THE UPDATE

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Our "THE UPDATE" quarterly publication is back! As usual, we bring you highlights on civil, commercial and corporate laws as decided by the Malaysian superior courts as well as the industrial tribunals. Happy reading!

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FRAUDULENT TRADING BY DIRECTORS

Directors and shareholders are reminded that they cannot conveniently hide behind the corporate veil to escape liability but will indeed be held personally answerable for their company's debts if found guilty of 'fraudulent trading' under s.540 of the Companies Act 2016 (CA2016).

(1) High Court decision *in Eastmont Sdn Bhd v Tay Keong Kok & Ors*[i]

In *Eastmont*, the defendants were the common directors and shareholders of two companies, MP and Dakota. MP awarded the plaintiff (P) a construction contract. P completed the works but MP failed to pay a balance of RM12 million. P naturally sued MP for the said sum. It was discovered that MP and Dakota shared the same business address. Shortly after the cause papers were served on MP, P was notified by Dakota's solicitors that Dakota had obtained a default judgment against MP and had gotten MP wound up pursuant thereto. With the leave of the court, P also obtained a default judgment against MP. Thereafter, P filed a suit under s.540 of the CA against the defendants on the ground that they had jointly and severally carried on business with intent to defraud creditors; specifically, they had used Dakota to wind up MP so that MP would not have to pay its debt to P. The court was urged to lift the corporate veil.

The court found that the defendants had failed to show any proof that MP had genuinely owed Dakota monies in order for Dakota to sue MP for that sum. MP deliberately allowed judgment in default of appearance to be entered against it for that sum which then became the basis for Dakota to petition for MP's winding up. Financial reports showed that MP had substantial current assets and made handsome profits after tax. There was thus no reason for Dakota to wind up MP. In the court's finding, the winding up was to defraud MP's creditors, especially P and was a sham and an abuse of process of court whereby the defendants had wrongfully and fraudulently conspired with the sole intention of injuring MP's creditors by denying them the payment of their debts. The business of MP was carried out with the intent to defraud P and the defendants were knowingly parties in carrying out that fraudulent purpose in planning the entire process from the entering of the default judgment against MP to its winding up. Section 540 of the CA 2016 was invoked to ensure the principle of separate legal personality and limited liability were not wrongfully taken advantage of[ii]; and the defendants were accordingly held to be jointly and severally personally liable to P for the debts of MP.

(2) Federal Court decision in Lai Fee & Anor v Wong Yu Vee & Ors [iii]

In *Lai Fee*, the defendants wished to acquire the timber logging rights in an area in Gua Musang which were vested in Fave Enterprise (Fave), a partnership comprising the 1st and 2nd plaintiffs (P1P2). The defendants negotiated with P1P2 to transfer their business in Fave to Centennial Asia S/B (Centennial) for RM7 million vide a sale and purchase agreement (SPA). Although

[i] [2022] 10 MLJ 349

[ii] See also cases such as *Gurbachan Singh Bagawan Singh* [2015] 1 MLJ 773, FC ; *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd* [2015] MLJU 2247 ; *Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor* [2015] 4 MLJ 85, CA *; Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622, FC

[iii] [2023] 3 MLRA 495

Centennial was the designated buyer under the SPA, the defendants immediately procured the registration of themselves as the new partners of Fave with P1P2 relinquishing their interests. Pursuant to the SPA, the purchase price was to be paid in 3 tranches. The defendants procured another company, Westhill to pay the initial 2 tranches. Later, Centennial defaulted in paying the final balance purchase price of RM2.5 million (BPP). P1P2 filed a suit and obtained judgment against Centennial which failed to pay the BPP. P1P2 then brought a suit under s.540 of the CA2016 against the defendants for fraudulent trading. Both the High Court and Court of Appeal[i] ruled against P1P2. The final appeal however was in favour of P1P2.

The pinnacle court held that the scheme orchestrated by the defendants was obviously to insulate themselves against any personal liability for the purchase of Fave. P1P2 had been induced to agree to the immediate transfer of their interests in Fave to the defendants on the representation that the BPP would be paid by Centennial in the future. But, both Centennial and Westhill were dormant companies intended to create corporate layers to obfuscate the defendants from the transaction. There was no prospect of Centennial to pay the BPP; Westhill was not a party to the SPA. What was done was dishonest on the ordinary standards of reasonable people. The fact that Centennial and Westhill were utilized as layers to insulate the defendants led to an inference that the defendants must have known that their act was by those standards dishonest. Given the fact of the defendants' participation in the SPA transaction at negotiation stage, execution stage and post-SPA stage, they were the real controlling arm behind both Centennial and Westhill. In the circumstances, the answer to the question posed was affirmative – where a vendor agreed to the immediate transfer of an asset to a company relying on the representation of the company that the balance purchase price would be paid in the future and the company subsequently failed to pay the balance purchase price, the directors of the company were *ipso facto* liable to the vendor under s.540 of the CA 2016.

The Federal Court allowed the appeal and set aside both the High Court and Court of Appeal decisions.

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COMPANY LAW

SUCCEEDING ON A SINGLE COMPLAINT IN A S.346 OPPRESSION SUIT

Low Ean Nee v Low Cheng Teik & 3 Ors[ii] is a case on oppression under s.346 of the Companies Act 2016. There were 3 grounds advanced by the appellant/plaintiff : (i) allegations of 32 forged board of directors' resolutions of the company using the forged signature of the appellant for the past 10 years for personal gains of the 1st to 3rd respondents/directors; (ii) mismanagement of company accounts involving the tampering of the company's financial accounts for 10 years; and (iii) diversion of the company business and

[i] [2022] 5 MLJ 1

[ii] [2023] 2 AMR 541

assignment of its trademark to another company which was 50% controlled by the 1st respondent's daughter at nominal consideration.

The Court of Appeal held that the appellant had failed to prove ground (i) and (ii) but succeeded on ground (iii). It was the finding of the appellate court that there was no proper or reasonable explanation for the company's board of directors' resolution to grant the consent to the other company to use the trademark. The actions of the 1st to 3rd respondents were calculated to benefit them indirectly via other corporate entities controlled by or related to them to the unfair prejudice of the appellant who was a substantial shareholder of the company. The assignment of the trademark smacked of non-compliance of norms of fair dealing and violation of conditions of fair play. There was thus oppression on the appellant by the 1st to 3rd respondents. It was held that it was sufficient for the appellant to justify her case by having only established a singular complaint amongst a host of other complaints. The critical factor that counted was the materiality and efficacy of the complaint.

Orders were made against the 1st to 3rd respondents to purchase all the appellant's shares in the company at a price to be ascertained by an independent auditor to be agreed upon by parties failing which PricewaterhouseCoopers or EY or KPMG, based on international standards of accounting and valuation concerning a similar business as a going concern.

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COMPANY LAW

CLASSIFICATION OF SCHEME CREDITORS FOR A S.366 SCHEME OF ARRANGEMENT

How scheme creditors are segregated and placed in different classes under a scheme of arrangement undertaken pursuant to s.366 of the Companies Act 2016 (CA2016) (formerly s.176 of the Companies Act 1965) may well determine the success or failure of the scheme; as highlighted recently in 2 cases: *BGMC Holdings Bhd v Fulloop Sdn Bhd & Ors*[i] ("*BGMCHB*") and *MDSA Resources Sdn Bhd v Adrian Sia Koon Leng*[ii] ("*MDSA*"). Generally, a company in debt may resort to taking out a scheme of arrangement to restructure its financial obligations with a view to paying out the affected creditors a higher return than they would in a liquidation scenario, hence a win-win situation. For such a scheme to take effect, it has to be first approved by the requisite majority [in numbers and in value] of creditors or class of creditors (in the court-convened meeting) followed by the sanction of the court[iii] of which will only be issued if, *inter alia*, these two tests are satisfied:

(i) whether the class of creditors was fairly represented by those who attended the meeting and that the statutory majority were acting *bona fide* and were not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent; and
(ii) whether the scheme of arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.[iv]

(1) ***BGMCHB***

In *BGMCHB*, the relevant issue was whether in a scheme of arrangement, the related scheme creditors of the company must be placed in a different or separate class from the rest of the scheme creditors. The classic test for identifying classes is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interests.[v] In this case, *BGMCHB*, the applicant of the scheme, was the sole shareholder of the subject company, BGMCCSB ("Subject Company"). In the proposed scheme of arrangement, all the creditors, (whose debts were incurred for providing goods and services for projects that had been completed or handed over or terminated totalling RM199.142 million), both related and non-related to the Subject Company, had been lumped under one single category i.e. Category A, namely:

Related companies:	*Debt amount*
BGMCIL (ultimate holding company of the Subject Company)	RM124.987 million
BME (subsidiary of Subject Company)	RM1.387 million
BMEE (subsidiary of Subject Company)	RM0.735 million
Non-related:-	
Other creditors	RM72.033 million

The High Court held that the similarity of rights was to be tested upon the rights of each creditor in the event of liquidation, i.e. whether the rights of these creditors were similar in a liquidation scenario. In short, regardless whether related or not to the Subject Company, all these creditors would in liquidation rank in *pari passu* as their debts were unsecured. The Court further held that the legal rights of the ultimate holding company against the Subject Company were the same as those of other unsecured creditors. They thus ought to be classified in one single class. In the view of the learned Judge, it was unavoidable in some cases that the company undergoing restructuring under s.366 would have related party creditors but this did not necessarily mean that those creditors should be treated differently or classed separately when their rights against the company were the same as the other non-related party creditors, The classification of scheme creditors was based on their 'rights' against BGMCCSB and not their 'interests'[vi].

The objection that BGMCIL, the ultimate holding company and 2 subsidiary companies have a 'special interest' in ensuring the Subject Company's continued survival and hence, clashed with the interests of the class as a whole was rejected by the Court as it held that classification of scheme creditors was, at the risk of repetition, based on their "rights" and not their interests'[vii].

The learned Judge also pointed out that the amount owed by the Subject Company to its subsidiaries was only about 0.8% of the total scheme debts. Since the majority of the scheme creditors were not subsidiaries or related party companies of the Subject Company, they could have by majority caused the scheme to fail by voting against it but they did not.

(*Note*: With due respect, on the facts, the amount owed collectively to the related companies by the Subject Company made up of 63.829% of the total amount owing to Category A scheme creditors. Unfortunately, it was held that there was no evidence that BGMCIL was a subsidiary of BGMCCSB or BGMCCSB was in control of BGMCIL or vice versa but mere speculation.)

(2) *MRSB*

Three months later, the Court of Appeal appears to have shifted its ground in MRSB. In this case, all the creditors of MRSB were likewise grouped together under a single class in its proposed scheme of arrangement under s.366 of the CA2016; comprising both related and non-related companies of MRSB (as per the above case) as follows :-

> *Related companies:*
> Harten Group ("HGS Creditors") totalling 19 in numbers with value of RM276.084 million (constituting 73.8% of total debt owed by MRSB)
> *Non-related companies:*
> 3rd Party Creditors totalling 1,636 in numbers with value of RM98.104 million (constituting only 26.2% of total debt owed by MRSB)

The court-convened meeting was held and the scheme was approved by 90.4% of the scheme creditors. However, the High Court refused to sanction the scheme. On appeal, the Court of Appeal affirmed the decision. In the appellate court's view, the HGS Creditors were the dominant group but they were all related to MRSB as they comprised MRSB's ultimate holding company, holding company, subsidiaries, directors and related parties with common directors. They would obviously be in favour of the scheme. On the other hand, the 3rd Party Creditors were not related to MRSB and had disparate and distinct interests from HGS Creditors. They would obviously be keen to safeguard their interest, including preserving their right to recover maximum debts owed to them by MRSB compared to HGS Creditors. The HGS Creditors outnumbered the 3rd Party Creditors who, because of their relative number to the former, would not be able to cogently challenge the HGS Creditors who, because of their sheer number, would effectively and decisively vote in favour of the scheme. Therefore, the composition of the class of creditors to constitute a single class was unfair, uneven and lop-sided and could not be regarded as fairly representative of the class in question. In arriving at the decision, the court cited in reliance the decision of the Court of Final Appeal in Hong Kong in *Re UDL Holdings Limited*[viii] which set out the principles, among others, as follows:

> "... (2) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting...
>
> (6) The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end, it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question."

The court also cited the decision of the Singapore Court of Appeal in *The Royal Bank of Scotland NV v TT International Ltd*[ix] that the votes of wholly-owned subsidiaries companies and related party creditors should be totally discounted for a scheme of arrangement.

(3) View

In the light of the Court of Appeal stance in *MRSB*, it is prudent to read *BGMCHB* with a pinch of salt.

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[i] [2023] 2 CLJ 558
[ii] [2023] 3 CLJ 191
[iii] Section 366(4) of CA2016
[iv] *Transmile Group Bhd & Anor v Malaysian Trustee Bhd & Ors* [2012] 9 CLJ 1071
[v] *Sovereign Life Assurance v Dodd* [1892] 2 QB 573
[vi] See also *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] SGCA 23, *Airasia X Bhd v BOC Aviation Ltd & Ors* [2021] 10 MLJ 942.
[vii] See also *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] SGCA 23, *Airasia X Bhd v BOC Aviation Ltd & Ors* [2021] 10 MLJ 942.
[viii] [2002] 1 HKC 172
[ix] [2021] 2 SLR 213

NO GENERAL DUTY OF GOOD FAITH TO BE IMPLIED IN COMMERCIAL CONTRACTS

In *Hewlett-Packard (M) Sdn Bhd & Anor v Agih Tinta Sdn Bhd*[i], A1 and A2 were part of the Hewlett-Packard Group of Companies (HP) with A1 in enterprise products and services business and A2 dealing in personal computers and printers. R was in the business of selling and supplying all types of office stationaries and IT consumables. In Asia, HP implemented a Most Valuable Customer (MVC) Programme under which MVC resellers were appointed to supply to end-users HP products which they would buy from identified authorized distributors of HP. R was one such MVC reseller which bought all its HP products from a company named Sunlight. Sunlight eventually entered into a contract with A1 to become a HP partner. However, following a regional policy change that required all MVC resellers to be either HP partners in their own right or affiliates of an existing HP partner, Sunlight via an addendum to its partner agreement with A1, named R as its affiliate. When Sunlight's contract as HP partner was eventually terminated, A2 notified R that its status as MVC reseller also ceased since R was no longer affiliated to any HP partner. This resulted in R suing A1 and A2 for breach of its letter of appointment (LA) and wrongful termination of the MVC reseller agreement and sought damages.

The High Court ruled in favour of R on the ground that due to the long-standing business relationship between A1 and R, A1 had a contractually implied duty of good faith and honesty to ensure R's status as MVC reseller continued to subsist, unless there was proven misconduct.

On appeal, the decision was overturned. It was held that there was no obligation of good faith given that the terms of the contract and the facts of the case did not warrant such an obligation or duty to be implied. Decided cases[ii] have shown that no general duty of good faith could be implied in commercial contracts and the court should be slow to imply such a duty. There was also no special relationship that existed between parties such that A1 had reposed trust in R. It was purely commercial and non-exclusive. In the view of the appellate court, the contractual relationship between the parties was based on the LA and the MVC reseller agreement, both of which required the reseller to have a HP partner agreement in order to continue as a reseller. As R did not have an HP partner agreement, it rode on the addendum to Sunlight's HP partner agreement as an affiliate to qualify to be a MVC reseller. When this was terminated, R's position as MVC reseller had to cease because the underlying basis for that status, which was Sunlight's HP partner agreement, no longer subsisted. R was

[i] [2022] 6 MLJ 853

[ii] The case relied heavily by the High Court, *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) must be read with care due to subsequent cases which appear to show reticence in implying the duty of good faith into commercial contracts.

not a stand-alone entity but was tied to Sunlight as an affiliate. On that score, the appeal was allowed.

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COURT PROCEDURE

SUING UPON FOREIGN JUDGMENT

What may seem to be technicality becomes fatal non-compliance, that would be the sum-up in the recent Federal Court case of *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LCC & Anor*[i] . The applicant/claimant had obtained a judgment in default in the Abu Dhabi Court of First Instance, United Arab Emirates (UAE) (Abu Dhabi Judgment). However, UAE is not a reciprocating country listed under the First Schedule to the Reciprocal Enforcement of Judgments Act 1968 (REJA). Under REJA, there can be direct execution of a foreign judgment obtained from any of the countries listed under its First Schedule. However, in the case of foreign judgment from non-REJA country such as the present case, the claimant will have to file a suit to sue in common law upon the foreign judgment[ii]. The foreign judgment is treated as an implied obligation to pay a debt i.e. the sum awarded by the foreign court upon which the debtor can be sued on our shores.

The claimant did that. However, only a copy of the Abu Dhabi Judgment (which was in the Arabic Language) was produced, by accompanying each of the 3 translations in English. The fourth translation was incomplete as it translated only the first page of the Abu Dhabi Judgment. An original copy of the Abu Dhabi Judgment was never produced.

It was held that since only a copy of and not the original Abu Dhabi Judgment was exhibited and that exhibited copy was furthermore not certified, verified or authenticated in the manner prescribed under the Evidence Act 1950 (EA), there was no proof of the document central and critical to the underlying cause of action. That was fatal notwithstanding the inclusion of the exhibit copy in Part B of the Bundle of Documents (where authenticity of documents is agreed between both parties of the suit) which did not however render an inadmissible document admissible[iii]. Absent the Abu Dhabi Judgment, the claim of the applicant remained unproven and failed. In other words, in order for a foreign judgment to be enforceable by a common law action in Malaysia (the foreign country not being a First Schedule country under the REJA), the judgment must be proved as a foreign judgment in accordance with the EA[iv]. Without the Abu Dhabi Judgment being proved in accordance with the EA, there was no sustainable cause of action.

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[i] [2023] 3 MLRA 1

[ii] Alternatively, the claimant can opt to sue upon the underlying cause, be it in tort, contract or for any other complaint without relying on the foreign judgment.

[iii] Inadmissible evidence remains inadmissible even if no objections were taken by the parties; more so when erroneously admitted contrary to the relevant principles: see *Malaysia National Insurance Bhd v Malaysia Rubber Development Corporation*[1986] 1 MLRA 103.

[iv] Relevant provisions such as ss 74, 78 and 86 of EA.

NO JUSTIFICATION IN AWARDING GENERAL, AGGRAVATED AND EXEMPLARY DAMAGES

In *Big Junkyard Sdn Bhd & Anor v Chan Kah Wai*[i], measure of damages for fraudulent misrepresentation by the defendants to induce the plaintiff to enter into a sub-tenancy agreement which the plaintiff otherwise would not have done was in issue. In contract, generally the damages recoverable are limited to what may reasonably be supposed to have been in the contemplation of the parties. However, in fraud, the defendant is bound to make reparation for the actual damages directly flowing from the fraudulent inducement and is not limited to those which are reasonably foreseeable. This was laid down in the authoritative decision of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd*[ii] approved by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*[iii]. Our Court of Appeal has followed the principles, see *Sim Thong Realty Sdn Bhd v Teh Kim Dar*[iv].

In *Big Junkyard*, the High Court on appeal affirmed the decision of the Sessions Court Judge in awarding restitutionary damages except for failing to take into account the amount that was received for furniture sold (benefit). The learned Judge however over-turned the global award consisting of 3 heads of damages namely general damages, aggravated damages and exemplary damages. Firstly, there was no evidence of general damages produced at the trial. Secondly, aggravated damages as a specie of compensatory damages are awarded as additional compensation where there has been intangible injury to the interest of personality or feelings of the plaintiff and where his injury has been caused or exacerbated by the exceptional conduct of the defendant[v], such as high-handed or malicious act or an act done in an oppressive manner. The facts of the case at hand did not make out a case for aggravated damages. There was nothing exceptional about the action of the defendants; no evidence of offensive conduct or arrogance or insolence of motive or being motivated by malevolence or spite. Thirdly, the purpose of exemplary damages is to show the court's abhorrence to outrageous conduct which is punishable. In seeking for such damages, the plaintiff must first show that his case fails within one of the 3 categories enunciated in *Rookes v Barnard*[vi], namely (i) oppressive, arbitrary or unconstitutional action by the servant of the Government; (ii) where the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff; or (iii) where exemplary damages is expressly authorized by statute[vii]. Thereafter, the plaintiff must show "outrageous" conduct. In the case at hand, the plaintiff failed in bringing himself within any of the categories and also failed to show "outrageous" conduct. Therefore, the High Court set aside this part of the decision of the lower court.

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[i] [2023] 1 CLJ 564
[ii] [1969] 2 WLR 673
[iii] [1996] 4 All ER 769
[iv] [2003] 3 CLJ 227. See also *Kee Wah Soong* [2018] 1 LNS 1284
[v] See *Sambaga Valli KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors* [2017] 1 LNS 500
[vi] [1964] AC 1129
[vii] See *Koperal Zainal Mohd Ali & Ors v Selvi Narayan* [2021] 6 CLJ 157 (FC); *Tenaga Nasional Bhd v Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179

1. NEGOTIATED FOR A "FORCED" RESIGNATION

In *Matrix Global Education Sdn Bhd v Felix Lee Eng Boon*[i], R who was a CEO of the company under a fixed term employment was reassigned to a new post but the offer was withdrawn after the company received information on his involvement in certain irregularities. R was advised to resign and informed that he would be given 6 months salary in lieu of the notice. R entered into a series of negotiations with the company to achieve a better severance package for his resignation. R then tendered his resignation in cordial language and thanked the company for the opportunity to work with them and expressed his intention to assist the company in the future. However, R subsequently filed an action before the Industrial Court (IC) contending he was forced to resign and the terms did not bar him from claiming constructive dismissal. Both the IC and the High Court decided in favour of R. The Court of Appeal however set aside the award and order. It was held that R's conduct in entertaining and entering into negotiations for settlement on terms does not fit snugly and indeed cannot support what he later asserted at the IC that he had been constructively dismissed. R could not have the best of both worlds; negotiating and accepting terms of a separation and then claiming constructive dismissal. With his legal training, R would be conscious of his rights under the law and would not have caved in into resigning just because the managing director said so. In the view of the appellate court, he could have refused to resign at that suggestion and treated himself as constructively dismissed. But the moment he put in his letter of resignation coupled with thanking the company and offering to help in the future were all the language of conciliation and closure with no trace of resentment or recrimination. **A resignation made pursuant to a series of negotiations completely negates the allegations of forced resignation**. The award founded on constructive dismissal therefore could not stand and had to be quashed. Even if, as alleged, there was a fundamental breach of the employment contract, R's delay in treating himself as being constructively dismissed and his actions of entering into negotiations with the company through his e-mails reinforced the fact that he had affirmed the breaches of the company.

2. WHEN TO OBJECT TO JURISDICTION

This was the main issue in the High Court case of *Ng Boon Leh v Malaysian-American Commission on Educational Exchange (MACEE) & Anor*[ii]. The Applicant was an employee of the 1st Respondent (MACEE) which was a Binational Commission established by way of an agreement between the Governments of Malaysia and the USA with the main functions of administering the Fulbright grant programs in Malaysia and advancing binational and cultural exchange. His employment was terminated and he claimed unlawful dismissal. The Minister of Human Resources Malaysia referred the matter pursuant to s.20(3) of the Industrial Relations Act 1967 (IRA) to the Industrial Court (IC) for determination. At the outset of the hearing before the IC, MACEE raised a preliminary issue on jurisdiction of the IC. It was MACEE's contention that s.52(1) of the IRA is applicable which provides that the jurisdiction of the IC under Part VI (Representation of Dismissal) does not apply extend to employment by statutory authority or Government employment. Although the IC

[i] [2023] 2 AMR 20

[ii] [2022] 4 ILR 26

upheld such contention, the High Court allowed the Applicant's application for judicial review to quash the IC decision. It appears from the High Court decision that the challenge on such jurisdictional issue ought to have been taken EITHER against the Minister's reference by seeking to quash the reference by way of a *certiorari* at the High Court and for an order of prohibition against the IC with the Minister as a party OR substantively as part of the entire hearing of the applicant's claim at the IC. In other words, such challenge could not be done by way of a preliminary issue before the IC. This had indeed been established in cases such as *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*[i] and *Assunta Hospital v Dr A Dutt*[ii]. The IC should have therefore heard the dispute in its entirety on merits where MACEE bore the burden of proving the applicability of s.52(1) of the IRA. In this respect, from the decided cases, the mere fact an entity is established by the Government does not render a person a Government servant; the mere fact that MACEE was established by the 2 Governments could not render MACEE a Government entity. Relevant evidence must be given at the trial before the IC on the true nature of the Applicant's employment as well as MACEE's formation in order to determine as to whether he was a Government employee within the ambit of s.52(1) of the IRA.

The High Court went on to reiterate that the IC could not abdicate its statutory duty to hear the entire reference on its merits unless there is a clear violation of s.20(1A) of the IRA which prescribes the time limit for the filing of representation of unlawful dismissal with the Director-General where, in such circumstances, the Minister obviously has no power to confer threshold jurisdiction upon the IC.

3. IMPORTANCE OF REPLYING TO SHOW CAUSE LETTER

The Industrial Court award in *Kathirayan Arumugam v Carrier International Sdn Bhd*[iii] drives home the message that an employee must reply to a show cause letter issued by his employer. In the case, the company had served on the employee 2 show cause letters (being at the rest area during working hours and breaching the smoking rules laid out during the Conditional Movement Control Order (CMCO) period and not wearing a mask at his workstation). There was no response from him. Such failure to respond was held to have demonstrated insolent behaviour that had been detrimental to the company's discipline. The company was correct to conclude that his failure to respond had proven his guilt to the charges stated therein.

4. SALARY REDUCTION WITHOUT EMPLOYEE'S CONSENT

In the Industrial Court award in *M Kohmala Laxmi Manickavasagar v Prometric Technology Sdn Bhd*[iv], due to the Covid-19 pandemic, some employees of the company were furloughed to enable the company to survive. The claimant was duly informed that she would be put on unpaid leave and asked to sign her acceptance and agreement to the unpaid leave which she refused. She was put on continuous unpaid leave and eventually she wrote to the company asking for her unpaid leave to be uplifted. The company did not accede to her request which culminated in her walking out claiming constructive dismissal. It was held that there was no justification that the claimant was temporarily redundant (as alleged by the

[i] [1997[3 CLJ 777 (SC)
[ii] [1980] 1 MLJ 96
[iii] [2022] 4 ILR 70
[iv] [2002] 4 ILR 91

company) or to put her on unpaid leave. It had been the unilateral action on the part of the company without her prior and informed consent, which had been the prerequisites for the voluntary acceptance of an unpaid leave scheme. It is trite that the unilateral reduction of salaries would be considered as a unilateral variation of the terms of the contract of employment which amounts to a fundamental breach that goes to its root thereby entitling the employee to claim for constructive dismissal.

5. ODD JOBS NOT POST-DISMISSAL GAINFUL EMPLOYMENT FOR MITIGATION PURPOSE

The claimant in *Nor Awallizan Dollah v Zurich General Insurance Malaysia Bhd*[i] initially lost her unfair dismissal claim at the Industrial Court (IC). He however succeeded at the High Court to quash the decision and further appeal by the company was dismissed. Consequently, the case was remitted to the IC for the determination of the reliefs to be awarded. In relation to compensation *in lieu* of reinstatement, he was awarded 4 months of his last drawn salary considering the fact that he had been employed for 4 years, applying the usual multiplier of one month's wages for every year of service. In relation to backwages from the time of his dismissal to the time the matter had been remitted, more than 24 months had passed hence he was awarded 24 months pursuant to para 1 Schedule 2 of the IRA. As to the post-dismissal employment income as a measure of mitigation, he had been unable to secure a job as evident from his EPF statements which had shown no income. Whilst he had been doing some odd jobs such as driving as a Grab driver and doing deliveries, the High Court decision in *Loh Guet Ching v Menteri Sumber Manusia & Ors*[ii] had held that e-hailing drivers are not employees or workmen within the strict parameters of the IRA. As such, he could not be said to have been in gainful employment post-dismissal. As to the contention that he had been sufficiently remunerated post-dismissal as he had withdrawn his EPF savings, such savings are individual savings for retirement and it had been preposterous to suggest that he ought to have mitigated his situation by utilising his own lifetime savings to compensate himself from the unfair dismissal. That said, he did receive some income from his odd jobs and as such, a nominal reduction of 5% for post-dismissal earnings was imposed.

6. DISPROPORTIONATE PUNISHMENT FOR DISHONESTY AND LACK OF INTEGRITY

The Industrial Court award in *Tasrin Ojo v Boulevard Motor (Sabah) Sdn Bhd*[iii] is an interesting one. The claimant had admitted to have consistently taken leave on Fridays and Mondays to correspond with weekends. The charge of patterned leave usage levelled against him was made out. Likewise, the charge that he had overused his leave in excess of his contract entitlement. Similarly, the charge that he had

[i] [2022] 4 ILR 338

[ii] KLHC Judicial Review Application No. WA-25-296-10/2020

[iii] [2022] 4 ILR 357

abused his medical benefits including taking medication under his wife's and children's name without taking them to the clinic. After considering the facts that (i) he had been given less than 24 hours to prepare for the domestic inquiry; (ii) he had served the company for over 23 years with a clean disciplinary record; (iii) his excessive leave and patterned leave usage had been approved by the company; (iv) his payslip had reflected that deductions to his pay had been made for his taking of unpaid leave and (v) he had not been put on a performance improvement program prior to his dismissal, his dismissal had been held to be disproportionate to his misconduct. The IC held that the company ought to have imposed other lesser forms of punishment. He was therefore dismissed without just cause or excuse. In ordering other remedies, the IC made a deduction of 40% for the claimant's contributory conduct. Be that as it may, one must not read too much into the case. It must be borne in mind that whilst the IC is duty-bound to do a balancing exercise by taking into account various factors[i] in considering whether the employee's act or omission qualifies as a misconduct, honesty and integrity (apart from competence) are amongst the key characteristics that the claimant should possess[ii]. The charges established against the claimant had, in our considered view, struck right at the core of dishonesty and lack of integrity bordering cheating and deception. With due respect, the misbehaviour of the claimant warrants the serious punishment of dismissal.

7. IMPORTANCE OF STATING REASONS FOR TERMINATION

The importance of setting out in full the reasons for termination of an employee in the termination letter cannot be emphasized enough. This message was reiterated in the Industrial Court award in *Somyanarain Nalla Pillai Munusamy v Limkokwing University of Creative Technology*[iii] which drew guidance from the authoritative cases of *Maritime Intelligence Sdn Bhd v Tan Ah Gek*[iv] and *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd*[v]. The court can only enquire into the reason for termination based on matters and events occurring at the time of dismissal as stated in the termination letter and not those subsequently raised in pleadings. In the instant case, the company had pleaded repugnant misconduct involving alleged Muslim sensitivities on religion and race, but it was not stated in the termination letter. By keeping silent on it and later springing it on the claimant by surprise in its pleadings, this had run contrary to the above principle.

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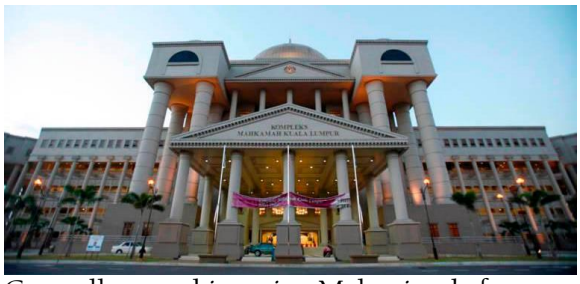
EMPLOYMENT LAW

DIFFICULTY IN SACKING POOR PERFORMER

The High Court case of *Astro Radio Sdn Bhd v Industrial Court of Malaysia & Anor*[vi] epitomizes the difficulty of sacking a poor performing employee without the employer being penalised of unlawful dismissal. In that case, the company had in place an annual performance appraisal

[i] See *Tan Poh Thiam v Industrial Court of Malaysia & Anor* [2015] 1 LNS 1534
[ii] *Tan Poh Thiam v Nestle Products Sdn Bhd* [2009] 9 CLJ 504 (HC)
[iii] [2022] 4 ILR 485
[iv] [2021] 10 CLJ 663 (FC)
[v] [1981] 1 LNS 30 (FC)
[vi] [2023] 2 AMR 558

system whereby any employee who did not perform and was rated "Below Expectation" would be placed on a "corrective action plan" (CAP) which was to assist him to improve performance to the standard expected and to close performance gaps. The failure to satisfactorily meet the CAP expectation would result in a performance inquiry (akin to domestic inquiry) being convened that might result in a dismissal on the ground of poor performance. The claimant (R)'s annual performance review for 2017 was rated as "Below Expectation"; he was emplaced on CAP. R allegedly failed to meet the CAP expectation; he was subjected to 2 performance inquiries. During the 3rd CA period, a warning letter was issued. Following the conclusion of the 2nd performance inquiry, R was dismissed. The Industrial Court and the High Court ruled in favour of R for having been dismissed by the company without just cause or excuse.



Generally speaking, in Malaysia, before an employee can be dismissed for poor performance, the employer must first tell him of the respects in which he is failing to do his job adequately, warning him of the likelihood of dismissal on that ground and giving him an opportunity of improving his performance. The employer is the best judge whether he is performing unsatisfactorily and does not have to prove that he is incompetent but must honestly believe on reasonable grounds that he is a poor performer. However, the employer must not have *mala fide* intentions which would include procedural unfairness, victimisation, discrimination and unfair labour practice.

In *Astro Radio*, in the annual performance review letter, the company did not particularize the employee (R)'s shortcomings in his performance (that necessitated him to be placed under the CAP), without which it was impossible to aid him to improve his performance or to design a proper CAP. The fact that R had accepted the said letter and CAP without any objection did not matter. At the hearing, there was no document or evidence produced to show what the shortcomings were for the rating "Below Expectation" to justify R being placed under a CAP. Further, R was not informed of his right to raise written objection which was tantamount to procedural unfairness. There was also failure to adduce evidence concerning R's performance during the extended period of the 1st CAP; whilst there were numerous flaws in the 2nd CAP including new areas of work were added that were not originally identified to have any performance gap that needed improvement on the part of R; and unsatisfactory features in the minutes and comments and conclusion section. Thus, R ought not to have been placed in the 3rd CAP which had also been unfairly carried out with inadequacies. Evidence was led that the reviewer in the 2nd CAP had subtly pressurized R to resign which went to show the company as acting with *mala fide* intentions.

In the light of findings of facts and on the credibility of witnesses, the High Court in exercising supervisory jurisdiction held that there was no error of law committed by the Industrial Court or illegality or irrationality in the decision-making process which was reviewed on both process and substance.

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EVIDENCE / COMMERCIAL LAW

IMPORTANCE OF CONTEMPORANEOUS EVIDENCE TO DISPUTE

In *Malpakat Leisure Group Sdn Bhd v Eastern Global Summit Sdn Bhd*[i], the importance of contemporaneous evidence to dispute or complain about the transaction or contract concerned was accentuated particularly in the context of establishing a triable issue to resist a claim for summary judgment for goods sold and delivered or services or work done. If the contents of the invoices are being disputed, there is a need for contemporaneous protests during the period of subsistence of the contract. Failure to detail the sum disputed and the reasons therefor may give rise to estoppel against the party which had by design or default chosen to keep silent and which will be estopped from raising any issue regarding the goods, services or work. Any attempt to do so at a late stage long after the transaction or contract in question will be regarded as an "after-thought" raised to delay and to avoid payment which cannot in law constitute a triable issue.

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FAMILY LAW

IS AN IMMORAL MOTHER FIT TO BE GIVEN CONTROL, CARE AND CUSTODY OF CHILDREN?

Alleged adulterous relationship and exhibitionist lifestyle do not necessarily render a mother unfit to be given custody, care and control of her children, see *Tang Heng Kit v Cindy Ong Pik Yin*[ii]. Such an allegation might have rendered the defendant an immoral and promiscuous person but not an unfit parent. The court is a court of law and not of morals and unless her purported adultery had contravened the law or had a negative effect on the welfare of the children, it was unfair to deem her unfit as a mother. In determining guardianship and custody of the children, the factor in priority is the welfare of the children and all factors relevant and necessary must be considered. The photographs of the defendant uploaded on social media, although brazen and unconventional, had nothing to do with her parenting skills. Her conduct in flaunting her body might have made her an exhibitionist or even a narcissist at most but such behaviour could not be said to compromise her parenting skills. Notwithstanding that the welfare of the children encompasses their moral upbringing, the court must be cautious to not impose its own moral values on the parties and their children. The private conduct of a person which does not affect the community, society or public does not warrant sanction or censure. The court should not assume the role of moral police and judge any litigant for moral transgressions committed in private save where such transgressions descend into the arena of the child's life, and as a result compromises the child's welfare. Insofar as the child aged 8 years old was concerned, she would be reaching puberty in a few years' time and would need her mother, the defendant, for mental and emotional support. She would feel awkward and embarrassed to discuss female-oriented issues with her father, the plaintiff. In the light of her hormonal and physical development, the defendant was in a better position to cater to her needs and provide her the support. The children's wishes were to live with the defendant with whom they shared a close relationship. Further, the plaintiff being a USA citizen was a flight risk as he would be able to leave Malaysia with the children for good. In the

[i] [2022] 1 LNS 60
[ii] [2023] 2 AMR 624

circumstances, the Court ordered the primary care and control of the children to remain with the defendant whilst joint guardianship and custody be granted to both the plaintiff and defendant.

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FAMILY LAW

DNA TEST ORDERED ON A CHILD TO ASCERTAIN BIOLOGICAL FATHER

Do courts in Malaysia have the power to order a child to undergo a DNA test to determine paternity ? That was the issue before the High Court in *CAS v MPPL & Anor*[i].

First, the facts in brief. P was a pilot in a Malaysian airline in which D1 was a stewardess. D2 was a pilot in a Singapore airline company. D1 and D2 were husband and wife married on 3.3.2007. D1 gave birth to a girl on 23.6.2008. P claimed he was the biological father of the child as he and D1 had been lovers since 2005 and often had sex before as well as after D1's marriage until around January 2014. D1 stopped P's access to the child in December 2013. P claimed that he had regularly given D1 monies for the child's maintenance until around August 2014 when D1 closed her bank account. P filed a suit to seek a court order for a DNA test to be conducted on the child to determine her paternity.

The High Court took cognizance of an earlier Court of Appeal decision in *Lim Hooi Teik v Lee Lai Cheng*[ii] which held that the plaintiff mother must make out a *prima facie* case against the defendant that she was in an intimate relationship with him before the court could order that the defendant undergo a DNA test to determine her child's paternity. The High Court however draw a distinction between *Lim Hooi Teik* and the instant case. In the former, it related to a DNA test on the putative biological father of a child. In the latter, the plaintiff (P) claimed to be the putative biological father of the child and his application was to have a DNA test on the child (as opposed to an adult) to determine her paternity. In such circumstance, a *prima facie* case of sexual relationship between an applicant and the mother of the said child was not sufficient for the court to order that the child undergo a DNA test. It would open the floodgates.

The court ruled that P the applicant must at least make a *prima facie* case that he had sexual relations during the period the child was conceived (conception period) and provided other supporting evidence to validate his claim that he might be the biological father of the child, before the court made an order that the child undergo a DNA test to determine his or her paternity. The court went on to evaluate evidence adduced at the trial and came to the findings that on a balance of probabilities : (i) the child was conceived during the conception period; (ii) D1 had in her own testimony in court admitted to have carried on extra-marital

[i] [2022] 12 MLJ 135
[ii] [2016] 3 CLJ 529

sexual relationship with P for more than 6 years; (iii) P had sexual intercourse with D1 during the child's conception period; (iv) D1 had told P and P's mother that P was the father of the child; (v) from photographs and videos taken from June 2008 until October 2010, 2011 and 2012, P had proven that he had access to the child's life from her birth until his access was stopped by D1 in December 2013; (vi) D1 had led a double-life with P vis-à-vis her husband, D2 and it was not just as an affair as she claimed; and (vii) P had paid monies for the maintenance of the child into D1's bank account since 2010 until she closed the account in December 2014.

The court next re-stated the current state of law on legitimacy and paternity: both are two separate and distinct concepts; and the presumption of legitimacy under s.112 of the Evidence Act 1950 (that a child born during the child's mother's valid marriage to a man is presumed to be the legitimate child of that man) does not bar any enquiries into the paternity of a child. The court went on to hold that a birth certificate does not prove a child's biological father and is not proof of the child's paternity. After considering the wealth of authorities from UK and India, it was held that based on the English common law as administered in England on 7.4.1956 and pursuant to s.3(1) of the Civil Law Act 1956, the High Court in Malaysia has the jurisdiction to order a blood test—and with the advances of science, a DNA test—on a child to determine her paternity. On the facts and findings, it was in the best interest and welfare of the child to undergo a DNA test to determine her biological father.

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ILLEGITIMATE CHILD ENTITLED TO INHERIT *INTESTATE* ESTATE

Is a seemingly "illegitimate" child entitled to inherit under the Distribution Act 1958 (Act 300) where the father died *intestate* (without a will)? The answer appears to be "Yes" in a ground-breaking decision delivered by the Federal Court in *Tan Kah Fatt & Anor v Tan Ying*[i]. In the case, the deceased died intestate leaving behind his wife whom he had married in January 2005 and a daughter, TSL born in January 2009. He also left behind another daughter, TSY who was born earlier in October 2002 from his relationship with another woman, Lu. Both his wife and Lu are Chinese nationals. The marriage with the wife was registered under the Law Reform (Marriage & Divorce) Act 1976 (Act 164) while he and Lu only underwent a Chinese customary marriage. The birth of TSY was registered under s.13 of the Births and Deaths Registration Act 1957, a provision governing the registration of illegitimate children.

In overturning both decisions of the High Court and the Court of Appeal, the apex court laid emphasis on the object of Act 300 as providing for the distribution of a deceased's *intestate* estate amongst those who survive the deceased and this must follow the order of succession as set out in s.6. Act 300 however does not whether expressly or impliedly state that only legitimate children may inherit in the case of intestacy. On the contrary, nowhere in s.6 is the term "child" used whereas the term "issue" is used. Both the terms are separately defined in s.3. The definition of the term "issue"*"includes the children and the descendants of deceased children*". The presence of the word "*includes*" in the definition

[i] [2023] 1 AMR 829

of "issue" suggests an enlarging or non-exhaustive definition as opposed to the use of the more definitive or comprehensive word "means" as found in the definition of "child". After going through numerous dictionaries for the definition of the word "issue", the court held that the word "issue" suggests descendants by blood lineage, not dependent on the matter of legitimacy of the descendant. The intent in using the word "issue" as opposed to "children" in s.6 is obviously to expand the category of persons who may inherit consonant with the purpose of Act 300. The word "issue" as defined in s.3 also seeks to statutorily extend the generational lineage to beyond the immediate persons who may properly be counted as issue, to the offspring or grandchildren, even if the immediate parents of such grandchildren are themselves deceased.

On the facts, TSY was an issue of the deceased, her birth certificate attested to that lineage. She was therefore entitled to succeed and inherit under her late father's estate under s.6 of Act 300.

The pinnacle court further invoked s.75(2) of Act 164 to aid TSY. The court found that the Chinese customary marriage between the deceased and Lu was performed but it was not solemnized in the manner required in Part III of Act 164 which rendered it a void marriage in contravention of s.6. However, s.75(2) provides that the child of a void marriage shall be treated as the legitimate child of his parent if, at the time of the solemnisation of the marriage, both or either of the parties reasonably believed that the marriage was valid. The testimonies of Lu and the parents of the deceased as well as the conduct of the parties attested to the existence of such belief. For this added reason, TSY was held to be a "legitimate" child entitled to inherit under her late father's estate.

GUARDED NEIGHBOURHOOD SCHEME

The issue of whether a residents' association could legally set up, operate and manage a guarded neighbourhood (GN) scheme (comprising a guardhouse and boom gates) in its locality came up for determination in the Court of Appeal case of *Ranjan Paramalingam & Anor v Persatuan Penduduk Taman Bangsar Kuala Lumpur*[i]. On the legality of the scheme, the Court recognized that there is no law that specifically deals with GN scheme but there was a circular "Pekeliling Ketua Setiausaha Kementerian Perumahan dan Kerajaan Tempatan Bil. 1 Tahun 2010" titled "Garis Panduan Perancangan Gated Community and Gated Neighbourhood" (the said Guidelines) issued on 20.10.2010 which provided explanations and guidance to state authority and local authority in relation to the implementation of the Gated Community and GN schemes. The said Guidelines had been approved by the Cabinet as well as the National Council for Local Government that was established under Art. 95A of the Federal Constitution. The local authority could thus rely on the said Guidelines to approve the GN

[i] [2023] 2 MLRA 425

scheme provided that the approval was consistent with all relevant laws and regulations mentioned in the said Guidelines. Notwithstanding that there was no specific legislation on the GN scheme, the Court held that the local authority had the residual power to approve the GN scheme based on the general power conferred to it by the Local Government Act 1976. Upon approval obtained by the defendant from the local authority the issues raised by the plaintiffs with regards to the GN scheme in particular the obstruction caused by the boom gate fell apart. The Court further cited the Federal Court decision in *Au Kean Hoe v Persatuan Penduduk D'villa Equestrian*[i] in support.

The plaintiffs had also failed to prove their case on the tort of nuisance, private as well as public, against the defendant. As to the infringement of Personal Data Protection Act 2010 (PDPA), there was no evidence that the defendant through its security guards had committed any of the acts within the meaning of "processing" in s.4(a) to (d) of the PDPA whilst taking or recording personal information of visitors to the GN area. In any event, the non-compliance of the PDPA could not be a cause of action in a civil suit; and the plaintiffs should have lodged a report to the Commissioner under s.104 of the PDPA for investigation and necessary action to be taken by the proper authorities.

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LAND LAW

RUBBER TREES AS PART OF THE LAND

In *Abdul Latif bin Puteh & Ors v Pentadbir Tanah Jajahan Pasir Mas & Anor*[ii], the Pentadbir Tanah Jajahan Pasir Mas and the State Government of Kelantan (the Respondents) allocated (but not alienated) parcels of state land to the Appellants who were the participants of the land scheme under the auspices of the Federal Land Consolidation and Rehabilitation Authority (FELCRA) to develop and rehabilitate such land. Over the years, the Appellants had planted rubber trees on the land using their own funds, to the knowledge of the Respondents. A dispute arose when the area allocated to the Appellants was reduced. During the pendency of the suit, the Respondents called for tenders for the felling and removal of the rubber trees. The Appellants filed another suit to claim for declarations that the tenders were unlawful in disregard of the Appellants' rights, title and interests in the rubber trees and sought for damages.

Upon the Respondents' application to strike out the Appellants' suit, the High Court allowed it which was upheld on appeal at the Court of Appeal (COA). The principal reason was that so long as the land had not been alienated to the Appellants, the rubber trees planted thereon had become part of the land within the definition of 'land' under s 5 of the National Land Code and could not belong to the Appellants.

The trees growing on land *in situ* could not be classified as 'chattels' as contended by the Appellants. The trees planted came within the definition of 'land' without any room to argue otherwise. Whilst a rubber seed or sampling before it was planted might be regarded as a chattel, once it was planted, its legal nature changed. Title in a chattel that was vested in a person would be extinguished when it was converted and became part of the land. Any title or interest in the rubber trees that the Appellants might have had before they were planted was lost when the trees became part of the land not belonging to the Appellants.

[i] [2015] 3 MLRA 101
[ii] [2022] 6 MLJ 569

Therefore, the Appellants had no interest or right to the felled trees which became chattels as there was no concept of a re-vesting of a prior title to chattel in such a situation. Without being able to retain or obtain title to the rubber trees as the land did not belong to the Appellants, the negligence pleaded against the Respondents could not lie. Further, no contractual or equitable basis had been advanced for their claim to ownership in the rubber trees.

As to the argument that third parties had been unjustly enriched from the felled trees, the COA held the Appellants as the actual parties benefitted or enriched from the use of the land that they did not own by planting on the land and extracting the benefits from the rubber trees for some 30 years without having to incur any payment for the use of the land. They were well aware the land was never alienated to them. There was also no promise or representation made by either Respondent to any of them that the land would be alienated to them.

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REVENUE LAW / PRIVACY

ENGINE OF FRAUD, FISHING EXPEDITION

The Inland Revenue Department (IRD)'s attempt to expand its tax base, increase its tax collections and reduce tax evasions was rejected by the High Court in *Genting Malaysia Bhd v Pesuruhjaya Perlindungan Data Peribadi & Ors*[i]. IRD (as the 3rd respondent, R3) purportedly acting under s.81 of the Income Tax Act 1967 (ITA)[ii] required the applicant – which operated a casino – to furnish them with personal data of all its customers including members of its Genting Rewards Loyalty Programme and individuals who had won or lost big at the casino. The applicant refused, citing its fear of breaching Personal Data Protection Act 2010 (PDPA) and being sued by customers for wantonly divulging their personal particulars to 3rd parties. IRD then produced a letter from the 2nd respondent (R2) i.e. the deputy commissioner of the 1st respondent (R1) stating that the applicant could divulge the particulars requested by IRD pursuant to s.81 of the ITA read together with s.39(b)(ii) of the PDPA without contravening any law. The applicant filed the instant judicial review application to quash the decision of the respondents.

Prior to this case, the Court of Appeal had in *Ketua Pengarah Hasil Dalam Negeri v Bar Malaysia*[iii] ruled that it was illegal for IRD to use s.81 of the ITA to undertake a 'fishing expedition' for

[i] [2022] 11 MLJ 898

[ii] Section 81 of the ITA: The Director General may require any person to give orally or may by notice under his hand require any person to give in writing within a time specified in the notice all such information or particulars as may be demanded of him by the Director General for the purposes of this Act and which may be in the possession or control of that person.

[iii] [2022] 2 MLJ 428

information when IRD demanded to be given access to books and records pertaining to the clients' accounts of law firms with a view to check whether the law firms have under-stated their income without having any reasonable suspicion of any misconduct or criminal conduct on the part of the law firms. The High Court therefore ruled that IRD had acted unlawfully in encroaching upon the statutorily protected right to privacy by demanding access to the personal data of the applicant's customers without any shred of evidence that any particular customer had engaged in any under-declaration of income or any offence under the ITA. IRD was clearly on a 'fishing expedition' as the information it wanted was not for any specific audit or investigation but merely to enlarge its tax base, increase its tax collections and reduce tax evasion.

R1 and R2 had acted contrary to the protections offered under the PDPA and the right to privacy under the Federal Constitution by giving R3 the 'green light' to demand disclosure of the personal data from the applicant. They had failed in their statutory duties under the PDPA to protect personal data in the country (as reflected in s 48 of the PDPA) and to prevent its abuse. It was not for R1 and R2 to assure the applicant that it would not be prosecuted under the PDPA if it released the information requested. Any such promise to the applicant was *ultra vires* the PDPA and there was always the potential for the applicant to be sued by its customers for disclosing their personal particulars.

IRB had failed to show that the disclosure of the personal data of the applicant's customers was necessary either to prevent or detect a crime or for the purpose of investigations within ss 39 and 45(2) of the PDPA. IRD's reliance on ss 80 and 81 of the ITA to gain information and personal data of the applicant's customers without any basis was clearly perverse, illegal and contrary to the maxim that 'equity will not permit statute to be used as an engine of fraud'[i], more so when the IRD's request defeated the very protection accorded by the PDPA.

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TORT (DEFAMATION)

BREACH OF CONTRACT NOT THE SAME AS CHEATING

In *Al Maarif Travel & Tours Sdn Bhd v Nur Farhana Yeop Hussin & Anor and Another Case*[ii], the Defendant published defamatory statements of the Plaintiff on her Facebook on the Plaintiff's last minute cancellation of overseas packaged trip purchased by the Defendant. Among others, the Defendant asserted that "*bukan nak tutup periuk nasi orang tapi kau buat bisnes biarlah jujur, amanah. Jangan la nak menipu orang. ... Harini kau tipu orang, ...*" The High Court ruled that ineptitude and an assertion of breach of contract were not equal to being dishonest and a cheat. Therefore, statements referring to the Plaintiff as a cheat, having cheated people, dishonest and deceitful were defamatory. However, the Plaintiff had operated its travel agency business without a valid licence. The learned Judge took into account the change of law as propounded by the UK Supreme Court in *Patel v Mirza*[iii]. The proportionality test was applied. To dismiss the Plaintiff's claim in defamation in whole due to the infraction of the licensing requirements would not be a proportionate response to the

[i] The maxim is a doctrine of wide operation which, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statuitory provision that would defeat his opponent's case.
[ii] [2022] 1 LNS 69
[iii] [2017] 1 All ER 191

tortious acts committed by the Defendant. Thus, a 20% reduction in the damages that the Plaintiff would have been entitled to would serve to instill into members of the public the need to comply with the law as well as not to take the law into their own hands.

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TORT (DEFAMATION)

LIBEL VIA INSTANT MESSAGING APPS

The next time you feel the urge to forward a WhatsApp text or whatever message received, think again; as you may well find yourself liable for defamation. This was highlighted in *Tan Sri Dato' Nathan Elumalay v Natarajen Manoharan*[i] and *Pushparajan R Thanchanamorthy v Chin Wai Yee*[ii].

In *Nathan Elumalay*, the impugned posting was posted by the defendant to a WhatsApp group called the DG Chatgroup which was administered by SP1 who had then forwarded it to another WhatsApp chatgroup [politics and public debate chatgroup] before deleting it in the DG Chatgroup. Whilst accepting the fact that forwarded WhatsApp messages could not be edited out by the person who forwarded such messages, the Court held that the mere act of forwarding the message in itself was tantamount to "publication"; an element for proving liability under defamation laws. In this case, as the defendant had clearly forwarded the posting to another group, "publication" was proven; this despite the fact that the defendant had subsequently deleted the message from the original chat group.

In *Pushparajan*, the defamatory statement was allegedly sent by D to the plaintiff's wife via iPhone messaging application, iMessage via 'michellechin0X@icloud.com' (iCloud Email Address) to her phone. The plaintiff contended that D's English name was 'Michelle' as evidently shown by her current Apple ID 'michelleXXX@hotmail.com' and her Cloud ID's phone name 'Michelle Xs XXX' hence D must be the owner of the iCloud Email Address. D's defence was that she had never owned the iCloud Email Address and that the screenshot impugned iMessage had never displayed her profile picture nor her handphone number which rendered the presumption under s.114A of the Evidence Act 1950 unavailable. The trial Judge took cognizance of the fact that iMessage was only available to the Apple user and one particular feature was that any person could send and receive an iMessage via his iCloud email from any Apple device. In the instant case, the impugned iMessage was sent to the plaintiff's wife from the iCloud Email Address. However, the plaintiff failed to prove that D owned the iCloud Email Address. The plaintiff's argument that the ownership of the iCloud Email Address could not be checked due to privacy policy held by Apple was rejected as he did not obtain confirmation from Apple or the Malaysian Communications and Multimedia Commission. Further, it was stated in the impugned iMessage that 'the sender is not in your contact list report junk' which indicated that the sender was not in the contact list of the recipient/plaintiff's wife's mobile phone. If the iCloud Email Address user was D, such

[i] [2022] 10 CLJ 467
[ii] [2023] 1 CLJ 97

reminder would not have appeared at the bottom of the impugned iMessage. It was also remarked that just because the iCloud Email Address contained the words "Michelle Chin" and D had an alias 'Michelle' with family name 'Chin', one could not simply associate D with the iCloud Email Address. Given that the iMessage application is used by Apple products (iPhone, iPad, MacBook) users worldwide and there were millions of such users globally, there could be many iCloud users bearing the name 'Michelle Chin' or prefer to name themselves or use the words 'Michelle Chin' in their iCloud email addresses. On top of this, the impugned iMessage only showed an icon but no picture of the sender or D. In the premises, the court ruled that the plaintiff failed to establish that it was D who had sent the impugned iMessage.

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

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