THE UPDATE

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TABLE OF CONTENTS		Page

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DOES *QUINCECARE* TORTIOUS DUTY OF CARE EXTEND TO DUTY OWED BY A BANK TO A 3RD PARTY NON-CUSTOMER?

The *Quincecare* duty of care as propounded in the English case of *Barclays Bank plc v Quincecare Ltd*[i] was in the limelight in the Privy Council decision in *JP SPC 4 and another v Royal Bank of Scotland International Ltd*[ii]. It is a duty on a bank to refrain from exercising a customer's order if, and for so long as, the bank is "put on inquiry" in the sense that the bank has reasonable grounds for believing that the order is an attempt to defraud the customer. There was a statement in *Quincecare* which recognized such *Quincecare* duty of care protected not only the customer against fraud but also innocent 3rd parties. Thus, the principal issue in *JPSPC4* was whether the *Quincecare* duty of care was applicable i.e. whether a bank owed a duty of care in the tort of negligence to a non-customer i.e. a person known to be the beneficial owner of the moneys held in the account of a customer of the bank and who had been defrauded by the customer.

On the facts in brief, the claimant was an investment fund which established a scheme to seek profit by lending to solicitors in UK to finance their pursuit of litigation. The loans were to be advanced and repaid through a company using bank accounts which the company held with the defendant bank. The claimant claimed that the company and two individuals behind it had been parties to a fraud by which the money beneficially belonging to the fund was paid out for the benefit of those individuals rather than by way of legitimate investments intended for. The bank was not a party to, or otherwise responsible for, the fraud. However, the claimant contended that the bank knew or ought to have known that the moneys in the accounts were not beneficially the property of the company but instead of the fund. It was alleged that the bank owed the claimant a duty of care in tort to exercise reasonable care and skill to protect the fund from losses caused by the alleged fraudulent misappropriation of funds.

The Privy Council in *JPSPC4* refused to extend the *Quincecare* duty of care beyond being a duty owed to the bank's customer which arose as an aspect of the bank's implied contractual duty of care and co-extensive tortious duty of care. In their Lordship's view, the reference to protecting innocent 3rd parties in *Quincecare* had to be read in context. In all circumstances, the claimant had pleaded no factual basis (and there was nothing in the assumed facts) upon which a duty of care based on assumption of responsibility[iii] could be established. There was also no evidence which could establish such a duty. There was further no good reason for incrementally developing the tort of negligence[iv] beyond the well-established *Quincecare* duty of care, so as to impose on a bank an equivalent duty of care to a third party who was not a customer of the bank.

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[i] [1992] 4 All ER 363 (HC) as approved by UK Court of Appeal in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2018] 2 BCLC 1

[ii] [2022] 4 All ER 431

[iii] See *N v Poole* [2019] 4 All ER 581

[iv] See *Murphy v Brentwood DC* [1990] 2 All ER 908 (HL) and *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 All ER 1041 (SC) which rejected the *Anns v Merton* two-stage approach ; and also *Caparo v Dickman* [1990] 1 All ER 568 which favoured a three-stage test for novel duties of care (foreseeability, proximity, and whether fair, just and reasonable).

On the pleaded (and assumed) facts of the case, it would not be fair, just and reasonable to impose a duty of care on the bank to the claimant/fund. That would place an unacceptable burden on banks going outside their contractual relationship with their customers. Moreover, common law did not generally impose liability for failure to prevent harm caused by others. For a duty of care to arise in cases where the relevant conduct of the defendant was an omission (as opposed to a positive act), restrictive principles needed to be satisfied that the defendant had some special level of control over the source of danger or had assumed a responsibility to protect the claimant from the danger. Neither existed in the present case.

As to equitable wrong of dishonest assistance, banks and other parties who were alleged to be assisting a breach of fiduciary duty were liable only if they were dishonest and not if they were merely negligent.

The upshot of the appeal was that *Quincecare* did not extend beyond a duty of care being owed by a bank to its customer. Such tortious duty of care cannot be extended across to a third party with whom the bank has no contractual relationship even if the bank knew or ought to have known that the third party was the beneficial owner of the moneys in the customer's account.

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BANKING / NEGLIGENCE

DUTY OF CARE OWED BY A BANK TO A NON-CUSTOMER

The central issue in the Court of Appeal case of *Koperasi Sahabat Amanah Ikhtiar Berhad v RHB Investment Bank Berhad*[i] was whether the respondent (D1), an investment bank, was liable for negligence to the plaintiff depositor (P) when it allowed a sum of RM10 million deposited into its (D1) account with Maybank (a share trading account) to be transferred to D3 which has a trading account with D1 without the authority or instruction from P. P had invested the said sum in a so-called "Equity Fund/Special Issue/IPO fund" based on the investment proposals made by D2 who had held himself out as representing D1 and had issued a cheque for the said sum and deposited accordingly to the D1's share trading account with Maybank. D1 subsequently channelled the monies out of its share trading account into D3's account purportedly on D2's instructions, with the assistance of its employee and Credit Control Department. P had no knowledge of D3 and had not authorised the transfer. Upon alerted by the Securities Commission that its investment with D1 did not exist, P demanded the return of the monies from D1 which claimed that there was no such investment. Investigation found that D2 was a fraudster with his sons acting as directors in D3 which had utilized third-party cheques to channel monies into its account and siphoned off such monies. P realized it had been scammed. D2 had since become a bankrupt and D3 in liquidation.

P had sued D1 to D3 but the High Court held that D1 did not owe any duty of care to P who was not its customer. On appeal, the issue in essence was whether the investment bank owed a duty of care to a depositor who was not its customer but whose money it had allowed to be transferred out to a 3rd party without the depositor's authorisation.

[i] [2022] 8 AMR 645

It was held that D1 owed a duty of care to P when it received the monies and P thereafter may be regarded as D1's customer irrespective of whether any formal contract was entered into. The fact that a contractual banker-customer relationship had not been established did not necessarily mean that a duty of care could not arise. It is a misnomer to say that a provider of professional service such as an investment bank could not under any circumstance owe a duty of care to a non-customer. The particular facts of each case would have to be examined from the perspective of foreseeability, proximity and policy consideration – three-fold test to establish a duty of care in tort in Malaysia[i]. To hold that there was no duty of care when D1 was prepared to allow cheques for investment purpose to be deposited into its common pool account would be harmful and dangerous for the financial system and for *bona fide* investors who had laboured under the impression that they were investing with a licensed investment bank because they had made their cheques payable to the investment bank.

The test for breach of duty of care in the context of banking transactions was whether a reasonably prudent banker faced with the same circumstances would regard the course of action taken on the facts justifiable. The standard of the reasonable care and skill that a bank has to exercise was an objective standard and it was obliged to guard against the facilitation of fraud. There was a breach of duty when D1 did not check with P on the so-called instruction to transfer the monies that were deposited with it to D3. A reasonably prudent bank having received such monies would have acted in a commercially acceptable way to verify the identity of the depositor, the purpose of the deposit and the instructions with respect to the monies. A bank-in slip which was an unsigned document was not a mandate or authorisation to transfer out funds.

The Court of Appeal found that D1 had been negligent in transferring the sum of RM10 million deposited with it to D3's account. The appeal was allowed and judgment was entered for P's claim.

Postscript

The Privy Council decision in *JP SPC 4 and another v Royal Bank of Scotland International Ltd*[ii] as featured in the previous page was not brought to the attention of the Court of Appeal. It could be relevant particularly the cautious approach in extending the tortious duty of care owed by a bank to a non-customer.

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[i] See *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd* [2018] 4 AMR 234, *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar* [2019] 2 AMR 442

[ii] [2022] 4 All ER 431

COMPANY LAW

FRAUDULENT TRADING BY COMPANY DIRECTORS AGAINST CREDITORS

Fraudulent trading by the directors of a company with intent to avoid paying debt owed to its creditors was the gist of the High Court decision in *Eastmont Sdn Bhd v Tay Keong Kok & Ors*[i]. Mega Planner Jaya Sdn Bhd (MP) awarded the plaintiff a construction contract which was completed but MP failed to pay the balance of RM12.5 mil. The plaintiff sued MP to recover the said sum. Dakota Engineering Sdn Bhd (Dakota) through its solicitors then informed the plaintiff that Dakota had wound up MP for failing to settle a judgment sum. It turned out that the judgment was a judgment in default of appearance. The plaintiff succeeded in obtaining leave to proceed with its suit against MP and obtained a judgment in default of defence. Thereafter, the plaintiff initiated the instant suit against six defendants who were the common directors/shareholders and/or ultimate controllers of MP and Dakota in pursuance of s.540 of the Companies Act 2016 (the CA). It was the contention that the defendants had jointly and severally carried out businesses with the intent to defraud the creditors of the company by using Dakota to wind up MP in order to avoid repayment of debts due by MP to the plaintiff.

The High Court agreed. The defendants had failed to show any proof that MP had genuinely owed Dakota debt (RM5.89 mil) in order for Dakota to sue MP for that amount. Dakota's financial reports did not show any debt owing to it by MP. Instead, the SSM search showed that MP had current assets of about RM12.6 mil and was making a profit after tax of RM7 mil. As such, there was no reason for Dakota to wind up MP allegedly on the ground that MP owed Dakota about RM5.89 mil. In the view of the learned Judge, the winding up was to defraud MP's creditors. MP was wound up despite financially healthy. The winding up was a sham and the defendants were knowingly parties who had wrongfully and conspired for the sole intention of injuring MP's creditors by denying them the payment of their debts particularly that owing to the plaintiffs.

The defendants raised separate legal personalities as defence to sever the link to the actions of the companies (MP and Dakota). The court however invoked s.540 of the CA to ensure the principles of separate legal personality and limited liability were not wrongfully taken advantage of. On the facts and evidence, there was basis to lift the corporate veil of the companies to determine who were behind the companies that were responsible for the fraudulent winding up of MP. In the circumstances, the defendants were ordered to be jointly and severally personally liable, without any limitation of liability, for the debts of MP to the plaintiff in the sum of RM17 mil as special damages.

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CONTRACT

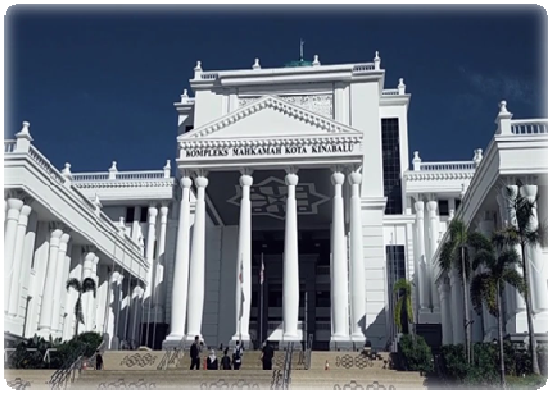
NO ACCORD AND SATISFACTION

The defence of accord and satisfaction was raised in the Kota Kinabalu High Court decision in *Nurinah bt Alip & Anor v Edwind ES Banting @ Eddie B Mohd Banting & Anor*[ii]. The Plaintiffs were

[i] [2022] 10 MLJ 349

[ii] [2022] 10 MLJ 573

negligently knocked down by the car driven by D1 and owned by D2. In keeping with a customary practice among the Kadazandusun community of Penampang, Sabah, in order to make amends when a wrong had been done, D1 paid the Plaintiffs RM1,275 as 'sogit kampung' and 'sogit mangsa kemalangan' (offerings to appease the families of the victims and the 'spirits' of the kampung) which was evidenced in a 'peace agreement' signed between the parties. D1 had admitted that he was responsible for the accident and that he was prepared to pay the medical expenses of the Plaintiffs whereupon D1 paid each Plaintiff RM4,000 as part-payment. D1 failed to make the full sums. The Plaintiffs brought a suit to recover damages from the accident. The Sessions Court dismissed the claim on the ground that an accord and satisfaction had been achieved by virtue of the payment of the 'sogit' and the sum of RM4,000.



The High Court allowed the appeal. The Plaintiffs did not make any demand to pursue the outstanding sums due to them under the 'peace agreement' as they had accepted D1's repudiation of the compromise and re-asserted their original claim to pursue civil action against the defendants for damages arising from the road accident. There was no estoppel since they had not elected to affirm the compromise and sue upon it.

There was still a balance due for medical expenses; and there was no evidence that the 'sogit' payment and the sum of RM4,000 paid by D1 were intended to be full and final settlement of the Plaintiffs' claims. The 'peace agreement' had indeed not been completed. Whilst 'sogit' and medical expenses were two different things, the non-payment of medical expenses meant the settlement arrangement had not been completed. There was no accord and satisfaction.

The High Court awarded the general damages as assessed by the trial judge for pain and suffering.

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CONTRACT / EVIDENCE

QUOTATION AS PROOF OF LOSS IN THE ABSENCE OF REBUTTAL EVIDENCE

In *Chong Nge Wei & Ors v Kemajuan Masteron Sdn Bhd*[i], the plaintiffs (P) who were buyers of apartments in a housing project developed by the defendant (D) sued D for changing without their consent the building material for the outer brick walls from autoclaved aerated concrete (AAC) building block to flexcore. The relevant clause 12 of their statutory sale and purchase agreements [Schedule H of the Housing Developers (Control and Licensing) Regulations 1989] provided that if D made changes to the construction of the apartments and common property without the buyer's consent, and if the changes involved the

[i] [2022] 3 MLJ 135

substitution or use of cheaper materials or there was a failure to carry out agreed works, the buyer was entitled to 'a corresponding reduction in the purchase price or to damages in respect thereof'. P's claims were allowed and the damages payable for the cl 12 breach was ordered to be assessed.

The registrar (SAR) assessed the damages at RM380k based on a quotation prepared by P's contractor which was tendered in evidence at the assessment hearing. The quotation contained details of remedial works to be undertaken and the costs involved in replacing flexcore with AAC building blocks. D appealed to the Judge on the ground of excessive and unreasonable award and that P should have tendered more than just one quotation 'to ascertain the necessity for the particular works in the quotation'. The appeal was dismissed but further appeal to the Court of Appeal (COA) was allowed. On final appeal to the Federal Court, the COA decision was set aside and the High Court decision was restored.

The apex court took note that D had raised no objection when the quotation was tendered in evidence before the SAR. D's objection was only raised at the submissions stage and even then, it was only over P's reliance on the single quotation to prove expenses. In the view of the appellate court, the quotation provided *prima facie* proof of the sum which would meet the costs of the remedial works. In the absence of rebuttal evidence, it did not lie in the mouth of D to say that RM380k claimed by P was excessive and unreasonable. That was the sum that P's contractor had determined would meet the cost of the remedial works and that was the only evidence before the court which both SAR and High Court accepted as proof of the loss suffered by P. The principle that the defendant had no burden to offer rebuttal evidence had no application where P had produced *prima facie* proof of loss. And it is germane to point out that the apex court had disagreed with the COA's view that actual works must first be carried out and actual expenses must first be incurred before P could claim for damages

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CONTRACT

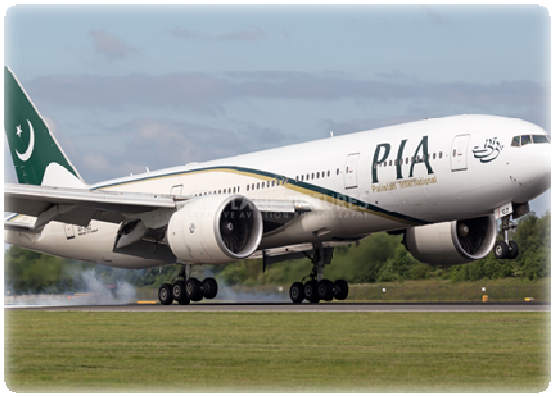
LAWFUL ACT ECONOMIC DURESS

The concept of lawful act duress was the central of attention in the UK Supreme Court (UKSC) decision in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation*[i]. Duress in the law of contract focuses on an illegitimate threat (or pressure) which induces a party to enter into a contract. If duress is established, the remedy for the threatened party is rescission of the contract. In *Times Travel*, the form of duress in question was economic duress which was first recognized in English law in 1970s and authoritatively accepted in 1982[ii]. The main example of economic duress is where a contracting party threatens to break a contract unless the other contracting party agrees to do something (for example, to pay extra money for completion of the promised performance). However, *Times Travel* was not concerned with where what is threatened is unlawful but with where what is threatened is lawful. In other words, was there "lawful act duress" and, if so, what was its scope?

[i] [2022] 2 All ER 815

[ii] *Universe Tankships Inc of Monrovia v International Transport Workers Federation, The Universe Sentinel* [1982] 2 All ER 67, HL

But first, the brief facts. TT was a travel agency which sold flight tickets for Pakistan International Airlines Corp (PIAC). Disputes arose between various travel agents and PIAC as to non-payment of commission that such agents claimed was owed to them on the sale of PIAC tickets. PIAC threatened to end any contractual relationship with TT, as it was legally entitled to do, unless TT entered into a new contract under which TT released PIAC from all claims that TT might have against PIAC in relation to commission under the previous contract. Under pressure from PIAC, TT did not join in those legal actions by travel agents and reluctantly agreed to accept an onerous waiver term in the new contract with PIAC. TT later sought to rescind the new contract for duress, thereby freeing it to recover the commission which it claimed it was owed under the previous contract. At first instance, TT was held to be entitled to rescind the contract for economic duress; but this was overturned at the Court of Appeal which found that economic duress had not been made out on the facts. This was affirmed ultimately by the UKSC.



The UKSC held that lawful act duress including lawful act economic duress did and should exist in English law as a ground for rescinding a contract or for the restitution of non-contractual payments. There were 3 elements to be established in order to succeed in a claim for rescission of a contract on the ground of economic duress :

(i) a threat (or pressure exerted) by a defendant that was illegitimate ;

(ii) that illegitimate threat (or pressure) had caused the claimant to enter into the contract; and

(iii) the claimant must have had no reasonable alternative to giving in to the threat (or pressure).

As the threat was lawful, the illegitimacy of the threat was determined by focusing on the nature of the demand rather than the nature of the threat. Thus, a demand motivated by commercial self-interest was in general justified. Indeed, lawful act economic duress was essentially concerned with identifying rare exceptional cases where a demand, motivated by commercial self-interest, was nevertheless unjustified.

On the nature and justification of the demand, regard had to have to, *inter alia*, the behaviour of the threatening party including the nature of the pressure which it applied, and the circumstances of the threatened party. Morally reprehensible behaviour, which in equity was judged to render the enforcement of a contract unconscionable in the context of undue influence, had been treated by English common law as illegitimate pressure in the context of duress.

Nonetheless, whilst the concept of lawful act duress was not to be stated too widely, the boundaries were not fixed; and the

courts should approach any extension with caution particularly in the context of contractual negotiations between commercial entities. A general principle of good faith dealing was to be rejected[i], as was a range of factors approach. And the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power meant that TT's claim would not have succeeded even if it had shown that PIAC had made a bad faith demand[ii].

It was also concluded that in relation to a demand for a waiver by the threatened party of a claim against the threatening party, a demand is unjustified, so that the lawful act economic threat is illegitimate (hence lawful act economic duress is established), where, first, the threatening party has deliberately created, or increased, the threatened party's vulnerability to the demand and, secondly, the 'bad faith demand' requirement is satisfied. The demand is made in bad faith where the threatening party does not genuinely believe that it has any defence (and there is no defence) to the claim being waived.

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CONTRACT

ENTIRE AGREEMENT CLAUSE

It is not uncommon to come across an entire agreement clause in agreements. The extent and effect of such a clause was in focus in the case of *Bsynclive Sdn Bhd v Technology Park Malaysia Corporation Sdn Bhd*[iii]. Parties had executed an agreement dated 1 September 2017 which however was not stamped and returned to the defendant by the plaintiff. There was another agreement executed on 23 February 2018 which the defendant contended as the final agreement containing material changes and the agreement superseded the terms of the earlier agreement.

There was an entire agreement clause which provided, among others, that the '*... agreement supersedes all proposal, negotiations, commitments and understanding with respect to the subject matter hereof made between the parties hereto prior to the execution of this agreement.*' However, the plaintiff contended that the word "contract' or "agreement" did not appear in the said clause which should only preclude "proposal, negotiations, commitments and understanding" between parties. The learned High Court Judge rejected such contention and held that the entire agreement clause constituted a binding contract between parties in that it helped to provide certainty that the contract in question constituted an entire agreement between the parties and that the contract superseded any previous understanding, document or other contractual agreement between the parties.

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CONTRACT (MONEYLENDERS)

ILLEGAL LOAN CAMOUFLAGED AS SPA – LESSON TO UNLICENSED MONEYLENDER

[i] English law has never recognized a general principle of good faith in contracting; instead English law has relied on piecemeal solutions in response to demonstrated problems of unfairness. See [27] of Times Travel.

[ii] See [58] of Times Travel. As to 'bad faith demand', see *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714.

[iii] [2022] 7 CLJ 710

In *Tang Lee Hiok & Ors v Yeow Guang Cheng*[i], P owed an unlicensed moneylender a sum of RM780,000.00 (1st Loan) which was secured by his land (Land). P then approached Ds to obtain a loan of RM900,000.00 (2nd Loan) bearing interests at the rate of 12.5% per month (which rate was however disputed) to settle the 1st Loan. P signed a sale and purchase agreement (SPA), a Form 14 memorandum of transfer and a power of attorney (PA) in respect of the Land favouring Ds as security/collateral for the 2nd Loan. The 2nd Loan was released to repay the 1st Loan with the balance RM120,000.00 handed over to P. P subsequently paid to Ds a total of RM328,400.00 as interests from March to September 2016 but thereafter, was unable to service interests despite demands. Ds proceeded to effectuate the transfer of the Land without P's knowledge. P filed a suit which was premised on Ds having carried on an illegal moneylending business with regards to the SPA which was allegedly an unlawful loan transaction.

The High Court allowed the claim which decision was affirmed on appeal by the Court of Appeal. It was held that the impugned SPA was a sham to disguise an illegal moneylending transaction in breach of the Moneylenders Act 1951 (MLA). Taking the discrepancies altogether, which included the full payment of the purchase price without immediately taking vacant possession or even asking for the keys, the long delay in the Land being registered in Ds' name and the various payments made by P at the express instruction of some of the Ds, the courts were concurrently satisfied that the transaction was in fact an illegal moneylending transaction. The SPA used to effectuate the transaction was a sham and illegal and thus null and void as provided under the MLA.

Ds could not claim restitution under ss 66 or 71 of the Contracts Act as they were aware of the illegality and could not plead ignorance. To allow restitution would be tantamount to allowing Ds to benefit from the transaction that they had devised to camouflage their nefarious intention which would only embolden unlicensed moneylenders.

It was ordered that the completed transfer of the Land in the name of Ds was to be cancelled and re-vested in P. By this decision, Ds lost a sum of RM571,600.00 in the impugned transaction whilst P gained the same sum and reclaimed his ownership of the Land.

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COURT PROCEDURE

REAL RISK OF DISSIPATION, DIRECTLY OR TO BE INFERRED BUT NOT TO BE PRESUMED, TO WARRANT A MAREVA INJUNCTION

[i] [2022] 5 MLJ 584

In cases where there is a real risk that a litigant (defendant) facing potential liability may seek to render any judgment that may finally be entered against him worthless or nugatory by dissipating or disposing his assets, the court may grant a *Mareva* injunction to restrain the litigant from doing so. It is trite that there are 3 ingredients that must be established to obtain a *Mareva* injunction: (i) that the applicant had a good arguable case; (ii) that the respondent had assets within the jurisdiction; and (iii) that there was a real risk that the assets would be dissipated or placed beyond the reach of the applicant before the judgment. It was the ingredient (iii) that the Court of Appeal in *Lee Kai Wuen & Anor v Lee Yee Wuen*[i] subjected to scrutiny.

The *ratio decidendi* is that there must either be direct evidence of a real risk of dissipation of assets or circumstances in evidence that warrants an inference of such a risk. The real risk may not be presumed. However, if want of probity or misconduct is clearly established, then depending on the nature of the lack of probity or misconduct, a real risk of dissipation of assets may be **inferred – not presumed**.

By way of *obiter dicta*, the appellate court also remarked that the balance of convenience to be in favour of granting an interlocutory injunction sought is not a criterion to be met when considering the grant of a *Mareva* injunction.

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I. WHO IS TO PROVE THAT THE CLAIMANT WAS NOT GAINFULLY EMPLOYED POST-DISMISSAL?

Commonly, a favourable award to the claimant/workman comprises compensation for backwages from the date of dismissal until the date of the award subject to a maximum of 24 months and compensation *in lieu* of reinstatement on the basis of one month's salary for each completed year of service. The quantum of backwages may be reduced where there are post-dismissal earnings[ii]. The question is who bears the burden to prove that the workman was not gainfully employed.

The answer appears to be the company as decided in *Savithri Veloo v Eversendai Constructions (M) Sdn Bhd & Anor*[iii]. This is how the learned High Court Judge rationalized and arrived at the decision. The legal burden to prove that the workman was not gainfully employed lay on the workman as this would be a fact that was especially within his knowledge. However, once the workman testified that she was not gainfully employed post-dismissal, the evidential burden to prove otherwise shifted to the company. In this case, the company did not lead any evidence to discharge the burden nor challenge by cross examining the workman's testimony about her being unemployed. Thus, the workman's testimony of being unemployed stood unrebutted. As to the company's contention that the workman ought to have tendered evidence of record of her contributions to EPF, SOCSO and personal income tax returns to show that she was not gainfully employed, the court remarked that the company could have subpoenaed for such evidence but it

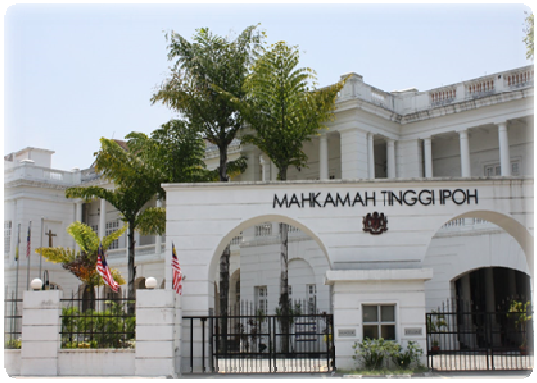
[i] [2022] 7 CLJ 505

[ii] See Second Schedule, Industrial Relations Act 1967, para 3 read with ss. 20(3)

[iii] [2022] 2 ILR 389

did not. The Industrial Court's decision to deduct 70% from the backwages to be paid to the workman was unsupported by evidence and plainly irrational.

Last but not least, whilst post-dismissal earnings are one of the factors to be taken into account when the court cogitates in the decision-making process, it does not necessarily mean a deduction must be made. Indeed, the court had gone on to state that in any event, it would not have made any deductions due to the trauma that the workman was subjected to by the company in line with the principle that post-dismissal earnings need not be taken into account to reduce monetary compensation to show the court's abhorrence of the conduct of the company[i].



The above decision of the High Court was affirmed by the Court of Appeal on appeal in *Eversendai Construction (M) Sdn Bhd & Anor v Savithri a/p Vello*[ii]. The High Court was justified to grant an order of certiorari to quash the part of the award of the Industrial Court which reduced the backwages by 70% since the company did not challenge the workman's oral testimony that she was unemployed after she had been constructively dismissed and the company also did not produce any evidence to contradict the workman's evidence on her status of an unemployed person post-termination.

2. SELECTION CRITERIA OTHER THAN LIFO

When there is a redundancy situation in a company, there is a surplus of labour or the business requires fewer employees of whatever kind or reorganization. The usual consequence is retrenchment i.e. termination by employer of those employees found to be surplus to the requirements after the reorganization. In carrying out retrenchment, it is common for the company to apply the LIFO (Last In First Out) principle in selecting the employees to be retrenched. However, this is not mandatory, if the company is able to come out with an objective guide/criteria/assessment. The IC case of *Wong Choy Pheng & Ors v Taylor's University Sdn Bhd*[iii] is one of such case.

The company used an independent selection matrix based on numerous criteria i.e.

[i] See *Tai Chin Yee v Tong San Chan Distributors Sdn Bhd & Anor* [2021] 1 LNS 543, HC
[ii] [2022] 7 AMR 869
[iii] [2022] 2 ILR 88

job grade, length of service, performance ratings, academic qualifications and skill sets and point system to evaluate and determine which employees to be retained. In the case of Claimant No.2, out of 3 sub-departments to be consolidated to be headed by one team leader, the one who scored the highest was retained while the other two (including Claimant no.2) were regarded as surplus and retrenched accordingly.

With regards to Claimant no.3 who was an education counsellor, the IC opined that it was reasonable for the company to take the opportunity to transform and upgrade its system of doing business towards digital transformation and IT. The company was justified to reduce the headcount of education counsellors (who had been using conventional approach) in order to hire 4 new employees with strong digital background to deal directly with customers both online and face-to-face. The four education counsellors who scored the lowest mark according to the selection matrix were regarded as surplus and retrenched accordingly.

3. COMPANIES AS A SINGLE ENTITY EMPLOYER, ANTICIPATORY BREACH BY EMPLOYER

The claimant in *Chiam Toon How v Pilot Cargo (M) Sdn Bhd*[i], a Singaporean, was the founder of the company which was in the airline cargo and general sales agency business, with a similar business in Singapore known as Union Aviation Pte. Ltd. (UAPL). He sold his shares in the company and UAPL to Agilan vide a sale of shares agreement (SSA) using TKL Total Logistics (KL) Sdn Bhd (TKL) which was fully controlled by Agilan's father, Thillainathan. The claimant was thereafter appointed by UAPL as Regional Director for 3 years. It was an express term of the appointment that he would derive a monthly salary and transport allowance and be entitled to a 10% share of the net profits of both the company and UAPL. About 9 months into his appointment, he received a letter from UAPL that his employment would be terminated. His queries to the company and UAPL went unanswered. Then he was informed that an EGM had been scheduled to remove him as a director of the company. This culminated in him claiming constructive dismissal. The dispute was referred to the IC. One of the contentions of the company was that the claimant was not its employee after the execution of the SSA.

Evidence in the form of e-mails which had been produced to show negotiations pertaining to his employment with UAPL and/or the company had not been refuted. Further evidence had shown that UAPL, the company and TKL had been so intertwined that they had run its business as a single economic unit ; and central to this group of companies had been Thillainathan being the controlling mind and the *de facto* and/or shadow director for all 3 companies. Evidence also shows that the claimant had done extensive work for all 3 companies. In this respect, over the years, the law pertaining to the position of an employee who works within a group of companies has evolved. It is now well established that the court may lift the corporate veil where the relationship between the companies in the same group is so intertwined that they should be treated as a single entity to reflect the economic and commercial realities. On the facts and evidence adduced, all 3 companies had operated as a single economic unit. Thus, the company's contention was rejected; the claimant had been employed as the Regional Director into a single

[i] [2022] 2 ILR 483

economic unit comprising the 3 companies of UAPL, the company and TKL.

Interestingly, the IC made a ruling on constructive dismissal in the form of an anticipatory breach. An anticipatory breach occurs when a party, expressly or impliedly intimates by words or conduct prior to the time for performance, that he will not be ready or willing to perform the contract when the time for performance arrives. The company vide its termination letter had clearly indicated its intention to sever the claimant's employment, and taken together with Agilan's cold silence to his letters, he could not be faulted for claiming constructive dismissal.

4. SOME GENERAL GUIDELINES ON RETRENCHMENT

In *Kilby Jacob Atticus v Halliburton Business Services Sdn Bhd*[i], the salient principles involving retrenchment were summarized by the Industrial Court as follows :-

(i) It is the right of every employer to decide how he wants to conduct or organize his business.

(ii) It is also his right to reorganize or restructure his business or workplace provided it is done in good faith.

(iii) Selection of staffs to do the work or the size of the workforce is a management prerogative,

(iv) Retrenchment can be carried out by an employer if a redundancy situation has arisen i.e. when there is a surplus of labour. The burden is on the employer to prove redundancy.

(v) Notwithstanding that the choice of staffs for the work is a management prerogative, the discretion to retrench staff must be exercised fairly subject to the scrutiny of the court.

(vi) The retrenchment exercise must be *bona fide* and done in accordance with the established retrenchment principles such as found in the Code of Conduct for Industrial Harmony (1975).

(vii) The onus of proof is on the employer to prove that the retrenchment was done fairly and in good faith.

(viii) There must be good and strong reason for the company to depart from the principles laid down in the Code of Conduct.

In the case, the claimant's original job scope had not been redundant and had remained in existence at all material times. The company's finances had not been directly affected by the low price of the crude oil. The company had also failed to show it had taken positive steps i.e. cost cutting measures to avert or minimize its reduction in workforce and that there had been a real necessity for the retrenchment due to the Covid-19 pandemic. Retrenchment had been the first and only cost-cutting measure taken towards the claimant in non-compliance of the Code of Conduct. This was akin to a ship captain throwing his crew overboard in the face of an oncoming storm to keep enough speed to manoeuvre out of it, leaving them to fend for themselves in the ocean of uncertainty, which, in turn, had been a breach of the implied terms of mutual trust and confidence. The claimant therefore was dismissed without just cause or excuse. There had also been mishandling of the cancellation of the claimant's employment pass which severely

[i] [2022] 3 ILR 281

jeopardised the claimant's job seeking efforts elsewhere. Thus, no deduction was made for post-dismissal earnings against the back-wages awarded to him.

5. LIFO NOT RELEVANT FOR RETRENCHING SOLE EMPLOYEE IN THE CATEGORY

One of the issues raised in *Thomas Hans Raab v Nokia Services and Networks Malaysia Sdn Bhd*[i] was the non-compliance of the Last In First Out principle in carrying out a retrenchment exercise. The claimant contended that the company had failed to take into consideration that he was a long-serving staff when the selection process for retrenchment was being carried out and a junior staff was not considered first for retrenchment. The Industrial however held that this was not a case of retrenching a group of workers. It was one where a commercial decision had been made by the employer to merge roles, thus rendering the claimant's role redundant leading to a mutual separation between the parties. In other words, LIFO has no application to the case of retrenchment of the only employee in a particular category of workmen because in such a case it was retrenchment of the post itself[ii].

6. INDUSTRIAL COURT HAS NO EXTRA-TERRITORIAL JURISDICTION

The Industrial Court has no jurisdiction to adjudicate the claim for wrongful dismissal pursuant to the representation made under s.20(a) of the Industrial Relations Act 1967 where the governing law of the employment agreement (EA) is a foreign law and there is express provision that any dispute arising out of or in connection with the EA shall be referred to the courts in a foreign country. In *Wong Lee Lee v Hermetic-Pumps Singapore Pte Ltd*[iii], the governing law was the law of the Republic of Singapore and parties had agreed to submit to the courts of Singapore to settle any dispute arising out of the EA. The Industrial Court accordingly struck out the claim.

Likewise, where the party resides outside Malaysia, the IC will not allow an application to join such party in the case before the IC. In *Bruce Dargus v Cloudfx Malaysia Sdn Bhd*[iv], in the non-compliance proceedings, the claimant sought to add the directors of the company, J1 to J3 (the Proposed Joinees) as co-respondents on the basis that the company was 'dormant' and the Proposed Joinees had at all material times total control, direction and management of it. The IC disallowed the joinder of J1 and J2 as they were respectively residing in Australia and Singapore. It was not within the jurisdiction of the IC to join a party who resided outside its territorial jurisdiction. As to J3, he resided in Malaysia. Applying the "reasonable factual or legal *nexus* test"[v], there was nexus between J1 with the company as J1 was a director as shown in the SSM search report.

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EMPLOYMENT LAW

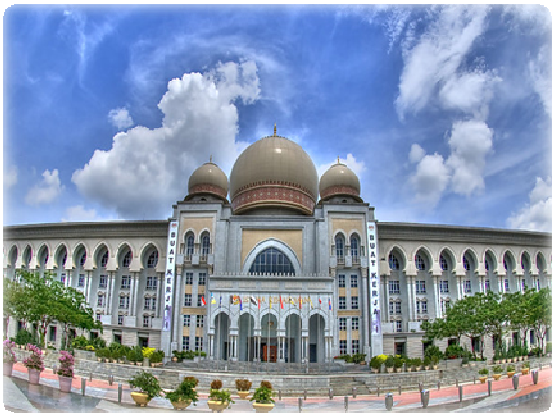
PROPER TIME TO LAUNCH ATTACK ON JURISDICTION

[i] [2022] 3 MLJ 135
[ii] See *Firex Sdn Bhd v Ng Shoo Waa* [1990] 1 ILR 226
[iii] [2022] 3 ILR 476
[iv] [2022] 2 ILR 228
[v] See *Asnah Ahmad v Mahkamah Perusahaan Malaysia* [2015] 3 CLJ 1053

In the Federal Court case of *The United States of America v Menteri Sumber Manusia & Ors*[i], the 2nd respondent (R2) was employed by the sovereign state of the USA (A, the appellant) as a security guard at the Embassy of the USA in Kuala Lumpur. He was dismissed from his employment by A vide a phone call without any reason given. He then filed a representation under s.20(1) of the Industrial Relations Act 1967 (IRA) for wrongful dismissal without just cause or excuse (s.20 Claim). At that time (May 2008), it was prior to the amendments made to s.20. R2 as a dismissed employee had no direct access to the Industrial Court (IC). Access was available only upon a reference by the 1st respondent (R1) i.e. Minister of Human Resources to the IC, after conciliatory efforts by the Director General of Industrial (DGIR) failed to reach a settlement. R1's reference therefore conferred threshold jurisdiction upon the IC to enter into the adjudication of the s.20 Claim.

However, before the matter could be proceeded with in the IC, A applied to the High Court by way of judicial review (JR) to quash R1's reference to the IC, prohibit the IC from adjudicating on R2's claim and declare that A as a sovereign government was immune from the jurisdiction of the IC. The Federal Court held that the proper forum to decide whether or not the restrictive doctrine of sovereign immunity applied based on the facts and circumstances of a given case was the IC. In the present case, the IC had not even commenced any hearing. If a party was aggrieved, the proper course was to apply for JR of the decision of the IC only after the IC had made a determination on the question regarding the applicability of the restrictive doctrine of sovereign immunity, after evidence was led as to the scope of R2's job and whether there was any involvement with diplomatic/sovereign functions of A. As far as R1's decision to refer R2's s.20 Claim to the IC was concerned, it was not erroneous as the only question he had to consider was whether the representation had raised a serious issue of fact and/or law that required adjudication by the IC/

On 1.1.2021, amendments to s.20(2) and (3) came into effect[ii]. The Minister of Human Resources is no longer the person given the power to make reference of a representation after conciliatory efforts failed to reach a settlement. The DGIR instead is given the power. Despite such amendments, the principle in *The United States of America v Menteri Sumber Manusia* remains of relevance. A challenge on jurisdiction on ground of immunity particularly where it depends on the facts and circumstances of a given case must not be prematurely made against the act of reference by DGIR to the IC and the proper forum is the IC as a matter of first instance.



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[i] [2022] 4 MLJ 589

[ii] See Act A1615

GUARANTEE / BANKING

GUARANTOR LIABLE EVEN IF BANK CANNOT RECOVER FROM THE BORROWER

G had signed a personal guarantee in favour of the bank, B to unconditionally pay B on demand all monies owing to B under a term loan facility it had granted to a borrower, ABN. When ABN was wound up which constituted an event of default under the facility, B demanded payment of the sum owing from G and filed a suit to recover the same. In a separate action, ABN sued B for damages for losses it had allegedly suffered due to B's delayed and erratic disbursements under the facility, its unconscionable conduct and premature suspension of the facility.

Against such brief background in the case of *Bank Pembangunan Malaysia Bhd v Ketheeswaran a/l M Kanagaratnam*[i], could B succeed in its application for summary judgment against G? The High Court disallowed B's application on the ground that B's inequitable and unconscionable conduct towards B was a factor that absolved G's liability in equity.

The Court of Appeal decided otherwise, allowed B's appeal and entered summary judgment. The terms and conditions of the personal guarantee had to be given a strict interpretation. G's liability thereunder was independent of the facility agreement hence any claim that ABN might have had in the separate suit against B would not discharge G from his obligation to pay. The complaints against B could be raised by ABN in its suit but they were not issues that affected G's liability under the guarantee. G had clearly contracted his rights as a surety away and he was precluded from contending that he was entitled to be discharged in equity. Further, G had contracted that all sums payable under the guarantee would be paid in full without any set off, counterclaim or condition whatsoever and that his liability would not be affected or discharged by any termination, amendment or variation of the security documents. Whatever claim ABN had against B had therefore no bearing on the guarantee. G was not merely a surety but a principal debtor/obligor who was primarily liable for the principal borrower's indebtedness to a lender whose liability was not dependent or secondary to the liability of the principal borrower. Indeed, the contract entered into between B and G was a contract of indemnity under which G had undertaken an original and independent obligation to indemnify as distinct from a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee. Thus, G was not entitled to be discharged from his liability despite the pending suit by ABN against B. The court also held, by *obiter dicta*, that the duty of good faith and fair dealing was not a suitable subject matter to be imposed on a banking transaction. B's appeal was allowed with costs.

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LAND LAW

INVALID RATES OF MAINTENANCE CHARGES AND CONTRIBUTION TO SINKING FUND

[i] [2022] 5 MLJ 393

The determination and imposition of the maintenance charges and the contribution to the sinking fund were the questions in *Yii Sing Chiu v Aikbee Timbers Sdn Bhd & Ors*[i]. During the preliminary management period[ii], the developer of a serviced apartment imposed maintenance charges at RM2.22 and contribution to sinking fund at RM0.30 in respect of apartment parcels; whilst maintenance charges at RM0.11 and contribution to sinking fund at RM0.06 in respect of commercial parcels. The learned Judge held that the developer had, by fixing different rates for apartment parcels and commercial parcels, contravened clause 19 of Schedule H of the Housing Development (Control and Licensing) Regulations 1989 and s.52(3) of the Strata Management Act 2013 (SMA). The rates must be the same during this period for all parcels whether it was an apartment parcel or a commercial parcel. The proprietors of the apartment parcels paid a massive RM2.2 per share unit for maintenance charges while the proprietors of the commercial parcels merely paid a token of RM0.11 per share unit. Apart from that, the calculation of the contribution to the sinking fund was also incorrect as it was not equivalent to 10% of the maintenance charges in violation of s.52(3) of the SMA. Therefore, the determination and imposition of the different rates of maintenance charges and contribution to the sinking fund between apartment parcels and commercial parcels by the developer was not valid in law.

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[i] [2022] 10 CLJ 650

[ii] The period commences from the date of delivery of vacant possession until one month after the management corporation held its 1st AGM.

DIRECTOR NOT LIABLE FOR TAX OF COMPANY PRIOR TO HIS BECOMING DIRECTOR

The extent of liability of a company director in respect of the tax imposed on the company was the core issue in the Court of Appeal (COA) case of *Government of Malaysia v Mahawira Sdn Bhd & Anor*[iii]. Under s.75A of the Income Tax Act 1967 (the ITA), where any tax is due and payable under the ITA by a company, any person who is a director of that company during the period in which that tax is liable to be paid by that company shall be jointly and severally liable for such tax that is due and payable. The term "director" means, among others, any person who is occupying the position of director and is the owner of not less than 20% of the ordinary share capital of the company. R2 was the 20% shareholder and director of the company R1 with effect from 19.12.2003. The appellant claimed against R1 being the company and R2 being a director of the company tax for the years of assessment 2001, 2002, 2003 and 2004. Insofar as R2 was concerned, the High Court gave judgment only for the tax for the year of assessment 2004 because R2 only became a director of R1 with effect from 19.12.2003.

On appeal, the COA affirmed the decision. R2 could not have been liable for the tax preceding his appointment as a director. Holding anyone responsible when he had not reached the stage to even ponder on the duties as a director, let alone actually undertaken the post, could no doubt be harsh and

[iii] [2022] 3 MLJ 1

unreasonable. The words "during the period" in s.75A(1)(a) of the ITA must mean only when R2 was made a director of R1. It was thus only logical that R2 could not be liable for the tax imposed on R1 for the years of assessment of 2001, 2002 and 2003.

In addition, there was the issue of limitation bar. The appellant relied on s.106(1) of the ITA to recover the tax due and payable as a debt due to the Government. Such claim was subjected to limitation of time of 6 years since the cause of action arose, under s.6(1)(d) of the Limitation Act 1953. Therefore, the appellant could not issue the notices of assessment in 2014 to claim for tax due and payable in 2001 to 2004.

Lastly, when R2 was appointed as a director on 19.12.2003, the statutory provision then defined a director as someone owning more than 50% of the ordinary share capital of the company. At that time, R2 did not own more than 50% of the ordinary share capital of R1. Therefore, R2 could not be held liable under the present s.75A(2)(b) of the ITA which had no retrospective effect.

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INTOXICATED PASSENGER AND DRIVER IN CAR ACCIDENT: ANY CONTRIBUTORY NEGLIGENCE?

Whether a passenger is able to rely on his own intoxication (and consequential lack of insight) to avoid finding of contributory negligence or reduce apportionment of responsibility in a case where the passenger was injured in car driven by an intoxicated driver is the question in *Campbell v Advantage Insurance Co Ltd*[i]. The claimant, L, was a back seat passenger in a car driven by his friend, D, in a high speed collision with a lorry. D died in the collision whilst L suffered catastrophic injuries. Prior to the accident, L, D and A (D's brother) had been drinking at a nightclub. L had become very drunk and D and A had walked him back to the car and placed him in the front passenger seat. The brothers had then gone back to the club, continued drinking and returned to the car about an hour later. A had returned to the club in search of some jump leads to start the car but when he returned, he found that the car had gone. It would appear that at some point, L had moved to the back passenger seat.

The trial Judge found it to be unlikely that L could have sobered up sufficiently to execute those manoeuvres on his own, rather it was far more likely that D had assisted him back into the back seat. L must have been awake as he had been moved, as it would not have been possible for D to move him into the back of the car without his assistance. L should have appreciated that D had drunk too much alcohol to be fit to drive and assessed L's contributory negligence at 20%.

[i] [2022] 4 All ER 1007

On appeal to the UK Court of Appeal, it was remarked that drunkenness of the passenger would not avoid a finding of contributory negligence. The fact that a claimant was drunk was not a characteristic that could be taken into account in deciding whether he took reasonable care for his own safety. If an ordinary reasonable person would have known that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who was sober enough to enter the car voluntarily was guilty of contributory negligence.

The test of whether a person has breached a duty of care in negligence is an objective standard which is that of a reasonable, prudent and competent man. Such a man in L's position would have appreciated that D had drunk too much to drive safely. The finding of contributory negligence had thus been properly made by the judge.

The appellate court had also observed that a person who while unconscious through drink was put by others into a car which was then driven by an (evidently) drunken driver would not be guilty of contributory negligence because he had done no voluntary act; he would not have consented to being driven at all. On the other hand, a person who was not totally unconscious might nevertheless be in a state where he was incapable of making a decision. The decision where exactly to draw the line between voluntary and involuntary conduct – between consent (albeit drunken consent) and no-consent – in a particular case is a fact-sensitive question which must, within reasonable limits, be left to the trial judge. The appellate court did not interfere with the findings of the trial judge whose decision was affirmed.

LACK OF DRIVING LICENCE, ROAD TAX OR MOTOR INSURANCE ON FINDING OF CONTRIBUTORY NEGLIGENCE

The implication of the non-possession of driving licence and road tax and the absence of a motor insurance policy on the finding of contributory negligence of a motorcycle rider in an accident with a motorcar was the point on illegality raised by the High Court (HC) in *Ahmad Zulfendi Anuar v Mohd Shahril Abdul Rahman*[i]. The appellant (A) was riding a motorcycle when he collided with a motorcar driven by the respondent (R). At the Sessions Court, the trial judge apportioned liability between the parties at 70% against R for being responsible for the collision and 30% against A for contributory negligence. On appeal at HC, the Judicial Commissioner imposed an additional 30% contributory negligence on A, on account of A riding without a valid driving licence, road tax and insurance at the material time as a result of which the apportionment of liability between R as the tortfeasor and A became 40%:60%.

[i] [2022] 9 CLJ 307

The Court of Appeal reversed the HC's decision. The appellate court acknowledged the maxim *ex turpi causa non oritur actio* which means that public policy would defeat any claim which is premised on illegality. However, a balance must still be drawn on specific facts and circumstances of each case. While violation of traffic laws must only be dealt with under the specific laws such as Road Transport Act 1987 (RTA), the RTA does not contain any provision which restricts, let alone prohibits, the rights of any road user from making personal injury claims by reason of the claimant breaching the RTA, including in respect of the requirement for holding the requisite driving licence, road tax and vehicle insurance. The breaches [absence of licence, road tax or insurance] must be established to have been a contributing cause (causal connection) to the accident causing the injuries sued for or somehow the proximate cause of the same. The lack of licence *per se* (and for that matter, road tax or vehicle licence) could not be the proximate cause. Thus, the non-holding or non-existence of such licence, road tax or insurance ought not to be factored into increase of liability. As such, the additional 30% liability apportioned by the HC could not stand and the original apportionment at 70% against R and 30% against A was restored.

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TORT

POLITICAL PARTY HAS NO REPUTATION TO PROTECT

In a ground-breaking decision, the Federal Court ruled in *Lim Lip Eng v Ong Ka Chuan (as a public officer of a society registered as Malaysian Chinese Association*[i] that a political party could not sue for defamation in Malaysia. The Malaysian Chinese Society (MCA) as a political party registered under the Societies Act 1966 could not maintain a legal suit for defamation against the appellant as it had no requisite reputation to constitute a cause of action for defamation and for and over which it could go to court to sue to protect. Unlike incorporated bodies or companies which had separate legal identities from its shareholders, a society like the respondent did not have a legal identity of its own. A company was able to possess or own property, could sue and be sued in its own name and had a reputation generally related to its trade or commerce for which it might sue to protect. A society on the other hand depended on its members to sue. It was not a legal entity and could not sue or be sued in its own name[ii]. Since the respondent had no existence separate from its members, it could not assert any reputation. The *Derbyshire* principle, as propounded in UK that on grounds of public interest, accountability, transparency and protection of the right to free speech, a local authority or government body could not sue for defamation[iii], and as extended to political

[i] [2022] 4 MLJ 454
[ii] See s.9(c) of the Societies Act 1966
[iii] *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011

parties in *Goldsmith & anor v Bhoyrul & Ors*[i] and *R Rajagopal @ PP Gopal @ Nakheeran Gopal v Ms J Jayalalitha*[ii] were applicable with equal persuasion. A political party relied on the public to get their votes to be in power. It put itself forward for office or to govern and be responsible for public administration. It was thus not right nor in the public interest to put the public in fear of a defamation suit or to prevent them from expressing their views or making criticisms or voicing out opinions. To allow that to happen went against the true value of democracy. In a free democratic society in Malaysia, a political party must not be thin-skinned and must always be open to public criticisms. However, the apex court pointed out that the individual members of a political party retained a right to sue (if they could prove that they were injured) but insofar as the political party was concerned, it could always 'answer back through public announcements', press conferences or press statements or such similar social media.

The apex court however refused to revisit its earlier decision in *Chong Chien Jen v Government of State of Sarawak & Anor*[iii] on the ground that the issue there was whether the Sarawak State Government had a right to sue for damages for defamation and not as in *Lim Lip Eng* here whether a political party could maintain a suit for defamation. Under the Government Proceedings Act 1956, the government has a statutory right of action to sue in civil proceedings and such a cause of action includes actions for defamation. The apex court also pointed out their recent decision in *Lim Guan Eng v Ruslan bin Kassim and another appeal*[iv] in which it was held (by majority) that the appellant (who was then the Chief Minister of Penang and a Member of Parliament) was suing in his individual capacity as a private citizen and not in his official capacity as the Chief Minister or the state government and as such, he was entitled to sue to protect his personal reputation. The facts and principles are therefore distinguishable from *Lim Lip Eng*.

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[i] [1998] QB 459
[ii] [2006] 2 MLJ 689
[iii] [2019] 3 MLJ 300
[iv] [2021] 2 MLJ 514