principal debtor clause. Although the Judge cited *EON Bank Bhd (previously known as Oriental Bank Bhd) v Mohd Yunus bin Alias & Ors*<sup>iv</sup> to seemingly support the effect of a principal debtor clause, in truth the decision in *Mohd Yunus bin Alias*, as reported in Issue Q4 of 2010 of THE UPDATE, gave over-riding effect to the on-demand clause over the principal debtor clause. A couple of extracts from *Mohd Yunus bin Alias* will be enlightening :

"In the context of guarantors, this (principal debtor) clause is intended to allow the creditor the right to sue the guarantors in the event of a default without requiring the creditor to first seek recourse against the principal borrower. The creditor may sue both principal borrower and guarantors as principal debtors at the same time. It does not however mean that a demand to the principal borrower is to be construed as a demand on the guarantors. In my view, a separate and specific demand must be made on the guarantors and it is upon the failure to pay on that demand that the cause of action accrues."

..."As much as the guarantors may be entitled to insist on the strict adherence to the terms of the guarantee and cannot be held liable for more than what was undertaken, this must similarly hold true for the plaintiff. The plaintiff is equally entitled to insist on the rigid adherence to the terms of the guarantee. In this guarantee, the parties had agreed that the defendants 'will pay you on demand all sums of money'. The plaintiff cannot be faulted for having complied with the terms of the guarantee and complying with the condition precedent to the filing of the claim."

The position adopted by *Mohd Yunus bin Alias* is reflective of the prevalent law. For instance, the Supreme Court in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* said:

"It is true that cl 14 makes each guarantor a principal debtor. But this does not mean that the guarantor is not entitled to a

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proper demand. After all, the first defendant, the principal debtor, was served with a proper demand. Why should the guarantors be treated as principal debtors, not be served with the proper demand?"

And in an earlier case of *Mok Hin Wah & Ors v United Banking Corp Bhd*, the apex court remarked:

"Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor."

Recently, the Court of Appeal in *Malayan Banking Berhad v Boo Hock Soon @ Boo Choo Soon*<sup>v</sup> upheld the entrenched legal position that the accrual of the cause of action against a guarantor was to be calculated from the date the notice of demand was issued and not from the date of the breach by the borrower.

Our view is that *Mohd Yunus bin Alias* is to be preferred over *Glorious Holidays*. However, the fact remains that we are now faced with two

conflicting decisions, *Glorious Holidays* and *Mohd Yunus bin Alias*. It is hoped that an occasion will arise soon for our appellate courts to make a final ruling and clarify the state of law in this regard. However, pending that, it is advisable for banks to ensure that a demand against guarantor(s) is issued (so as to be in compliance with the on-demand clause) and the suit against the guarantor(s) is commenced within 6 years from the date the cause of action against the principal borrower accrues.

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<sup>i</sup>KLHC Suit No: D-22-NCC-842-2010, decision delivered on 13.2.2012.

<sup>ii</sup>[1993] 2 Bank LR 128

<sup>iii</sup>See *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155, *Mok hin Wah & Ors v United Banking Corp Bhd* [1987] 2 MLJ 610

<sup>iv</sup>[2010] 9 MLJ 587

<sup>v</sup>[2013] 1 AMCR 19, decision delivered on 1.10.2012.

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## LAND LAW

### MALAYSIA BOLEH !

***"If this case is any indication, some landowners in Perak will be having sleepless nights wondering if the titles they have in their possession are still valid because of the mischievous and criminal inclinations of a few within and outside of the land registry," said the Judge.***

That would be an apt (and sarcastic) description of the events that took place in *Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors*<sup>i</sup>. A registered proprietor of a plot of land (P) in Perak woke up one morning and found that he was no longer the registered owner of the land, although he has never parted with the manual issued document of title (IDT) of the land. How could this have happened? Apparently, the dispossession of P's ownership of land happened when the 8<sup>th</sup> to 12<sup>th</sup> defendants (D8-D12) was embarking upon an exercise to convert the land titles in Perak to a computerized IDT (computerized IDT). During this

exercise, a computerized IDT of P's land had been issued in the name of the 1<sup>st</sup> defendant (D1) on 12.6.2002. Thereafter, the land changed hands 3 times, ie, from D1 to D2 (1<sup>st</sup> sale); from D2 to D3, 4, 5 & 6 (2<sup>nd</sup> sale); and from D3, 4, 5 & 6 to D6 (3<sup>rd</sup> sale). Thereafter, D6 sold the land to D7 but consequent upon a police report lodged by P complaining about the dispossession of its ownership of the land, a registrar's caveat was entered to protect P's interests. However, when the said caveat came to be removed (upon D6's application but neither D6 nor D8-D12 saw it fit to notify P or make P a party), D7 became the registered proprietor of the land ! P who had no knowledge of the removal, commenced action to restore itself as the rightful proprietor of the land.

The High Court unhesitatingly ruled in favour of P, whose original manual IDT was the valid title. The second computerized IDT ought not to have been issued. Its issuance was due to a grave failure of D8-D12 in failing to adhere to the strict mandatory provisions set out in the National Land Code (NLC). No notification was issued to P for P to take delivery of the computerized IDT in exchange for the manual IDT in P's name and possession. There was no cancellation or destruction of the manual IDT in P's name and possession. P was never issued with the computerized IDT in its name. Thus, the issuance of the computerized IDT in D1's name was *ultra vires* and unlawful with the effect that any other

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instruments executed thereon would also be void and liable to be set aside at the instance of P as the rightful registered proprietor. In view of the void title at its inception, subsequent *bona fide* purchasers for value could not avail themselves of the protection afforded by the proviso to s 340(3) of the NLC.

D7 claimed for contribution and indemnity against D8-D12. The Judge allowed it. D8-D12 had failed to ensure reasonable or adequate security of their computer system and had fallen short of the standard that was to be expected of a public authority. They were grossly negligent and in breach of their statutory duties. On evidence in

its entirety, the irresistible supposition was that there was fraud going on within the offices of D8-D12.

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<sup>i</sup>[2013] 7 MLJ 755

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## PARTNERSHIP

### LAWYERS FOUGHT OVER NAME

***Goodwill in the name of dissolved firm remains partnership asset and cannot be utilized without consent of all partners***

A simple but important point in relation to partnership was canvassed and determined in *Tai Foong Lam v Hamdi Abdullah & 3 Ors*<sup>i</sup>. In the absence of a partnership agreement, upon dissolution of partnership, is a partner entitled to use the firm's name and to carry on business under such name? Who owns the name of the firm?

A group of lawyers --- R1, R2, A, R3 and R4 formed a partnership under the name of "Abdullah Chan & Co" (the firm). No agreement was entered into by the parties. Their relationship deteriorated resulting in A issued a notice of dissolution to dissolve the firm. After such dissolution, R1 and R2 applied to practice under the name and style of "Abdullah Chan". The High Court allowed their application with some ancillary orders. Dissatisfied, A appealed and the interveners (R3 and R4) cross-appealed.

The appellate court held that the High Court judge had not addressed his mind to the critical issue at hand but had instead focused on the irrelevant issue of R1 and R2 being entitled to continue to use their surnames (Abdullah and Chan) in their intended new firm and that it would not cause confusion. The pivotal question was whether the goodwill in the name "Abdullah Chan" belonged to all 5 partners of the dissolved firm and in the absence of an agreement to the contrary, no partner thereof had a right to use the firm name.



The goodwill of a partnership related to the implicit and intangible element of reputability, character, even respectability of the partnership. The test of whether a partner could use the name of the partnership after the dissolution depended on whether the goodwill of the partnership had been assigned and not whether the name of the dissolved firm carried the name of the partner who was objecting to the use of the name. There was no agreement among the five partners that the goodwill in the name "Abdullah Chan" was to be divided between them. Thus, in the absence of such an agreement, the goodwill could not said to belong to R1 and R2 only. It remained in the asset of the firm as a whole. A, R3 and R4 were legally entitled to have the partnership assets including the goodwill sold for their common benefit. Until and unless the process of winding-up of the affairs of the firm was completed, none of the partners was entitled to use the name of their erstwhile partnership.

The orders of the High Court were therefore set aside.

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<sup>i</sup>[2013] 2 AMR 50

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## PRE-CONTRACTUAL DUTY OF CARE IN PRIVATE BANKING RELATIONSHIP

The bank-client relationship in private banking was the focus in the Singapore case of *Deutsche Bank AG v Chang Tse Wan*<sup>i</sup>. The facts are lengthy and complex. Given limited space here, we can only provide a very brief version, both on the facts and the principles (law) set out in the case.

The plaintiff (DB) filed a claim against the defendant (Dr Chang) for the repayment of sums due from Dr Chang's private wealth management account with DB's Singapore branch. Dr Chang counterclaimed for damages arising from actionable misrepresentation, fraudulent misrepresentation, breach of fiduciary duty and breach of a duty of care against DB and DB's relationship manager (Wan). DB and Wan sold Dr Chang a total of 34 derivative products, all of which led him to lose about US\$49m. Dr Chang contended that DB and Wan assumed a duty of care to use reasonable care to advise him on managing his new wealth which they failed to do. Dr Chang also asserted that they assumed a fiduciary obligation to him. DB and Wan relied on the banking documents (particularly the non-reliance, own-judgment, non-advisory clauses therein) to operate as an evidential or contractual estoppels that prevented Dr Chang from establishing his claims.

On the claim based on misrepresentation, the High Court reiterated the test laid down in *Bestland Development Pte Ltd v Thasin Development Pte Ltd*<sup>ii</sup>. For a statement to constitute an actionable misrepresentation, it had to be a statement of a present fact. This excluded statements as to future intention, predictions, statements of opinion or belief, sales puffs, exaggerations and statements of law. Thus, a statement by one party that he "would" do something for the other party in the future (*ie*, the written representations from the Presentation by Wan/DB to Dr Chang in question allegedly contained the word "would") was in essence a promise, which became actionable only if such promise was subsequently incorporated into the contract as a term. Nonetheless, the fact that the statements were statements as to future intention was not necessarily fatal to a misrepresentation claim.

A statement as to a future act "could and often did carry with it a representation that the maker of the statement had an honest belief or

expectation, based on reasonable grounds, that events would turn out to be stated or forecast", which made it a statement of present fact<sup>iii</sup>. Statements as to future facts might thus be re-characterised as statements implying (a) that the maker of the statements honestly believed that the event would happen in the future; or (b) that the maker had reasonable grounds for making such an assertion<sup>iv</sup>.

Dr Chang's pleaded case, however, did not reveal any false statements of present facts made in the Presentation such as to constitute actionable misrepresentation (at best, they were statements of future intention or business promotional puffs). Accordingly, his claim based on misrepresentation failed.

On the claim of breach of fiduciary duty, the High Court held that on the facts, DB had not undertaken as Dr Chang's fiduciary. A fiduciary was someone who had undertaken to act for or on behalf of another in a particular matter in circumstances which gave rise to a relationship of trust and confidence<sup>v</sup>. The distinguishing obligation of a fiduciary was the obligation of loyalty. A principal was entitled to the single-minded loyalty of his fiduciary. And a fiduciary relationship might arise in law in 3 situations: when it fell within established categories of relationships; by contract, or on proof of exceptional circumstances<sup>vi</sup>. Ordinarily, the relationship between a bank and its customer was not considered as a fiduciary relationship<sup>vii</sup>. However, it might be one if exceptional circumstances existed. This depended on whether or not the fiduciary had undertaken, expressly or impliedly, to act as a fiduciary vis-à-vis the principal, *ie*, to put the principal's interests ahead of its own<sup>viii</sup> (the concept of selflessness<sup>ix</sup>). In this regard, the court cautioned against 'read equity backwards', *ie*, it was unacceptable for the court to impose fiduciary duties on an errant party whenever the court thought that it was fair, just and reasonable to do so. On the facts, whilst DB's and Wan's conduct did not reflect best industry practice, it was insufficient to establish that they had exceptionally undertaken to promote Dr Chang's interests above their own. The commercially self-interested DB and Wan did not undertake to act in Dr Chang's interests and to subordinate Dr Chang's interests to their own. Accordingly, a fiduciary relationship did not arise.

That left Dr Chang with the final claim under the tort of negligence. The existence of a duty of care was to be determined by the basic two-stage test premised on proximity and policy considerations with its application preceded by a

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preliminary requirement of factual foreseeability as laid down in *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency*<sup>x</sup>. The absence of an analogous precedent case was not an absolute bar against a finding of a duty of care. The prevailing approach was to focus on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole, instead of mere application of high level statements of principle<sup>xi</sup>. Whilst DB and Dr Chang had an adviser-client relationship, labels such as “adviser” and “advisory relationship” were inherently ambiguous and revealed very little about the content of the relationship. The mere giving of advice, even specific investment advice, was without more insufficient to establish a duty of care.

The primary enquiry focused on factors such as: (i) the customer’s degree of commercial sophistication and financial acumen; (ii) the extent to which a bank had held itself out as offering advisory services or as a financial expert, whether orally, in its contractual documentation or in promotional literature; (iii) the status and role within the bank of any individual with whom the customer dealt and the capacity in which that person tendered any alleged advice; and (iv) the terms of the parties’ contractual relationship which might operate to negate the existence of any implied or concurrent duty of care<sup>xii</sup>.

On the facts, Wan had sought out Dr Chang and arranged for the March meeting where he recorded Dr Chang’s financial inexperience and that Dr Chang was looking for advice to manage his new wealth. Wan then voluntarily undertook to Dr Chang during the meeting that DB was able to and would advise Dr Chang in managing his wealth. As a result of such undertaking, Dr Chang decided to retain Wan and DB to advise him on managing his wealth. 5 months later, Dr Chang signed the application form and deposited the funds in DB. On these unusual facts, Wan and DB had voluntarily assumed a pre-contractual duty of care in advising Dr Chang on managing his new wealth at the March meeting. The absence of a specialized advisory agreement did not preclude the assumption of a duty of care.

The court went on to decide whether the Service Agreement Disclaimers and the Derivative Disclaimers were effective to exclude liability on the part of DB. The Service Agreement Disclaimers provided that DB was not acting as Dr Chang’s fiduciary or adviser in respect of any services provided; that Dr Chang had made his own decisions in relation to any transaction with

DB; that DB might give advice but if DB did so, such advice was given on the basis that Dr Chang would make his own assessment and rely on his own judgment. The Derivative Disclaimers also contained rather similar non-fiduciary, non-advisory disclaimer, own judgment disclaimer and non-reliance disclaimer.

It is trite that a general duty of care may arise as a concurrent tortious duty co-existing alongside contractual duties, to the extent that the contractual duty does not limit or exclude the tortious duty. Where the bank was not acting as adviser, contractual disclaimers would effectively exclude a concurrent tortious duty of care between commercially sophisticated parties. However, in the instant case, there was a complete asymmetry of commercial sophistication and experience between Dr Chang and Wan and DB such that the concurrent tortious duty of care, quite apart from the pre-contractual duty of care, was not displaced by the Service Agreement Disclaimers.

The Service Agreement Disclaimers or the Derivative Disclaimers might operate as evidential or contractual estoppels to prevent Dr Chang from establishing a duty of care. Evidential estoppel operated to prevent the party who had given an acknowledgment (of non-reliance) from asserting in subsequent litigation that the acknowledgment given to the same party was not true<sup>xiii</sup>. Contractual estoppel allowed parties to agree via contract that a certain state of affairs should form the basis for the transaction, whether it be the case or not<sup>xiv</sup>. Wan and DB had failed to establish an evidential estoppel because they did not show that Dr Chang had intended Wan or DB to act on the Service Agreement Disclaimers. Indeed, there was no evidence that the disclaimers were brought to Dr Chang’s attention.

Significantly, the line of cases establishing contractual estoppel involved professionally-drawn commercial contracts between experienced parties of equal bargaining power. The doctrine did not apply here because Dr Chang was known to Wan and DB to be financially inexperienced, and Wan and DB undertook pre-contractually to advise him in managing his new wealth.

Lastly, the duty of care was breached when (a) Wan and DB sold 34 derivate products without advising Dr Chang as to the implications of the deep discount to the market price of those shares; (b) Wan and DB failed to provide Dr Chang with any risk management advice; (c) Wan applied for and DB extended unsolicited unilateral margin trading facilities to Dr Chang; and (d) DB failed to notice Dr Chang’s sudden recorded

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changes in his risk profile when Dr Chang purchased the 34 derivative products in quick succession within three weeks. Accordingly, DB's claim against Dr Chang for margin shortfall failed whilst Dr Chang's counterclaim for damages of US\$49m succeeded. The court had an unfettered discretion to award simple or compound interest as damages as was appropriate that would justly compensate the person for the loss that he has suffered<sup>xv</sup>. However, Dr Chang was only awarded simple interest as compound interest was not appropriate in this case.

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

<sup>ii</sup>[1991] SGHC 27

<sup>iii</sup>*Bank Leumi Le Israel BM v British National Insurance Co Ltd* [1988] 1 Lloyd's Rep 71

<sup>iv</sup>*British Airways Board v Taylor* [1976] 1 WLR 13, *Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR (R) 307

<sup>v</sup>*Bristol and West Building Society v Mothew* [1998] Ch 1

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<sup>vi</sup>*Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41

<sup>vii</sup>*Governor and Company of the Bank of Scotland v A Ltd* [2001] 1 WLR 751

<sup>viii</sup>*Ng Eng Chee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109

<sup>ix</sup>*Ellinger's Modern Banking Law* 5<sup>th</sup> Ed, 2011, p.128

<sup>x</sup>[2007] 4 SLR(R) 100

<sup>xi</sup>*Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785

<sup>xii</sup>*JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm)

<sup>xiii</sup>*E A Grimstead & Son Ltd v Francis Patrick McGarrigan* [1999] EWCA Civ 3029

<sup>xiv</sup>*Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386, *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566, *Als Memasa v UBS AG* [2012] 4 SLR 992

<sup>xv</sup>*Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, *The Oriental Insurance Co Ltd v Reliance National Asia Pte Ltd* [2009] 2 SLR(R) 385

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the business of a motor vehicle tyre supplier and fitter.

The county court held that all the requirements of *Rylands v Fletcher* were satisfied and entered judgment for the claimant. He concluded that it was the escape of fire that brought the case within *Rylands v Fletcher* principles. At the Court of Appeal, the issue was whether there was a special or different rule under *Rylands v Fletcher* to deal with damage caused by the spread of fire. The answer was an emphatic "No".

The principles espoused under *Rylands v Fletcher* were to be applied in fire cases as well as in other cases of escaping dangerous things. The court acknowledged the difficulty to bring fire damage cases within the rule because (i) it was the 'thing' brought onto the land which must escape, not the fire started or increased by the 'thing'; (ii) while fire could be a dangerous thing, the occasions when fire as such was brought onto the land might be limited to cases where the fire had been deliberately or negligently started by the occupier; and (iii) starting fire on one's land could well be an ordinary use of the land.

In this case, the 'thing' brought onto the defendant's premises was a large stock of tyres. Tyres as such were not exceptionally dangerous or mischievous. The fire had escaped, not the tyres. Keeping a large stock of tyres on the premises of a tyre-fitting business was not an extraordinary or unusual use of the land. The county court had

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## TORT

### DAMAGE CAUSED BY 'ESCAPE' OF FIRE

#### Application of *Rylands v Fletcher* to raging fire

Every law student will remember the rule in *Rylands v Fletcher*<sup>i</sup>. It is the law, in the original words of Blackburn J in the case, that "the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape".

Thus, the 3 well-known requirements to the rule establishing liability: (i) the defendant must bring onto his land something that was dangerous; (ii) the danger escaped from the defendant's land to the claimant's land; and (iii) the use to which the defendant had put his land was 'non-natural'. It is a branch of the law of nuisance. The question that arose in the English case of *Gore v Stannard (trading as Wyvern Tyres)*<sup>ii</sup> was whether the rule applied where the damage to the claimant's land was caused by the 'escape' of a fire which raged through the defendant's premises, its ferocity fed by the ignition of the large stock of tyres which he had brought on to his land on which he carried out

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therefore erroneously extended the scope of the principle. The appeal was allowed.

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<sup>i</sup>[1861-73] All ER 1  
<sup>ii</sup>[2013] 1 All ER 694

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## TORT / CONTRACT LAW

### DOES ARCHITECT OWE DUTY TO PURCHASERS TO ENSURE CFO FOR OCCUPATION ISSUED WITHOUT DELAY?

In *Loh Chiak Eong & Anor v Lok Kok Beng & Ors*<sup>i</sup>, the defendants (D) were the architects of an industrial development project (the project) while the plaintiffs (P) were purchasers of the industrial buildings in the project who had entered into sale and purchase agreements (SPA) with the developer. The original layout plan for the project was submitted by D to the local authority. In granting the planning approval, the local authority imposed a condition that the requirements of the Department of Environment (DOE) must be complied with. The SPA also specifically contemplated compliance with the statutory requirements of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 and for the construction of a Central Effluent Industrial Treatment System (the CEITS) for the treatment of hazardous and toxic waste that would be discharged by the industries in the project.

The CEITS arranged by the developer to be designed by a specialist and constructed did not function to the satisfaction of DOE, and as a consequence DOE refused to issue its certification of approval. Due to this, D refused to apply for the Certificates of Fitness for Occupation (CFO) and subsequently, resigned as the architects for the project. A delay of 8 years ensued before P could lawfully occupy the buildings. It was P's case that the delay in obtaining the CFO had caused them financial loss and such delay was due to the professional negligence on the part of D who owed P a duty of care to ensure that the CFOs for the buildings were obtained without undue delay.

The Court of Appeal overturned the decision of the trial court. It was held that while an architect might be made liable for faulty design or negligent supervision in personal injury or inherent

defects or damage to property, there was no authority to support the contention that D as the architects owed D as purchasers of the industrial buildings a duty of care to ensure that the CFOs were obtained without undue delay. While D as the architects of the project would be able to foresee that the various acts or omissions complained of would result in a delay in obtaining the CFOs and consequential loss to P, such 'foreseeability of harm or damage' was not the only test or factor in determining the existence of a duty of care.

After combing through authorities in numerous Commonwealth countries over the years since the very first landmark case that established the 'neighbour principle' in duty of care in *Donoghue v Stevenson*, the appellate court decided that it would be not be just and reasonable to impose a duty of care on the architects to ensure that there was undue delay on the part of the developer in obtaining the CFOs from the local authority. The purchasers had entered into a contractual relationship with the developer.

Thus, should there be any undue delay in obtaining the CFO, due to some carelessness or blunder or omission on the part of the developer or its agents (the developer's architects were the agents of the developer), the purchasers' only remedy was to sue the developer for breach of contract or negligence, and not to sue the architects, who have no contractual relationship with the purchasers, by attempting to invoke the law of negligence. Further, the court reiterated the weight of judicial opinion which went against extending the *Donoghue v Stevenson* principle to pure economic loss, which was the case here. P's loss was purely financial in nature and was not linked to any personal injury or structural defects or damage to property.

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<sup>i</sup> [2013] 1 MLJ 27

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## TORT (DEFAMATION)

### DEFAMATORY ARTICLE CARRIED OUT PHOTO OF WRONG PERSON

#### ***Not necessary to show article intended to refer to plaintiff***

A mistaken photograph accompanying an article formed the basis of action in *Kumarasamy a/l v The New Straits Times Press (M) Bhd*. The defendant (NST) was a newspaper publisher. It published an article entitled 'Murugiah move riles some MIC, PPP members' which referred to statements made by one Dr R Muruga Raj who expressed unhappiness with sacked People's Progressive Party (PPP) Youth leader Datuk T Murugiah's decision to join another political party, Malaysian India Congress (MIC). The article carried a photograph of an Indian man purportedly to be that of Dr R Muruga Raj, but in actual fact, the Indian man in the photograph was the plaintiff (P). P claimed that as a result of such publication, he had been held in contempt and ridicules by many people who read the article and who actually thought that P was actually Dr R Muruga Raj. P sued NST for defamation.

The impugned words in the article were held to be defamatory. However, were they defamatory of P? In this regard, it was not necessary to show that NST intended to refer to P or to defame P. NST's intention or state of mind was irrelevant. It was sufficient if reasonable people would think the words to be defamatory of P. The test was not whom the article intended to name, but who a part of the audience might reasonably think was named --- not who was meant but who the article pointed to. Granted P's

photograph was used by mistake in the article identifying him to be Dr Muruga Raj, the court found that in all circumstances, the impugned words could reasonably be understood to refer to P.

NST attempted to argue that the delay of about one year from the date of the publication of the article in filing the action showed that P was actually not defamed by the article. This argument was rejected by the court, for on the facts, the delay was contributed by NST's lackadaisical attitude in attending to P's complaint about the article.

On hindsight, NST could have escaped liability or at least be held to be less blameworthy if it were to immediately take action to correct the mistake, such as publishing a clarification, after the mistake came to its knowledge. Unfortunately, despite having received complaint from P, NST maintained a wall of silence. Even after the writ was filed, NST still refused to publish a clarification unless P withdrew the suit. In such circumstances, it was inappropriate to only grant P nominal damages. General damages of RM120,000.00 were awarded

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<sup>i</sup>[2013] 7 MLJ 361

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(Yeoh Seok Khoy, third party)<sup>i</sup>. The exact advertisement is reproduced below:

## TORT (DEFAMATION)

### ADVERTISEMENT TO LOCATE SOMEONE WITH REWARD PROMISED --- DEFAMATORY ?

At times, you may come across advertisement in a newspaper which requests anyone knowing the whereabouts of a person (accompanied by his photograph) to contact a phone number and a reward will be given. Can that person sue the newspaper for defamation by claiming that such advertisement in its natural and ordinary meaning impute dishonourable or discreditable conduct to him?

Such factual scenario arose in the case of *Lim Kee Fung v Kwong Wah Yit Poh Press Bhd*

(Colour photograph of the plaintiff)

ORANG YANG HILANG  
Lim Kee Fung 611102-07-5277

Jika anda temui atau jumpa orang ini  
Sila hubungi  
016-903 2527  
Pembayaran akan dibuat sebagai tanda penghargaan.

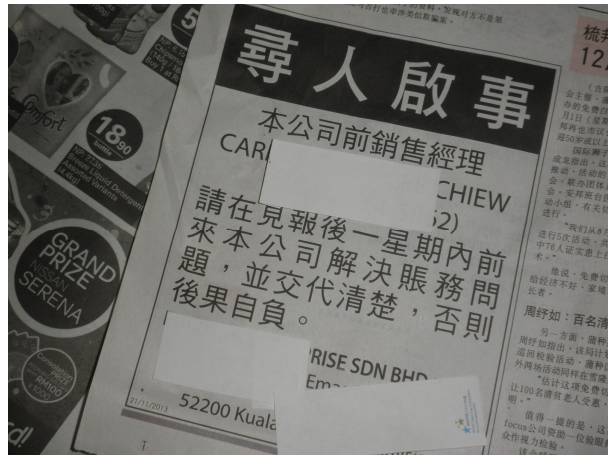
The 3<sup>rd</sup> party who took out the advertisement did so because allegedly the plaintiff owed him money and his efforts to contact the plaintiff were unsuccessful. He said that he resorted to do so as he had commonly seen such

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advertisements in Chinese language newspapers to locate people. The plaintiff claimed that the advertisement was defamatory of him in that it had suggested he was a cheat or conman, that he had committed a serious offence and was in hiding or was involved in illegal transactions and that he was not fit to hold any position in society or to be a director or head of a company.



The High Court in Alor Setar dismissed the claim. Applying the standard 'of ordinary people, of

fair average intelligence, who are not avid for scandal and should not be unduly suspicious"<sup>ii</sup>, the judge held that the words in the advertisement were neutral and meant exactly what were stated there, which was to locate someone. There was nothing in the advertisement which carried the negative connotations as asserted by the plaintiff. The offer of reward was as stated therein to be a token of appreciation. The defendant's employee who had drafted the advertisement based on the 3<sup>rd</sup> party's instructions was told that the 3<sup>rd</sup> party wanted to locate the plaintiff who was a customer who owed money. This being a social service provided by the newspaper and common in Chinese press to place advertisements to locate a person, it was sufficient for the said employee to ensure the contents were true by making sure the wordings did not affect the person concerned.

<sup>i</sup>[2013] 7 MLJ 91

<sup>ii</sup>*Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492

THE UPDATE is a quarterly law bulletin of TAY & HELEN WONG Law Practice which aims to highlight to the firm's clientele, business partners and friends contemporaneous development in law (particularly in principal areas of the firm's law practice) which might have an impact on their business dealings, operations or trade. The bulletin focuses primarily on case law development in the jurisdiction of Malaysia.

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