THE UPDATE

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TABLE OF CONTENTS		Page

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NON-PAYING RESIDENTS TO OPERATE BOOM GATES THEMSELVES

To what extent can a residents' association in a guarded community impose condition upon non-paying residents or non-members? This question surfaced yet again in the recent Court of Appeal (COA) decision in *Lim Keng Jit v Majlis Bandaraya Petaling Jaya*[i] where the appellant was an authorized officer of the Residents Association of Parkville Sunway Damansara (RA) which had applied for the renewal of the approval of the respondent i.e. the local authority, MBPJ to continue operate as a guarded community. MBPJ had rejected the RA's application to impose a rule that non-paying owners and residents or non-members of the RA would have to operate the boom gates by themselves without the assistance of security guards (the Rule). In the Garis Panduan Komuniti Berpengawai di Kawasan MBPJ (Penambahbaikan 2017) (the 2017 Guidelines), there were provisions that prohibited any guarded community scheme from requiring any person from alighting his vehicle to open a barrier blocking a road (the Condition). The RA applied for *certiorari* to quash the decision of the MBPJ and for a declaration that the RA was entitled to impose the Rule.

The High Court did not favour the RA which succeeded on appeal to the COA. The COA acknowledged the Federal Court decision in *Au Kean Hoe v Persatuan Penduduk D'Villa Equestrian*[ii] (*Au*) was a case of nuisance in obstruction (and not on the Condition imposable by local authority) in that the condition that residents who did not pay monthly fees for security and maintenance charges would have to open the boom gate by themselves without the assistance of the security guard on duty was not a nuisance in the interest of the community but merely an inconvenience. However, the COA held that the *ratio* underlying *Au* was the recognition that individuals live in a community; and there has to be a balancing between the rights of the individual or what was termed as inconvenience as opposed to the interest of the community at large. It was in this context that the Rule was in the larger interest of the community.

The Rule was imposed as it would be unfair and unreasonable for non-paying members to enjoy the benefits of a guarded community without making any contribution. With such Rule, the non-paying members would merely suffer the inconvenience, as in *Au*, in having to operate the boom gate without the assistance of security guards. There must be a sense of collective responsibility towards the greater good to ensure the safety and security of the residential area as a whole.

Au recognized that MBPJ was the rightful authority for the approval of boom gates which power has to be exercised to balance the rights of individuals against those of the community. It was not

[i] [2023] 7 CLJ 745

[ii] [2015] 3 CLJ 277, FC

reasonable for the MBPJ to refuse to exempt the RA from the Condition. In the COA's view, the larger interest of the community had to prevail over the rights of individuals where the issues of public safety and security had to prevail over matters of inconvenience. The Rule was necessary to ensure the proper functioning of a security system for the residential area. Further, it was unreasonable for non-paying individuals to enjoy the benefits of a guarded community without making any contribution and without having to fork out a single cent. It could not be construed as an attempt to force residents into joining the RA. It was reasonable that the RA was entitled to impose the Rule and as a consequence, the MBPJ decision was quashed.

Postscript

On 12.7.2023, then Federal Court has allowed leave to MBPJ to appeal against the COA decision to the Federal Court. The COA decision is not final and we shall await for its determination at the apex court.

RELATED PARTY CREDITORS VIS-À-VIS THIRD-PARTY CREDITORS IN SCHEME OF ARRANGEMENT

The Cour of Appeal decision in *MDSA Resources Sdn Bhd v Adrian Sia Koon Leng*[i] as featured in issue Q1 of 2023 (Jan – Mac 2023) of THE UPDATE was affirmed on appeal at the Federal Court[ii]. It was held by the pinnacle court that a wholly-owned subsidiary or related party of a company that proposed a scheme of arrangement under the Companies Act 2016 should not be placed in a single class of creditors due to their special interest in promoting the scheme. There was no community of interest between the subsidiary or related party and other creditors. The legal right or interest deriving from the legal right of the third-party creditors in this case was the outstanding rental of the units of Hatten Suits under the 'Guaranteed Rental Return' scheme agreements. This was dissimilar from that of the Hatten Group Creditors which had a special interest in promoting the scheme. They obviously could not sensibly consult together with a view to their common interest. In the circumstances, the third-party creditors should not be placed in a single class creditors with the Hatten Group Creditors ; the single classification was not fairly representative of the scheme creditors. Therefore, the answer to the question on whether the votes of related-party creditors are to be treated differently from the votes

[i] [2023] 3 CLJ 191
[ii] [2023] 5 MLRA 358, [2023] 6 AMR 1

of other creditors in the same class in the scheme of arrangement is affirmative. The votes of the related parties must be discounted or given less weight as they had special interest in promoting the proposed scheme with the propensity to disregard the interests of the other creditors in the scheme.

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COMPANY LAW / LIQUIDATION

LIMITATION BAR AND INTERESTS ON POD

In *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors*[i], there were two questions of law posed before the Federal Court concerning the applicability of the Limitation Act 1953 (the LA) to a proof of debt (POD) and the power of liquidators to impose interests on the amount provable in the POD.

GIE had lodged a POD with the liquidators of UEG for USD997,750.70 on 28.3.2011. On 10.5.2012, the liquidators wrote to inform GIE that they had yet to decide on GIE's claim pending further verification. It was 4 years later in November 2015 that the liquidators informed GIE that the claim amount of USD997,750.70 had been admitted to the extent of USD179,075.61 only; the sum of USD1,871.32 was rejected whilst in respect of the balance of USD995,879.55, a sum of USD816,803.57 was deducted for the purpose of procurement fee due to UEG pursuant to cl. 10(B) of the subcontract between UEG and GIE. The sum of USD816,803.57 was not rejected. It was only 2 years later through the liquidators' solicitors' letter dated 5.12.2017 that GIF was notified that the sum claimed in the POD was time-barred as the cause of action against UEG had set in on 20.11.2006 hence there was no sum owing to GIE by UEG.

The apex court held that if a POD had been accepted and had not been rejected, then the liquidators could not renege on a decision made and decide to rely on limitation two years later. Indeed, the liquidator must state that he rejected a POD based on limitation in clear and certain terms in the notice of rejection in compliance with the procedure under the Company (Winding Up) Rules 1972. Having admitted the POD of GIE, the liquidators were estopped from availing themselves and invoking the statute of limitation to reject the POD., in answering question 1, the LA cannot apply to the POD which was accepted and not formally rejected by a liquidator.

On the facts, the imposition of the late payment interest for over 20 years was outside the scope of the terms of the subcontract. The POD exercise did not permit the liquidators to assert a claim for the wound-up company without filing a civil claim in court. The liquidators here were not asserting a right of set-off or mutual credit; arguments which were popularly raised and dealt with by a court of law and not unilaterally by liquidators. Hence, in answering question 2, the

[i] [2023] 4 MLRA, [2023] 5 AMR 353

liquidators cannot unilaterally impose interest on the basis of a commercial decision and at a rate unilaterally decided by them in the absence of any contractual provision.

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COMPANY / TORT

DIRECTOR LIABLE AS AN ACCESSORY TO A TORT COMMITTED BY A COMPANY

Under what circumstances can a director of a company which is the primary tortfeasor be held personally liable as an accessory to the wrongdoing of the company? That was one of the main issues in the UK Court of Appeal (COA) decision in *Barclay-Watt and others v Alpha Panareti Public Ltd and others*[i]. The 1st defendant (APP) was a property development company whilst the 2nd defendant (IO) was a director of APP and the driving force behind the marketing of the properties to the claimants/investors. The claimants were sold a package of investment property in Cyprus funded by a loan (taken in Swiss franc) secured by a mortgage, which eventually suffered substantial fall in value (due to fall in sterling and Cyprus pound) with increasing indebtedness of the claimants to the bank. The trial Judge found that APP had owed a duty of care to put the claimants on notice of the currency risks and were in breach of that duty, but there had been no assumption of personal liability to the claimants by IO.

On the claimants' cross-appeal, they submitted that the 3 conditions for accessory liability set out in the landmark case of UK Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK*[ii] had been satisfied in relation to IO :- (i) the defendant must have assisted the commission of an act by the primary tortfeasor; (ii) the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and (iii) the act must constitute a tort as against the claimant. The claimants contended that IO had assisted in the commission of an act by APP; that he had done so pursuant to a common design between him and APP to sell as many properties as possibly by marketing them through the network of salesmen who had intended and directed to promote taking of mortgage in Swiss franc; and the way in which the properties had

[i] [2023] 1 All ER 165

[ii] [2015] 4 All ER 247 (UKSC)

been marketed constituted a tort committed by APP against the claimants due to their failure to warn about the currency risks.

The UK COA disagreed. The question of whether a director should be held personally liable as an accessory to a tort committed by a company was a fact-sensitive question, requiring the balancing of competing principles. A conclusion against the personal liability of IO was in accordance with the principles that accessory liability ought to be kept within reasonable bounds and that it should be possible to carry on business by means of a limited liability company without exposing the individuals carrying on that business to personal liability. IO who had not had personal dealings with the claimants or assumed any responsibility towards them, had not himself committed any tort. The business of developing and marketing the properties had been the business of APP, not IO. The principle of limited liability which shielded a director from personal liability in contract should also apply in the case of a tort, liability for which depended on the existence of a relationship which was equivalent to contract.

In the view of the COA, there had indeed been a common design which was shared between IO and APP in that IO had intended that APP should market the properties through the salesmen recruited for the task and that included the promotion of the benefits of the Swiss franc mortgage. However, the act or omission which had made that conduct tortious had been the failure to warn about the currency risks of that mortgage. The Judge's finding was that there had been no conscious decision not to include such warning. That being so, it was difficult to say that there had been a common design not to do so. Therefore, the condition on common design was not fulfilled to incur personal liability as an accessory on the part of IO. The claimants' cross-appeal against IO was accordingly dismissed.

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CONTRACT (MONEYLENDERS)

RESTITUTIONARY REMEDY FOR DEFAULTED MONEYLENDING TRANSACTIONS

Moneylending was once again the centre of attention in the Court of Appeal case of *Anuar bin Abd Aziz v Dato' John Lee Siew Neng & 2 Ors*[i]. There were two loan transactions. In the first loan, R1 agreed to lend A a sum of RM2 million with 3 pieces of land transferred to R1's nominee, R2 as security. Both parties entered into a sale and purchase agreement (SP) and executed the land transfer. A was allowed to redeem the land upon repayment of the loan. Then, A requested RM22 million as the second loan and transferred 5 pieces of property as security which were redeemable after repayment. A failed to repay the second loan. R1 filed suit for the repayment of the loan with interest whilst A counterclaimed for the return of the 8 pieces of land on the ground that the loan agreements were

[i] [2023] 5 AMR 113

illegal and unenforceable as R1 was not a licensed moneylender when he granted the two loans to A. It would also appear that there was no moneylending agreement in writing entered into by R1 and A.

Interestingly, R1 adduced evidence to show that at the material time of the loans granted to A, he was not carrying on "the business of moneylending" within the meaning of the Moneylenders Act 1951. R1 was a businessman running a business of supplying building materials through various companies. There was also other evidence which resulted in the finding of fact that R1 was not carrying out a moneylending business upon which the appellate court was disinclined to interfere.

That said, the court ordered restitutionary remedy to prevent injustice and unjust enrichment. The SPAs were not SPAs simpliciter and they were meant to serve as security for the two loans. In line with R1's own pleaded case that the 8 pieces of land were intended as security for the loans, A would be entitled to redeem the land upon repayment of the loans.

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1. WATERING DOWN IMPORTANCE OF DOMESTIC INQUIRY

In a wrongful dismissal case, is there any difference when a domestic inquiry (DI) was held before sacking a worker on disciplinary ground as compared to a case in which the worker was sacked without any hearing of a DI? It is commonly believed that following the High Court decision of *Bumiputra Commerce Bank Bhd v Mahkamah Perusahaan Malaysia & Anor*[i], where a due inquiry has been held, the Industrial Court (IC)'s jurisdiction is limited to considering whether there was a *prima facie* case against the employee. The IC should first consider whether the DI was valid and whether the inquiry notes are accurate, and not to decide the matter without any regard to the notes. However, the recent Court of Appeal (COA) decision in *Institute of Technology Petronas Sdn Bhd/Universiti Teknologi Petronas v Amirul Fairuz Ahmad & Anor*[ii] cast some doubts on such approach.

The COA held that the IC should not be concerned with the DI held by the employer but to hear the dispute *de novo* (afresh or anew). When the IC hears a reference under s.20 of the Industrial Relations Act 1967 (IRA), it is by way of rehearing, to hear the case *de novo*, regardless of whether DI was held or not. The IC thus cannot rely on the notes of proceedings of the DI only to decide whether a *prima facie* case has been established. The IC was in error to rely on the findings of DI that fraud in this case had not been established, instead of making a finding based on the evidence presented before the IC. The High Court fell into the same error in taking the same position as the IC. Below are the excerpts from *Amirul Fairuz Ahmad :*

[i] [2004] 7 MLJ 441
[ii] [2023] 2 ILR 242

"*...the provisions in IRA empower the IC to conduct its own hearing and its primary function is to investigate into the grounds for dismissal. The IC may act in an inquisitorial or adversarial* (role), *depending on the circumstances. In determination, it has to have regard for equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.*

Therefore, when the duty of the IC is to conduct the hearing itself, it defeats its statutory purpose when it should first consider the procedure adopted by the DI tribunal to verify its validity and to check the accuracy of the inquiry notes, before it can get on with its own investigation.

Added to that, reliance on the DI will invariably lead to the IC being influenced by the findings of the DI, an inquiry that was held by an employer before dismissing his workman. Such a stand would simply mean that the guilt or innocence of a workman upon a charge of misconduct would be decided not by the IC, but by the employer himself. This is not the purpose for the setting up of the IC, which is a special machinery for the vindication of the rights of workman."

This decision may not be the last to be heard on how IC is to deal with a decision of a DI held by the employer. However, at present, the utility of holding a DI appears to be very limited.

Postcript:

Amirul Fairuz Ahmad in our view represents a departure of the position taken by another panel of the COA in *Lini Feinita Muhammad Feisol v Indah Water Konsortium Sdn Bhd*[i] that where a DI was held by the employer, the IC was duty-bound to consider the findings made by the DI panel in deciding whether the employee's dismissal was with just cause or excuse; and should not proceed to hear the matter *de novo*. The findings of the DI ought to be considered by the IC and unless the decision could be shown to be perverse, the employer could not be allowed to reargue its case to justify the termination in the IC. *Amirul Fairuz Ahmad* being latter in time, the

[i] [2021] 2 ILR 385 (CA)

principles therein prevail over those in *Lini Feinita Muhammad Feisol.*

2. EMPLOYER'S FAILURE TO REPLY TO EMPLOYEE'S GRIEVANCE EMAILS

In *Teng Tong Kee v Nikmat Jasa Piling Sdn Bhd*[i], the Court of Appeal (COA) held that an employer's failure to respond to an employee's letter cannot be equated with proof that the employee had been dismissed without just cause or excuse. In *CIMB Bank Berhad v Ahmad Suhairi Mat Ali & Anor*[ii], whilst the COA had alluded to the proposition, it was nevertheless held on the facts and evidence of the circumstances in which the claimant had raised several issues in his multitude of e-mails that the employer/bank's failure to respond was wholly inexcusable.

This was a case of constructive dismissal in which the employer had transferred and redesignated the claimant from Area Commercial Manager (ACM) for bank's operations in Kedah/Perlis to Team Leader of the Special Acquisition Team (SAT) based in Penang after he was notified of his poor performance and no bonus for 2011. Apart from the finding on non-response as stated above, it was also found that the position of SAT Leader was an inferior position that required the claimant to work alone without any relationship manager/clerical staff/PA reporting to him. The transfer to a position where he had to perform tasks which he had performed before he became ACM was a demotion notwithstanding that there was neither a salary reduction or change in job grade. It was a fundamental breach of the implied term that the employer would not do anything to destroy mutual trust and confidence that was the bedrock of any employer/employee relationship.

The employer's contention that by asking for stationery and business cards, the claimant had acquiesced or consented to the breach by the employer was rejected. Although the claimant walked out after 1 month and 18 days as the Team Leader of SAT, this could not be construed as an affirmation of the unilateral variation of the contract of employment.

3. EXCESSIVE MEDICAL, EMERGENCY & UNPAID LEAVE MAY BE MISCONDUCT

Does taking excessive medical leave constitute misconduct? In *Mohammad Fauzi Hassan v Motoria Sdn Bhd*[iii], the Industrial Court remarked that the claimant's trend of taking medical/sick leave, emergency leave and unpaid leave started even before the claimant's first diagnosis of thyroid and continued after the issuance of the first warning up to his admission at the hospital. It was held that the claimant had committed a misconduct when he took excessive medical/sick, emergency and unpaid leave for the following totals :

[i] [2006] 1 MELR 1, [2006] 1 MLRA 70
[ii] [2023] 6 MLRA 652
[iii] [2023] 2 ILR 300

2012	58.5 days
2013	72.5 days
2015	61 days
2016	66 days
2017	49 days
2018	71.5 days
2019	65.6 days

That came to an average of 6 days per month or 2 months per year to avoid work. The claimant was thereby in breach of the duty to attend work and to discharge his duties diligently. Do take note that taking of excessive medical leave supported by medical certificates may not be wrong in law but doing so in order not to come to work and indicating unwillingness to perform his duties amount to a serious misconduct[i].

The claimant had also conducted misconduct when he was late on 7 occasions in July 2016, 4 occasions in August 2016 and 6 occasions in September 2016. Despite warning, he continued to report late for work in 2017. Relying on the principle that "*lateness is unauthorized absence without leave for the period between the time the employee is required to arrive and the time he actually does arrive*"[ii], it is misconduct.

4. USING CRITERIA OTHER THAN LIFO FOR RETRENCHMENT EXERCISE

There are two points that are worth mentioning in the Industrial Court award in *How Zheng Hong v AirAsia Berhad*[iii] which concerned retrenchment exercise undertaken by the low cost air carrier company. First is that the selection of employees to be retrenched does not necessarily follow the rule of LIFO (Last In First Out) as stated in the Code of Conduct for Industrial Harmony 1975. The failure to use LIFO in itself does not render the selection automatically unfair. An employee can choose to depart from LIFO and adopt its own criteria but this then means that the selection criteria will be subject to evaluation of the court. In the instant case, the selection criteria adopted was objective and reasonable based on conduct and performance which entailed yearly review ratings. The company was in the best position to determine its needs and to formulate its selection criteria.

Second is that there is no legal obligation for the company to notify the claimant/employee on the selection criteria

[i] See *Malaysia Smelting Corp Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Pelaboran Logam, Butterworth* [1992] 3 CLJ 1722

[ii] See *Yee Lee Corporation Bhd v Mallika Paul* [1995] 1 ILR 432

[iii] [2023] 3 ILR 113

before its implementation or to consult or inform the claimant on the performance matrix used for its selection process in a retrenchment exercise.

5. PAYMENT OF DIVIDEND DOES NOT INVALIDATE RETRENCHMENT EXERCISE

The claimant in *Khairul Amree Ahmad Suhaimi v TC Management Services Corporation Sdn Bhd*[i] attempted to challenge the decision of his employer to retrench him on the ground, among others, that the employer had the financial means to declare and execute dividends payout to the shareholders and thus, the employer should have no financial difficulty to retain him in the employment. The Industrial Court rejected such contention. Dividends were paid to the shareholders. Whilst it was accepted that the financial situation of Tan Chong Motor Holdings Berhad (TCMHB) which was the holding company of the employer invariably reflected on the financial situation of the company, TCMHB as a public-listed company had to maintain the confidence of the shareholders and it was important for economic purposes. Payment of dividends was a fiduciary duty of the company and hence, the execution of dividends payout to its shareholders did not invalidate the redundancy of the employee in a retrenchment exercise. Therefore, the issue of dividends raised by the claimant was untenable in fact and in law.

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EMPLOYEE HIDING CONFLICT OF INTEREST FROM EMPLOYER

Three different areas of law were in play in the High Court case of *Pekat Solar Sdn Bhd v Suria Dan Sonne Sdn Bhd & Anor*[ii]. The facts are fairly simple. P and D1 were in the business of supplying and installing photovoltaic systems or the solar power systems (PV system). Between November 2018 and January 2020, P had sub-contracted to D1 four of its projects on the installation works of its PV system. From January 2016 until April 2021, D2 was engaged by P as a Senior Project Engineer and then an Assistant Project Manager. In late 2016, D2 was allowed to work at a distance from overseas but subject to a bond for 5 years; and if he were to break the bond, he would be liable to pay RM80,000 as compensation. Subsequently P found out that D2 had actually founded D1 in 2015 even before he joined P and that he was and had remained a director of D1 until January 2020 while he was in P's employ. At all times, he was a major shareholder in D1. P brought an action against D1 and/or D2 for copyright infringement, passing off, breach of confidence, conversion and breach of contract of employment. D2 counterclaimed for breach of privacy in the use of his name in P's e-Perolehan renewal application to the Ministry of Finance.

[i] [2023] 3 ILR 76

[ii] [2023] 6 CLJ 790

On the claim of copyright infringement, evidence shows the author of the three (3) photographs was an employee of P named Zharif. Thus, the photos were eligible for copyright and P being the owner thereof, had the exclusive right to control in Malaysia the reproduction and the communication to the public [s.13(1)(a) and (aa) of the Copyright Act 1987]. Therefore, without P's permission to reproduce the photos on D1's website, D1 had infringed P's copyright in the photos.

On the claim for breach of employment contract, it was not up to D2 to subjectively and unilaterally determine whether or not he should have disclosed his links with D1 to P. In a situation where D2 was running a company (D1) that has a business similar to that of his employer (P), in order to avoid conflict of interest, D2 was obliged to disclose his interest in D1 to P from the outset when he applied for a job with P.

On the claim on bond, the relevant wordings were that : "*...If you resign and leave the company before 31 August 2021, you are required to compensate the company and pay a sum of RM80,000.*" The Court rejected D2's defence that because he was sacked, he did not breach the condition and was not liable to pay the bond to P. Liability to pay the bond was not just restricted to resigning but also upon being terminated as he would still be leaving the company. If it were otherwise, any employee with the same condition would simply act up whenever they want to leave the company and get dismissed just to avoid paying such bond.

On D2's counterclaim, it was held that the law does not recognize invasion of privacy as an actionable tort in Malaysia. Nevertheless, even if it was, the court would still not have found P liable to D2. Firstly, an ongoing business concern is entitled to use whatever assets it has at its disposal, be it movable or immovable, or human capital to further and promote its business. P hired D2 due to his qualifications and experience which included his certification with the Sustainable Energy Development Authority. P was therefore entitled to tout those qualifications and experience in selling its services to the public and procuring business. Further, D2 had not produced an iota of evidence to show he had suffered any loss from P doing so.

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PROPRIETARY ESTOPPEL TO ASSIST SON WORKING ON FARM IN RELIANCE ON PROMISED INHERITANCE

The UK Supreme Court case of *Guest v Guest*[i] is a typical example where the parents had promised inheritance to the son who had acted for years in reliance on such promise and in expectation but eventually both fell out and the parents cut him out altogether. What remedy (if any) can the court provide to the son?

The following are actual facts in brief. The husband and wife (defendants) had carried on a farm business. Their eldest child, C, had lived and worked on the farm for very low wages from 1982, when he had left school aged 16, until 2015, in the expectation of inheritance encouraged by his father. However, C and his parents fell out. The defendants changed their wills, cutting out C from inheritance; and C left to find alternative work and rented accommodation for himself and his own family elsewhere. C then brought proceedings against his parents seeking a declaration of entitlement to a beneficial interest in the farm under the principles of proprietary estoppel.

The Supreme Court stated that the purpose of the remedy in proprietary estoppel cases was dealing with the unconscionability constituted by the promisor (the parent) repudiating his promise. Neither detriment compensation (as contended by the parents) nor expectation fulfilment (by the son) was the aim of the remedy. The aim had always been the prevention or undoing of unconscionable conduct. A proportionality test had been established as part of the assessment of whether a proposed remedy to deal with the proven unconscionability based on satisfying the claimant's expectation worked substantial justice between the parties. But it was merely a useful cross-check for potential injustice.

The court's normal approach was as follows. The first stage was to determine whether the promisor's repudiation of his promise was, in the light of the promisee's detrimental reliance upon it, unconscionable at all. The second (remedy) stage would normally start with the assumption that the simplest way to remedy the unconscionability constituted by the repudiation was to hold the promisor to the promise. If the promisor asserted and proved that the specific enforcement of the full promise, or monetary equivalent, would

[i] [2023] 1 All ER 695 (SC)

be out of all proportion to the cost of the detriment to the promisee, then the court might be constrained to limit the extent of the remedy.

In the end, the court would have to consider its provisional remedy in the round, against all the relevant circumstances, and ask itself whether it would do justice between the parties, and whether it would cause injustice to third parties. 'Minimum equity to do justice' meant, in that context, a remedy which would be sufficient to enable that unconscionability question to be answered in the negative. There was however no equity to give a claimant more than his promised expectation, either in terms of simple amount or accelerated receipt. There might be discretion to accelerate, if necessary for example to achieve a clean break, but only if there was built in an appropriate discount to reflect early receipt.

Since the aim of the remedy was to prevent or remove unconscionability, then, where there were two different ways of doing so, the persons against whom the equity was asserted should in principle be the ones to make that choice. In the present case, satisfaction of C's expectation was a *prima facie* appropriate remedy (as granted by the High Court and affirmed by the Court of Appeal)[i]. However, there was no good reason why it would have been unconscionable for the defendants to have discounted an offered payment substantially by reference to C's early receipt, and as the *quid pro quo* for them having to give up their farm by having to sell it during their lifetime to pay him off, which they had never promised to do. Therefore, in that respect the Judge had exceeded the ambit of his discretion, and the Supreme Court should exercise it afresh. The Court held that the parents should be entitled to choose between two alternative forms of relief: an award on appropriate terms to the claimant of a reversionary interest under a trust of the farm, with the parents having a life interest in the meantime, or, alternatively, the opportunity of a completely clean break. If the parents chose the alternative financial remedy, it would be necessary to identify the amount of the early receipt discount, the assessment to be remitted to the Chancery Division if not agreed. The parents' appeal was thus allowed to that extent.

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EVIDENCE / CONTRACT

ADEQUATE PROOF OF ORAL CONTRACT OR REPRESENTATION

What is sufficient to prove an "oral" contract? That was the question raised by the learned Judicial Commissioner in *Yoon*

[i] The High Court recognized the need for a clean break and held that the remedy should be determined by reference first to C's expectation based upon the nature of the assurance made to him, with a check to ensure the result was not out of proportion to the value of detriment suffered. C was awarded 50% of the farming business and 40% of the proceeds of the sale (or valuation) of the farm, reduced by crediting his parents a life interest in the farmhouse.

Goon How v Aston Villa Sdn Bhd[i]. To establish an oral contract, it must not only be shown by oral testimony but also be corroborated with documentary evidence or the parties' conduct. Contemporaneous documents would provide the best evidence of the intention of the parties at the time of the transaction. As to promise or representation allegedly made orally, the absence of a natural and ordinary practice, such as putting an arrangement into writing or mentioning it in any of the communication between the parties from an educated person would only confirm that there was indeed never such an arrangement.

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EVIDENCE / CONTRACT

NON-DENIAL TO STATEMENT ON ORAL GUARANTEE AS ADMISSION OF THE EXISTENCE OF SUCH GUARANTEE

In *Chooi Loo See v PNSG Holdings Sdn Bhd & 2 Ors*[ii], the Plaintiff (P) asserted a claim against the two Defendants (D2 and D3) pursuant to an alleged oral personal guarantee that the latter would jointly and severally assume the liability to pay P in the event the purchaser (D1) of P's shares in the company were to default in respect of the payment of the purchase price. P relied on a WhatsApp message sent to D2 wherein he made a reference to the March 2020 conversation. There was also a letter of demand (LOD) sent to D2 and D3. It was P's contention that it was no longer open to D2 and D3 to refute or deny the existence of the oral contract of guarantee made during the March conversation as D2 had not responded or denied P's reference to the March conversation in P's WhatsApp message; and both D2 and D3 had not replied to the LOD.

The learned High Court Judge disagreed and dismissed P's claim. Silence whilst capable of amounting to admission or acquiescence of statement made need not always be the case. Even in cases where silence or failure to deny can be treated as an admission, it is only so as corroborative to other probative evidence which taken together tilts the balance of probabilities towards establishing the fact asserted by the statement. In any case, in order for the court to impose the obligation of a guarantor on D2 and D3 purely resting on the mere silence on the part of D2 to deny or dispute P's claim in P's WhatsApp message, the court must be satisfied that such an inference is unequivocal or irresistible, which was not the case here.

Where the claim is based on an oral contract of guarantee, it is incumbent for the party asserting it to state as far as possible the actual words spoken between the parties and the circumstances under which the words were spoken. There was no evidence led to that effect in the case here. There were also no contemporaneous documents alluding to any oral guarantee. P did not take any steps to put on record or confirm the oral guarantee either by way of a letter or email or through the available

[i] [2023] 7 CLJ 66
[ii] [2023] 5 AMR 309

social media communication platforms including WhatsApp immediately after the March conversation. The evidential burden was easily rebutted by D2 and D3 by a simple denial of the alleged oral guarantee.

D2 and D3's failure to reply to the LOD could not be treated as admission of the existence of the oral contract of guarantee. There was no duty on the part of both the Defendants to respond to it. Indeed, the non-response was because of the subsequent conversation transpired between D2 and P after the receipt of the LOD. In any event, the court accepted D2 and D3's explanation that they did not wish to incur any legal costs to issue a reply having already spoken to P about the same.

The learned Judge in the case did not apply the oft-cited principle in the Court of Appeal decision in *David Wong Hon Leong v Noorazman bin Adnan*[i] that "*in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if it means to dispute the fact that he did so agree*". Instead, he cited and discussed several cases which had propounded a less "extreme" view and a different approach[ii], one of which is that "*failure to respond goes to conduct and is a relevant fact but it is not an admission*"[iii].

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LAND LAW / LIMITATION

CHANGE OF LAW ON LIMITATION BAR ON CHARGE ACTIONS AND RELIEFS TO CHARGOR

In a landmark decision, the Federal Court made clear the law on the enforcement of charge over land as security for loan with regard to limitation bar and remedies available to the aggrieved charge/lender in *Thameez Nisha Hasseem (as the administrator of the estate of Bee Fathima @ dll, deceased) v Maybank Allied Bank Berhad*[iv]. Bee had in 1983 granted a power of attorney to C who had then in 1984 charged the land as security for a loan to CCB Bank which went into receivership and was taken over by R bank. C defaulted in the repayment of the loan; and an order for sale of the land was granted in 1991 after the Form 16D statutory notice under s.254 of the National Land Code 1965 (NLC) was ignored. However, the order for sale was subsequently set aside by the High Court. Thereafter, no further action was taken by R bank to enforce the charge or to recover the loan from C. T filed a suit to compel C to pay the sum as required by R bank to discharge the land from any liability under the charge. R bank applied to intervene as the 2nd defendant in the suit.

[i] [1995] 4 CLJ 155

[ii] *Small Medium Enterprise Development Bank Malaysia v Lim Woon Katt* [2016] 5 MLJ 220 (CA), *Ulster Bank Ireland Limited v Rory O'Brien Danny O'Brien and Michael McDermott* [2015] 2 IR 656; *Bank of Scotland Ltd v Fergus* [2019] IESC 91

[iii] See *Small Medium Enterprise Development Bank Malaysia,* ibid.

[iv] [2023] 5 AMR 581

This resulted in T seeking a declaration that R bank as the chargee had ceased to have any interest in the land, that R bank's rights to enforce the charge had extinguished by operation of law and that R bank to execute a discharge of charge. The suit was however dismissed by the High Court and Court of Appeal. As against R bank, it was held that "*equity and common sense dictate that the bank cannot discharge the charge until the debt is fully settled*" despite the fact that the bank was barred by limitation to enforce the charge.

The Federal Court set aside both the orders. It first ruled that R bank's rights and interests in the charge had been extinguished due to limitation bar by operation of s.21(1) of the Limitation Act 1953. The limitation of period of 12 years applied to charge actions. Secondly, the period of limitation begins from the date of the failure to repay the debt and not from the failure to remedy the Form 16D statutory notice. On this, the apex court differed from the position arrived at in the earlier Federal Court decision in *CIMB Bank Bhd v Sivadevi Sivalingam*[i].

Upon successfully invoking the statutory limitation to defeat charge action, the chargor could resort to s.340(4)(b) of NLC for the determination of title or interest by operation of law. When a chargee had failed to obtain an order for sale timeously or at all or failed to file proceedings in court to obtain an order for sale of the charged land within the limitation period, a chargor was entitled to defeat the registered interest of the chargee pursuant to s.340(4)(b) of the NLC and consequently, obtain the return of the land title free from the charge pursuant to s.244(1) of the NLC.

That said, in the absence of statutory remedy available to T as the chargor, he was entitled to file proceedings in court to obtain a declaratory judgment against R bank, as was done by T in the instant case, since there need not be established a cause of action for a declaration of right. Other than declaration as prayed for by T, the final court of appeal made consequential orders for the return of the title of the land to T together with other requisite instruments to discharge the charge.

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[i] [2020] 1 AMR 243

LAWYERS / TORT

WHAT TO PROVE IN A CLAIM AGAINST A LAWYER FOR PROFESSIONAL NEGLIGENCE

The extent that an aggrieved client is required to prove in a claim for professional negligence against his own solicitor is the focus of the Court of Appeal case of *Suresh Subramaniam v Majlis Perbandaran Selayang*[i]. The Respondent (R) was sued by SLBB for trespass on its land in a case at the High Court (the Case). R was represented by the appellant (A). An interlocutory default judgment for non-compliance of the "unless" orders of the High Court was entered against R. A also did not attend the proceedings on assessment of damages as a result of which a final judgment was obtained. R paid SLBB as ordered. R then commenced a suit against A for negligence in its conduct of duties as R's solicitors. The High Court found A liable for breach of duty of care and entered judgment as prayed.

The decision was over-ruled by the Court of Appeal. It was held that besides establishing that A was careless in the conduct and discharge of its professional duty to R, it was vital for R to establish its prospect of success in defending the Case brought by SLBB against R[ii]. Unfortunately, there was neither pleading nor evidence adduced by R (which bears the burden of proof) on the prospect of success in defeating the claim against R. The High Court Judge had omitted to make any finding on the same hence a fatal misdirection of law. The appeal was allowed.

In doing so, the appellate court appeared to have differed from the position in *Tenaga Nasional Bhd v Tetuan Ariff & Co*[iii] which stated that "*in assessing damages arising from professional negligence of solicitors, the question was not whether the plaintiff would have succeeded in its claim against the (3rd party); but rather whether the defendant's negligence has occasioned the plaintiff to lose a valuable right, cause of action, chance or opportunity to claim their loss. ... It was the loss of chance of recovery of damages in the dismissed action that determines the issue of damages and not the prospect of success in that dismissed action.*"

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LOCAL GOVERNMENT / TORT

MBSA REMOVING DERELICT CAR

One day, M had parked her car at a public place in Shah Alam. Whilst carrying out a routine inspection, enforcement officers of MBSA (D), the local authority, came across M's car as a derelict car and issued notice requiring her to remove it within 7 days. After 5 months, M still did not comply with it. D thus issued compound notice and 3 months later, the car was still there. So, D caused the car to be towed and kept at D's

[i] [2023] 8 CLJ 97

[ii] See also *Supramaniam Kasia Pillai v Subramaniam Manickam* [2017] MLRAU 425

[iii] [2014] 1 CLJ 1112

depot pursuant to s.46(1)(e) read with s.46(3)(a) of the Street, Drainage and Building Act 1974 (Act 133). M contended that D had no right to tow and store her car and claimed for conversion.

The above are the brief facts in *Ramli Wan v Majlis Bandaraya Shah Alam and Anor*[i]. The High Court remarked that a person who had deposited, among others, derelict vehicles in any public place shall be guilty of causing an obstruction under s.46(1)(e) of Act 133. As the car "*tidak bergerak dan terbiar di situ, cukai jalan telah tamat selama hampir satu tahun, warna lusuh, tayar hadapan kanan kempis pancit dan enjin tidak boleh dihidupkan*", it was indeed derelict. D was empowered under s.46(3)(a) of Act 133 to remove such obstruction to a suitable place and detain the same until the expenses of removal and detention were paid. D was not obliged to give any notice prior to towing and removing the car. As D had dealt with M's car in accordance with the law, there could be no conversion. M's claim was thus rightly dismissed by the trial judge.

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REVENUE LAW

TAX ON COMPENSATION FOR COMPULSORY ACQUISITION IS UNLAWFUL

The Federal Court has struck down the newly introduced provision, s.4C in the Income Tax Act 1967 (ITA 1967) to tax the compensation received by landowner for the compulsory acquisition of land pursuant to the Land Acquisition Act 1960 (LAA 1960). In 2014, s.4C was enacted as follows :-

> "4C. For the purpose of paragraph 4(a), gains or profits from a business shall include an amount receivable arising from stock in trade parted with by any element of compulsion including on requisition or compulsory acquisition or in a similar manner."

The appellant in *Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[ii] had its land acquired compulsorily by the state government and duly received the compensation amounting to about RM52

[i] [2022] 1 LNS 137

[ii] [2023] 8 CLJ 21

million. The respondent, Inland Revenue invoked s.4C of the ITA 1967 to tax the compensation amount. Aggrieved, the appellant challenged the decision but failed at the High Court and Court of Appeal. At the final appeal, the apex court ruled in favour of the appellant on the principal ground that s.4C of the ITA 1967 contravened art. 13 (2) of the Federal Constitution as it deprived the appellant of adequate compensation granted in accordance with the LAA 1960. Art. 13 (1) of the Federal Constitution provides "No person shall be deprived of property save in accordance with law" while art. 13(2) states "No law shall provide for compulsory acquisition or use of property without adequate compensation".

In its judgment, the Federal Court reckoned that the Parliament intended to tax the compensation received from compulsory acquisition via the new s.4C which sought to clarify that any amount receivable by a person from the disposal of its stock in trade by compulsory acquisition was treated as gains or profits from a business. However, it is an established legal principle that the adequate compensation places the landowner in the original position as if the land had not been acquired, by referring to the market value of the land. Section 4C of the ITA 1967 stated that gains or profits from a business include compensation on account of compulsory acquisition (amounts receivable arising from stock in trade parted with by compulsory acquisition). This means that s.4C considered compensation from compulsory acquisition to be a form of profit or gain. But profit and compensation have different meaning. Profit or gain mean that there is a pecuniary advantage. Adequate compensation means that there is no more or no less than the loss resulting from the compulsory acquisition of the land. It places a landowner in the same financial position as he would have been in had his land not been compulsorily acquired. In other words, the landowner earns no profit from the adequate compensation.

Section 4C of the ITA was thus fundamentally flawed in providing that a business' profits or gains included compensation from compulsory acquisition, when an adequate compensation had no element of profit or gain nor any pecuniary advantage. In receiving compensation, the landowner is put back to his original position and gains no earning or pecuniary advantage. Charging income tax on his compensation amount would mean that the landowner had not in fact received adequate compensation for the land acquired and therefore, s.4C of the ITA 1967 had infringed his right to adequate compensation protected under art. 13(2) of the Federal Constitution. It had taken away the safeguard guaranteed under art. 13(2) and it had the effect of reducing the compensation paid to the landowner such that he would no longer be receiving adequate compensation under art. 13(2). Section 4C was thus unconstitutional and liable to be struck down.

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LEGITIMATE EXPECTATION AND REPRESENTATIONS IN A TENANCY DISPUTE

The tenant rented 2 lots of premises at Jaya One PJ for an initial period of 3 years to run its steamboat restaurant business and had spent purportedly RM1.13 million to renovate the said premises. Under the tenancy agreement entered, option was given to the tenant to renew the tenancy but it must be exercised not less than 6 months prior to the expiry of the term of tenancy. The tenancy had expired on 31.8.2022 but the tenant only gave notice to exercise the option on 9.5.2022 when the last day to do so was 28.2.2022. The landlord thereby refused to renew the tenancy. The tenant filed a suit by invoking the doctrine of legitimate expectation[i] to have the tenancy renewed for a further three-year term based on meetings between both parties which resulted in the tenant carrying out renovation works at huge expense at the said premises. The tenant also relied upon representations made by the landlord's agent that the tenancy would be one of "long term" in the nature or for a term of "3+3" years.

The above were the brief facts in *Fused Project Sdn Bhd v Tetap Tiara Sdn Bhd*[ii]. On the application of the doctrine of legitimate expectation, although it "may arise in situations other than in the realm of public law', the learned Judicial Commissioner (JC) held that the factual matrix here did not justify and call for the recognition and application of the said doctrine. The option to renew the tenancy had been expressly provided for in the tenancy agreement and thus had formed an express contractual term.

On the concept of representation, it might be relied upon by a contracting party as the basis of a claim for misrepresentation for a breach of contract. Pre-contractual negotiations and documents might be crucial in assisting the court in determining the intention of the parties. However, where the intention of the parties had clearly been expressed in a contract, the

[i] Under this doctrine, private individuals have a legitimate right to expect that public authorities will act in a certain way based on their past actions or representations. This is to ensure that public authorities act in a consistent and fair manner and that uindividuals are not unfairly disadvantaged by sudden changes in policy or procedure.

[ii] [2023] 5 AMR 771

weight to be given to such pre-contractual negotiations or representations diminished considerably.

The period of tenancy and the option to renew it had been expressed in clear and unambiguous terms in the letter of offer. Regardless of the "representations" made by the agent of the landlord, the option remained at all times with the tenant. The agent's representation, if any, did not in any alter the condition which required notice of not less than 6 months prior to the expiry of the term of tenancy to exercise the option. The tenant had failed to exercise the right afforded to it and was therefore solely responsible for the predicament it was facing. The landlord thus succeeded in its claim for vacant possession of the said premises.

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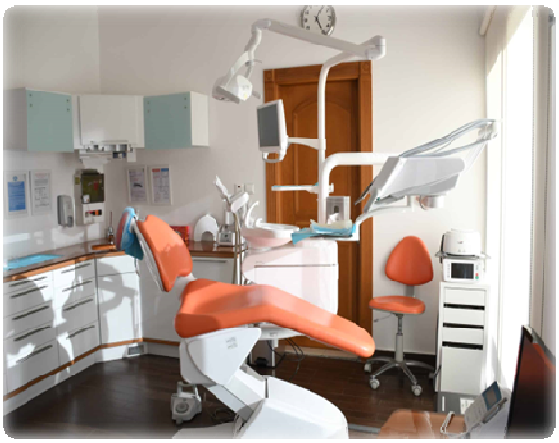
TORT

IS OWNER OF DENTAL PRACTICE LIABLE FOR ACTS OR OMISSIONS OF ASSOCIATES?

In *Hughes v Rattan*[i], the claimant (H) received dental treatment on numerous occasions at the dental practice in which the defendant (D) was the owner and sole principal dentist. H was not treated by D personally but by 6 different dentists including 3 self-employed associate dentists. At no time had H chosen which dentist treated her; and she had not known which dentist she would be seeing until she had been called through to the surgery. As far as she had been concerned, she had been a patient of the practice. On every occasion, she had signed a personal dental treatment plan form which had listed the practice as provider. The associate dentists were not employed under contracts of employment with D, but provided their services pursuant to associate agreements, based on the British Dental Association standard template contract. They each held professional indemnity insurance, were responsible for their own work, their own tax and national insurance, did not receive sick pay or a pension and could work for other businesses. They had had complete clinical control over the dental treatment provided to H at each of their consultations. H alleged that her treatment was negligent. A preliminary issue arose whether H was liable for the associate dentists' acts or omissions by virtue of either a non-delegable duty of care or vicarious liability.



[i] [2023] 1 All ER 300

As to the non-delegable duty of care, the question was whether the first three (3) factors identified in the leading case of *Woodland v Essex CC*[i] had been satisfied, there being accepted that if they were satisfied the 4th and 5th factors did not have to be considered. They were : (a) The claimant was a patient or a child, or for some other reason 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, independent of the negligent act or omission itself, and (c) the claimant had no control over how the defendant chose to perform those obligations.

The Court of Appeal in UK held that D had been under a non-delegable duty of care to H in respect of the treatment she had received at the practice. She had been a patient of the practice as a matter of law. "Patient" in the first *Woodland* factor included anyone receiving treatment from a dentist. A claimant did not have to be within a subset of especially vulnerable patients in order to qualify.

With respect to the second *Woodland* factor, an antecedent relationship between H and D had been established at the latest on each occasion when H had signed the personal dental treatment plan which she had been required to do before any NHS treatment had been carried out. That relationship had placed H in the actual care of D, not because he was a dentist himself, but because he was the owner of the practice. The duty owed by D was a positive or affirmative one to protect the patient from injury, not simply to avoid acting in a way that foreseeability caused injury; and it involved an element of control over the patient.

As to the third *Woodland* factor, H had no control over how D had chosen to perform his obligations, whether personally or through employees or third parties.
The COA, however, ruled against H on vicarious liability. The critical question was whether the alleged tortfeasor's relationship with the defendant could properly be described as being 'akin' or 'analogous' to employment, with the focus being on the contractual arrangements between the tortfeasor and defendant[ii]. The test was not met in the instant case. The associate dentists were free to work at the practice for as many or few hours as they wished. They were free to work at other practice owners and businesses. D had no right to control the clinical judgments they made or the way in which they carried out treatment. They chose which laboratories to use and shared the cost of disbursements. They were responsible for their own tax payments and were treated as independent contractors for tax purposes. Although D took most of the financial risk by virtue of running the premises and paying ancillary staff, they shared the risk of bad debts. They were required to carry personal professional indemnity insurance; they had to pay for

[i] [2014] 1 All ER 482

[ii] See *Various Claimants v Barclays Bank plc* [2020] 4 All ER 19, at [27]

their own professional clothing and development. All in all, although there were other factors pointing the other way, the appellate court did not regard them as sufficient so as to make the relationship between H and D analogous to employment to satisfy the *Barclay*s test.

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TORT

JKR LIABLE FOR INJURIES CAUSED TO ROAD USER BY UPROOTED FALLING TREE FROM ROADSIDE

A motorcyclist whist stopping at a traffic light was seriously injured by a nearby tree which uprooted and fell on him. Who could he sue for his injuries? The City Council? the Jabatan Kerja Raya (JKR, i.e. Public Works Department)? The Government of Malaysia vicariously? The concessionaire (Selia Selanggara) which was awarded the contract to undertake the maintenance of Federal roads?

The plaintiff actually sued all the above parties in *Pengurus Kawasan, Selia Selanggara Selatan Sdn Bhd & Anor v Iqmal Izzuddeen Mohd Rosthy & Ors And Anor Case*[i]. It was, however, held on appeal, by the High Court that only the JKR and vicariously the Government of Malaysia were liable. If the JKR bears the duty to maintain Federal roads to ensure that they may safely be used by general public for passage, then it must necessarily follow that JKR owe a duty to road users to take reasonable care to ensure that such roads would be free from dangers such as potholes, poorly marked lanes, malfunctioning traffic lights and falling trees. It may not cover beautification of public roads or maintenance of the aesthetics of the trees that are planted by the roadside but it covers ensuring that risks to road users from falling trees are appropriately mitigated. Evidence showed that JKR had assumed responsibility for removing dead and fallen trees from Federal roads and that it had awarded contracts to local companies to undertake trimming of branches of trees on the road shoulders. JKR's own website depicted photos and reports of its activities relating to removal of dead trees along the sides of roads and removal of coconut trees that overhung roads. There was thus sufficient material to conclude that there existed a duty of care owed by JKR to the users of Federal roads, based on the relationship of proximity between it and the road users as well as the assumption by JKR of the responsibility to maintain such roads.

As to causation of fact, there were 2 operating mechanisms which had caused the tree to fell: (i) the tree was top heavy due to its large size, long branches and lush foliage; and (ii) the trunk of the tree was in poor condition. Nothing had been shown to overturn such finding.

As to Selia Selenggara, the terms of the concession agreement specifically excluded landscaping works from the scope of routine maintenance works. They were thus not charged with the responsibility to

[i] [2023] 6 CLJ 476

undertake routine maintenance works relating to the monitoring of the condition of wayside trees and the pruning of such trees.

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TORT

TEACHER AND GOVERNMENT LIABLE FOR FREQUENT ABSENCE IN CLASS

In *Rusiah Sabdarin & Ors v Mohd Jainal Jamran & Ors*[i], a group of Form 4SS students brought an unprecedented legal suit in High Court, Kota Kinabalu against their English language teacher (D1), the school principal (D2), the Director General of Education (D3), the Minister of Education (D4) and the Government of Malaysia (D5) for D1's frequent absence from English classes between March to July 2017 and total absence from August to October 2017 (the Absent Period).

D1's defence was that he was present and teaching English language classes for 4SS unless he was involved in school activities. However, he did not adduce any evidence to substantiate his explanation for the long period of his absence. The requisite "*buku kawalan*" was not produced for the major part of the Absent Period without any reasonable explanation. The adverse inference under s.114(g) of the Evidence Act 1950 was invoked against the Defendants. The Plaintiff had proven their case against D1.

Despite knowing about D1's absenteeism since May 2017, D2 failed to take any reasonable step to exercise disciplinary control and supervision over D1. D1 to D4 were under a statutory duty to prepare the Plaintiffs for their English language examinations pursuant to s.19 of the Education Act 1996 (the EA) which reads :

> " Every school shall prepare its pupils for examinations prescribed by or under this Act or any regulations made under this Act unless otherwise exempted by or under this Act."

In performing their statutory functions, D2 to D4 must ensure that the English teacher that they provided was reasonably competent and present in class to teach English during the school's schedule for 2017. In the event of absenteeism by the teacher, D2 to D4 were under a statutory duty to take appropriate disciplinary action against the absent teacher. Regulation 3C(2) of the Public Officers (Conduct and Discipline) Regulations 1993 (POCDR) provides that an officer who fails to exercise disciplinary control and supervision over his subordinates or take action against his subordinate who breaches any provision of the POCDR shall be deemed to have been negligent in the performance of his duties and to be irresponsible and shall be liable to disciplinary action. Thus, the Defendants

[i] [2023] 8 CLJ 603

were liable for breach of statutory duty and negligence.

There was no targeted malice with the requisite intention to harm the Plaintiffs or students of Form 4SS or reckless indifference to the probability of harming. The claim for misfeasance in public office was not established.

As D1 and D2 were found to be liable for negligence and breach of statutory duty, D3 to D5 were vicariously liable for their acts and omissions.

The expression 'life' in art. 5(1) of the Federal Constitution (FC) should be given a liberal interpretation to include rights such as livelihood, quality of life and right to education[i]. The court went on to rule that the right to be provided with a teacher who attends classes to teach and to prepare the Plaintiffs for their English language examinations were an integral part of the Plaintiffs' constitutional right of access to education under art. 5(1) of the FC, read together with art.12 of the FC. The said constitutional right had been breached by the Defendants.

The Plaintiffs were awarded nominal damages of RM30,000 each for the loss of opportunity to obtain good grades in English and opportunity in their lives to receive better education in the future. They were also awarded with aggravated damages of RM20,000 each for being subjected to humiliation whilst being questioned during the trial and for emotional and psychological injury suffered.

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TRUST / SUCCESSION

PREMATURE TERMINATION OF TRUST

The case of *B & Ors v Rockwill Trustee Bhd*[ii] is a stark reminder to act with care when making bequest of properties and devising trust in estate planning[iii]. The deceased in that case passed away in May 2021 and left a will in which the defendant (D), a professional trustee, was the sole executor and trustee for the deceased's estate. The movable properties were mostly given to the widow whilst the immovable properties were bequeathed to his son. However, there

[i] See *Lee Kwan Woh v PP* [2009] 5 CLJ 631 (FC); *CCH & Anor v Pendaftar Besar Bagi Kelahiran Dan Kematian, Malaysia* [2022] 1 CLJ 1 (FC).

[ii] [2023] 6 AMR 292, [2023] 7 CLJ 432

[iii] A bequest is the act of leaving property to another through a will. Estate planning is the process through which one makes arrangement for the distribution of one's property after one's demise.

were two trusts created: (a) "welfare trust" in respect of the moveable assets and "property trust" in respect of the immoveable assets. Under the "welfare trust", the deceased had directed D to hold on trust any provision set aside for it including the son's entitlement in the movable assets for the purpose of supporting his maintenance, education and medical expenses "until he attained the age of 35". Under the "property trust", the deceased had directed D to hold on trust the son's entitlement in the immovable assets together with any provision set aside for it "until he attained the age of 35". During the respective trust period, provisions were set out on the powers of D as the trustee and how it may utilize the trust assets.

The son, the widow, the brother-in-law and the daughter of the deceased (the Applicants) however wrote to D to seek its cooperation to terminate both the welfare trust and the property trust on the ground that the son was turning into 35 years of age in under 8 months and ,being the sole beneficiary, was *sui juris* (of adult age) and sound mind, had an absolute indefeasible interest in the legacy under the trust, was of sufficient maturity and competent to independently handle his own financial affairs and assets and, following the deceased's demise, was considered and accepted as the family patriarch. The monthly allowances under the welfare trust were inadequate to support the financial needs of the son and family. There was also concern on possible breach of the conditions of the financing facilities for the company (a legacy of the deceased) which could lead to the recall and trigger cross-default on other facilities hence jeopardizing its reputation, financial position and credit-rating. In summary, the Applicants wished to terminate the trusts in order to sustain the living expenses of the son, the widow and the daughter and family and to ensure the financing facilities were not jeopardized. D however refused the Applicants' request hence the legal suit filed for an early termination of a trust contrary to the expressed wishes and terms of the deceased's will.

The suit was dismissed. On the facts, the court was not convinced that it was a matter of urgent necessity to terminate the trusts to sustain the daily living expenses of the son, the widow and the daughter. Factually, the court was also not with the Applicants on the risk of the financing facilities being affected. Legally, the criteria on early termination of a trust as laid down in *Saunders v Vautier*[i] was not satisfied. Beneficiaries of a trust may lawfully end it should they be *sui juris* – of

[i] [1841] 4 Beav 115

full age and of sound mind, the assets under the trust are absolutely theirs and when all are in agreement. It was held that the son had not have an indefeasible interest in the legacy of the moveable and immoveable properties of the trusts as the deceased had clearly intended for him to only possess the assets absolutely when he turned 35 years old. His interest in the trust properties was therefore not vested as of yet. It was contingent interest until he attained the age of 35. D carried a duty to ensure the deceased's wishes and intentions as stated in the will were adhered to and executed. It was therefore not expedient under ss.59 and 60 of the Trustee Act 1949 to exercise the power to terminate the trusts.

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