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THE UPDATE

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NOTICE

We are pleased to bring to you this new year a new feature on our website via blog posts under the section entitled "**UPDATE SPOTLIGHT**" to showcase some of the recent case law to keep abreast of legal developments in Malaysia.

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BANK LIABLE FOR HARM CAUSED TO VICTIM OF SCAM

In a probably unprecedented decision, the High Court in *Nemonia Investments Ltd v AmBank Islamic Bhd & Ors*[i] ruled that banks had a duty of care to a victim of scam. In the instant case, P was a victim of a fraudulent scam undertaken by a group of individuals who included one Siti Mah Penggawa through her accounts held in the name of Mart Advance Trading and Weez Global Trading in the defendant banks (D1 to D4). P's lawyer was duped to cause funds from P's account held in the Bank of Cyprus to be paid to Mart Advance Trading and Weez Global Trading. P claimed that the defendants had been negligent in undertaking their business as bankers in Malaysia.

The main contention of the defendant banks was that they did not owe any duty of care to P as it was not their customer and that it would be too remote to expect their actions may have an impact on P. The Judge however held that the fact that the defendant banks did not have any direct relationship with P did not automatically mean that the banks did not owe any **duty of care** to P. Considering that the defendant banks were aware that the monies were transferred from the accounts of P from the Bank of Cyprus, there was an indirect relationship between the said defendants and P. Applying the proximity test, the foreseeability test and policy consideration, it was fair, just and reasonable to impose liability on the defendants for harm caused to P.

However, P had failed to discharge its burden of proof to establish the **standard of care** expected of a reasonably competent banker in opening an account, monitoring accounts, standard operating procedure in Swift transactions and anti-money laundering procedures that were required of banks. Therefore, the defendant banks were not negligent in the above issues vis-à-vis the operation of the bank accounts of Mart Advance Trading and Weez Global Trading.

The defendant banks were also found not negligent in not ensuring that the fraudulent transactions were identified and stopped at the time when the money was received. At that time, it could not be said that the said transactions were on their face value suspicious. The officers had also checked with Deutsche Bank. When the transactions were instructed by the instructing banks, Deutsche Bank and Society General, the defendants could not have foreseen that the said transactions were undertaken fraudulently by scammers. There was no requirement that the defendant banks undertake any investigation as to the purpose of these payments unless there were suspicious circumstances which were none.

There was no negligence on the part of D2 to D4 when notice of fraud was received from Deutsche Bank, Society General and Bank of Cyprus. At that time,

[i] [2023] 9 CLJ 281

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monies in the accounts at issue had been withdrawn hence D2 to D4 could not have taken any action to freeze the accounts. D1 however was liable in this regard. The form utilized by Bank of Cyprus, MT 999 might not have been the best or the most prudent notice to have been utilized but it was the contents that must be looked at and must not be ignored totally. D1 should have undertaken an investigation immediately upon receipt of such notice and at least frozen the accounts until such time it was satisfied that the complaint was not genuine. D1 was thus negligent in ignoring the said notice and in allowing the withdrawal of the funds.

BREACH OF BANKING SECRECY

Remember the national feedlot "scandal"? An employee of a local bank leaked the information of its customers relating to bank accounts to third parties and by reason of such disclosure, Rafizi Ramli was able to hold a press conference whereby such confidential information was made public together with an "expose" captioned as "*Bukti Bagaimana Dana Awam Untuk Projek Feedlot Digunakan Sebagai 'Jaminan' Pinjaman Peribadi Untuk Membeli 8 Unit Hartanah Mewah di KL Eco City, Bangsar*". The customers concerned filed a legal suit against the bank for breach of the bank's statutory, contractual and/or fiduciary duties of confidentiality as a financial institution. That suit has reached Court of Appeal (COA) and has now been reported as *National Feedlot Corporation Sdn Bhd & 4 Ors v Public Bank Berhad*[i].

The COA held that s.97 of the Banking and Financial Institutions Act 1989 (BAFIA) is targeted at the wrongful conduct of the individuals within the bank for breaching banking secrecy. However, the bank as an institution did not fall within the purview of s.97. That lacuna has since been corrected by s.133 of the Financial Services Act 2013 (FSA) which targets individuals and the financial institution. Be that as it may, s.97 does not provide the plaintiffs qua customers of the bank with a civil cause of action. As to the

[i] [2023] 7 AMR 213

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claim based on fiduciary duties, applying the principles in *Aseambankers Malaysia Berhad & 3 Ors v Shencourt Sdn Bhd & Anor*[i], there was no element of investment advisory work as undertaken by the bank which may perhaps place the bank in a fiduciary capacity vis-à-vis the plaintiffs.

There was however an implied term in the contractual relationship between the plaintiffs and the bank that information relating to the former's banking details would remain confidential and not be disclosed to unauthorized persons. Thus, the bank as a financial institution owed a duty of secrecy over their customers' banking information; and on the facts, the bank had been proven to have breached such implied duty of confidentiality and secrecy.

The plaintiffs had failed to prove damages. In cases of breach of confidence claims, the courts may have to consider a *modified* approach to the question of damages as there may be circumstances where the plaintiff may not be able to prove a loss as a result of the wrongful disclosure of confidential information as done in the Singapore Court of Appeal decision in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting & Ors*[ii] on the basis of "equitable damages". However, the COA was not prepared to give the plaintiffs a second bite of the proverbial cherry by remitting the case to the High Court for assessment of equitable damages. Nominal damages in the sum of RM10,000 was awarded with interest.

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COMPANY LAW

DIRECTOR'S ABSOLUTE RIGHT TO INSPECTION UNDER S.254

In *Low Ean Nee v SNE Marketing Sdn Bhd*[iii], the Appellant filed an action under s.346 of the Companies Act 2016 (CA 2016) against the chairman and a director of the Respondent and other directors and shareholders, alleging oppressive conduct towards her. Having lost at the High Court, the Appellant succeeded at the Court of Appeal (COA) and whilst the appeal was pending at the Federal Court, the Appellant in October 2020 requested the Respondent to provide her its accounting documents or records in order for her to inspect and make copies pursuant to s.254 of the CA 2016. The Respondent indicated that they would provide the documents on the condition

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[i] [2014] 2 CLJ 773

[ii] [2020] 1 SLR 1130

[iii] [2023] 1 LNS 2326

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that the Appellant gave a covenant that she would not use the documents for any ulterior or improper purpose that was detrimental to the interest of the respondent. The Appellant was removed as a director of the Respondent on 9 December 2021. The High Court dismissed the application on the grounds, *inter alia*, that the Appellant was actuated by *mala fides* and the documents were not necessary and the Appellant did not need them in carrying out her duties as a director of the Respondent.

At the COA, the right of a director of a company to inspect the company's accounting, financial and other records pursuant to s.254 of the CA 2016 is declaratory of the common law right. Such right is concomitant of the fiduciary duties of good faith, care. Skill and diligence which the director owes to the company. Thus, the obligation of the company to allow inspection by its director is regarded as mandatory. There is no residual discretion in the court to refuse inspection. Being an "absolute" right, a director is prima facie entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis. The Appellant was not required to provide any covenant or reason for the inspection.

The oppression suit merely demonstrated hostility towards the other directors and shareholders of the Respondent and not the Respondent itself. Such hostility was not a disqualification for an application under s.245 of the CA 2016. The fact that the Appellant was an inactive director was also irrelevant.

However, an ex-director is not entitled to seek the aid of the court for an order of inspection. A director's right to inspect and take copies of documents is due to 'the nature of a director's duties and to enable him to properly perform his duties as a director'[i]. Since the Appellant had been removed as a director, upon ceasing as a director, she was no longer entitled to seek relief under s.245 of the CA 2016.

Therefore, the appeal was dismissed and the High Court decision was affirmed albeit on a different ground.[ii]

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[i] See *Haw Par Bros (Pte) Ltd v Dato Aw Kow* [1973] LNS 44

[ii] See also article "*A Director's Absolute and Unqualified Right to Inspection: Section 245 of the Companies Act 2016, a Statutory Mandate*" by Lau Zhong Yan and Sebastian Liew Tzen Jue [2021] 3 MLJ clxix.

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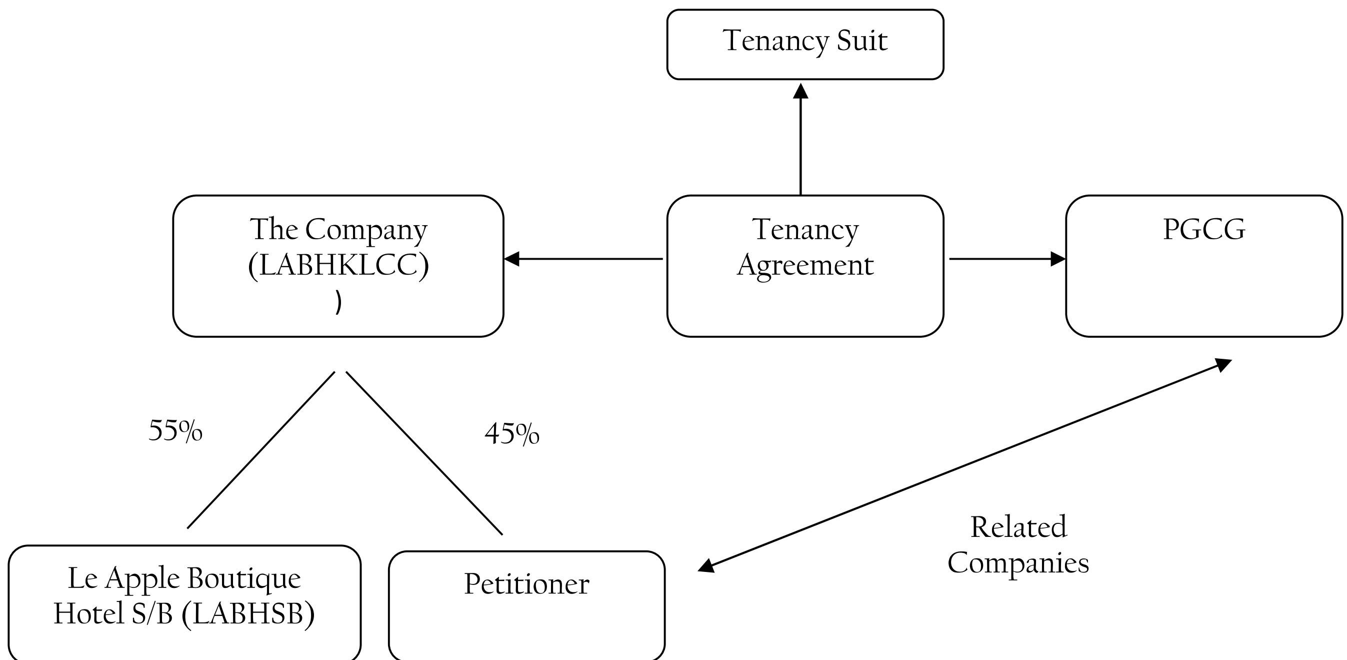
SHAREHOLDER ATTEMPTING TO WIND UP COMPANY FOR ULTERIOR MOTIVE



There were 2 shareholders in the company, namely Le Apple Boutique Hotel S/B (55%) and the petitioner (45%). The company entered into a tenancy agreement with the petitioner's related company, PGCG for the purpose of development and operation of a hotel at the demised property. There was a dispute over the tenancy agreement which escalated into a legal suit (the Tenancy Suit) [see the diagram above for an overview of the relationship]. The company obtained a summary judgment against PGCG for part of the sums claimed with the remainder slated for full trial. Within less than 10 days after PGCG's stay application was dismissed. In total contradiction of the petitioner's own interest in the company, the petitioner then filed a winding up petition against the company, on the grounds of alleged lapsing of the company's

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purpose or business and breakdown of trust and confidence of the management which arguably constituted just and equitable grounds to wind up the company.

Based upon the above-stated brief facts, the Court of Appeal in *Le Apple Boutique Hotel Sdn. Bhd. v Keen Solution Sdn Bhd & Anor Appeal*[i] overturned the decision of the High Court which had ordered the company to be wound up. In the appellate court's view, the petitioner as a shareholder of the company definitely stood to gain some measure of financial gain anytime and every time that the company stood to earn monies. The lower court had failed to identify the sheer oddity of the petitioner's self-harming petition which indirectly would be beneficial to PGCG. There was an obvious *mala fide* ulterior motive which was simply that the petitioner and PGCG were each other's alter egos or inextricably related companies. Although the petitioner might gain from the Tenancy Suit vide its 45% shareholding in the company, in actual fact the petitioner and PGCG (collectively) would have to relinquish and lose 55% of their collective interest in the monies of LABHSB (due to LABHSB's shareholding in the company). That was the real *mala fide* ulterior motive incentivising the petitioner's self-harming petition to achieve the collateral purpose of stifling the company's suit against PGCG which had rendered the petition an abuse of the process of the court[ii]. And there was a barrage of facts which explicitly showed the link between the petitioner and PGCG. Thus, the High Court was wrong in refusing to lift the corporate veil and in finding a *bona fide* petition without ulterior motive[iii].

> "*A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition.*" – Plowman J in *Re Bellador Silk Ltd*[iv]

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[i] [2023] 9 CLJ 429, [2023] 7 AMR 947
[ii] See *Ho Num Chan & Anor v Tech-Lab Manufacturing Sdn Bhd* [2017] 5 CLJ 187, HC
[iii] See *Gurbachan Singh Bagawan Singh & Ors v Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719, FC
[iv] [1965] 1 All ER 667

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SPECIFYING DEFAULTING EVENT IN TERMINATING CONTRACT

To what extent must a notice of termination specify defaulting event or breach of term(s) of an agreement in order to constitute a proper termination? Do breaches of agreement once remedied became extinguished so as to preclude the applicability of provision on repeated breaches of agreement as a defaulting event? These are the 2 key questions for determination in the Court of Appeal (COA) case of *Gerbang Alaf Restaurants Sdn Bhd (formerly known as Gloden Arches Restaurants Sdn Bhd) v Chai Su Lin & Anor*[i].

The case is essentially a contest between the franchisor (i.e. D, as the appellant) and sub-franchisee of McDonald's restaurants in Malaysia (i.e. P, as the respondent) which involved various agreements including the franchise agreement (the FA) and the operator's tenancy agreement. D claimed that P had repeatedly failed to maintain and operate the McDonald's restaurant in a good, clean and wholesome manner in breach of Clause 18(b) of the Franchise Act 1998 (the FA). A notice of termination under s.31(3)(d) of the FA was issued. This is the provision which entitles the franchisor to terminate the franchise agreement before the expiration date except for good cause which, among others, include circumstances in which the franchisee *repeatedly fails to comply with the terms of the FA, without the requirement of notice and an opportunity to remedy the breach.*

That said, D's notice of termination did not specify which terms of the FA that P had repeatedly failed to comply with although it did refer to an earlier notice of default and earlier correspondences. The trail Judge ruled it as fatal for lack of details. The appellate court over-turned it, holding that reference to the earlier notice of default and correspondences, viewed objectively, constituted sufficient notice to P as to the reason for the termination of the FA[ii]. There

[i] [2023] 7 AMR 654

[ii] See also *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 CLJ 177, FC

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was no need for D to specify in great details the reasons for the termination since the defaulting event was already communicated through correspondences between the parties. P always knew about the breaches and were warned of the consequences[i].

On the finding that the fact that P had remedied breaches on its part to maintain and operate the restaurant in a good, clean and wholesome manner and complied with the standards prescribed by the McDonald's system could not amount to "repeated failures" as relied upon by D as ground of termination of the FA, the COA held otherwise as follows :

> "…the fact that a failure to comply or a breach of the terms of the FA has been remedied does not extinguish the fact that there was a failure to comply or a breach in the first place. If the failure to comply or the breach is repeated, even though the earlier breach has been remedied, the repetitive nature constitutes a breach of the FA. Section 31(3)(d) of Act 590 caters to such circumstances. Hence, whether the failure or the breach has been remedied or not is irrelevant to the termination of the FA under s.31(3)(d) of Act 590. …"

D's appeal was allowed.

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CONTRACT (MONEYLENDERS)

800K LOAN WITH 'AGREED PROFIT' AT 800K

In The Update issue Q2 of 2023 (April-June 2023), we had featured the Court of Appeal (COA) decision in *Triple Zest Trading & Suppliers Sdn Bhd* v *Applied Business Technologies Sdn Bhd.* The decision was however over-turned by the final appellate court in *Triple Zest Trading & Suppliers & Ors* v *Applied Business Technologies Sdn Bhd*[ii].

The COA's finding was that the borrower (A) had failed to prove that the lender (R) was an illegal moneylender. The loan granted by R to A was in the sum of RM800,000.00 subject to repayment together with another RM800,000.00 as 'agreed profit'. The COA ruled that R had adduced sufficient evidence to rebut the presumption under s.10OA of the Moneylenders Act 1951 (MLA). Section 10OA reads :-

> "Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of

[i] See *Majlis Bandaraya Pulau Pinang v Mohd Noor Sirajajudeen & Anor* [2019] 3 CLJ 770, FC

[ii] [2023] 10 CLJ 187

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moneylending until the contrary is proved."

The Federal Court pointed out that both the High Court and COA made the same error in finding that there was no evidence that R was engaged in a moneylending business which was another way of saying that A had failed to lead evidence to prove that R was carrying on a moneylending business. Under s.10OA of MLA, the onus of proof was not on A to prove that R was carrying on a moneylending business but on R to prove that R was not carrying on such a business.

There was not a morsel of evidence adduced by R to show that the RM800,000 that it lent to A was not lent at interest. The 'agreed profit' of RM800,000 was in fact and a matter of law 'interest' within the meaning of s.2 of MLA as it was a sum that was "in excess of the principal paid or payable to the moneylender" and indeed at an exorbitant interest rate of 100%.

The following answers given by the apex court to some of the leave questions will be helpful to guide us in relation to giving 'friendly' loan:

(i) A loan agreement which charges an interest at the rate of 100% within a period of 30 days is ILLEGAL under the law.
(ii) The court should not assist the moneylender to recover the principal amount lent.
(iii) If a person was found to be not a moneylender, he is NOT at liberty to enter into loan agreement charging any interest rate including interest at the rate of 100% per month.

Indeed, the Federal Court was rather critical of the High Court judge for setting the precedent that an unlicensed moneylender could lend money at 100% interest without being in breach of MLA; and of the COA for suggesting that an unlicensed moneylender could recover the principal loan sum but not the interest in spite of the illegality of the transaction.

The appeal was allowed. The COA decision favouring R was set aside. A was thus not liable to pay any sum of money to R.

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COPYRIGHT OVER PHOTOS; INVASION OF PRIVACY

There are numerous issues arising in *Pekat Solar Sdn Bhd v Suria Dan Sonne Sdn Bhd & Anor*[i] but we wish to highlight only two. The first is the infringement of copyright and the second is invasion of privacy. P was in the business of supplying and installing the photovoltaic system or the solar power system (PV system). D1 was the sub-contractor of P whilst D2 was P's employee, its Assistant Project Manager. It took P a few years later after employing D2 to find out that D2 was the Ketua Pegawai Operasi,

[i] [2023] 3 ILR 219

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director and shareholder in D1. P then discovered, among others, that photos of the subcontracted installation works were displayed on D1's website. At the trial of the suit brought by P against D1 and/or D2 for copyright infringement, passing off, breach of confidence, conversion and breach of contract of employment, P testified that all four photos were taken by Z whilst he was in P's employ. It was held that by virtue of s.3, s.7(1)(c), s.10(3) and s.26(2) of the Copyright Act 1987, the photos were eligible for copyright and P did own the copyright to them. The photos were aerial, taken from up high using a drone which surely required skill and technique hence sufficient efforts had been expended to make them original in character. D1 had thus infringed P's copyright in the photos by publishing them on its website without obtaining P's permission.

On D2's counterclaim for breach of his privacy in the use by P of his name, without his consent, in P's e-Perolehan renewal application to the relevant Ministry, D2 was listed as P's project engineer under the category "management". The law, however, does not recognize invasion of privacy as an actionable tort in Malaysia[i]. In any event, 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 was entitled to tout D2's qualifications and experience in selling its services to the public and procuring business for P. Therefore, the court would still not have found P liable to D2.

****

DAMAGES

RELIEFS TO BUYER OF PROPERTIES IN ABANDONED PROJECT

In *Rumaya Properties Sdn Bhd v Seacera Development Sdn Bhd & Anor*[ii], P bought 18 units of apartments in a low and medium cost residential project (MCA units) in Selangor (the 1st Project, aka Vista Damansara) of which D2 was the owner and developer. D2 had abandoned the 1st Project and the land was sold to D1 which then developed a different high-end condominium project (the 2nd Project, aka Boulevard Residence). The delivery of possession of P's units never materialized. P thus filed a suit for specific performance of the sales and purchase agreements of the MCA units (SPAs). In order to continue the development of the 2nd Project, D1 entered into a consent order with P (the Consent Order) in the suit at the High Court (HC) while the trial continued between P and D2. The suit was allowed by the HC. A series of appeals to the Court of Appeal (COA) and Federal Court (FC) ensued. Eventually, pursuant to the direction/order of the FC (the FC's Order for Assessment), P filed an application for assessment of damages (*in lieu* of specific performance of the SPAs) before the HC.

[i] See also *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors And Anor Appeal* [2010] 7 CLJ 525

[ii] [2023] 6 AMR 781

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P contended that the assessment should be based on the market value of the high-end condominium project (2nd Project), liquidated ascertained damages (LAD) and alternatively, loss of rental. D2 in reply stated that it should be based on the market value of the MCA units in the 1st Project.

The HC ruled in favour of D2. The COA affirmed the HC decision. In the view of the COA, the basis of the assessment of damages before the HC ought to be the earlier order of the COA which was affirmed by the FC. The wordings "*a monetary compensation would be appropriate remedy to be awarded to the plaintiff (P) in relation to the 18 MCA units that formed the subject matter of the 18 SPAs*" were inferentially clear – the damages to be assessed should be based on the value of the MCA units in the 1st Project and not the high-end condominium in the 2nd Project. And the assessment should be as at the date when the SPAs were lost i.e. the date when D2 transferred the land to D1 on 11.3.2008 which was, based on D2's expert report, RM2,885,000. The valuation by P's expert at RM12,822,000 as at 28.8.2019 (which was the date of the FC's Order for Assessment), based on the market value of the 18 units of condominium within Boulevard Residence in the 2nd Project, was rejected as it would have been a windfall to and unjustly enriched P.

Further, D2 did not have the ability to deliver the vacant possession of the MCA units in the 1st Project to P as per the SPAs. The HC was therefore correct in finding that actual delivery of the units could never take place since the 1st Project never materialized. Hence, the claim for LAD or loss of rental based on the SPAs was not claimable.

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DIGEST OF EMPLOYMENT LAW CASES

1. TRAINING CUM EMPLOYMENT PROGRAMME

A rather unique arrangement was put in place to offer a graduate a training scheme to gain experience with two employers of different sectors (i.e. CIMB Investment Bank Bhd [CIMB] and PricewaterhouseCoopers [PwC]). During the duration of the programme, the trainee would be employed first by PwC as an

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associate for 21 months (1st milestone), followed by CIMB as an assistant manager for 18 months (2nd milestone) and finally, with PwC as an associate for 12 months (3rd milestone). At the end of the tenure, the trainee may be offered employment at PwC or CIMB. The applicant had signed a letter of offer for a fixed term of employment with PwC for the period from 18.9.2012 until 30.6.2014; followed by another letter of offer for a fixed term of employment with CIMB commencing 1.7.2014 until 30.6.2015. Having completed the 1st milestone, towards the end of the 2nd milestone, the applicant was informed by PwC that she was not required to report to PwC for the 3rd milestone. Following a meeting with CIMB, she was informed that she was removed from the programme vide a letter dated 10.8.2015. She claimed that her removal was the result of a joint decision by CIMB and PwC which amounted to dismissal without just cause and excuse. She filed representations against both companies.

The High Court in *Yong Pui Yee v Mahkamah Perusahaan Malaysia & Anor*[i] concurred with the findings of the Industrial Court in dismissing the applicant's claim. The tripartite training contract and programme were a training programme and not a contract of employment. PwC and CIMB did not guarantee anything in the programme document which was merely informative in nature. There were two employment contracts which were fixed term that had expired on the effluxion of time. Upon such expiry, there did not exist another contract of employment between the applicant and PwC due to the applicant being removed from the programme. There was thus no dismissal of employment under the contract with CIMB. The letter dated 10.8.2015 contained the reason for removing her from the programme for not meeting the performance expectations and requirements expected of her under the training programme. It was to inform her not to report to PwC and not on her dismissal from employment. There was no dismissal as the fixed term of CIMB contract had expired by then. The awards of the Industrial Court were thus left intact.

2. EMPLACEMENT TO WORK FOR ANOTHER COMPANY – WHO IS THE REAL EMPLOYER?

In *Fareen Shazli Ali v Kebabangan Petroleum Operating Company Sdn Bhd*[ii], R had entered into a contract with a 3rd party

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[i] [2023] 4 ILR 88
[ii] [2023] 3 ILR 557

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known as Carimin Sdn Bhd (Carimin) for the provision of general and specialist manpower services for R where Carimin was to provide individuals as contractors to perform certain functions for R. The claimant, a senior executive, was one of the individuals provided by Carimin for R. On grounds of poor performance, R ceased his emplacement in the company. The claimant claimed that R was his true and real employer in view of the degree of control the company had exercised over him. R rebutted to assert that the claimant was an independent contractor under a contract for services with Carimin which in turn emplaced him in R to provide his services.

The Industrial Court agreed with R. The claimant had signed a contract for services with Carimin for 12 months whereupon he was given an assignment at the company premises as a senior executive. He signed acceptance of all the terms and conditions in the contract and was fully aware of what was expected of him by Carimin. In view of the contract of employment between Carimin and the claimant, the claimant was not able to show any contract of employment in whatever nature between him and R. Evidence on 'contractor personnel time sheet' of Carimin and payment of the claimant's monthly remuneration, all statutory contributions and insurance coverage under a personal accident policy by Carimin revealed that Carimin was his real employer who had emplaced him in R to provide services by virtue of an agreement between Carimin and R. The power to terminate the claimant's services was vested in Carimin and not R which Carimin had exercised by terminating the claimant from his services with Carimin. Thus, the right party for the claimant to pursue was Carimin and not R.

3. COOLING OFF PERIOD IN BETWEEN FIXED TERM CONTRACTS

The issue of fixed term contract was the focal point in the Industrial Court case of *Syed Agil Syed Hashim v Malaysian Bioeconomy Development Corporation Sdn Bhd*[i]. The claimant was employed by the company vide a series of fixed term contracts, more precisely 7 such contracts, from February 2006 to August 2018, with duration of 2 years for each contract and without any gap. The contracts were renewed automatically without requiring the claimant to apply for such renewal. At the end of the seventh contract (which ended in August 2018), the company took a different approach and gave notice to the claimant that, among others, the company was practicing a cooling-off period for all its fixed term employees (at least a month for senior VP like the claimant); and during the cooling-off period, the claimant was discharged from his function until the nomination and remuneration committee decided on the new appointment. The claimant accepted all the conditions imposed. Thereafter, the company offered a one + one year employment to the claimant as chief investment officer from October 2018. The company notified the claimant that his contract of employment would expire on 1.10.2020. The claimant lodged a

[i] [2023] 3 ILR 623

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complaint on the ground that his fixed term employment contract was not genuine as a disguise for a permanent employment.

The Industrial Court was with the company. The renewal of the last employment agreement (the seventh) was not automatic; the claimant's renewal occurred following a gap of 45 days of colling-off period. The claimant had agreed to all the conditions introduced by the company including the cooling-off period without any objection whatsoever. The cooling-off period was not a sham. The effect of the break in service (by virtue of the cooling-off period) was that the claimant's past service had been broken. The claimant, by accepting the break in service was deemed to have acknowledged that his fixed term employment contract in the company hd come to an end. This meant that the company could decide if it wished to re-engage the claimant's services thereafter on fresh terms. The claimant's employment in the company was not a permanent employment dressed up as a fixed term employment. There was no dismissal of employment as the claimant's fixed term employment came to an end due to expiry of the duration stipulated in the agreement.

4. NON-COMPLIANCE OF AWARD, JOINDER OF DIRECTOR TO ENFORCE THE AWARD

An employee/complainant in a case of unlawful dismissal from employment has succeeded to obtain an award from the Industrial Court which requires the employer/company to pay certain sums as compensation. The employer fails, refuses and/or neglects to pay. What recourse does the complainant have? The answer is s.56 of the Industrial Relations Act 1967 (IRA) which is to lodge a complaint of non-compliance of the award. Section 56(2) is very wide. Upon receipt of a non-compliance complaint, the court is empowered, among others, to direct any party to comply with any term of the award or to cease or desist from doing an act in contravention of any term of the award or to make such order as it considers desirable to vary or set aside upon special circumstances any term of the award.

Thus, in *Bruce Dargus v Cloudfix Malaysia Sdn Bhd*[i], after the award which ordered the company to pay an amount of RM361,400 to the complainant within 90 days after it was handed down was served on the company, the company maintained silence by not paying the said amount. The claimant filed an application for joinder of parties to add the directors of the company to impose liability on them, jointly and severally, to satisfy the amount due and payable under the award.

The Industrial Court pointed out the court was a court of equity and good conscience without regard to technicality and legal form. IRA is a social justice legislation and third parties can be made liable to pay the award notwithstanding that they were not the employer. Third parties cannot resist joinder on the ground of separate legal

[i] [2023] 3 ILR 639

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entity or no privity. The director ordered to be joined as well as the company was absent at the non-compliance trial. The court ordered the director pursuant to s.56(2)(a) of IRA to comply with the award and pay the sum ordered.

5. APPRAISAL IN POOR PERFORMANCE

What are the principles that an employer can draw on in deciding whether it can terminate the employment of a probationary employee on the ground of poor performance? The award in *Thomas Wilson Lowrie v Fairview International School Ipoh Sdn Bhd*[i] provides some guidance. The claimant was employed by the company as the acting principal of its Ipoh campus with a three-year fixed-term which was subject to a contract review (essentially probation) period of six months. There was an express provision that if, in the discretion of the company, it was found that the claimant was unsuitable for the position or unable to fulfil the requirements of the position, the company may extend the review period or terminate the contract prematurely without any liability. The company terminated the claimant's contract at the end of the sixth month as the company was of the opinion that he was unsuitable for the position.

Given that an employee on probation enjoys the same rights as a permanent or confirmed employee and his services cannot be terminated without just cause or excuse which is a well-established law[ii], the exercise of the power of termination must be *bona fide*. We reproduce an extract of the award below :-

> " The process by which suitability is assessed by the employer must be fair, ie. must not be capricious, arbitrary or tainted by unfair labour practice. The employer must also show reasonable steps had been taken to maintain appraisal of the probationer throughout the trial period of employment, giving him advice or warning him when such was likely to be useful or fair. The management should make an honest effort to determine whether the probationer came up to the required standard.
>
> The employer should afford a probationary employee every opportunity to prove himself suitable. Where there is any deficit or shortcoming by the employee during his probationary period, h should be told in what respect he has failed and be guided on his responsibilities.
> The question is whether the probationer had a fair opportunity to prove himself... "

[i] [2023] 3 ILR 343

[ii] See *Khaliah Abbas v Pesaka Capital Corporation Sdn Bhd* [1997] 3 CLJ 827

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On the facts, the claimant did not constructively take the feedback of the company on the areas of improvement set out for him. Despite being assigned a mentor to assist him and to monitor his progress in KPIs set for him, he failed to improve or achieve the KPIs. There was no evidence of *mala fide* on the part of the company for not confirming him. The company's decision was honest, fair, *bona fide* and not arbitrarily or capriciously.

6. VSS FOR CLOSURE OF HOTEL

The closure of 'The Parkroyal Kuala Lumpur' in June 2020 for renovation for approximately 15 months had caused the entire workforce to be retrenched. Prior to that, the Respondent which operated and managed the hotel extended an offer of voluntary separation scheme (VSS) to both its unionised employees and non-unionised employees. Out of 287 employees, 94 unionised employees and 60 non-unionised employees applied to participate in the VSS exercise, leaving the balance 133 employees who rejected the VSS offer. The unionised claimants who rejected the VSS were issued letters of retrenchment and were paid relevant contractual payments including retrenchment benefits under the 8th collective agreement between the Respondent and the hotel's union (CA), compensation *in lieu* of notice and encashment of unutilized annual leave. The non-unionised claimants who rejected the VSS were issued letters of retrenchment and received similar types of payment except retrenchment benefits as they were not governed by the 8th CA. The hotel was eventually closed down in mid-June 2020. It was re-opened in June 2022 under a new brand name called Parkroyal Collection Kuala Lumpur.

The Industrial Court dismissed the claimants' case. This was not a case of discharge of surplus of employees or redundancy due to restructuring or reorganization of the employer but all the staff of the hotel were discharged due to the closing down of the hotel. Evidence tendered showed that the closure of the hotel was not for the renovation work only but was impacted by the COVID-19 pandemic and the Movement Control Order (MCO) imposed by the government. Given that at the time of the closure of the hotel in mid-June 2020, there were a lot of uncertainties looming due to the

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unprecedented COVID-19 pandemic that struck the world and the implementation of the MCO, it would be too speculative to conclude as the claimants did that the closure was merely temporary. It was immaterial whether a business was reopened subsequently after it was closed. It is the right of the businessman to reopen his business. What mattered was that the closure of the business had to be a real and genuine closure in fact and not a pretence. There was no evidence to show that the hotel was still operating or the hotel did not completely shut down its operation during the period of two years. The closure was done in good faith.

The payment terms of the VSS were much better and more than those provided under the Employment Act 1955 under the layoffs and termination benefits and the CA between the hotel's union and the Respondent for retrenchment. The claimants' reason for not accepting VSS because they needed the job was unreasonable. The Respondent had never promised or agreed to continue their employment if they did not accept the VSS. The VSS memorandum also stated that those who did not take the VSS would be terminated. After the Respondent had lawfully terminated the services of the claimants, the contractual relationship between the claimants and the Respondent also ceased. There was no legal basis for the claimants to insist on reinstatement when the Parkroyal Collection Kuala Lumpur was re-opened two years later. The Respondent had done everything which could reasonably be expected of an employer prior to the retrenchment/termination of employment of the claimants. The claimants were dismissed with just cause or excuse.

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LAND LAW

LONG UNINTERRUPTED USAGE OF ROAD BELONGING TO ANOTHER DOES NOT CREATE RIGHT OF WAY

The outcome of the case *Remarkable Development Sdn Bhd v Kian Merculaba Sdn Bhd & Ors*[i] was unique as both litigants lost their respective claim and counter-claim. The plaintiff (P) was the registered owner of land located behind the land belonging to both the defendants (D). P had been using the road which ran through D's land (the Disputed Road) to enter and exit to the main road from P's land for 20 odd years. This was despite the fact that there was actually a road reserve gazette beside the land belonging to P and D which P alleged as not useable as it was yet to be constructed and was not suitable for the purpose of transporting fresh fruit branches. Following a near collision on the Disputed Road, a gate/barrier was erected at the entrance of D's land, preventing P from entering or using the Disputed Road. P filed action for a declaration that it had acquired an unfettered right to use the Disputed Road or alternatively equitable rights through long usage and right of way pursuant to s.2 of the English Prescription Act 1832. D counter-claimed for trespass against P for damages for its unlawful use of

[i] [2023] 10 CLJ 994

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the Disputed Road for 20 years, arguing that P had been using the Disputed Road without any consent and that a signboard had been put up at the entrance of its land stating that they were private properties and all trespassers would be prosecuted.

The High Court in Sandakan held that signs on the land, indicating that a certain activity was prohibited, were sufficient to render the subsequent activity contentious (thus preventing the activity maturing into an easement), even where the sign was wholly ignored for the prescriptive period and no attempt was made to enforce the landowner's rights. Although D did not do anything to assert their rights as regard to P's usage of the Disputed Road, it did not extinguish D's rights to, later on, do so. P's claim to have acquired a "public" right of way over the Disputed Road by dedication failed as there was no evidence that apart from P, the general public was also using the Disputed Road at the material time[i] and stood to benefit from the grant of the declaration for right of way. It was solely for P's benefit alone. On P's claim for equitable reliefs, it was insufficient for P in seeking equitable remedies to the detriment of D who were the rightful landowners to conveniently use the Disputed Road without any evidence of efforts made on their part to have the alternative road constructed. P's claim was thus dismissed.

On D's counter-claim, D's workers had allowed P to use the Disputed Road. Despite the lapse of time since P's initial entry in 2002, D had not taken any action against P for trespass. By allowing P to use the Disputed Road, D had acquiesced to the same[ii]; P's defence was made out. D's counterclaim was disallowed.

The decisions might seem inconsistent with each other but were actually not so. While P's assertions amount to a defence to trespass, they did not automatically establish their claim for "unfettered right" over the Disputed Road.

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SECURITIES

INSIDER TRADING, 3 TIMES THEORETICAL GAINS, CIVIL PENALTY & BAR FROM TRADING IN BURSA AND MANAGEMENT OF PLC

The Securities Commission (SC) had in *Securities Commission Malaysia v Toh Kai Fatt*[iii] filed a civil "insider trading" claim against an insider who had traded in the shares of a company (HPI) listed in Bursa Malaysia whilst in possession of inside information in violation of s 188(2)(a) of the Capital Markets and Services Act 2007 (CMSA). T as the advisor to HPI regarding the proposed acquisition by a Japanese corporation, OPC was one of the main persons negotiating the offer price in a meeting in Tokyo. D had a long-standing relationship with T who had provided audit and tax services to D's company. Right after

[i] See *Lye Thean Soo & Ors v Sykt Warsaw* [1990] 2 CLJ 743

[ii] See *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25

[iii] [2023] 6 AMR

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T's return to Malaysia from Tokyo, from 14.3.2011 to 16.3.2011, D and T shared voluminous communications. D then opened a trading account which was his first and immediately acquired 524,000 units of shares in HPI in the span of two days. Subsequently, D disposed of all the shares for profit in April. After further communications in June with T, D acquired 450,000 shares merely two days before the announcement by HPI that it had been served with a notice on behalf of OPA of a conditional take-over offer of all voting shares in HPI at the offer price of RM4.40 per share. D then disposed of all his shares for profit.

The High Court allowed the SC claim. D was held to be in possession of inside information based on circumstantial evidence. For a first-timer investor into the share market, D appeared too surefooted in his purchase of the shares as reflected in his 'sweeping' up of the shares to the limit of his trading account on 16.3.2011. Based on the timing of the communications between D and T and the proximity of D's purchases of the HPI shares to the said communications as well as D's trading pattern and volume, it was held that T did communicate inside information to D. The overwhelming body of contemporaneous, documentary and circumstantial evidence led to the irresistible conclusion that D was in possession of inside information at the time of his acquisition of shares and that he had received this from T.

The inside information is information which, on becoming generally available, a reasonable person would expect it to have a material effect on the price of securities. Here, it was the proposed takeover of HPI which up until the announcement was information not publicly available. It was not generally available when D acquired the shares in March and June 2011.

Whilst the difference between the actual price of the shares immediately prior to and immediately after the announcement is a fact that may be looked at by the court as a support of its conclusion that the information is material, this is not to be treated as the legal test to determine "materiality" of the information under s 185 of the CMSA. The court is required to posit the effect of the information "*on becoming generally available*" at the time the information was disclosed as opposed to the court looking at any *actual* impacted price or value of the shares or *actual* influence of reasonable persons who invest in securities

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in deciding whether or not to acquire or dispose of such securities.

SC had established on the balance of probabilities all the necessary ingredients against D for insider trading. D was an "insider" within the meaning of s 188(1) of the CMSA at the time of acquisition of the HPI shares and D had contravened s 188(2)(a) of the CMSA. A declaration was ordered that D had breached s 188(2)(a) of the CMSA. D was ordered to pay 3 times of the "theoretical gain" pursuant to s 201(5) of the CMSA in the total sum of RM2.36 million to SC. Civil penalty of RM250,000 was also to be paid to P. An order was also made that D be barred from being a chief executive or director and from being involved in the management, directly or indirectly, of any other public listed company in Malaysia for a period of 5 years from the date of judgment pursuant to s 360(1)(a)(L) of the CMSA; and that D be restrained from trading in securities on Bursa Malaysia for a period of 5 years from the date of judgment pursuant to s 360(1)(a)(B) of the CMSA.

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TENANCY

UNILATERAL INCREASE OF RENT, LOCKING UP PREMISES VIDE DISTRESS ACTION

Two significant principles were set out by the High Court in *Aida Ratini Mansor & Anor v Sungei Wang Plaza Sdn Bhd & Anor*[i]. The first is that if a landlord raised the rent and the tenant declined to agree, the only remedy open to the landlord is, after giving the tenant a proper notice to quit, to sue him for vacant possession, but had no right to distrain for his increased rent by way of a writ of distress. Therefore, a landlord could not apply for an *ex parte* writ of distress for an increased rent not agreed to by a tenant.

The second is that a landlord in an *ex parte* writ of distress could not apply for a court order to lock up the tenant's premises. There is no such provision under ss 5 or 7 of the Distress Act 1951 or Form 186 of O 75 r 3 of the Rules of Court 2012. Thus, locking up the premises in the course of the execution hence preventing the right of entry is unlawful.

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TORT

SHOOTING BY POLICE AGAINST A MEMBER OF PUBLIC IN FLEEING CAR

In *Muhammad Isma Izami Jaafar v Konstabel Muhamad Zafran Aiman Muhamad Zainol & Ors*[ii], P was driving a car with his friends along a road when a police MPV overtook his car and ordered him to stop. P was shocked and scared as he was driving without a licence, road tax and insurance. He did not obey the command and drove towards his house. He was about to stop when the 1st and 2nd defendant (D1 is a

[i] [2023] 9 CLJ 894

[ii] [2023] 10 CLJ 792. See also *Ketua Polis Daerah Shah Alam & Ors v Nor Azura Amzah & Anor* [2018] 1 CLJ 792

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police constable and D2 a police corporal) discharged their weapons and shot at his car. Upon reaching his house, they continued shooting at the car and one of the shots hit P's head. D1 and D2 discharged a total of 22 bullets. P suffered gun wound injuries to the head with a left parietal bone fracture, paralysis on the right side of his body and rashes all over his body.

P succeeded in his claim against D1, D2, OCPD of Kerian and Government of Malaysia in negligence. P was partly to be blamed when the policemen opened fire towards his car due to his action in fleeing upon seeing the MPV. He had pleaded guilty to a charge under s.186 of the Penal Code for obstructing a public servant in the discharge of his functions. However, that did not justify the firing of the weapons by D1 and D2. The rear tyre of P's car had been punctured by the shots fired earlier and the car had stopped the first time, the perceived threat had ended and it was no longer reasonable to continue shooting towards the car. But instead, D1 and D2 had continued to shoot at it from the back; they had been overzealous in their attempts to capture P and in that process, had used excessive force as could be seen from the gunshots traces found in the car. The negligence is evident from the two stray bullets which had travelled above the level of the windshields and could be seen on the ceiling of the car interior. It was common knowledge and could have been easily anticipated by trained police personnel that shooting towards members of the public from a moving vehicle with the kind of road condition encountered that night was a recipe for disaster. The High Court of Taiping thus ruled that D1 and D2 were negligent in discharging their firearms. However, P failed in his claims in assault and battery.

He was awarded RM350,000 in general damages, RM12,505 in special damages and RM240,000 for total loss of income and costs. Aggravated and/or exemplary damages were disallowed.

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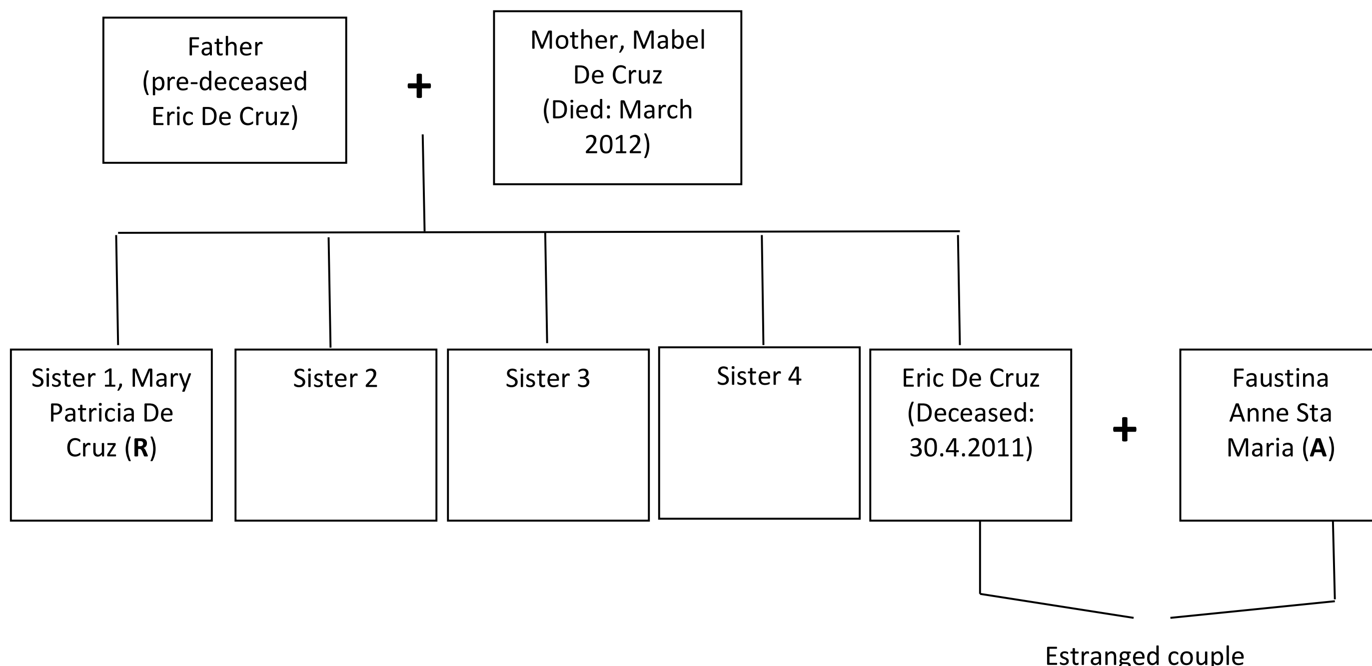
IINTERESTS OF BENEFICIARY UNDER INTESTACY NOT EXTINGUISHED UPON DEATH



The interplay between intestacy, beneficiaries, trust and estate was the focal point in the Court of Appeal decision in *Faustina Anne Sta Maria v Mary Patricia De Cruz*[i]. The appellant (A) was the estranged wife of the deceased, Eric De Cruz (Eric). They had no children. Divorce petition was filed by Eric but was not determined before he died intestate. His mother, Mabel De Cruz died 11 months after Eric's death. She was survived by four daughters, the Respondent (R) among them. The relationship is depicted in the above diagram.

R was the administrator of the estate of her late mother. R also applied under s.8 of the Small Estates (Distribution) Act 1955 (SEDA) for the distribution of the estate of her late brother, Eric De Cruz. A objected on the ground that R did not possess any right or *locus standi* to make such an application. The Land Administrator (the LA) rejected the objection and appointed R accordingly. A applied to the High Court to set aside the appointment. She failed and her appeal to the Court of Appeal was also dismissed.

[ii] [2023] 10 CLJ 863

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At the time of the passing of Eric, A and Mabel De Cruz were the only heirs to his estate pursuant to s.6(1)(b) of the Distribution Act 1958 (the DA) with one half share each. It was A's contention, ion reliance upon the Federal Court decision in *Chor Phaik Har v Farlim Properties Sdn Bhd*[i], that once Mabel De Cruiz passed away, her interest in her son, Eric's estate ceased; it was only if the estate had been completely administered and distributed that Mabel De Cruz would have an interest in the estate. The appellate court disagreed, pointing out that whilst the apex court ruled that the beneficiaries under an unadministered estate were incapable of passing interest or property in the lands to respondents, on the basis that they themselves did not have any interest or property in the hands, it did not state that the beneficiaries under an unadministered estate had no rights at all. The beneficiary under an intestacy takes under a statutory trust for sale and conversion.

In a trust for conversion, the beneficiary is entitled under the trust, not in the assets comprised in the trust itself, but to the proceeds of the sale of such assets, after deducting the liabilities of the estate. Similarly, the beneficiaries under an intestacy have a right to require distribution to be effected in accordance to s.6(1) of the DA. While the beneficiary under an intestacy has no interest or property in specific assets forming part of the estate of the deceased, there remains a right of the beneficiary existing as a chose in action. Therefore, the interest of a beneficiary under an intestacy is not extinguished upon the death of that beneficiary. Where a beneficiary under an intestacy himself dies intestate before the estate is fully administered, the rights under the trust for conversion devolves to his beneficiaries, the identities of whom are determined in accordance with s.6(1) of the DA. Hence, Mabel De Cruz's share in the estate of her son, Eric devolved upon her death to her lawful heirs, amongst whom was R. This meant R was entitled to petition for distribution under s.8 of the SEDA in respect of the estate of Eric.

Thank You for your time in reading this issue. If there is any query, please direct it to:

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[i] [1997] 4 CLJ 393

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