

THE UPDATE



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TABLE OF CONTENTS

| | | JUR | PAGE |
|---------------------------------------|---|-----|------|
| ADMINISTRATIVE LAW | JUDICIAL REVIEW IN A NUTSHELL | MY | 3 |
| ADMINISTRATIVE LAW / LOCAL GOVERNMENT | MPSJ'S QUEST FOR MORE REVENUE | MY | 6 |
| COMPANY LAW | SETTLEMENT AGREEMENT NOT AFFECTING CLAIM AGAINST NON-PARTY | MY | 8 |
| COMPANY LAW / DAMAGES | DAMAGES IN S.181 OPPRESSION SUIT | MY | 9 |
| COMPANY LAW / LIQUIDATION | WHAT TO DO IN APPOINTING PERSON TO ASSIST LIQUIDATOR | MY | 11 |
| COMPANY / TRUST LAW / TORT | COMPANY SECRETARY PROFESSIONALLY NEGLIGENT | MY | 12 |
| CONTRACT LAW | SELLER'S REMEDIES FOR NON-PAYMENT OF DEPOSIT | UK | 13 |
| CONTRACT / ADMINISTRATIVE LAW | POWER TO BLACKLIST SUPPLIER | IND | 14 |
| CONTRACT / TORT / BANKING LAW | ERROR IN CARRYING OUT STANDING INSTRUCTION | MY | 16 |
| COURT PROCEDURE | IS BREACH OF CONSENT ORDER AN ACT OF CONTEMPT? | MY | 17 |
| COURT PROCEDURE / CONTRACT LAW | INJUNCTION NOT AS OF RIGHT DESPITE CONTRACT STIPULATION | MY | 18 |
| DAMAGES / TORT (TRESPASS) | "USER PRINCIPLE" TO ASSESS DAMAGES FOR TRESPASS TO LAND | MY | 19 |
| DATA PROTECTION | LIQUIDATOR NOT DATA CONTROLLER UNDER PDPA | UK | 20 |
| DIGEST OF EMPLOYMENT LAW CASES | 1. EPF CONTRIBUTION NOT DEDUCTABLE FROM RETIREMENT GRATUITY | MY | 21 |
| | 2. INVALID INTRODUCTION OF NEW RETIREMENT AGE | MY | 22 |

| | | | | |
|-------------------------|----|--|----|----|
| | 3. | JOINDER IN NON-COMPLIANCE APPLICATION | MY | 23 |
| | 4. | MISAPPROPRIATION OF BEREAVEMENT COLLECTIONS | MY | 24 |
| | 5. | NO EXTRA TERRITORIAL JURISDICTION | MY | 24 |
| EMPLOYMENT LAW | | DISCIPLINARY HEARING IS NOT ADJUDICATION | UK | 25 |
| EQUITY | | FIDUCIARY DIVERTING CONTRACTS TO RIVAL COMPANY | SG | 27 |
| EQUITY | | DOCTRINE OF MARSHALLING | UK | 27 |
| EVIDENCE / BANKING LAW | | DEFECTIVE EXPERT OPINION | MY | 30 |
| GIFT | | <i>DONATIO MORTIS CAUSA</i> - GIFT IN CONTEMPLATION OF IMPENDING DEATH | UK | 31 |
| LAND LAW | | ACCESSORY CAR PARK PARCELS NOT TO BE DEALT SEPARATELY | MY | 32 |
| LAND / CONTRACT LAW | | REAL ESTATE NEGOTIATOR EFFECTIVE CAUSE OF SALE | MY | 33 |
| MORTGAGE / CHARGE | | MORTGAGEE AUCTIONED OFF MORTGAGED PROPERTY TO ITS OWN SELF | UK | 35 |
| PRIVACY / COPYRIGHT LAW | | RIGHTS TO PRIVACY IN MALAYSIA | MY | 36 |
| REVENUE LAW | | NO 'PASS ON' DEFENCE FOR ILLEGALLY COLLECTED TAXES | MY | 38 |
| TORT (NEGLIGENCE) | | LIABILITY TOWARDS SECONDARY VICTIMS | UK | 38 |
| TORT (NEGLIGENCE) | | SCHOOL MAYBE LIABLE FOR INJURY FROM SWIMMING LESSON | UK | 40 |

ABBREVIATIONS

| | | |
|-----|---|----------------|
| JUR | : | Jurisdiction |
| IND | : | India |
| MY | : | Malaysia |
| SG | : | Singapore |
| UK | : | United Kingdom |

IMPORTANT

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ADMINISTRATIVE LAW

JUDICIAL REVIEW IN A NUTSHELL

Beginning with his decision in *Laguna De Bay Sdn Bhd* as featured above, Mr Justice Vernon Ong (as he then was) discoursed on the law of judicial review which was reproduced in his two subsequent judgments in *The Ordinary Co Sdn Bhd v Lembaga Rayuan Negeri Selangor & Anor*¹ and *BU Development Sdn Bhd v Selangor Appeal Board & Ors*². The exposition does provide good insight into this area of law, hence worthy of reproduction here.

Meaning & Scope

Judicial review, a branch of administrative law, refers to the exercise of the court's supervisory powers³ over the decisions of inferior tribunals and statutory bodies. The court is statutorily armed with powers to issue various types of orders such as *mandamus*, prohibition, *quo warranto*, *certiorari*, writs of *habeas corpus* and declaration. The usual orders are *certiorari*, *mandamus* and prohibition. An order of *certiorari* has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any *ultra vires* exercise of powers. An order of *mandamus* is directed to private or

municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law⁴. An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

Judicial review is essentially a species of public law proceedings as opposed to private law proceedings. It affects members of the public or even the public at large apart from the parties to the proceedings. The court has to take into account not only the interests of the applicant and respondent but also the interests of the public as a whole in good administration. Some examples of public bodies cited as respondents in an application for judicial review are the Ministry of Human Resources, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, government departments such as Immigration, Royal Customs and Royal Malaysian Police, tribunals such as Housing Tribunal and Consumer Claims Tribunal, statutory bodies such as Malaysian medical Council and Lembaga Akitek Malaysia, Service Commissions, Director of Inland Revenue, Majlis Agama Islam and the Appeal Board constituted under the Town and Country Planning Act 1976.

¹ [2014] 7 MLJ 705

² [2014] 8 MLJ 539

³ Specific Relief Act 1950; Courts of Judicature Act 1964, para 1 of the Schedule to s 25

⁴ S 44 of the Specific Relief Act 1950

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Not an Appeal

The remedy of judicial review is NOT concerned with reviewing the merits of the decision but is primarily a review of the decision making process. The court is exercising its supervisory jurisdiction, not its appellate jurisdiction⁵. The Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsor (M)Sdn Bhd*⁶ laid out the principles upon which a reviewing court should scrutinize a decision of an inferior body or tribunal:

- (a) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;
- (b) the merits where the decision is grounded on illegality or plain irrationality;
- (c) the findings where the facts do not support the conclusion arrived at by the body or tribunal; and
- (d) the findings where the findings had been arrived at by taking into consideration irrelevant matters or failed to take into consideration relevant matters.

The principal grounds can be summed up into three: (A) procedural impropriety; (B) illegality and (C) irrationality.

Procedural Impropriety

It reviews the decision-making process to test for procedural fairness with reference to the context and applicable

⁵ *Michael Lee Fook Wah v Minister of Human Resources Malaysia* [1998] 1 MLJ 305

⁶ [2010] 6 MLJ 1

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statutory provisions. Based on numerous decisions, it includes: right to be heard, the rule against bias, the requirement of prior notice so that the person affected will be in a position to make representation and to adequately prepare and answer the case against him, duty of adequate disclosure. However, there is no general right: of oral hearing, to call witnesses or to cross-examine witnesses or to legal representation. Whilst there is no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. There must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. He must be impartial and free from bias.

Illegality

The test generally is whether the decision-maker strayed outside the purposes defined by the governing statute. Classic examples: error of law, excess of jurisdiction, abuse of power and *Anisminic* error. The court will consider whether the body had acted within the terms of power granted to it and within the bounds of the statutory purpose. A decision is tainted with illegality if the decision maker made a decision for an extraneous purpose or improper motive or took into consideration irrelevant factors or failed to take into consideration relevant factors. The decision must not be actuated by *mala fide*. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis, although as a rule there is non-interference with the assessment of evidence, particularly

testimonial evidence. Lack of jurisdiction may arise in circumstances where a tribunal asked itself the wrong question or take into account matters which it was not directed or required to take into account or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.⁷

Irrationality⁸

The question under this head is whether the power under which the decision maker acted, a power which normally confers



a broad discretion, had been improperly exercised. Therefore, it can be said that a review under this ground extends beyond the process and to the substance or merits of the decision. The test employed is what has been termed as

'*Wednesbury Unreasonableness*' test⁹--- whether the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality'¹⁰. Decisions taken in bad faith, oppressively or based on considerations which have been accorded

manifestly inappropriate weight can also be impugned under this head¹¹.

Illustration

The decision of the learned Judge in *BU Development Sdn Bhd v Selangor Appeal Board & Ors*¹² provides a good illustration of how the law was applied to quash a decision of a statutory body, in this case the Selangor Appeals Board (R1) incorporated under s 36 of the Town and Country Planning Act 1976 (TCPA) to hear appeals from the decision of a local authority (here Ampang Jaya Municipal Council)(R3, AJMC). Initially, the applicant(BU)'s application to develop its land (adjacent to R2's land) was allowed by AJMC under s 22(2) of the TCPA. On appeal, R1 set aside the planning permission in allowing the appeal. BU consequently applied for judicial review which was granted by the High Court.

The learned Judge noted that R1 had taken the unusual step of intimating to the parties at the hearing of the appeal that the appeal might be decided in favour of R2 on the question of whether AJMC had obtained the consent of Federal Public Works Department (JKR Persekutuan) to allow BU to connect its land to Middle Ring Road 2 (MRR2). This issue was not relevant or material to the appeal for R1's jurisdiction was not to conduct an investigation into purported non-compliance of internal matters between JKR Selangor and JKR Persekutuan.

Secondly, the fact that one of R1's panel members had called R3's planning officer and obtained a copy of the proposed development report (PDR) without the

⁷ *Anisminic Ltd v The Foreign Compensation Commission and Another* [1969] 1 All ER 208

⁸ See [1979] 1 MLJ 135 (FC)

⁹ *Associated Provincial Picture Houses Limited v Wednesbury Corpn* [1948] 1 KB 223

¹⁰ See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261, *Kumpulan Perangsang Selangor v Zaid bin Haji Mohd Noh* [1997] 2 CLJ 11

¹¹ *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145

¹² [2014] 8 MLJ 539

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knowledge of BU called into question the propriety of the same. Notably, this issue was not raised by R2. Further, R1 raised three other issues on its own accord. In the learned Judge's view, R1 gave the perception that it was partial towards R2. The decision making process at the hearing of the appeal had thus offended against the rule against bias. R1 had embarked on a course outside the purview of its statutory role and function as an appeal body to the extent that there was apparent bias and lack of impartiality on its part. Its decision was tainted with procedural impropriety.

Thirdly, the decision was also illegal as it was tainted with error of jurisdiction in the decision making process – when it asked itself wrong questions and took into account matters which it was not required to consider.

Finally, the decision was flawed in the sense that there are 5 serious errors of fact and law therein – so serious that it would render the decision so unreasonable that no reasonable body who applied their mind to the question to be decided could have arrived at it. It was also based on considerations which had been accorded undue weight and which on the evidence appeared to be illogical and arbitrary.

The upshot was the court issued orders of *certiorari* to quash R1's decision and *mandamus* so that R3's decision contained in the planning permission be maintained and that R3 shall process all plans and development proposals as submitted by BU.

MPSJ'S QUEST FOR MORE REVENUE

The ambit of powers of local authority was subject to close scrutiny and tested in the case of *Laguna De Bay Sdn Bhd v Majlis Perbandaran Subang Jaya*¹³. The applicant (LDB) was in the business of constructing and erecting outdoor billboards which were subsequently let out to its clients for displaying advertisements. The respondent (MPSJ) was the local authority for the municipality of Subang Jaya. LDB had obtained the necessary temporary occupation licence (TOL) from the land administrator in respect of the land upon which the billboards had been erected as well as the planning permission, structural permits and advertising licence till 2008. In August 2008, in need to increase income for the local authorities, the Selangor State Secretary issued new circulars relating to the construction of billboards for local authorities in the state which included the following salient points:

- (a) instead of the former practice requiring the applicant/advertiser to make application to the land administrator for the TOL, all applications for TOL had to be made by the local authority;
- (b) the local authority was to negotiate with the applicant to rent the land from the local authority and if the applicant refused to do so, the local authority was to issue a notice of eviction and demolish the structure;

¹³ [2014] 7 MLJ 545

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- (c) the rental rate for the site was to be between 25% to 30% of the revenue earned by the applicant on the particular billboard.

For the year 2008 to 2009, LDB upon negotiation paid RM33,000 as fees for TOL, structural permit and advertising licences to MPSJ. In August 2010, MPSJ wrote to LDB with an offer for the tenancy of the site under which, the rental imposed was the higher of either 25% of LDB's gross annual income together with the TOL fee of RM3,000 or a minimum charge of RM33,000. A year later, MPSJ required LDB to sign a sublicense agreement which included provisions requiring delivery up of documents which ordinarily only the income tax authorities had a right to. Eight months later, MPSJ wrote to LDB informing that they were withdrawing their offer and requiring LDB to remove the structure and billboards on the grounds that LDB had failed to sign the agreement and to obtain planning permission, structural permit and advertising licence. LDB applied for judicial review of the decision of MPSJ on 3 grounds: that MPSJ had acted *ultra vires* its powers, had imposed an agreement that was illegal and had acted unreasonably and grossly disproportionately and was motivated by factors which were irrelevant.

The learned Judge held that s 9 of the Local Government Act 1976 (LGA) empowered the state authority to give directions to local authorities, hence the circular was such a direction. However, directions given may not be inconsistent with the provisions of the LGA and directive or any portion thereof shall to the extent of any inconsistency with the LGA be void and of no effect.

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On (a) and (b), the right being licensed out by MPSJ to LDB was the right to occupy the land over which TOL was issued. The sublicense agreement was in fact an arrangement to circumvent s 68 of the National Land Code (NLC) which prohibited the assignment or transfer of the TOL to any third party. The purported assignment of the TOL under the sublicense agreement was illegal, null and void in contravention of NLC. Further, the terms of the sublicense agreement relating to the control of the applicant's shareholding, delivery of audited accounts and undertaking to pay taxes were arbitrary and not within the scope or contemplation of MPSJ's powers under the LGA and by-laws.

On (c), whilst MPSJ justified its imposition of the 25% rental charge under the sublicense agreement as being in compliance with the circular, there was nothing to support the contention that it was a permitted source of revenue under the LGA; neither was it provided under any by-laws¹⁴.



¹⁴ In our respectful view, this part of the decision is doubtful as s 39 of the LGA provides that the revenue of a local authority shall consist of all taxes, rates, rents, licence fees, dues and other sums or charges payable to the local authority by virtue of the provisions of LGA or any other written law.

In the learned Judge's words:

“What (MPSJ) sought to do under the agreement was an entirely different and distinct scheme altogether; it sought in one breath to disenfranchise (LDB) as the TOL holder to its right to apply for a renewal of its TOL; instead, the local authority would be issued the TOL. (MPSJ) would then sublicense the TOL to (LDB) and charge a 25% fee on the gross revenue. This scheme did not appear to be contemplated within the LGA or by-laws. It was also illegal for being in contravention of s 68 of the NLC.”

LDB's application was allowed.

It is noteworthy that the learned Judge undertook a discussion of the law on judicial review in Malaysia which will come in very handy for those uninitiated. Judicial review refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The court is statutorily armed with powers to issue various types of orders¹⁵ and the learned Judge went on to explain what they were. His Lordship distinguished public law proceedings and private law proceedings and then set out the principles of judicial review before concluding that by virtue of the Federal Court decision in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*¹⁶, the distinction between review and appeal no

longer held¹⁷. His Lordship ended his discussion by explaining the three principal grounds upon which a court might review a decision of an inferior tribunal or statutory body: procedural impropriety, illegality and irrationality.

COMPANY LAW

SETTLEMENT AGREEMENT NOT AFFECTING CLAIM AGAINST NON-PARTY

In *Malaysia Building Society Berhad v Dato' Yusuf bin Sudin*¹⁸, KB had submitted a proposal to the plaintiff (P) for the financing of a project and the formation of a joint venture with P for the said project (the said proposal). The defendant (D) was the chief executive of P. He presented a board paper on the said proposal and the BOD of P resolved at its meeting as follows:

“That management to proceed further with the joint venture proposal and submit a paper outlining the development concept, valuation report and joint venture agreement to the BOD for further consideration and approval.”
(the BOD Resolution)

Despite so, D caused P to enter into loan agreements with KB and to disburse loans to KB. The joint venture did not materialize and KB defaulted. P filed an action against D on breach of fiduciary duties and a separate action against KB to recover the loans. A settlement agreement was subsequently entered into between P and KB

¹⁵ Examples are *mandamus*, prohibition, *certiorari*, writs of *habeas corpus* and declaration.

¹⁶ [2010] 6 MLJ 1

¹⁷ We respectfully beg to differ with His Lordship's conclusion.

¹⁸ [2014] 1 AMR 632

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pursuant to which KB was to pay certain sums to P which would then discharge its charges over KB's land.

The High Court held that P had proved its losses but the settlement agreement precluded P from pursuing its claims against D and that the lesser sum paid was not a partial satisfaction only of its claim in damages. The Court of Appeal overturned the decision. It was held that the only parties to the settlement agreement were P and KB. D was not a party to it and the causes of action relied upon by P against D were totally separate, different and distinct from that taken against KB, in that P's cause of action against KB was for breach of contract as a defaulting customer, whereas against D, it was for breach of fiduciary duty and for breach of trust as defaulting chief executive. An indication that it was not the intention of the parties to the settlement agreement that the payment of the redemption sum would extinguish P's claim against any other party was amply provided by the fact that P had expressly reserved in full all its rights and interests in the matter under clause 20 of the settlement agreement. Further, the intention of the parties in inserting the said clause 20 ought to be viewed against the fact that when the settlement agreement was entered into, P had already commenced the action against D based on a completely distinct and separate cause of action. The settlement agreement on a proper reading only barred P from proceeding against KB for the shortfall of other claims in their lender/customer relationship but did not extinguish P's causes of action against D¹⁹. P's appeal was allowed and the decision of the High Court was set

¹⁹ See also the House of Lords decision in *Heaton and Ors v AXA Equity and Law Life Assurance Society PLC* [2002] 2 AC 329

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aside and substituted with a judgment in favour of P.

On cross appeal by D, the appellate court could not agree with the contention of D that the BOD Resolution was an "approval in principal" when the resolution itself made no mention or reference to such words or words to that effect. Further, D had in a subsequent board meeting about 5 years later fraudulently misrepresented to the BOD that approval had been given at the BOD meeting. Granted that one or more members of the BOD had actual knowledge of the project but there was a difference between knowledge of a thing and approval of it. The mere fact that some members of the BOD knew of the project did not equate with their approval of it. The findings of the High Court in this regard were left undisturbed.

COMPANY LAW / DAMAGES

DAMAGES IN S.181 OPPRESSION SUIT

In *Koh Jui Hiong @ Koa Jui Heong v Ki Tak Sang @ Kee Tak Sang (and Another Appeal)*²⁰, the 1st to 8th petitioners held 21.6875% of the equity of the 9th petitioner, CINB Holdings Sdn Bhd (CH) which in turn held 1,346,100 shares in Polymate Holdings Bhd (Polymate Shares). The 1st respondent (R1) was the managing director of CH and was primarily responsible for the financial management of CH. He and the other two respondents held 74.5625% of the equity of CH. Investigation by an ad hoc committee appointed by the board of directors of CH discovered that R1 had disposed off 446,100 Polymate Shares without authority of the board and had committed irregular financial transactions during his tenure as managing

²⁰ [2014] 1 AMR 308, [2014] 1 CLJ 401

director. The petitioners thus commenced proceedings by way of petition under s 181 of the Companies Act 1965 (the Act) against R1. The High Court ruled in favour of the petitioners and ordered, among others, R1 to purchase the minority interest of the petitioners at RM4.2353 per share (the Buyout Order) and damages to be assessed. Damages were subsequently assessed based on the quoted value of the 1,346,100 Polymate Shares on two dates and the difference (RM2,820,332.97) was awarded to CH *qua* petitioner.

On appeal at the Court of Appeal, the 1st to 8th petitioners and R1 entered into a consent order which set aside the Buyout Order, leaving the sole issue on quantum of damages. The COA held that CH was only entitled to damages for those 446,100 Polymate Shares disposed of by R1 without authority. On final appeal to the Federal Court, the sole question of law to be decided was “*whether an award of damages can be made in a petition under s 181(1) of the Act?*”

The answer was in the affirmative. Their Lordship noted that damages to members was not amongst the reliefs mentioned in s 181(2) of the Act but this was a non-exhaustive list that did not limit other types of relief that the court could fashion, with a view to bringing to an end or remedying the matters complained of under s 181(1)(a) or (b). As was laid down in *Re Kong Thai Sawmill (Miri)*²¹, s 181 “...leaves to the court a wide discretion as to the relief which it might grant including...that of winding the company up”. On the facts, however, the lower courts had erred in awarding damages. The fact that the petitioners subsequently agreed not to enforce the Buyout Order took place after the

orders had been granted and had no bearing whatsoever on whether the order of damages could stand alongside the Buyout Order. The valuation of the shares of the petitioners had taken into account the value of the 446,100 Polymate Shares that were disposed of by R1 without authority. Since the Buyout Order had brought to an end all matters complained of, there was no longer any “matter complained of” to be further remedied by any order of damages, declaration or injunction. In any event, with the Buyout Order, the petitioners could not have any further interest in the affairs of CH which would belong, after the Buyout Order, to the majority. All these circumstances were not considered in the exercise of discretion in granting the award of damages.

In the course of appeal, it was also raised that the object company (CH) could not be a nominal petitioner. The pinnacle court agreed. CH had no standing to file a s 181 petition. Whilst there was some latitude in the range of respondents who could be properly joined, there was no such latitude in the joinder of petitioners²². CH could have been but was not joined as a nominal respondent.

The court also observed that the case had features of a derivative action, *i.e.* the action was brought by the minority in the name of CH against the majority; the complaint concerned alleged wrongdoings by the majority against CH; and the damages that were awarded were to compensate CH for the loss caused by the misconduct of R1 against CH and not for mismanagement²³.

²¹ [1978] 2 MLJ 227

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²² *Atlasview Ltd and Ors v Brightview Ltd and Ors* [2004] 2 BCLC 191

²³ As to the difference between misconduct and mismanagement, see *Re Charnley Davis Ltd (No.2)* [1990] BCLC 760. Where the essence of the claim was not mismanagement but consisted of breaches of

However, the 1st to 8th petitioners had overlooked [if indeed this action was (as claimed by them) in the alternative to claim for damages to CH] to name CH as a nominal respondent and to obtain the requisite leave of court for a statutory derivative action. It was a defectively instituted derivative action. In any event, there was a limit to the extent to which s 181 could be used to outflank the rule in *Foss v Harbottle*²⁴. The derivative action elements should be an incident of the matters complained of under s 181. It would be an abuse of s 181 where the nature of the complaint was misconduct rather than mismanagement. Thus, on this score too, their Lordship could not defend the order of damages.

COMPANY LAW / LIQUIDATION

WHAT TO DO IN APPOINTING PERSON TO ASSIST LIQUIDATOR

In *Dato' Robert Teo Keng Tuan (administering the appeal substituting the personal representative of the estate of the deceased) v Metroplex Bhd*²⁵, the appellant as the court-appointed provisional liquidator (PL) of the respondent (R) appointed a Hong Kong-based valuer (Knight Frank) to prepare a valuation report on a property (known as

Putra Place Land) with a view to ascertain the disposal alternatives for the property. On completion of her appointed task, she applied to the court under s 232(2) of the Companies Act 1965 (the Act) to be remunerated as PL and she submitted, *inter alia*, the fees and costs charged by Knight Frank (the Valuer's Fees). The High Court disallowed the Valuer's Fees and that decision was affirmed by both the Court of Appeal and the Federal Court.

The common grounds of the decision are as follows:

- (a) There was no evidence to show that the views of R were sought before the appointment was made.
- (b) Nor was there evidence to show any compelling reason why a valuer in Hong Kong had to be appointed and that a Malaysian valuer could not have done the job.
- (c) There was also no evidence to show the fees charged by Knight Frank were competitive.
- (d) P failed to discharge the burden on her to show that her remuneration was justified and to put sufficient information before the court to determine whether the costs were reasonable.

In addition, the Court of Appeal also held that the PL owed R a fiduciary duty to act fairly and objectively in the interest of R and the PL had in breach of such duty failed to ensure that the fees were competitive. The Federal Court also ruled that the fees or costs of the valuer appointed by the PL fell under r 173 of the Companies Winding-Up Rules 1972 and not s 232(2) of the Act. As the question of reasonableness of the valuer's

duty or other misconduct actionable by the company itself, the proper vehicle for relief was a derivative action. See also *AR Evans Capital Partners Limited v Gen2 Partners Inc* [2012] HKCU 1284.

²⁴ The rule in *Foss v Harbottle* is that in any action in which a wrong is alleged to have been done to a company, the proper plaintiff is the company itself. One of the exceptions to this proper plaintiff rule is the "derivative action" which allows a minority shareholder to bring a claim on behalf of the company in situations where the wrongdoer is in control of the company and will not permit action to be brought in its name.

²⁵ [2014] 1 MLJ 39

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costs was essentially a question of fact to be determined by the trial judge in his discretion, their Lordship refused to disturb such decision.

It is noteworthy that the decision aforesaid was arrived at notwithstanding the terms of the court order pursuant to which the PL was appointed which conferred power to the PL “(t)o commission any valuation reports as to the value of any of the Putra Place Land as the Provisional Liquidator deems fit and that the costs of such valuation report(s) be paid for by the Respondent out of the assets of the Respondent.”



COMPANY / TRUST LAW / TORT

COMPANY SECRETARY PROFESSIONALLY NEGLIGENT

In *Wong Kim Cheng v Aidil Fahmy bin Zainal Abedin & Ors*²⁶, P purchased a company (the Company) with a view to acquire roadwork projects from the government. She paid RM15,000 to the then company secretary of the Company and RM475,000 to acquire 390,000 shares thereof which represented 30% of the Company. The said 390,000 shares were registered in the name of D1 to hold as trustee and nominee for P. This was done so

that the Company would be a ‘bumiputra’ company. To protect her interests as beneficial owner of the said shares, P kept the original share certificates (No. 023 and 030) and procured D1’s duly signed undated resignation letter as director of the company and pre-signed blank transfer forms (Form 32A) in relation to such shares and kept in escrow with the new company secretary, Nordic. D2 was invited and given free 5% shares of the Company because he was the brother-in-law of the then Prime Minister. D3 purchased 5% of the shares of the Company at RM0.5m. Without the knowledge of P, D1 to D4 all being directors of the Company terminated the services of Nordic and appointed D5 as the new company secretary. D5 then acted on a board of directors’ resolution of the Company to cancel share certificates No. 023 and 030, issued new replacement share certificates and transferred the same to D2 to D4. P filed a suit to claim against D1 to D4 in conspiracy and against D5 in professional negligence

On the above set of facts, the Court of Appeal ruled for P. The trial Judge’s findings were held to be erroneous in several aspects whilst the version of D1 was regarded as nothing but mere afterthoughts and blatant lies. In the appellate court’s view, there was a resulting trust relationship between P and D1 in relation to the said shares while D2 to D4 held the same as constructive trustees for P’s benefit. Evidence of P established that D1 had fraudulently transferred the said shares to D2 to D4 with the assistance of D5. D5 was liable for professional negligence as he could not have lawfully transferred the said shares without first obtaining original certificates from D1 or from P. As a company secretary, he must or should have known that under the

²⁶ [2014] 2 MLJ 63

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circumstances of the case, the board of directors of the Company had no power either under the Companies Act 1965 or under the memorandum and articles of association of the Company to cancel the original share certificates and to issue three new certificates.

CONTRACT LAW

SELLER'S REMEDIES FOR NON-PAYMENT OF DEPOSIT

In *Griffon Shipping LLC v Firodi Shipping Ltd*²⁷, the seller (S) agreed to sell a vessel to the buyer (B) at a price of US\$22m under a memorandum of agreement (MOA) dated 1 May 2010 based upon Norwegian Saleform 1993. A deposit was payable under clause 2 within 3 banking days of signature 'as security for the correct fulfilment of this Agreement'. Clause 13 had 2 limbs. Limb 1 provided that, if the deposit were not paid, then S had the right to cancel the contract and was entitled to claim compensation for its losses. Limb 2 provided that, if the purchase price were not paid, S would be entitled to cancel the agreement and to forfeit the deposit. The 10% deposit was not paid by the due date of 5 May 2010. S consequently accepted B's conduct as a repudiation of the MOA and cancelled the MOA pursuant to an express contractual right to do so, thereby bringing the MOA to an end. B accepted that its failure to pay the deposit had been a repudiatory breach. The issue was whether S could recover the deposit or only claim damages on the conventional measure of the difference between contract and market price which turned out to be in a lesser sum (US\$275,000).

S' case was that the right to payment of the deposit had accrued before the MOA was terminated and accordingly, S was entitled to claim the deposit either as a debt or as damages for breach of contract. B's case was that in the event of non-payment of the deposit, S on the true construction of the MOA in particular clause 13 was only entitled to claim "compensation for ...losses" and not the deposit. B argued that the contrast in treatment between the case where the deposit was paid (limb 2 of clause 13) and the case where the deposit was not paid (limb 1 of the same clause) demonstrated a clearly expressed intention that in the event that termination took place before the deposit had been paid, the seller's remedy had been compensation for their losses, assessed on the conventional basis of the difference between the contract and market price. The seller could not be intended to have been able to take the benefit of a windfall.

The decisions were split, with the arbitration tribunal in favour of B and the UK Commercial Court in favour of S. At the Court of Appeal, B's appeal was dismissed and S was held to be entitled to recover the deposit. In His Lordship view, limb 1 of clause 13 did no more than afford the seller an express contractual right exercisable in the event that the deposit was not paid. It conferred upon the seller a valuable contractual remedy over and above the remedy which it enjoyed at common law. A contractual remedy of termination which had no need to characterise the defaulting buyer's conduct as repudiatory was a valuable addition to the seller's armoury.

However, the existence of the prospective contractual rights afforded by

²⁷ [2014] 1 All ER(Comm) 593

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limb 1 of clause 13, exercisable in the event of a failure to pay the deposit on time, could not have had any bearing on the proper characterisation of the seller's and the buyer's rights and obligations in the period between signature of the contract and the expiry of the time within which the buyer had promised to pay the deposit. It followed that limb 1 of clause 13 was simply of no relevance to the proper characterisation of the rights and obligations under clause 2. Limb 1 did not spell out the consequences which inexorably followed a failure to pay the deposit on time. Whether looked at it in isolation or read together with limb 2, limb 1 could not have had any effect upon the proper construction and effect of clause 2.

Clause 2 provided that the deposit was 'security for the correct fulfilment' of the agreement. The deposit was an earnest of performance. The right to receive it was plainly not conditional upon the contract having been performed by the seller, nor sensibly could it have been regarded as in any other sense conditional. On 5 May 2010, S had been invested with an accrued right to receive and thus to sue for the deposit as an agreed sum forfeitable in the event of failure by B correctly to fulfil the agreement. It was trite law that in construing a contract, one started with the presumption that neither party intended to abandon any remedies for its breach arising by operation of law, and clear express words had to have been used in order to rebut that presumption. Limb 1 did not provide clear express words intended to deprive the seller of its accrued right to sue for the deposit. S had both accepted B's repudiatory breach in failing to pay the deposit on time as terminating the agreement and exercised its right to cancel the

agreement as afforded by limb 1 of clause 13. The rights unconditionally acquired by S prior to termination survived the termination. Accordingly, S retained the right to sue for the deposit as an agreed sum which it could recover in debt. Alternatively, S had an accrued right to sue for damages for breach of the obligation to pay the deposit, the measure of which was the amount of the deposit. In any event, the word 'compensation' in limb 1 was apt to embrace recovery by S of compensation for failure by B to pay the deposit, the measure of which, by analogy with the position at common law, would have been at least the amount of the deposit itself.

In reaching such conclusion, the UK Court of Appeal departed from the decision of the Singapore Court of Appeal in *Zalco Marine Services v Humboldt Shipping*²⁸ and two practitioners' text on ship sales. His Lordship held the respectful view that neither of them had sufficiently grappled with the point that clear language would be required to divest the seller of a right accrued before termination.

CONTRACT / ADMINISTRATIVE LAW

POWER TO BLACKLIST SUPPLIER

In *Kulja Industries Limited v Chief Gen. Manager, W.T.Proj., BSNL*²⁹, the appellant-contractor had emerged successful in a tender exercise for the supply of telecom ducts and installation of cable to the respondent-BSNL, and orders for supply of the material etc. were placed and goods were accordingly supplied. It was BSNL's case that they had discovered that the contractor had

²⁸ [1998] 2 SLR 536

²⁹ AIR 2014 SC 9

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fraudulently withdrawn huge amount of money in collusion with its officers by fabricating bills to facilitate payments as if such bills were genuine thereby causing losses to BSNL and a corresponding gain to the contractor. Apart from lodging reports to the authorities, BSNL blacklisted the contractor permanently and banned it from having any dealing with entire BSNL throughout the country on the ground that it had committed gross misconduct and irregularities by receiving excessive payments. The contractor denied these allegations, *inter alia*, contending that BSNL policy/manual did not provide for punitive action in the nature of blacklisting and that excess payment at best was an irregularity which had been cured by its refund of the amount in question. It also contended that reconciliation of accounts revealed that it was entitled to an amount far in excess of the payments received by it. The contractor applied to assail the blacklisting order. The High Court in Bombay dismissed the application. The contractor appealed to the Supreme Court of India.

The contractor contended that paras 31 and 32 of the bid documents provided for blacklisting only for a "suitable period" and on three grounds. Thus, the decision of BSNL was unsustainable and neither was it fair, reasonable nor proportionate to the gravity of the offence. His Lordship took cognizant that the terms of the contract provided that BSNL had reserved the right to disqualify any supplier who (a) habitually failed to supply the equipment in time or (b) the equipment supplied did not perform satisfactorily in accordance with the specifications or (c) failed to honour his bid without sufficient grounds. A literal construction of the

provisions would mean that the power to disqualify or blacklist a supplier was available to BSNL only in the three situations enumerated and no other. Such interpretation would give rise to anomalous results. Cases where a supplier was found guilty of much graver offences, failures or violations, resulting in much heavier losses and greater detriment to BSNL in terms of money, reputation or prejudice to public interest might go unpunished simply because all such acts of fraud, misrepresentation or the like had not been specifically enumerated as grounds for blacklisting of the supplier. That could not be the true intention of BSNL when it stipulated conditions of the tender documents by which BSNL had reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. If bidders who committed a breach of lesser degree could be punished by an order of blacklisting, there was no reason why a breach of a more serious nature should go unpunished, be ignored or rendered inconsequential by reason only of an omission of such breach or violation in paras 31 and 32 of the tender documents. Paras 31 and 32 could not, in that view, be said to be exhaustive; nor was the power to blacklist limited to situations mentioned therein.

That apart, the power to blacklist a contractor whether the contract was for supply of material or equipment or for the execution of any other work whatsoever was inherent in the party allotting the contract. There was NO need for any such power being specifically conferred by statute or reserved by contractor. That was because 'blacklisting' simply signified a business decision by which the party affected by the breach decided not to enter into any contractual relationship

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with the party committing the breach. Between two private parties, the right to take any such decision was absolute and untrammelled by any constraint whatsoever. The freedom to contract or not to contract was unqualified in the case of private parties.

Having said that, any such decision was subject to judicial review when the same was taken by the State or any of its instrumentalities. This implied that any such decision would be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus became an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto.

The apex court ruled that on the facts, permanent debarment from future contracts for all times to come was too harsh and heavy a punishment to be considered reasonable especially when (a) the contractor was supplying bulk of its manufactured products to BSNL and (b) the excess amount received by it had already been paid back. The court remitted the matter back to the authority to determine the time period for which the contractor should be blacklisted having regard to the attendant facts and circumstances. Thus, the appeal was partially allowed.



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CONTRACT / TORT / BANKING LAW

ERROR IN CARRYING OUTSTANDING INSTRUCTION

In *Razali Mohamed Saad v CIMB Bank Bhd*³⁰, P was a customer of D bank who had instructed D to make periodical payments of a fixed sum from his account with D to P's housing loan account held with HSBC Bank. D did so accordingly for 5 years. In August 2010, P deducted the sum but inadvertently credited it to a 3rd party's account with HSBC Bank and this carried on for six months. Due to such mistakes, P's housing loan was characterized as a defaulting loan and the subject property in which P resided was put up for auction. Subsequently, P managed to resolve the matter with HSBC Bank and the house was not sold. P filed a suit against D seeking compensation for the loss and damage suffered, primarily for mental anguish due to D's negligence and/or breach of contract.

In defence, D relied on an exclusion clause in its Periodical Payment Instruction Application Form which read: "Although the Bank will endeavour to effect such periodical payments, it accepts no responsibility to make the same and accordingly, the Bank will not incur any liability through an error, refusal or omission to make all or any of the payment or by reason of late payment or by any omission to follow any such instruction." However, the trial Judge adopting the strict rigorous test propounded in *Tai Hing Ltd v Liu Chong Hing Bank* held that the full extent of the said exclusion clause had not been made known to P at the time when contracted with D. Thus, D was disentitled to rely on the said clause as D in effect breached

³⁰ [2014] 1 CLJ 123

its fundamental obligation of debiting and remitting periodical payments to P which it had contracted to do.

In assessing damages, the trial Judge took into account the mental anguish suffered as a consequence of the fact that his house was put up for auction and this was exacerbated by the fact that D took no action to rectify the same despite complaints. On the other hand, despite being put up for auction, the house was not sold. Case law indicated that a modest and restrained approach ought to be adopted in determining the quantum and the courts were reticent in awarding large sums by way of compensation³¹. A sum of RM50,000.00 was awarded instead of RM2 million sought for by P. As a concluding remark, prior to the trial, D had made an offer of settlement to P in a sum in excess of that ultimately awarded. If P had accepted the offer, the trial would have been obviated. In that regard, pursuant to O 22B r ((2)(b) of the Rules of Court 2012, the court granted costs of RM3,000 in favour of D although P won the case.

COURT PROCEDURE

IS BREACH OF CONSENT ORDER AN ACT OF CONTEMPT?

Generally, a disobedience of a court order can amount to contempt of court. However, where the order is a consent order, is a breach of such order capable of being regarded as an act of contempt of court which consequently renders the party in breach to be liable to committal proceedings? That was the question for determination in the matrimonial dispute case of *Bee Ah Nya v Ooi*

³¹ *Farley v Skinner* [2001] 4 All ER 801, *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15

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*Ah Yan*³². There, the petitioner/wife (PW) and the respondent/husband (RH) in a judicial separation petition came to an agreement and recorded a consent order pertaining to the steps to be taken by RH in arranging for a valuation of the matrimonial home and thereafter in selling it and dividing the proceeds between them. In the order, it was also stated in the alternative that the son of PW and RH, OGH was entitled to purchase the matrimonial home for a pre-agreed price of RM580,000. RH subsequently entered into an agreement with a 3rd party to sell said property at a higher price. PW contended that RH's act of selling the home to the 3rd party and refusing to sell it to OGH constituted an act of contempt and commenced committal proceedings against RH.

Conceptually, a consent order operates as a contract where in the event of breach, the non-defaulting party will have to take out separate proceedings to sue on the consent order as if it were a contract. However, on the authorities³³, the High Court of Penang held that not all consent orders were incapable of being enforced through committal proceedings. It depended on the nature and the effect of the terms of the consent order. In certain well defined and precisely worded consent orders where there was an undertaking that had been given to the court or where the consent order was otherwise of a coercive nature, the breach of such a consent order would constitute an act of contempt of court.

On the facts, the consent order did not contain any undertaking by RH to the court but was instead more in the nature of a

³² [2014] 1 AMR 574

³³ *Lim Chau Leng (p) v Wong Chee Chong* [2006] 2 MLJ 269, *Ladlay Mohan Mathur v RS Bhatnagar* [1985] All LJ 17

contract between RH and PW regulating or stipulating the steps to be taken towards the disposal of the matrimonial home. On a plain reading, the consent order was in pith and substance a contract, not a coercive order.

Further, the terms of the order were at best vague and ambiguous as regards timelines for compliance such as when exactly the alternative term of the consent order crystallized so that OGH became entitled to purchase the matrimonial home. The order was not free from interpretive difficulty and there was an inherent ambiguity. Such an inherent ambiguity must be construed in favour of the contemnor, RH since committal proceedings were quasi-criminal in nature. Therefore, PW failed to prove beyond reasonable doubt that RH had committed contempt of court.

COURT PROCEDURE / CONTRACT LAW

INJUNCTION NOT AS OF RIGHT DESPITE CONTRACT STIPULATION

In *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd*³⁴, the mutual non-disclosure agreement contained an express provision which prohibited D from disclosing confidential information disclosed to it by P (Clause 4). There was also a specific provision (Clause 15)³⁵ that monetary damages would not be sufficient to avoid or compensate for the unauthorized use or disclosure of confidential information and that injunctive relief would be

³⁴ [2014] 1 CLJ 821, [2014] 1 AMR 593

³⁵ The full Clause 15 reads: "The Receiving Party understands and agrees that monetary damages will not be sufficient to avoid or compensate for the unauthorized use or disclosure of Confidential Information and that injunctive relief would be appropriate to prevent any actual or threatened use or disclosure of such Confidential Information."

appropriate to prevent any actual or threatened use or disclosure of such confidential information. P alleged that D had breached the confidentiality provision and applied for an interim injunction. Both the High Court and Court of Appeal, whilst finding that there was a serious question to be tried, held that damages were the adequate remedy and dismissed P's application.

The issue framed for determination by the Federal Court was: "whether, when parties have agreed that damages are not an adequate remedy in respect of injuries caused by breaches of an agreement between them and that injunctive relief would be an appropriate remedy, the parties are therefore disentitled from asserting that damages are an adequate remedy and/or the High Court is disentitled from concluding that damages are an adequate remedy for the purposes of an application for interim injunctive relief".

The apex court affirmed the decision. It held that the mere existence of Clause 15 did not *ipso facto* entitle P to an interim injunctive relief. The test enunciated in the case of *American Cyanamid Co v Ethicon Ltd*³⁶ and followed locally in *Keet Gerald Francis Noel John v Mohd Noor @ Harun Abdullah & 2 Ors*³⁷ regarding the grant of an interim injunction must still be satisfied. The existence of such a clause did not as a matter of law fetter the jurisdiction and discretion of a court of law to decide whether to grant an interim injunctive relief. The justice of the case must be considered. Thus, the contention that a negative covenant existing in a contract would obviate the need for the court to consider the balance of convenience

³⁶ [1975] AC 396

³⁷ [1995] 1 CLJ 293

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test as enunciated in *American Cyanamid* was rejected.

The court further made reference to two cases from Canada and United States³⁸ and ruled that a clause in a contract stipulating that injunctive relief “may” or “shall” be the appropriate remedy where damages might not be appropriate or where there was irreparable harm did not mean that such relief would be granted as of right. The party seeking to secure equitable relief of such a nature must still satisfy a court of law that the pre-requisites for granting injunctive relief were prevalent. In their Lordship’s concluding words:

“The grant of an injunctive relief is an equitable remedy which is within the court’s absolute discretion. In this regard the principles for the granting of such a remedy must be strictly adhered to at all times and cannot be curtailed by a contract entered between the parties.”

DAMAGES / TORT (TRESPASS)

“USER PRINCIPLE” TO ASSESS DAMAGES FOR TRESPASS TO LAND

The amount of damages to be paid for trespass onto another person’s land was at issue in *Piccolo Mondo Gastro Sdn Bhd v Absolute Prestige Sdn Bhd*³⁹. D had carried on its business at “Juice Bar” which occupied one of the several lots at the Side Walk Cafe at Jalan Bukit Bintang, Kuala Lumpur rented by

P from DBKL, the landlord. P’s claim that D’s use of the property constituted a trespass on its premises was allowed. In assessment of damages, the Registrar had ordered, among others, that damages was calculated at the rate of rental of RM4 per sq ft. Dissatisfied with the decision, P appealed against such decision.

The learned JC applied the principle that where the trespass amounted to the use of property by a defendant, the normal measure of damages was the ordinary letting value of the property. This was so even if the plaintiff was not in fact thereby impeded or prevented from himself using the property either because he did not wish to or for any other reason. The principle has come to be known as the “user principle” ie. the measure of damages was not what the plaintiffs had lost, but what benefit the defendant had obtained by having the use of the property⁴⁰. Uncontroverted evidence showed that D had used the premises to carry out its own business for monetary gain and P had been deprived of the use. The benefit that D had derived from the trespass was that it had not paid any rental at all for the use of the premises. Had it rented the premises from P to carry out its business, then it would have had to pay market rental rates and not the rate that P paid to DBKL. Thus, D was obliged to pay reasonable market rent. The rates ascribed in P’s valuation report were more reflective of the market rentals which would be RM42 per sq ft for the 1st term and RM50 for the 2nd term. The use of the rate of RM4 per sq ft was erroneous. The appeal was allowed with the judgment sum of RM463,220.65 entered in substitution.

³⁸ *Jet Print Inc v Cohen* [1999] OJ NO. 2864, *First Health Group Corp v National Prescription Administrators, Inc and David W Norton* 155 F Supp 2d 194

³⁹ [2014] 1 CLJ 387

⁴⁰ *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd’s Rep 359, *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841, *Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693

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DATA PROTECTION

LIQUIDATOR NOT DATA CONTROLLER UNDER PDPA

In *Re Southern Pacific Personal Loans Ltd*⁴¹, in the course of its business of making personal loans to individuals, a company collected and retained data relating to its borrowers, including names and addresses, the amount of the loans, records of repayments and details of court proceedings, all of which were ‘personal data’ under the Data Protection Act 1998 of United Kingdom (the 1998 Act)⁴². The 1998 Act made the company a ‘data controller’⁴³ for the purposes of s 1 of the 1998 Act, and thus responsible, *inter alia*, for dealing with ‘data requests’ made under s 7 of the 1998 Act. Once a loan was made, the company transferred the data to a loan servicing company which stored it and subsequently dealt with administrative matters pertaining thereto, including processing ‘data requests’

made under the 1998 Act. In 2012, the company went into creditors’ voluntary liquidation and the applicants were appointed joint liquidators. They found that the company was receiving about 88 data requests per month for data held by the loan servicing company. The statutory fee payable for a data request was £10 but the cost to the company responding to a request was about £455 plus the loan servicing company’s fee, resulting in an average total annual costs of some £589,000. The liquidator applied to the court for directions on whether they were ‘data controllers’ within the meaning of s 1(1) of the 1998 Act.

It was held that the appointment of the applicants as liquidators did not render them ‘data controllers’ for the purpose of s 1(1) of the 1998 Act in respect of data collected by the company when it made personal loans to customers, since that data belonged to or was under the control of the company when it went into liquidation and remained vested in it. The liquidators, when exercising any rights in respect of the data, were merely acting as agent of the company and not as principals in their capacity as office-bearers or as co-principals with the company. It followed that the liquidators were not personally responsible for responding to data requests made under s 7 of the 1998 Act or for compliance with other provisions of the 1998 Act in respect of the data processed by the company.

⁴¹ [2014] 1 All ER 98

⁴² The Personal Data Protection Act 2012 of Malaysia (the PDPA) modelled upon the 1998 Act, hence the relevancy of this decision.

⁴³ In the PDPA, the terminology used is ‘data user’.

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DIGEST OF EMPLOYMENT LAW CASES

1. EPF CONTRIBUTION NOT DEDUCTIBLE FROM RETIREMENT GRATUITY

The two plaintiffs, David and Lai Ying in *Funk David Paul v Asia General Asset Bhd*⁴⁴ filed a claim against their former employer (the Company) for their retirement gratuity. Clause 19 of the Handbook on Terms and Conditions of Employment for Executive Staff provided, in relation to Retirement Gratuity, that subject to any executive having served not less than 5 years continuous service, the Company shall make a lump sum payment referred to as retirement in accordance with the provisions in cll 19.1 – 19.8. The proviso of cl 19 of the Handbook, which was the crux of contention, read: “Retirement benefit shall be calculated on the basis of 1 ¼ months of last drawn salary for every completed year of service *less the Company’s contribution to any form of provident fund including E.P.F* or any form of Government sponsored or administered superannuation scheme, or pension covering retirement or death benefit.” It was the Company stand that although David and Lai Ying were entitled to gross retirement gratuity of RM141,000 and RM181,000 respectively, the amounts that the Company had paid as employer contributions pursuant to the Employment Provident Fund were RM148,297 and RM108,803 respectively. Applying the cl 19 proviso, the net retirement gratuity for David and Lai Ying were –RM7,297 and RM73,097 respectively.

Under the Employment Provident Fund Act 1997 (EPF Act), s 47(1) provides: “Notwithstanding any contract to the

contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employers contribution, from the employee.” The issue thus was whether cl 19 proviso of the Handbook which allowed deduction of EPF contributions by the Company in calculating the retirement gratuity contravened the said s 47(1). The High Court ruled there was no contravention on the ground that retirement gratuity did not come within the definition of ‘wages’ and ‘remuneration’ in s 2 of the EPF Act. Under the EPF Act, the word ‘wages’ is defined as, among others, all remuneration in money due to an employee under his contract of service whether agreed to be paid monthly, weekly, daily or otherwise but did not include service charge, overtime payment, gratuity or retirement benefit. The word ‘remuneration’ is not defined.

On appeal, the Court of Appeal overturned the decision. The appellate court applied the trite principle of construction that the Parliament did not use words in legislation in vain. Therefore, it must be the intention of the Parliament that the words ‘wages’ and ‘remuneration’ have different meanings. Their Lordship opined that the EPF Act was a piece of social legislation, hence a liberal or purposive interpretation should be given to it. The term ‘remuneration’ must be affixed with a meaning of wider connotation. ‘Wages’ was a term referring to payments for service or works rendered on a regular basis, hence terms or saying ‘my weekly or monthly wages’ in ordinary parlance. This meaning would explain the exclusion of (a) service charge (b) overtime payment (c) gratuity or (d) retirement benefit from the definition of

⁴⁴ [2014] 1 MLJ 681

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'wages'. Wages was but one species of remuneration. Thus, the word 'remuneration' included the plaintiffs' retirement gratuity. The Oxford Dictionary defined it as 'payment for services rendered'. 'Payment for services' could and must include 'retirement gratuity'. The upshot was the Plaintiffs succeeded in their claim for their full retirement gratuity without any deduction of the Company's contribution to the EPF.

In our respectful view, this decision means that on the one hand, Parliament expressly excludes 'retirement benefits' from the definition of 'wages' in s 2 of the EPF Act but on the other hand, the court includes 'retirement benefits' as part of 'remuneration'. As submitted by the counsel of the Company, this would defeat the whole purpose of s 2 of the EPF Act and render redundant the express exclusion of retirement benefits from the definition of wages. Further clarification from the Federal Court as the highest court in the land on such contradictions will be most helpful.

2. INVALID INTRODUCTION OF NEW RETIREMENT AGE

The decision of the Industrial Court in *Tay Teong Chong Iwn AB Technology Sdn Bhd*⁴⁵ in certain respects is not free from contentions. This is a case where the retirement age was not stipulated in the letter of appointment and the claimant was after four years of service issued with a notice of retirement. That was after the employer had issued a memorandum on the new policy on retirement age at the age of 55 years old and there was a clause (Cl 17) in the letter of appointment which expressly stated that "The company reserves the right

⁴⁵ [2014] 1 ILR 61

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to alter, delete or make any changes to the rules and regulations should the need arises". Notwithstanding so, the claimant asserted constructive dismissal. The Industrial Court Chairman relying upon the decisions of the High Court in *Dr Satwant Singh Gill v Hospital Assunta*⁴⁶ and *Eric Walter Davis v Mahkamah Perusahaan Malaysia & Sepakat Setia Perunding Sdn Bhd*⁴⁷ remarked that "dapatlah difahami bahawa Mahkamah Tinggi tidak dapat menerima sebarang bentuk penambahan kontrak secara unilateral oleh majikan ke dalam terma-terma kontrak pekerjaan walaupun ianya melibatkan umur persaraan yang telah dijadikan polisi oleh syarikat...tiada sebarang penambahan terma-terma kontrak pekerjaan boleh ditambah melainkan mendapat persetujuan di antara pihak pekerja dan pihak majikan". The learned Chairman went on to cite *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong*⁴⁸ and held that the court's task was to discover "what is the reasonable expectation or understanding of the employees at the relevant time concerning the matter of the age at which they can reasonably expect to be compelled to retire. In undertaking this exercise, the court has to consider all relevant facts and circumstances of this case which constituted the employment relationship between the company on the one hand and its employees and the claimant on the other". There was no relevant fact that might be considered by the court to decide whether the retirement age fixed by the employer on the claimant was justified.

⁴⁶ [1998] 4 CLJ 47

⁴⁷ Mahkamah Tinggi Malaya di Kuala Lumpur, Permohonan Semakan Kehakiman No.: 25-40-02/2012

⁴⁸ [1998] 3 ILR 843, on appeal to Court of Appeal [2001] 3 CLJ 9

In our considered view, the two High Court cases are distinguishable in that there was no provision similar to Cl 17 present in those cases. In light of the clear provisions of Cl 17, it is respectfully submitted that the employer ought to be entitled to alter the letter of appointment with new term on retirement age. Having said that, perhaps the learned Chairman was swayed by the dicta of Lord Denning in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)*⁴⁹ that “Each man signs a form saying that he will abide the rules, but these rules are in no way terms of the contract of employment. They are only instructions to a man as to how he is to do his work”. The use of the words “rules and regulation” in Cl 17 restrict the alteration, deletion or change to rules and regulations that have no contractual effect.

By way of *obiter dicta*, the court held that in the absence of any term or condition on retirement age in a contract of employment, reference shall be made to s 4 of the Minimum Retirement Age Act 2012 which provides 60 years old as the minimum age. However, this is inapplicable to the present case as at the time the claimant was constructively dismissed, the said statute has not come into force yet.

3. JOINDER IN NON-COMPLIANCE APPLICATION

In a rare show of disagreement, the Industrial Court [constituted of the President and one member from each of the panel of persons representing employers and workmen]⁵⁰ in *Aminuddin Ahmad v EPC Oil &*

*Gas Sdn Bhd*⁵¹ by a majority of 2 to 1 allowed the joinder application of the complainant/claimant(C) consequent upon non-compliance of a consent award in a dismissal case whereby the respondent(R) had been ordered to pay C certain sum of monies by way of 5 instalments. C had applied to join 2 additional persons as parties in the non-compliance proceedings⁵². The 2nd proposed joinee had been a majority shareholder holding 70% of the paid-up share capital in R. The 1st proposed joinee had owned 20%. The directions on the appointment of C had been given by the 1st proposed joinee whilst the request for an extension of time to pay the award sum had been made by the 2nd proposed joinee. The financial information statement from the company search had shown that R had been insolvent but not been wound-up. The learned member of the employers’ and employees’ panel had been of the view that the corporate veil of R should be lifted as the 2nd proposed joinee had been the directed mind of the company and a majority shareholder whilst the 1st proposed joinee had also been the directing mind as the CEO. Although he had only owned 20%, he had been married to the 2nd proposed joinee. The dissenting President opined that there had been insufficient evidence to lift the corporate veil. The marital relationship of the proposed joinees should not be taken into consideration.

⁴⁹ [1972] 2 All ER

⁵⁰ See s 22 read with s 21(1) of the Industrial Relations Act 1967.

⁵¹ [2014] 1 ILR 444

⁵² The test is whether the joinder of the party is necessary to make the adjudication effective and enforceable, see *Harris Solid State (M) Sdn Bhd & Others v Bruno Gentill Pereira & Others* [1996] 4 CLJ 747.

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4. MISAPPROPRIATION OF BEREAVEMENT COLLECTIONS

Misappropriation of bereavement collections for the demise of a fellow staff's parent is tantamount to a major misconduct. So held in the case of *Pang Wen Sing v Samling Plywood (Miri) Sdn Bhd*⁵³ where the claimant only handed over one instead of two envelopes which contained cash contributions collected from the staff of the company for the bereaved staff. The claimant claimed that he might have lost it. The Industrial Court held that the claimant had been in possession of the money at all material times and as it had not been delivered to the bereaved staff and he could not explain how the money had disappeared, the company's conclusion that the claimant had misappropriated it had not been unreasonable. The company had chosen to find the claimant guilty of misappropriation rather than the less serious act of negligence. It had been reasonable and not perverse as there had been sufficient evidence to support it.

On the claimant's complaint that the company had acted hastily in asking him for an explanation within 24 hours, even though

it would have stood the company in good stead to have given him more time to reply the show cause letter, having seen the claimant's explanations, giving him more time would not have served any useful purpose as he had explained that the money had been lost or dropped. Giving him more time would not have helped him to explain how the money had been dropped or lost. More importantly, the claimant had not asked the company for an extension of time to reply.

The claimant contended that he had volunteered to collect and hand over the collections to the bereaved staff. The collections did not belong to the company and the collecting and handing over took place outside working hours, hence he should not be punished. The Chairman took the claimant to task for advancing such contentions. It reflected very poorly on his ethics, his relationship with the staff, not to say his moral lack of responsibility to adopt this attitude. In the Chairman's view, in collecting the money from the staff and being entrusted to hand it over to the bereaved staff, the claimant was performing a duty in a general if not specific sense. It was a duty perhaps of a higher order than his normal routine duties. It was entrusted to him by the company and the claimant had a duty to ensure that it reached the bereaved staff safely.

5. NO EXTRA TERRITORIAL JURISDICTION

In *Wong Ying Siang v Ghim Li Group Pte Ltd & Anor*⁵⁴, GL was a company with registered office in Singapore while MaximTT was a company incorporated in Malaysia.

⁵³ [2014] 1 ILR 505

⁵⁴ [2014] 1 ILR 558

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There was no nexus between both companies but they were owned by the same proprietor, one Mdm Estina, the direct superior of the claimant. The claimant had been employed by GL in Singapore as a Group Chief Financial Officer *vide* an Employment Contract (EC). While under probation, his services were terminated. The claimant contended that his dismissal had been without just cause or excuse. The primary issue was whether GL or Maxim TT was the claimant's real employer.

Just because the claimant had been asked to work from MaximTT in Kulai, Malaysia by GL had not *ipso facto* made MaximTT his employer. The payment of salary by Maxim TT was explained away by the company that MaximTT billed back GL for the payment made. Likewise, payment of statutory deductions for the claimant's PCB, SOCSO and EPF were made by MaximTT and then reimbursed by GL. The claimant had fully known that the right company to confer and consult upon his termination had been GL as could be seen through his various initiatives to contact GL for outstanding matters relating to a shortfall in the calculation of his payment as stated in the termination letter, his demand for alleged pro-rated annual leave encashment owed to him and his other claims. Through his acts of accepting the EC and the termination letter, the claimant had clearly admitted, understood and agreed that his employment had commenced and ended with GL. GL being a Singapore company was not a legal person within Malaysia. Further, Clause 21 of the EC had clearly stated that the contract was governed by the laws of Singapore and the parties had agreed to submit to the jurisdiction of the Singapore courts. Thus, the Industrial Court had no jurisdiction over the

contractual terms of the EC.

EMPLOYMENT LAW

DISCIPLINARY HEARING IS NOT ADJUDICATION

In *Christou v Haringey London Borough Council*⁵⁵, W and C were social workers found to be at fault in the manner they had dealt with the case of Baby P (subject of a child protection plan devised by the local council), who tragically died at the age of 17 months as a result of chronic lack of care and abuse displayed by her mother and two men. Disciplinary proceedings were brought against W and C under a 'simplified' disciplinary procedure which took the form of a manager detailing the case to the employee and considering any response. Such a procedure was only applicable with the agreement of the parties for relatively minor breaches of conduct where the likely sanction was merely a verbal or written warning. Under this procedure, it was found that W and C had failed in their duties in 3 aspects, all of which were procedural failings⁵⁶. Both were given written warnings.

Subsequently, P's mother pleaded guilty to causing or allowing P's death whilst the two men were convicted of the same offence. A second, more formal set of disciplinary proceedings were instituted. W was charged with 4 allegations of misconduct: the first two involved breaching the child protection procedures, one in

⁵⁵ [2014] 1 All ER 135

⁵⁶ In W's case: lack of recording; failure to put records onto the relevant database in a timely manner; and failure to call a legal planning meeting despite concerns about child protection for P. In C's case: lack of recorded supervision; lack of documented management direction; and no management knowledge of social work tasks that were incomplete.

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relation to the frequency of visits, the other in failing to follow up a report from a child minder of a bruise; the third was poor professional judgment; and the fourth was the failure to report certain information to the legal planning meeting. No new facts were relied upon, but the charges were directed at alleged failings of substance rather than the procedural complaints that had formed the basis of the charges in the earlier simplified procedure. After a full disciplinary hearing, all allegations were substantiated and were held to amount to gross misconduct justifying instant dismissal. C was subject to similar process and outcome. Both W and C brought unfair dismissal proceedings and lost at both levels at the employment tribunal. In appealing to the UK Court of Appeal, they submitted that: (i) the doctrine of *res judicata* applied so as to bar the second disciplinary process because essentially the same charges were advanced in the second process as in the first, with no fresh evidence; (ii) it was an abuse of process to subject them to a second disciplinary procedure, particularly since the parties had expressly agreed to the use of the simplified procedure.

It was held that the doctrine of *res judicata* did not apply to the exercise of disciplinary power by an employer, which was far removed from the process of litigation or adjudication to which the doctrine applied. The critical question was whether the procedures operated independently of the parties such that it was appropriate to describe their function as an adjudication between the parties. In that regard, it was wrong to describe the exercise of disciplinary power by the employer as a form of adjudication. In the employment

context, the disciplinary power was conferred on the employer by reason of the hierarchical nature of the relationship. The purpose of the procedures was not a determination of any issue which established the existence of a legal right, nor was it properly regarded as determining a dispute. The purpose was not to allow a body independent of the parties to determine a dispute between them, but typically to enable the employer to inform himself whether the employee had acted in breach of contract or in some other inappropriate way and, if so, to determine how that should affect future relations between them.

Likewise, the doctrine of abuse of process was not strictly applicable to an employer's disciplinary proceedings since it operated in the area of adjudication. However, when a tribunal was considering whether dismissal after second disciplinary proceeding was fair, it would perforce have to ask itself whether it was fair to institute the second proceedings at all. In the instant case, although it was true that the factual substratum was the same for all the charges, the particular focus of complaint in the second proceedings was very different. The first proceedings focused on procedural errors and the second concentrated much more firmly on substantive errors of judgment and breaches of the care plan. It followed that there was justification to institute the second disciplinary proceedings.

With due respect, we are of the view that the decision is flawed and was arrived at due to public policy. The case was 're-opened' because the allegations of misconduct involved a risk to a member of the public and that the new management was entitled to take a different view about the seriousness of

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the matters involved. To the appellate court, that was a proper and sufficient basis to conclude that the dismissals were fair notwithstanding that the double jeopardy principle was infringed. Unfortunately, it did not seem that the case would go further up to the Supreme Court as the application for permission to appeal failed.

EQUITY

FIDUCIARY DIVERTING CONTRACTS TO RIVAL COMPANY

The assessment of “profits made by a fiduciary from his breach of duty” was the subject matter in *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan*⁵⁷. D was an employee in P, a family-run company in the business of providing software engineers on contract to 3rd party clients. Whilst in the course of employment, D set up a rival company, MN and diverted contracts from P to MN. D was found liable for breach of fiduciary duties and was ordered to account for any profits he made personally from the diverted contracts. At the hearing of assessment, the registrar fashioned the account to include D’s share of the net profit which MN made from the diverted contracts, and the commissions due from MN to D in respect of those contracts. On appeal to the High Court Judge, D was allowed to retain the commissions due to him from MN, reasoning that P ought not to enjoy a windfall because P would have to pay D the same amount of commission had D not breached his fiduciary duties and procured the contracts for P.

On final appeal to the Singapore Court of Appeal, it was held that the remedy of

‘account’⁵⁸ was a gains-based remedy⁵⁹ grounded in the principle that a fiduciary should not be allowed to retain any profit derived from his breach of duty, regardless of whether the conduct caused any loss to the principal or whether the principal enjoyed a windfall as a result of the account. The commissions D received from MN were derived from the profits which MN earned from the diverted contracts and thus, fell squarely within the profits to be accounted to P.

D further contended that equitable allowance should be granted to him for his expenditure as well as work and skill invested by him in generating MN’s profits. The court however held that power to grant such allowance should be exercised sparingly in order not to encourage fiduciaries to act in breach of their duties. The instant case was a classic case of a fiduciary reaping profit from deliberately placing himself in a position of conflict. It did not warrant an exercise of the court’s discretion to grant the fiduciary an equitable allowance.

EQUITY

DOCTRINE OF MARSHALLING

Doctrine: The equitable doctrine of marshalling was applied in the UK Supreme Court decision in *Szepietowski v National Crime Agency*⁶⁰. The doctrine was explained pithy terms in *In re Bank of Credit and Commerce International SA (No 8)*⁶¹ as:

“[A] principle for doing equity between two or more creditors,

⁵⁸ As opposed to ‘compensation’ for loss.

⁵⁹ As opposed to restitutionary remedy.

⁶⁰ [2013] 3 WLR 1250, [2014] 1 All ER 225

⁶¹[1997] 4 All ER 568

⁵⁷ [2014] 1 SLR 847

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each of whom are owed debts by the same debtor, but one of whom can enforce his claim against more than the one security or fund and the other can resort to only one. It gives the latter and equity to require that the first creditor satisfy himself (or be treated as having satisfied himself) so far as possible out of security or fund to which the latter has no claim.”

Indeed, the doctrine had earlier been elaborated in the same case at the Court of Appeal:

“The doctrine of marshalling applies where there are two creditors of the same debtor, each owed a different debt, one creditor (A) having two or more securities for the debt due to him and the other (B) having only one. B has the right to have the two securities marshalled so that both he and A are paid so far as possible. Thus if a debtor has two estates (Blackacre and Whiteacre) and mortgages both to A and afterward mortgages Whiteacre only to B, B can have two mortgages marshalled so that Blackacre can be made available to him if A chooses to enforce his security against Whiteacre. For the doctrine to apply there must be two debts by the same debtor to two different creditors”.

Facts: Proceedings were brought in 2008 by the predecessor of Serious Organised Crime Agency (SOCA) against D1 and her husband, seeking to confiscate 20 properties (over which an interim receiving order was granted) on the basis that they constituted recoverable property under the Proceeds of Crime Act 2002. Settlement was reached on terms in a consent order, to which was attached a deed of settlement expressed to be made in “full and final settlement” of SOCA’s claims. The settlement scheme was that 13 “transfer properties” (which included TS and CS properties) were vested in the Trustee for Civil Recovery on behalf of SOC (subject however to existing charges to D2 Bank), whilst others including the “family home” were released from the receiving order and returned to D1. D1 had outstanding borrowings with D2 Bank as a result of which D2 also had charges secured over a group of non-transfer properties (Claygate Properties) and the family home. In reaching the settlement, the parties contemplated that the sale proceeds of the Claygate Properties which were on the point of being sold would have repaid all the borrowings to D2 Bank, leaving the charged TS and CS properties available to SOCA free of charges to the D2 Bank. The settlement did however by clause 4.5 provide that if TS and CS properties were sold before the Claygate Properties, and D2 Bank not consenting to its charge being transferred to the Claygate Properties only, D1 would grant SOCA a 2nd charge over the Claygate Properties. As it turned out, TS and CS properties were sold first, with D2 Bank declining to consent to its charges over those properties being transferred and the sale proceeds thereof were paid to D2 Bank. The proceeds of the eventual sale of the Claygate

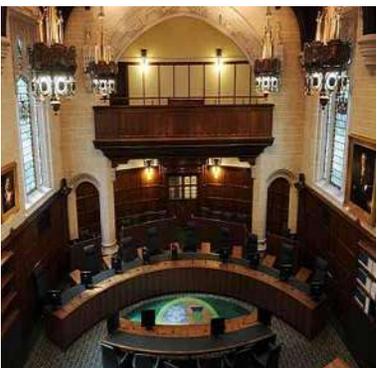
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Properties were lower than anticipated and sufficient only to satisfy D1's remaining indebtedness to D2 Bank, save for a nominal sum. SOCA took the view that the purpose of the 2nd charge under clause 4.5 was to give it security equal to the sum raised from the sale of TS and CS properties. Being aware that D2 Bank additionally had a charge over the family home which D2 Bank could have enforced to secure its remaining debt, SOCA applied for a declaration that it was entitled to apply the equitable doctrine of marshalling so as to marshal the charge granted to D2 Bank over D1's family home with its 2nd charge over the Claygate Properties, so that it could look to the family home to satisfy its security.

Issue: The question in the present case was whether it is open to SOCA to invoke the doctrine so as to marshal a charge granted to D2 Bank over D1's family home and the Claygate Properties, with a later charge granted to SOCA over the Claygate Properties alone, thereby enabling SOCA to look to D1's family home to satisfy the sum secured by the second charge.

Illustration: Their Lordship in the Supreme Court opined that marshalling has been allowed to a creditor, in a case where (i) his



debt is secured by a second mortgage over property (the common property), (ii) the first mortgage of the common

property is also a creditor of the debtor, (iii) the first mortgagee also has security for his debt in the form of another property (the other property) (iv) the first mortgagee has been repaid from the proceeds of sale of the common property, (v) the second mortgagee's debt remains unpaid, and (vi) the proceeds of sale of the other property are not needed (at least in full) to repay the first mortgagee's debt. In such case, the second mortgagee can look to the other property to satisfy the debt owed to him.

Their Lordship proffered the following example: A mortgagor owes £2m to the first mortgagee and £2m to the second mortgagee, the common property and the other property are each worth £3m, and the common property is sold, resulting in repayment in full of the mortgagee and a reduction of £1m in the debt of the second mortgagee. The mortgagor still owes £1m to the second mortgagee, whether or not the second mortgagee can marshal. The only effect of the second mortgagee being able to marshal would be that it could directly enforce its outstanding £1m debt against the other property rather than falling back on the status of unsecured creditor. This emphasizes the point marshalling only really comes into its own where the mortgagor/debtor is insolvent: marshalling improves the position of the second mortgagee as against the unsecured creditors of the debtor, not as against the debtor herself.

Decision: Marshalling should not be allowed in respect of a charge which did not secure an underlying debt save where exceptional circumstances required otherwise. In the instant case, once the TS and CS properties were sold by the D2 Bank and the proceeds of sale distributed, there was no surviving debt

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owing from D1 to SOCA. The 2nd charge over the Claygate Properties was therefore made without any underlying personal liability but merely conferred a contingent interest in the charged assets not as the means to the recovery of a liability but as itself constituting the primary benefit. In other words, the 2nd charge over the Claygate Properties had not created, or acknowledged the existence of, any debt from D1 to SOCA, save that it rendered D1 liable for a contingent debt, in that she was bound to pay SOCA an amount of up to RM1.2m out of such sum, if any, as remained from the proceeds of sale of the Claygate Properties after the charge to the D2 Bank had been paid off.

Further, in the normal case, marshalling did not result in the liabilities of the chargor being increased after the sale of the common property. If the second chargee could marshal in a case where there was no underlying debt due to it from the chargor, the chargor's liabilities would be increased once the common property had been sold by the first chargee. That would be against the intent of marshalling which was to be neutral in its effect upon a debtor and not to result in an increase in the chargor's financial exposure.

SOCA was thus held not to be entitled to invoke the doctrine of marshalling.

EVIDENCE / BANKING LAW

DEFECTIVE EXPERT OPINION

A bank customer claimed that the bank had made wrongful payment of 105 cheques from its current account to third parties on the ground that the signatures of the signee (SP2) on such cheques were forged. In a suit to claim for losses suffered,

the plaintiff in *McLaren Saksama (M) Sdn Bhd v Hong Leong Bank Bhd*⁶² did not call S who had admitted to SP2 that she had forged the signatures. Instead, it relied entirely on the evidence of its handwriting expert witness, SP6.

The trial Judge dismissed the claim on the ground that the plaintiff had failed to prove its case on the balance of probabilities. The evidence of witnesses that S had admitted to them that she had forged SP2's signature was not admissible as it was hearsay. The failure to call S as a witness also prompted the court to draw an adverse inference under s 114(g) of the Evidence Act 1950⁶³. It was further held that signatures written differently did not mean that it was evidence of forgery as no signature could be exactly the same even though it was actually written by the same person. The evidence by a handwriting expert could never be conclusive because it was only an opinion evidence which was to merely assist the court to form its own opinion⁶⁴. In the instant case, the expert (SP6) evidence was not accepted by the trial Judge for 2 reasons: (1) The plaintiff's failure to send specimen signature card containing SP2's signature for analysis was fatal as SP6 could not form his opinion on the cheques without comparing the signature of SP2 on the specimen card. (2) The basis of the expert opinion was not stated in his report and neither did he show the process by which he came to his conclusion. No reason was provided to substantiate his findings.

⁶² [2014] 7 MLJ 104

⁶³ It is a statutory presumption that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

⁶⁴ *Dr Shanmuganathan v Periasamy Sithambaram Pillai* [1997] 3 MLJ 61

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In such circumstances, the expert opinion was a bare expression of opinion without more and could not be given any weight. The court thus ruled that the plaintiff failed to meet the burden of proof to make out its case against the bank and its claim was dismissed with costs.

GIFT

***DONATIO MORTIS CAUSA* --- GIFT IN CONTEMPLATION OF IMPENDING DEATH**

Gift in contemplation of impending death was at issue in the UK case of *Vallee v Birchwood*⁶⁵. During the claimant's visiting her biological father in August 2003, the claimant's father was not in good health and told her that he did not expect to be still alive by Christmas when she next planned to visit him. Saying that he wanted her to have his house on his death, he gave her the deeds and key to the house. He continued to live until December 2003 when he died, without leaving a will. However, it turned out that as she had been adopted by her foster parents, she was not her heir. She would have no claim over the house which would be bequeathed under the law to his surviving brother, nephews and niece, unless her claim was sustainable on the basis of *donatio mortis causa*. The claimant brought an action against the administrator of the estate for a declaration that the transfer of her father's house to her had been effected by a *donatio mortis causa*:

- 1) A *donatio mortis causa* is a present gift which remains conditional until the donor dies and can be revoked in the

meantime. Until his death, the gift is inchoate⁶⁶. If the donor effectively transfers the title to the donee, the gift will become unconditional on the donor's death; if it is revoked in the mean time, the donee holds on trust for the donor. If title has not been effectively transferred, the donor's personal representative will hold the property on trust for the donee and can be compelled to transfer it to him. There are three conditions to constitute a valid *donatio mortis causa* as laid down in the judgment of the UK Court of Appeal in *Sen v Headley*⁶⁷: the gift must be made in contemplation, although not necessarily in expectation, of impending death.

- 2) the gift must be made on condition that it is to be absolute and perfected only on the donor's death, being revocable until that event occurs and ineffective if it does not.
- 3) there must be a delivery of the subject matter of the gift, or essential indicia of title thereto, which amounts to a parting of dominion and not mere physical possession over the subject matter of the gift.

In the case here, there were two main objections raised in the appeal against the county court's ruling in favour of the claimant. Firstly, the gap between the gift and death of 4 months was not 'within the near

⁶⁵ [2014] 2 WLR 543

⁶⁶ It means pending, not yet completed.

⁶⁷ [1991] Ch 425

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future' which rendered the gift not one which was in contemplation of 'impending' death. In this point, the Judge held that requirement (1) did not mean that the donor had to have been in extremis, with no opportunity to make a will, when the gift was made. The fact that there had been an interval of more than a few days between the gift and the donor's death did not preclude a valid *donatio mortis causa*, providing that the motive for the gift had been that the donor subjectively contemplated the possibility of death in the near future. Secondly, the donor continued to stay in his house after the gift, hence he had not parted with his dominion over his house. The Judge referred to case law and held that in the context of a gift of land, delivery of the title deeds would usually be enough to indicate that the donor had parted with dominion over the land, unless the evidence established or implied that he had reserved to himself the power to deal with the land in a manner incompatible with the gift. Since a gift by way of *donatio mortis causa* did not become effective until the death of the donor and so the property remained both in law and equity the property of the donor, there was no reason why acts of continued enjoyment of his own property should be regarded as incompatible with his intention to make a gift effective on his death. By the delivery of title deeds and key to the house to the claimant, the claimant's father had sufficiently parted with dominion over it notwithstanding that he had in fact continued to live in it after the gift. The administrator's appeal was therefore dismissed with costs.

ACCESSORY CAR PARK PARCELS NOT TO DEALT SEPARATELY

With a view to operate a car park rental business, P in *Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & Anor*⁶⁸ purchased 45 units of condominiums together with 439 accessory car park parcels⁶⁹ from the developer at the Palm Spring @ Damansara Condominium and rented out the latter to the tenants/residents. Subsequently, D1 being the joint management body of the condominium issued a notice to the residents that the car park rentals ought to be paid to it. P sued D1 for declaration that P had absolute right to collect the rentals and injunction to restrain D1 from collecting such rentals.

The trial Judge held against P and allowed D1's counterclaim. Firstly, the Strata Titles Act 1985 (the STA) envisaged, by the use of the words "accessory parcel", that the accessory car park parcel must be used in conjunction with the main parcel to which it was attached or appurtenant. Further, s 34(2) of the STA stated that no rights in an accessory parcel shall be dealt with or disposed of independently of the main parcel. Thus, P was prohibited by the STA from renting out the accessory car park parcels separately or independently from the main parcels.

Secondly, the renting of the accessory car park parcels to persons other than the tenant of the specific unit and/or the renting

⁶⁸ [2014] 1 CLJ 598, [2014] 1 AMR 49

⁶⁹ The actual facts were that out of the 45 units condominiums, only 5 units were allocated with one accessory car park parcel while the rest had been allocated between 8 to 15 accessory car park parcels per unit.

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of the accessory car park parcels in itself amounted to “using”, “intending to use” and “dealing” with the accessory parcels “separately” or “independent” from the main parcel. P’s such action was not envisaged by the STA.

Thirdly, the claim of “ownership” of the 439 accessory parcels by P was illegal and in breach of the STA. The sale of these accessory parcels contravened the Town and Country Planning Act 1976 (the TCPA). The developer had also breached the condition of the development order made under s 22(3) and (4) of the TCPA. By dealing with the car parks meant for visitors’ car parks and/or which were meant to be “common property” as defined in s 2 of the Building and Common Property (Maintenance and Management) Act 2007, the developer had breached the mandatory conditions stipulated in the development order. The 45 sale and purchase agreements between P and the developer thus contravened s 24 of the Contracts Act 1950 as the consideration and object of these agreements was unlawful, rendering the sale void.

Fourthly, on the facts, P had not shown the accessory titles were obtained in good faith and for valuable consideration to qualify for the benefit under the proviso to s 340 of the National Land Code. P had only paid for the price of the condominiums while the 394 accessory car park parcels were given free to P. This arrangement was made possible because of the special and close relationship between P and the developer (associated companies, sharing same office and having common director). Therefore, the titles obtained by P in respect of the accessory car park parcels were not indefeasible, resulting in the transfer of such

parcels from the developer to P void.

In the circumstances, the court dismissed P’s claim and granted orders, among others, that D1 was entitled to collect rentals from the accessory car park parcels; that the sale of 394 accessory car park parcels assigned to 40 units of condominiums was void; that P was entitled to only 1 accessory car park parcel assigned to each unit purchased by P; that 213 accessory car park parcels which were assigned to the units purchased by P were meant for visitors’ car parks and were “common property” within the context of the STA; and injunction to restrain P to interfere with the maintenance and collection of rentals from the 213 accessory car park parcels.



LAND / CONTRACT LAW

REAL ESTATE NEGOTIATOR EFFECTIVE CAUSE OF SALE

Having introduced prospective purchaser to the vendor of land (D) which eventually culminated in a concluded sale, the real estate agent(P)’s claim for fees was not met by the vendor. That sums up the dispute in the Court of Appeal (COA) case of *Inch Kenneth Kajang Rubber Public Ltd Co v Tor Peng Sie (t/a Pacific Landmark Real*

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Estate Agents)⁷⁰. Timelines for the events are as follows:

19.4.1999 P employed PW2 as a senior real estate negotiator with full authority to act for P.

End 1999/Early 2000 PW2 contacted DW1 (director of D) to inquire if D would be interested to sell its land or to enter into a joint venture and if so, to appoint P as its 'ad hoc' sales agent.

October 2000 DW1 consented to PW2 proceeding to look for potential purchaser(s) for the sale of its land (which included the Dunedin Estate). PW2 proceeded to source for interested parties and managed to secure two potential purchasers, one of whom was I&P.

5.12.2000 PW2 with the permission of DW1 took some officers of I&P on a site inspection of the land.

12.12.2000 D formally appointed P in writing as its sales agent.

16.11.2001 Sale and purchase agreement entered into between subsidiary of I&P and D for the sale of 405 acres out of the total 1006 acres of the Dunedin Estate at RM4.60 psf (the SPA).

14.12.2004 Sale and purchase transaction completed.

Among the terms of the letter of appointment:

- (a) D agreed to pay to P 1% of the total sale price of each individual transaction and payable in full upon completion of the sale and purchase agreement as commission/fees.
- (b) P's appointment shall be valid for 6 months from the date of appointment. The fees shall be payable if an introduction is made during the period of appointment which leads to any successful sale within 1 year after the expiry of termination of the appointment.

Upon completion of the SPA, P submitted its claim for fees but D failed to make payment despite reminders. The High Court allowed P's claim but limited the judgment sum to RM500,000 on *quantum meruit* basis on the ground that the whole of the Estate was not sold; that DW1 had to do substantial work himself to compete the sale; and that the sale price per square feet was less than what was intended.

On appeal, D raised 3 points, all of which were rejected by the appellate court as "afterthoughts". Firstly, on the defence that there was an oral agreement between DW1 and PW2 that P's fees would only be payable if the Estate was sold at a minimum price of RM5 psf, the COA held that there was insufficient evidence to support such a condition precedent. If the minimum price was a precondition, it was incumbent on D to have spelt it out in no uncertain terms in the letter of appointment so that P would have known in advance what its obligations were. His Lordship regarded this condition as an afterthought as D had never once wrote to P to inform it was not entitled to be paid as the

⁷⁰ [2014] 1 MLJ 118

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minimum price requirement had not been met.

Secondly, on the defence that P had not secured the whole of the Estate, it was held that nowhere in the evidence was it established that the sale of the whole estate was a condition precedent to be fulfilled before P would be entitled to be paid its fees.

Thirdly, on the defence that D had failed to perform its obligations as a real estate agent to help conclude the sale and purchase transaction, PW2 was the effective cause (not necessarily immediate cause) in bringing the parties together. Upon PW2 securing a purchaser for D, the event envisaged in the letter of appointment had happened and by operation of s 33 of the Contracts Act 1950, the contingent contract became enforceable by law and P was entitled to its commission. D's contentions that PW2 failed to take part in negotiations that led to the execution of the SPA, that PW2 failed to give advice, discuss documents and agreements, promote the land, obtain valuation and consultants' reports and other important information, His Lordship held that PW2 was a mere estate agent negotiator whose job was to source for and introduce potential purchasers for the land. She was not a qualified and licensed person to have given the kind of information and assistance DW1 sought in order to conclude the sale with I&P. Further, D had failed to respond to any of P's letters to dispute P's demands or to state its case that as PW2 did not perform her obligations, D would not be obliged to pay. This line of non-performance was regarded as the third afterthought.

The court allowed P's cross appeal. The High Court having found PW2 as the effective cause of the sale should have

awarded the full sum. The three reasons relied by the trial judge were inconsistent with his finding of fact and law on the issue of liability in favour of P. P was entitled to its full fees even if the ultimate sale was at a lower price than initially agreed. Further, the judgment sum of RM500,000 awarded was arbitrary as no basis or reasons had been proffered to support that figure. Judgment was thus entered for the full amount claimed by P.

MORTGAGE / CHARGE

MORTGAGEE AUCTIONED OFF MORTGAGED PROPERTY TO ITS OWN SELF

The duties of mortgagee/chargee when the mortgagee sought to purchase the mortgaged property at the auction held by the mortgagee were at issue in *Alpstream AG and others v PK Airfinance Sarl and another*⁷¹. The borrowers in that case obtained financing to purchase seven Blue Wing aircrafts from PK. The Blue Wing airline ran into financial difficulties and filed for insolvency. PK's power of sale arose in respect of the Blue Wing aircrafts. Six of such aircrafts were purchased by PK at an auction organized by PK, transferred to the order of PK's European subsidiary, GECAS and leased to another airline. The claimants complained of the way in which PK had acted in respect of the exercise of the power of sale over the six aircrafts. Among the contentions was that PK had failed to exercise its duty as mortgagee (i) to take reasonable care to obtain best value for the aircrafts (since the sale was to PK itself, the onus was on PK to establish compliance with its duty) and (ii) to

⁷¹ [2014] 1 All ER(Comm) 441

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act in good faith and for proper purposes. PK relied on an exemption clause whereby PK was exempted from liability for breach of duty, save in respect of wilful misconduct.

It was held that on evidence, there had been a breach of duty to the borrowers by PK. PK owed a duty not to have gone through the (at best) half-hearted exercise of an auction. In a connected-sale case⁷², independent advice⁷³ should always be taken. Thus, the only way to acquire the aircrafts which PK wished to sell to GECAS was to obtain an independent valuation. However, PK deliberately elected to avoid that course and to follow the route of the half-hearted auction so they could officially take the planes under their control.

The duty owed to the borrowers was limited to wilful misconduct. In reality, PK had known that they were “going through the motions” and preferring the interests of GECAS over their obligations as mortgagee, and they covered that up where necessary. They knowingly took a risk, namely setting up a minimalist auction, in which PK would be in a position to outbid any comers by putting forward a bid which was affordable, so as to secure the aircrafts for GECAS, while paying no regard to their duties to take care to obtain the best possible price for them. In those circumstances, there had been wilful misconduct.

⁷² See *Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 139 CLR 195, *Tse Kwong Lam v Wong Chi Sen* [1983] 3 All ER 54.

⁷³ Even in an ordinary case, a prudent mortgagee would take valuation advice from a duly qualified agent: *Michael v Miller* [2004] 2 EGLR 151.

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RIGHTS TO PRIVACY IN MALAYSIA

You were captured in a photograph. It was then published on a magazine without your consent or knowledge. Can you claim that you were the rightful owner of the copyright of the photograph and sue for infringement of copyright? Can you also sue the publisher for violating your right to privacy? These are the questions posed in the High Court case of *Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd*⁷⁴.

Facts

The plaintiff (P) was a beauty queen between 1992-1994 but converted to Islam in 1995 and as part of her religious practice, sported a headscarf. In 2008, she discovered that her photographs taken at the beauty pageant appeared on the packaging of the defendant(D)'s products and an advertisement board. Averring that she had rights to privacy and was the owner of the copyright of her photographs, P filed a suit against D for injunction and damages.

On Copyright

Evidence showed that P was not the photographer or author of the photographs or images. Neither did P claim that she arranged or took or produced the photographs or images. She merely relied on the fact that she was one of the three women shown in the photographs to assert her claim as the rightful owner of the photographs. The court however ruled that if P was the owner of the copyright by virtue of her being in the

⁷⁴ [2014] 7 MLJ 298

photographs or images, then the other two women would also be the owners of the copyright in the photographs or images. But they were not the parties to the suit and P had not established that they had assigned their rights to her or had agreed to her to launch the suit against D for infringement of the copyright purportedly jointly owned by them with P.

The photographs were published in a book by the Sabah Tourism Board. This implicitly meant that the board was the owner of the copyright or had the permission from the author or owner thereof to publish the photographs or images. That would effectively exclude P to be the owner of the copyright and the right to sue for infringement of the copyright. She had also not identified the photographer or author of the photographs or images or adduced any evidence that she had been assigned or owned the copyright pursuant to an agreement with the photographer or author or owner or the tourism board or the organisers of the various beauty pageants in which she took part during which the photographs or images were taken or produced. Pursuant to s 37(1) of the Copyright Act 1987, infringements of copyright shall be actionable only at the suit of the owner of the copyright. Since P had not shown that she was the owner of the copyright in the photographs or images used by D, she could not sue and had no *locus standi* to sue D for infringements of copyright.

On Privacy

The English common law does not generally recognize privacy rights except if a

photograph was highly offensive in nature and showed a person in an embarrassing position or pose⁷⁵. English courts however opt to classify the cause of action as a breach of confidentiality between the intruder and the victim, instead of recognizing it as a separate head of tort of privacy⁷⁶. Similar position has been adopted in Australia⁷⁷. That said, the learned Judge opined that in Malaysia, claim for invasion of privacy had since been recognized and cited two cases to support his view, *ie. Lee Ewe Poh v Dr Lim Teik Man & Anor*⁷⁸ and *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors*⁷⁹. On the facts, however, D did not intrude onto private property and took photographs of P without her consent. The photographs were taken many years ago by someone else at beauty pageants where she participated willingly as a contestant and in public. It was not a private affair on a private property. The photographs were also not offensive. P did not complain then that she had been humiliated or ridiculed or scandalized by the photographs or images. Further, the photographs were also published in the book by the tourism board, hence they were in public domain and D's act of re-publishing them on its products could not amount to an invasion of her privacy.

Decision

The upshot is that P's claim was struck off without having to proceed to trial.

⁷⁵ See *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2004] 5 CLJ 285

⁷⁶ See *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, *Douglas v Hello! Ltd* [2001] 2 WLR 992.

⁷⁷ See *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63

⁷⁸ [2011] 1 MLJ 835

⁷⁹ [2009] 6 CLJ 653

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REVENUE LAW

NO 'PASS ON' DEFENCE FOR ILLEGALLY COLLECTED TAXES

An interesting point popped up in *Power Root (M) Sdn Bhd & Ors v Director General of Customs*⁸⁰. The customs department (the respondent, R) had charged sales tax at the rate of 10% on the taxpayer (T) which was a manufacturer of various beverages but the court ruled that the proper tax rate was 5%. Consequently, T requested for the return of the overpaid tax sums previously paid. R however refused on the ground that the overpaid tax sums were charged to the consumers. It was contended that they had been 'passed on' to the consumers and thus if they were to be refunded to T, T would be unjustly enriched.

The High Court found that R's assertion that it was relieved of its obligation to make restitution because the illegally collected taxes had been 'passed on' to the end users was unfounded. Citing Canadian authority⁸¹, R had no right to retain illegally collected taxes and T should have recourse to restitution as of right. It would be in breach of fundamental constitutional principles to permit R to retain illegally collected taxes. The defence of 'passing on' was rejected because it was inconsistent with the basic premise of restitution law; it was economically misconceived; and the task of determining the ultimate burden of tax was exceedingly difficult and constituted an inappropriate basis for denying relief. To the learned Judge:

"...on the contrary, it is the respondent who will be unjustly enriched if they were permitted to retain the *ultra vires* tax."



TORT (NEGLIGENCE)

LIABILITY TOWARDS SECONDARY VICTIMS

Facts: In *Taylor v A Novo (UK) Ltd*⁸², C's mother sustained serious injuries in an accident caused by D's negligence. 3 weeks later, while recovering at home from her injuries, she unexpectedly collapsed and died. C, having witnessed her mother's collapse and death, suffered psychiatric illness (post-traumatic stress disorder). She claimed damages against D.

Issue: Whether C was entitled as a matter of law to claim damages from D as a "secondary victim" of the accident to her late mother (the primary victim).

Trial: At the trial, the trial Judge relying on the case law laid down seven conditions that must be satisfied by C in order to succeed as a "secondary victim":

⁸⁰ [2014] 2 MLJ 271

⁸¹ *Kingstreet Investment Ltd and Anor v New Brunswick (Department of Finance and Another)* [2007] 276 DLR(4th) 342, SC

⁸² [2014] QB 150

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- (i) her injury was reasonably foreseeable;
- (ii) she was a close relative of and had a close emotional relationship with the primary victim;
- (iii) she had suffered a recognized psychiatric injury;
- (iv) the injury was caused by the actions of D;
- (v) the injury was caused by “shock” as a result of a sudden perception of the death of, or risk to or injury to the primary victim;
- (vi) she was either present at the scene of the accident which caused the death or must have been involved in its immediate aftermath (both physical and temporal proximity being required); and
- (vii) she must have perceived the death, risk or injury with her own senses.

The learned Judge ruled that the event which caused damage to C was the collapse and death of C’s mother and there was no gap between that event and the injury she suffered, hence C’s claim was allowed.

On appeal, D accepted all the above requirements were met except (vi). It was their contention that proximity was lacking as C was not at the scene of the accident and was not involved in its immediate aftermath. The “shock” was suffered 21 days later. On the other side, C argued that the “event” for the purpose of deciding whether C was a secondary victim was not the original accident, but the collapse and death of C’s mother that resulted from it. In other words, the question was whether there was a relationship of proximity between C and D.

Held: In secondary victim cases, both a relationship of proximity with the defendant sufficient to found a duty of care [legal proximity] and also physical proximity in time and space to the event caused by the negligence [physical proximity] must be established. D’s negligence had caused a single accident or event (the falling of the stack of racking boards), with two consequences (injuries to C’s mother and her death) which had occurred 21 days apart. To make D liable to C for the second consequence would require a considerable extension of the scope of liability for secondary victims, which the courts were astute not to do. The relevant event for the purpose of determining the proximity question was the original accident and not the death of C’s mother. Therefore, although C would have been able to recover damages as a secondary victim had she suffered shock and psychiatric illness as a result of seeing her mother’s accident, she could not do so where that shock and illness had resulted from her seeing her mother’s death 21 days later. D’s appeal against the trial Judge’s finding of liability was thus allowed

Comments: The factual situation was a novel one as past cases were single event cases. The decision demonstrates yet again the reluctance of UK courts to extend the scope of liability for secondary victims. Indeed, in the seminal House of Lords decision in *Alcock v Chief Constable of South Yorkshire Police*⁸³, 5 common features had been identified as the “control mechanisms”⁸⁴ for limiting the class of persons who could

⁸³ [1992] 1 AC 310. See also *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

⁸⁴ The term was coined in *Page v Smith* [1996] AC 155, 197E-H.

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recover damages for psychiatric illness as secondary victim, as follows:

- (i) there was a marital or parental relationship between the plaintiff and the primary victim;
- (ii) the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system;
- (iii) the plaintiff was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnesses the aftermath shortly afterwards;
- (iv) the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim; and
- (v) there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim.

Whilst it has been recognized that this area of law was to some extent arbitrary and unsatisfactory, for policy reasons as advanced in *Alcock*, the courts would confine the right of action of secondary victims by means of strict control mechanisms. These policy reasons militated against substantial extension of the scope of such liability which should only be done by Parliament.

TORT (NEGLIGENCE)

SCHOOL MAYBE LIABLE FOR INJURY FROM SWIMMING LESSON

The tragic incident in *Woodland v Essex County Council*⁸⁵ could have happened to any school-going child when taking part in a school activity. The UK decision of the Supreme Court on the extent of duty of care and limitations in such a scenario is very much welcome. In that case, W, a pupil at a school for which the local education authority was responsible, had suffered serious brain injury in a swimming lesson in normal school hours at a swimming pool run by another local authority. The lesson was taught by a swimming teacher with a lifeguard in attendance, both of whom were not employed by the education authority; their services had been provided to the authority by an independent contractor who had contracted with the education authority to provide swimming lessons to its pupils. W sued for damages for personal injury allegedly due to the negligence of the swimming teacher and the lifeguard and claimed that the education authority owed her a non-delegable duty to procure that reasonable care was taken in the performance of the functions entrusted to it by whoever it arranged to perform them. Both the trial judge and the UK Court of Appeal struck out the claim on the ground that on the pleaded facts, the education authority could not be said to have owed W a 'non-delegable duty of care'.

At the final appeal in the Supreme Court, the decision was over-turned. His Lordship started by clarifying that the instant

⁸⁵ [2014] 1 All ER 482

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case did not revolve on vicarious liability⁸⁶, since its boundary (albeit expanded) had never extended to the negligence of those who were truly independent contractors. Ordinarily, the law of negligence was generally fault-based. What the claimant sought to do was to urge the court to regard its facts as falling within the exception to the ordinary principle, *ie.* non-delegable duty of care. Traditionally, a non-delegable duty of care had been held to arise in two broad categories. The first was where the defendant employed an independent contractor to perform some function which was either inherently hazardous or liable to become so in the course of his work. This normally concerned with the creation of hazards in a public place. The second was relevant in the instant case, which was where the common law imposed such a duty upon a defendant in cases with certain defining features. After extensive discussion, the following factors were held by the apex court to be giving rise to non-delegable duty of care:

- (a) The claimant was especially vulnerable or dependent on the protection of the defendant against the risk of injury;
- (b) There was an antecedent relationship between the claimant and the defendant, involving an element of control, and independent of the negligent act or omission itself, (i) which placed the claimant in the actual custody, charge or care of the defendant, and (ii) from which it was possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and

⁸⁶ At common law, vicarious liability is the only exception to the general principle that liability in tort depends upon proof of a personal breach of duty.

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- not just a duty to refrain from conduct which would foreseeably damage the claimant;
- (c) The claimant had no control over how the defendant chose to perform those obligations personally or through employees or through third parties.
- (d) The defendant had delegated to a third party some function which was an integral part of the positive duty which he had assumed towards the claimant; and the third party was exercising, for the purpose of that function, the defendant's custody or care of the claimant and the element of control that went with it;
- (e) The third party had been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

In His Lordship's view, a non-delegable duty of care imposed on schools ought to be recognized as it was consistent with the long-standing policy of law to protect those who were both inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives. The authority allowed to schools over children, for their education, conferred on schools a significant degree of control. When the school's own control was delegated to someone else for the purpose of performing part of the school's own educational function, it was wholly reasonable that the school should be answerable for the careful exercise of its control by the delegate. Parents were required by law to entrust their child to a

school; they did so in reliance on the school's ability to look after the child, and generally had no knowledge of or influence over the arrangements that the school might make to delegate specialized functions, or the basis on which the school did so, or the competence of the delegates, all of which were matters about which only the school was in a position to satisfy itself.

However, the liability of a school was not open-ended; schools would be liable for the negligence of independent contractors only if and so far as they were performing functions which the school had assumed for itself a duty to perform, generally in school hours and on school premises (or at other times or places where the school might carry out its educational functions) and where control over the child had been delegated by the school. They would not be liable for the defaults of independent contractors providing extra-curricular activities outside school hours (such as school trips in the holidays). Nor would they be liable for negligence of those to whom no control over the child had been delegated, such as bus drivers⁸⁷ or the theatres, zoos or museums to which the child might be taken by school staff in school hours.

On the present facts, the education authority had assumed a duty to ensure that W's swimming lessons were carefully conducted and supervised. W had been entrusted to the school for purposes which included teaching and supervision; the swimming lessons had been an integral part of the school's teaching function and had occurred in school hours in a place where the school chose to carry out that part of its functions. The teaching and supervisory

functions of the school and the control of the child had been delegated by the school to third parties to the extent necessary to enable them to give swimming lessons. The alleged negligence had occurred in the course of the functions which the school had assumed an obligation to perform and had delegated to its contractors. It followed that if the contractors had been negligent in performing those functions and W had been injured as a result, the education authority was in breach of duty. The order of the lower courts striking out the allegation of a non-delegable duty of care was therefore set aside.



⁸⁷ But they would be liable if they had undertaken to provide transport and placed the pupils in the charge of the bus driver rather than that of a teacher.

IMPORTANT

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