THE UPDATE

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PHD THESIS, AN ACADEMIC MATTER EXCLUSIVELY DECISION OF UNIVERSITY

In October 1996, the applicant who was a senior lecturer at Universiti Malaya (UM) had registered with UM, the respondent (R) as a candidate for the Degree of Philosophy (PhD). After about 9 years, he submitted his thesis to R in March 2006 which was recommended by 3 examiners for PhD. A *viva voce* was held in September 2006 whereby the R's Examination Committee (EC) approved the thesis to be awarded a PhD subject to the applicant making minor corrections within a period not exceeding 6 months. Subsequently, a member of the EC noticed the suspicious circumstances in the reports of the 2 external examiners which raised issues as to their credibility. R then informed the applicant that the result of the *viva voce* was nullified as a meeting of R's Senate had rejected the reports of the external and internal examiners. The applicant was required to attend another *viva voce* in December 2009 which he refused. A week later, the Senate decided that the applicant had failed his PhD examination; and he was not allowed to resume the PhD program.

On the above brief facts, the applicant in *Sivapalan a/l Govindasamy v Universiti Malaya*[i] applied for judicial review (JR) to challenge the decision. The High Court allowed his application for *certiorari* upon which R directed the Institut Pengajian Siswazah (IPS) to take certain measures to process his thesis, one of which was to attend a fresh *viva voce* in March 2015. The applicant however did not do so whereupon the new EC proceeded and decided that his thesis required major corrections to be submitted by mid-September 2015, failing which he would fail his PhD. The applicant challenged such decision in his second application for JR. He succeeded. The High Court quashed R's decision and declared that R was to proceed to make a decision on his PhD degree based on the thesis submitted in March 2006 and the reports of the internal and external examiners. In accordance with the court order, the applicant was informed of the Senate's decision referring to the recommendation of the EC in September 2006 which required him to make corrections within 6 months to be verified by his supervisor of the thesis. The thesis was to be submitted by March 2017 and to be dated 2017. The applicant was adamant that his thesis be dated 2006 as he claimed it would prejudice his academic credibility since the research undertaken for his thesis was up to 2006 only. In March 2017, he submitted his thesis dated 2006 without verification from his supervisor. In May 2017, the Senate informed the applicant that the thesis must be verified by his supervisor and dated 2017. He refused to accede to such requirements. In June 2017, he was informed of the Senate's decision to fail his PhD for not submitting his final thesis with the date 2017 within the stipulated period. The applicant filed for a third JR

[i] [2020] 12 MLJ 354

application. This time, the High Court dismissed his application.

His appeal to the Court of Appeal was, by majority of 2 to 1, dismissed. It was pointed out that the decision under challenge was directly related to an academic matter ie. the requirements to be satisfied by a PhD thesis in order to be conferred a PhD. The Senate, the body constituted under the Universities and University Colleges Act 1971 had been conferred express powers of control and direction and, amongst others, to formulate policies in respect of instruction and research. The Guidelines for the Preparation of Research Reports, Dissertations and Thesis (the Guidelines) which, *inter alia*, stipulated the date of a thesis to be the date of final submission had been adopted by the Senate to apply to all candidates of PhD programs. It was not open to courts to review the Guidelines. The exclusive jurisdiction of a university to determine whether a candidate had satisfied the requirements to be conferred a degree was indisputably an academic matter not amenable to the supervision of courts.

The COA also criticized the two High Courts in the previous 1st and 2nd JR applications for transgressing into the exclusive jurisdiction of the Senate and usurping the power of the Senate by substituting its decision to nullify the dubious results of the applicant's thesis submitted in 2006 with their own by compelling the Senate to confer a PhD on the basis of compromised examiner reports that had in fact been nullified by the Senate. The COA ruled that the Senate's decision to fail the applicant's PhD thesis was not irrational nor unreasonable for his wilful non-compliance with the Senate's requirements, which included the attendance of the *viva voce* before the EC, the verification of corrections by his supervisor and the dating of the thesis as 2017 instead of 2006.

Briefly, the judge in the minority held that R as a statutory body did not have unfettered discretion; and its exercise of powers was always justiciable and within the supervisory jurisdiction of the courts. The Guidelines were only issued in 2015 and did not apply to the applicant who commenced his academic session in 1996 and completed it in 2006. The mandate to and powers of the Senate was to be subjected to the provisions of the Constitution of the University of Malaya 1997, University of Malaya (Degree of Doctor of Philosophy) Rules 2007 and Regulations 2007. There was no requirement of printing the year of submission in a thesis under the Rules and Regulations 2007. The applicant had already passed his examinations and it was

not open for the Senate to say otherwise on account of the format of his thesis *ie.* printing of the date of the thesis. The failure of R to follow its own Constitution, Rules and Regulations 2007 amounted to procedural impropriety which rendered the decision unlawful and liable to be quashed.

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ARBITRATION

ARBITRATION AGREEMENT RENDERED INOPERATIVE

In *Kebabangan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd* & Ors[i], A had a supply agreement with R1. Dispute arose between the parties and A referred it to arbitration in September 2016 in exercise of its rights under the agreement's arbitration clause. R1 filed a response to the arbitration. In November 2016, the Kuala Lumpur Regional Centre for Arbitration (KLRCA), to which the application had been referred, directed the parties to pay a provisional advance deposit in the sum of RM55,800 in equal shares within 3 weeks so that the arbitration could commence. A paid its portion of the deposit by the end of November 2016 but R1 failed and/or refused to pay its portion despite numerous reminders by A and KLRCA. In November 2017, A filed a civil suit in the High Court against R1 for breach of contract and misrepresentations. Pursuant to s.10 of the Arbitration Act 2005, R1 applied to stay the civil suit pending reference of the dispute to arbitration. This application was followed by another application under O.18 r.19 of the Rules of Court 2012 to strike out A's suit.

The Court of Appeal held that R1's conduct in unreasonably and deliberately delaying or not paying its portion of the provisional advance deposit to KLRCA and its sheer unresponsiveness and callous disregard to the letters issued by A and KLRCA had rendered the arbitration agreement between itself and A inoperative. R1's conduct indicated that it was disinterested and was unequivocally abandoning its right under the umbrella agreement to refer the matter to arbitration.

The application to strike out A's civil suit on merits was an affirmation by R1 and that it constituted a step in the proceedings. The application clearly evinced an unequivocal intention on R1's part to submit to the court's jurisdiction and to proceed with the civil suit in preference to arbitration. By doing so, R1 had foreclosed any argument on their part

[i] [2021] 1 MLJ 693

that they had reserved their rights to arbitrate the matter.

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BANKING LAW / TORT

BANK DID NOT OWE CREDIT CARD HOLDER THE *QUINCECARE* DUTY OF CARE

In *Lee Cheong Chee v HSBC Bank Malaysia Berhad*[i], P was the holder of two credit cards issued by D and also had a savings account. For a period of 9 months, P made payments to four merchants (as investments in return for which P was promised a high return of profits) by using the credit cards and through D's telegraphic transfer service (TT). P subsequently paid back the credit card payments without dispute. About four months later, P discovered that he had been scammed. P accordingly notified D and disputed the credit card payments. P filed a suit against D in negligence and alleging breach of duty of care on the part of D in not informing P of the risks involved in the transactions with the merchants, in not querying his transactions and in not suspending the transactions to investigate or carry out due diligence of the accounts used by the merchants or to carry out relevant searches to determine if the merchants were licensed to provide services for financial instruments. P claimed for losses incurred by him from the financial scams.

P's claim was premised, firstly, on the principle laid down in the landmark English decision of *Barclays Bank Plc v Quincecare Ltd*[ii] which expanded the common law duty on banks to use reasonable care and skill in executing its customer's order. Under *Quincecare* duty of care, the bank is required to refrain from executing an order if and for so long as the bank is "*put on inquiry*" in the sense that it has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the customer. Secondly, reliance was also placed on the subsequent UK Supreme Court decision in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd*[iii] which extended the *Quincecare* duty in that if there was something suspicious going on, the bank must suspend payment and make reasonable enquiries to satisfy itself that the payments were properly made. Thirdly, P relied on the directive issued by Bank Negara Malaysia (BNM) which, as P contended, essentially codified the *Quincecare* duty.

The High Court relied on our Federal Court decision in *Chang Yun Tai & 178 Yang Lain v HSBC Bank (M) Berhad*[iv] and the Court of Appeal case of *Aseambankers Malaysia Bhd & 3 Ors v Shencourt Sdn Bhd & Anor*[v] which had expressly excluded any

[i] [2021] 4 AMR 374

[ii] [1992] 4 All ER 363
[iii] [2020] 2 All ER 383
[iv] [2011] 6 AMR 1
[v] [2014] 4 MLJ 619

relationship between a bank and its customer other than that of a contractual relationship that was purely commercial in nature. This must take precedence over any attempt to impose on the bank a tortious duty that was wider than that which was contractually provided. The salient terms of the cardholder agreement and generic terms and conditions in respect of TT did not impose on D the *Quincecare* duty. On the contrary, some of the terms negated such a duty and limited the liability of D in certain circumstances particularly in respect of P's dealings with merchants in a credit card transaction.

The High Court also cited the Privy Council case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[i] for the proposition that a tortious duty could not supersede the parties' duty in contract. The tortious duty of care sought by P would effectively circumvent or undermine the clear express terms of the banking contracts. In any event, the court ruled that even if the *Quincecare* duty was applicable, the facts did not support the imposition of such a duty.

As to the case of *Singularis*, exceptional circumstances were held to be needed for the *Quincecare* duty to arise. There was none in the instant case.

As to the BNM directive, it was meant to protect D from its own customers involved in illegal financial schemes that promised unrealistically high returns. There was no duty imposed by the directive on D to investigate P's own transactions. It was a matter between BNM as statutory supervisory and regulatory body and D and did not *ipso facto* give rise to a private cause of action.

Contractually, D was obligated to carry out the instructions of P as mandated. It would be grossly unreasonable to require D to also check and investigate the investment decisions that P himself had made on his own volition. And D was not privy to the transactions and the alleged scam was committed by the merchants and not D. The imposition of such duty was unreasonable and undesirable as it would stifle the banking business and expose banks to liability.

In the circumstances, as the *Quincecare* duty of care did not apply and there was in any event no breach of such a duty, P's claim was ordered to be struck out with costs.

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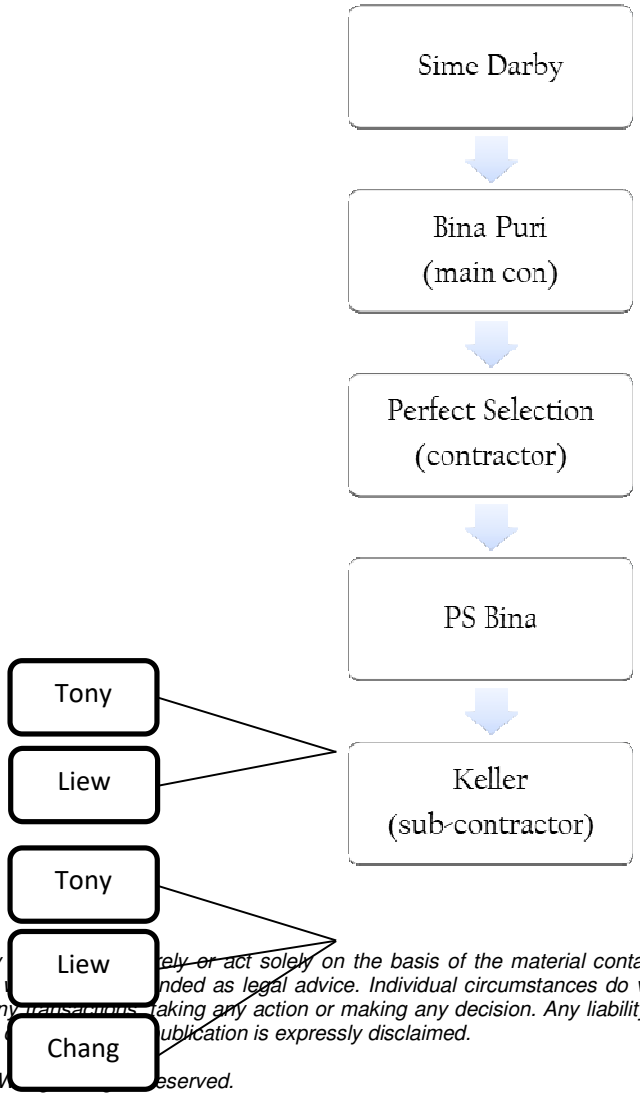
[i] [1986] AC 80. See also the more recent case of *Credit Guarantee Corporation Malaysia Bhd v SSN Medical Products Sdn Bhd* [2017] 1 AMR 481, CA

DISREGARDING CORPORATE PERSONALITY BY REASON OF FRAUD – OUTSIDE OF THE DOCTRINE OF PIERCING OF THE CORPORATE VEIL

In the construction project of Melawati Mall (the Project) by Sime Darby Capitalmalls Asia (Melawati Mall) Sdn Bhd (Sime Darby), Bina Puri Holdings Bhd was appointed as the main contractor which in turn appointed Perfect Selection Sdn Bhd (Perfect Selection) as the sub-structural works contractor. The directors of Perfect Selection were Tony Ong (Tony) and one Liew. Perfect Selection in turn subcontracted the sub-structural works to PS Bina Sdn Bhd (PS Bina) which had 3 directors and shareholders, namely Tony, Liew and Chang. PS Bina then sub-contracted the works to Keller (M) Sdn Bhd (Keller) which eventually carried out the actual CBP works, FBP works and GA works for the Project. The flowchart is as follows :-



The following are some of the findings of facts by the High Court in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors*[i]:

1. There was a missing page in the bills of quantities (BQ) given to the plaintiff, Keller to quote for the Project. That page stipulated EB works (EBW) would not be paid for. Thus, Keller was unaware of this fact. This was relevant because Keller's entire claim related to non-payment of works done in respect of these EBW in the sum of RM7.46 million.
2. Perfect Selection, run by Tony Ong, was aware from the BQ supplied by Bina Puri that EBW would not be paid for.
3. The letter of award sent out to Keller represented that EBW would be paid for.
4. Keller did write to PS Bina to state that the estimated costs of the EBW would be RM4.8 million. Tony Ong was in direct control of PS Bina too.
5. In a meeting with Keller's managing director, Tony Ong made several untruthful representations. Premised upon such representations and assurances, Keller accepted the letter of award for CBP works with PS Bina. Subsequently, a second and third letter of award (respectively for FBP works and GA works) issued by PS Bina were accepted by Keller. Keller did make clear that EBW would be payable.
6. Works proceeded smoothly but eventually, Keller found that PS Bina had reversed out the whole sum for EBW. Such decertification had been so timed as to ensure that the EBW was first completed, otherwise it might have hindered the progress of works, which would have precluded Perfect Selection from claiming and benefiting from works actually undertaken by Keller. It was only subsequently that Keller discovered that in the primary contract between Bina Puri and Perfect Selection, it was expressly stipulated that EBW would not be paid for.
7. Perfect Selection and PS Bina knew that Keller would not be entitled to payment for EBW and Tony Ong was in control of both companies. He was aware that EBW would not be paid by Bina Puri to Perfect Selection.

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[i] [2021] 4 CLJ 821

8. Despite this, Perfect Selection entered a contract with a new company with no assets, i.e. PS Bina which in turn contracted with Keller to pay a sum in excess of RM7 million for EBW. PS Bina was created by Tony Ong to evade the liability for the EBW which should have been borne by Perfect Selection. In other words, Perfect Selection evaded the legal obligation to pay for the EBW through the interposition of PS Bina.
9. Having benefitted from the EBW carried out by Keller, and for which Keller was deliberately not paid, Tony Ong, Chang And Liew had resigned as directors of PS Bina and replaced with persons who had no knowledge or comprehension of the company's obligations to Keller.
10. In evaluating the entirety of the evidence, Tony Ong, Perfect Selection and PS Bina had defrauded Keller in relation to the EBW. PS Bina was a mere façade and sham utilized by Tony Ong to shield Perfect Selection from having to pay out for EBW carried out by Keller.
11. In light of the fraud or equitable fraud, the corporate veils of Perfect Selection and PS Bina were lifted and both companies and Tony Ong were jointly and severally liable to Keller for the debt relating to the EBW.

The Court of Appeal affirmed the findings.

On final appeal at the Federal Court, interestingly, the concurrent decisions of the courts below were maintained without resorting to the doctrine of the piercing of the corporate veil. It was held that fraud in itself warranted the allocation of liability to the perpetrators of the fraud independently of the doctrine. The finding of fraud encompassed Tony and the two companies which he controlled. The companies were 'utilised' by Tony to enable the debt due to Keller to be evaded by Perfect Selection which enjoyed the profits of the FBP contract paid by Bina Puri, without paying for the EBW carried out by Keller. PS Bina was 'utilised' as a 'sham' company interposed between Perfect Selection and Keller to ensure that no effective enforcement could be taken by Keller to recover the debt and to defraud Keller. The person in control who engineered the fraud was Tony Ong. Perfect Selection was the recipient of the benefit gained from the fraud so perpetrated, because it received payment from Bina Puri while being insulated from the debt due and owing to Keller for the EBW. The fraud could not have been perpetrated without any of the three, Tony Ong and the two companies which were essentially engines of fraud. Liability was found against Tony Ong and the two companies by reason of the fraud alone, without the invocation of the doctrine of the piercing of the corporate veil.

Be that as it may, the apex court proceeded to apply the evasion principle under the said doctrine as enunciated by the UK Supreme Court in *Prest v Prest and others*[i]. It served as an

[i] [2013] 4 All ER 673

alternate rationale for imposing liability on the three parties. The Federal Court went on to review the judgment of the other judges of the seven-member bench of the Supreme Court in *Prest*, and the relevant case law in Malaysia. It held that it would be appropriate to adopt the analysis by Lord Sumption in *Prest* of the characterisation of wrongdoing justifying the piercing of the corporate veil but the analysis ought not to be applied too rigidly. It then clarified the legal position on disregarding of the corporate veil in Malaysia[i]. This case serves as the authority on the law on piercing of corporate veil.

[i] See paragraph [99](i) to (vi) at pp.853 to 855.

DEBT-RECOVERY ACTION DRESSED UP AS CLAIM FOR OPPRESSION

In an ingenious attempt to recover debts owed by its borrower, a bank (P) which was also a debenture holder resorted to the oppression remedy under s.346 of the Companies Act 2016 (CA 2016) [formerly s.181 of the Companies Act 1965] in the High Court case of *The Bank of Nova Scotia Bhd & Anor v Lion DRI Sdn Bhd & Ors*[i].

Section 346(1) of the CA 2016 provides that any member or debenture holder of a company may apply to the court for an order on the ground, *inter alia*, : (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders or in disregard of his interests as members or debenture holders of the company; or (b) that some act of the company has been done or threatened or that some resolution of the members or debenture holders has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one of more of the members or debenture holders. Section 346(2) empowers the court to make such order(s) as it thinks fit to bring to an end or to remedy the matters complained of.

In *Lion DRI*, D1 had agreed to manufacture and supply hot direct reduced iron (the product) to Megasteel S/B under an offtake agreement[ii]. In order to purchase iron ore and to finance the construction of its plant, D1 obtained facilities from P; and as security, P1 as a security agent solely held a debenture by way of charge over the assets and undertakings of D1, on behalf of P2. Drawdowns on the facilities were made from time to time. Megasteel eventually did not make the requisite payments to D1 for the product in full or on time and its trade receivables were impaired. D1 ceased operation and further drawdowns on the facilities from P1. P1 and P2 (plaintiffs) subsequently filed a suit pursuant to s.346

[ii] An offtake agreement means an agreement to buy or sell in advance goods that have not yet been made, making it easier for the producer/seller to obtain financing.

[i] [2021] 2 CLJ 400

of the CA 2016, in their capacity of the debenture holders of D1, against D1 and its directors, D2 and D3. In the main, the plaintiffs' complaints were that despite the dire situation of D1 and Megasteel, D2 and D3 had abused their position as directors by refusing or failing to cause D1 to stop trading with Megasteel or to actively collect receivables owed by Megasteel which had caused D1 receivables to exponentially increase. This had resulted in D1's business to fail to the prejudice of the plaintiffs' interests in D1; the value of D1's assets and undertaking charged to the plaintiffs under the debenture were severely diminished.

The High Court however struck out the plaintiffs' suit. Firstly, the plaintiffs had no *locus standi* as they were not 'debenture holders' within the meaning of s.346 of the CA 2016. 'Debenture' for the purpose of the CA 2016 means debt or financial instruments issued by the company and offered to the public for subscriptions for fundraising or arising from instruments or transaction effected in the money market. It excluded holders of security given to banks in consideration of commercial loans granted to the company. Thus, it was not open for banks and lenders which had obtained debentures as a form of security to mount an action under s.346 to recover the outstanding debts from the shareholders and/or directors of the subject company personally when faced with perceived difficulties to recover their loans. Oppression actions under s.346 of the CA 2016 are not a means of recovering debts of creditors of the company.

The learned Judge observed that the plaintiffs' complaints were breaches of the facilities agreement and the offtake agreement; and the directors' duties of D2 and D3 by preferring Megasteel to the detriment of D1. Neither could properly form the juridical basis for an action under s.346 which was not the platform to redress contractual claims. The claims were based on the underlying contractual agreements between D1 and the plaintiffs and between D1 and Megasteel; the rights and remedies laid in the enforcement of their respective contracts and not by way of an oppression action. The suit was thus an abuse of the court process and must be struck off.

As an end note, this case is the first reported decision in Malaysia where a debenture holder (holder of security given to banks in consideration of commercial loans granted to the company as opposed to holder of debt instruments that are tradeable) filed an action seeking reliefs for oppression under s.346 of the CA 2016

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COMPANY LAW / TORT

WRONG PARTY SUING FOR PASSING OFF

It is vital to recognize which proper party to be sued in respect of a wrongdoing. The plaintiff (P) ended up suing the wrong party and lost his case in *Kamdar Sdn Bhd v*

Mohammad Hafiz Bin Hamidun[i]. P claimed that he was the owner of the goodwill in the business of selling fabrics/apparel under the brand name 'Hafiz Hamidun' and that the defendant (D)'s conduct in selling 'Hafid Hamidun' branded fabrics/apparel to the public constituted the trot of passing off.

The Court of Appeal allowed the appeal in favour of D. It was ruled that the goodwill in the brand name had been owned by the company, Mikraj Concept Sdn Bhd (later known as Haje Sdn Bhd, HSB) and not by P. HSB had been carrying out the business in the fabrics and/or fashion line selling various clothing such as baju Melayu, jubbah and kurta and using the brand name since 2014. P considered himself as having goodwill in the brand name in so far as his career as an entertainer was concerned but such goodwill was exploited by HSB where fabrics and apparel were concerned. No evidence was led as to an independent right on the part of P personally to sue for loss in respect of goodwill in fabrics and apparel.

HSB was at all material times a separate legal personality. Any injury caused by the alleged passing off would have been sustained by HSB which was the proper plaintiff and not P. The High Court was wrong to lift or pierce the corporate veil of HSB[ii] to reveal P as HSB's alter ego in order to sustain P's claim. Since the Court of Appeal decision in *Law Kam Loy v Boltex Sdn Bhd*[iii] as endorsed by the Federal Court in *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd*[iv] and *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors*[v], lifting or piercing the corporate veil was not permitted merely where the "interests of justice" required it. There must exist special circumstances which included cases where there was either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. The court differed from the High Court on the lifting of the corporate veil of HSB.

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[i] [2020] 6 MLJ 69

[ii] P owned 80% of the total issued capital of HSB and was a director since its incorporation.

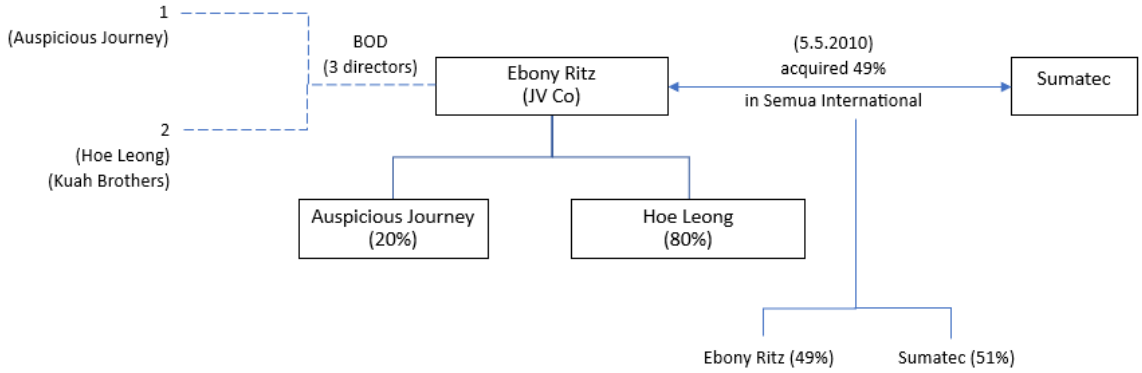
[iii] [2005] MLJU 225

[iv] [2014] 3 CLJ 73

[v] [2012] 1 CLJ 719. See also *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2012] 9 CLJ 537

DIRECTORS AND 3RD PARTIES MAY BE PERSONALLY LIABLE IN A S.346 OPPRESSION ACTION

To what extent, if any, director(s) of a subject company who are privy to the wrongdoings perpetrated at the subject company level, and such wrongdoings have been found to be within the ambit of s.181 of the Companies Act 1965 (CA 1965) (presently s.346 of the Companies Act 2016), may be visited with liability pursuant to the said s.181? This was one of the questions facing the Federal Court in *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors*[i].



- OFRA – Ebony Ritz, Sumatec + Auspicious Journey
- Shareholders Agreement – Ebony Ritz, Sumatec + Semua International
- Loan Agreement – Ebony Ritz + Semua International

2 years later (21.12.2012)

- 51% Conditional SPA – Hoe Leong, Setinggi Holdings (nominee of Hoe Leong), Ebony Ritz & Sumatec (to sell off 51% of Sumatec in Semua International ; 2% to Hoe Leong, 49% to Setinggi)

For easy understanding of the factual background, the above diagram depicts the relationship of the parties and contracts involved in the saga. The plaintiff, Auspicious Journey,

[i] [2021] 4 CLJ 721

entered into a joint venture agreement with Hoe Leong to form a JV company, Ebony Ritz, to undertake the acquisition of 49% shares in Semua International Sdn Bhd (Semua International) which was involved in the oil tanker chartering business. Auspicious Journey was the minority shareholder holding 20% of the shares in Ebony Ritz whilst Hoe Leong held 80%. The board of directors of Ebony Ritz comprised 3 directors of which one was nominated by Auspicious Journey and two were nominees of Hoe Leong (the Kuah Brothers). Upon the said acquisition on 5.5.2010, Ebony Ritz became a shareholder in Semua International with 49% shareholding whilst the original holding company, Sumatec Resources Bhd (Sumatec) held 51%. Several other agreements were also entered into on the same day: Options and Financial Representation Agreement (OFRA), Shareholders Agreement and loan agreement.

There were contractual expectations envisaged vis-à-vis Ebony Ritz and Semua International which were eventually not met. There was profit shortfall for the financial years 2012 in respect of which Ebony Ritz gave notice to Sumatec to make good the same in the sum of about RM27 million under the OFRA. Sumatec however defaulted.

On 21.12.2012, and unknown to Auspicious Journey, Hoe Leong entered into a conditional sale and purchase agreement with Setinggi Holdings (nominee of Hoe Leong), Ebony Ritz and Sumatec for the disposal by Sumatec of its entire 51% equity interest in Semua International (the Conditional SPA). This would enable Hoe Leong to take control of the oil tanker chartering business, with 2% purchased by Hoe Leong and 49% by Setinggi.

This resulted in Auspicious Journey as the minority shareholder filing a suit under s.181 of CA 1965 against, *inter alia*, Ebony Ritz, Hoe Leong, the Kuah Brothers, Setinggi and the sole director and shareholder of Setinggi, contending that the Conditional SPA had expropriated its rights as well as Ebony Ritz's rights under the OFRA and the latter had affected Auspicious Journey's rights as a minority shareholder in Ebony Ritz. It was argued that the claim fell within the said s.181 by reason of the Conditional SPA which demonstrated that Hoe Leong had utilized its majority powers to cause Ebony Ritz to enter into the Conditional SPA, for its own benefit (through its nominee Hoe Leong), to the ultimate detriment of Auspicious Journey. Hoe Leong in defence contended that Auspicious Journey had brought the action to recover its investment in Semua International by, *inter alia*, having its 20% shareholding in Ebony Ritz bought over by Hoe Leong.

The High Court and Court of Appeal ruled in favour of Auspicious Journey against the majority shareholder alone but not the other defendants who were directors and third parties. The basis for the refusal to extend liability to the directors, in essence, was that a director was an agent of a company and could not therefore be personally liable for the breaches of a company, even in an oppression claim under the said s.181.

In the final appeal at the Federal Court, the apex court pointed out that limb (a) of s.181 envisaged oppressive conduct as being established where either 'the affairs of the company are being conducted' or where '*the powers of the directors are being exercised*' in a manner oppressive...". Thus, limb (a) expressly identifies the directors' exercise of powers as a basis for establishing oppression. Read with s.181(2) which gives the court very wide powers to bring such conduct to an end or to remedying the minority's grievance, there is no prohibition against the court granting a remedy which encompasses the directors of the company personally.

Limb (a) focuses on the acts of the directors in their capacity as directors of the subject company, i.e. the acts of the Kuah Brothers as the directors of Ebony Ritz and not as the directors of Hoe Leong; and hence whether the acts conducted by the Kuah Brothers on behalf of Ebony Ritz had an oppressive effect in Auspicious Journey in its capacity as a shareholder. Section 181 targets conduct or acts of the company at both directors and shareholders' level. The judicial construction must accord the said s.181 the intention Parliament sought fit to enact, namely, a wide and broad remedy encompassing, not only the majority or the company, but also the directors and third parties where necessary, with a view to bringing the oppressive or prejudicial conduct to an end or remedying it. Therefore, all alleged oppressors are proper parties including third parties who participated in the transactions forming the substratum of the complaint and parties who are affected by the relief sought.

The Federal Court laid down a number of legal tests to determine the imposition of liability against directors or third parties pursuant to the said s.181. There must be a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It required something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It required deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties. The imposition should be fair or just and reasonable in all the circumstances of the case and the remedy resulted in fairness to the parties concerned as a whole.

In answering question 1 posed, the principle that a director is an agent of a company and is thereby not personally liable for the breaches or the acts of the company does NOT apply to proceedings under s. 181 of the CA 1965 where the shareholder is itself a company and the acts of oppression and unfair dealings are derived from the mind and acts of the principal directors. For question 2, director(s) of a subject company who are privy to the wrongdoings perpetrated at the subject company level, and such wrongdoings have been found to be within the ambit of the said s.181 may be visited with liability. For question 3, third party(ies) who are neither a director nor a shareholder of a subject company may be visited with liability, whether jointly

and/or severally, for acts within the ambit of the said s.181. Further to questions 2 and 3, the imposition of liability was ultimately dependent on the circumstances of a particular case.

On the facts, the High Court had made the finding of oppression on the part of the majority shareholder alone through the acts of the directors of Ebony Ritz, namely the Kuah Brothers. The Federal Court held that such acts were directed towards a salvage and warehousing situation becsause the minority shareholder, Auspicious Journey did not wish to expend further monies to effect such salvage of Ebony Ritz's investment. Whilst the acts themselves and the manner in which they were carried out may be categorized as prejudicial and detrimental to the minority shareholder, the apex court remarked that it remained an inexorable reality that the conduct was ultimately related to salvaging Ebony Ritz. This weighed in favour of non-attribution of liability to the directors as a matter of "fair and just" in all the circumstances of the case. The Kuah Brothers and a *fortiori*, the director of Setinggi were therefore held not personally liable for their oppressive conduct.

The Federal Court refused to grant the relief sought by Auspicious Journey for a buy-out of its 20% shareholding in Ebony Ritz which, in the words of the court, was to escape from a bad bargain or to recoup its investment in the joint venture with Hoe Leong. It affirmed the order of the High Court to wind up Ebony Ritz.

CIPAA 2012 APPLIES TO BOTH INTERIM AND FINAL CLAIMS

The applicability of the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) to final claims/certificates was the core issue in the Federal Court case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd*[i]. The plaintiff provided architectural consultancy services for a multi-storey development project to the defendant which was in property investment business. The defendant eventually terminated the plaintiff's services under the construction contract and the plaintiff accepted such termination whereupon the plaintiff claimed for about RM600,000.00 as the final sum of professional fees under CIPAA 2012. The adjudicator awarded the plaintiff the balance amount accordingly.

The defendant appealed to the High Court to set aside the adjudicator's determination on the main ground that the adjudicator had acted in excess of his jurisdiction in delivering the adjudication decision. It was contended that the plaintiff could not have made a valid claim under the CIPAA 2012 when the payment claim was served AFTER the construction contract had been terminated and the plaintiff had accepted the termination. Further, CIPAA 2012 ought to apply only to interim claims and not final claims. The main purpose of CIPAA 2012 was to assist the parties of the construction contract to receive prompt payments for work done and thus, it was intended to be applied to interim claims which involved payments on account. Any dispute as to the amount that was finally due was to be resolved through other dispute resolution method such as arbitration or court.

In this final appeal, the apex court upheld the decision of the High Court and the majority of the Cour of Appeal and dismissed the defendant's appeal. Firstly, the court held that Clause 6 of the construction contract expressly contemplated payment being made, after the contract had been terminated, for value of works done up to the date of determination. The said clause equated the rights and liabilities of the parties to the general law of contract situation where the parties' past rights and obligations prior to the termination were not affected by the termination; and the defendant was not relieved from its obligation to pay the plaintiff. Secondly, as long as they were payment claims relating to construction contract defined in s 4 of the CIPAA 2012, the CIPAA 2012 would apply. There was no logical reason to have a different approach between interim and final payments. The applicability of the CIPAA 2012 was not confined to "interim claim" only. Therefore, the adjudicator acted within his jurisdiction in deciding the matter under the CIPAA 2012 when at the time of service of the payment claim, the construction contract had been terminated and the claim was for

[i] [2020] 6 MLJ 224

determination of sums finally due to the unpaid party.

One more question raised was whether the CIPAA 2012 should prevail over the Architect's Act 1973. For this, the defendant relied on an earlier decision of the Federal Court in *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd*[i] which laid down the rule that disputes between an architect and his client on the architect's fees was to be resolved by the specific dispute resolution mechanism enacted for such purpose ie. s 21 of the Fourth Schedule to the Architect Rules 1973 that was arbitration. However, the Federal Court appeared to have regarded the said rule as no longer good law. It held that there was no need to see adjudication and arbitration to be mutually exclusive to each other as adjudication would only yield a decision of temporary finality whilst arbitration or litigation in court gets a final decision. Indeed, s 37 of the CIPAA 2012 provided that an adjudication proceeding, arbitration and court litigation may proceed concurrently. A mandatory procedure under the CIPAA 2012 and the right to a statutory adjudication should not be circumvented by any contract where parties had agreed to arbitrate.

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CONTRACT LAW / EVIDENCE

[i] [2007] 5 MLJ 692 (FC)

TERMINATION CLAUSE TO BE CONSTRUED STRICTLY

There are 2 points that we wish to highlight from the Court of Appeal (COA) case of *Damansara Realty (Pahang) Sdn Bhd v OM Cahaya Mineral Asia Bhd*[ii], one on the exercise of right to terminate agreement and the other on proof of documents that parties dispute both authenticity and contents, commonly called as Part C documents[iii].

P and D had entered into an agreement whereby P was to cut, clear, fill and level D's land and thereafter, extract minerals therefrom. P claimed that it had completed the clearance and levelling works. By a letter dated 11.9.2015, (Termination Letter), D abruptly terminated the agreement and did not give any reason. D refused to let P remain on the land. P filed suit for declaration and damages.

The COA pointed out that there were 2 methods for termination of the agreement under Clause 5.1:

(i) by giving a 60-day written notice of either party's intention to terminate the agreement (termination *simplicier*); and

(ii) forthwith termination by D upon occurrence of any of the events stated in Clause 5.1(a) to (c) (termination with cause).

[ii] [2021] 5 CLJ 283

[iii] See O.34 r.2(2)(d) and (e), Rules of High Court 2012. Part A documents are documents which parties agree to both the authenticity and contents whilst Part B documents are documents which parties agree only to the authenticity but dispute the contents.

Upon termination, P shall immediately cease to carry out any works on the land except for such work deemed necessary for the safety and security of the land and P also shall demobilize their equipment and immediately return and/or deliver possession of the land.

In the instant case, it appeared that D had opted for termination *simpliciter* by not ascribing any reason for its termination in the Termination Letter. As seen above, termination *simpliciter* was a termination with a notice period of 60 days. However, the Termination Letter demanded P to 'cease operations and demobilize immediately'. Having considered the contemporaneous evidence and all the circumstances, the appellate court held that the Termination Letter was for all intents and purposes a termination which was forthwith or immediate.

That being the case, it was necessary that the termination must be for cause and that meant the reason(s) for the termination or the breach that was purportedly committed by P must be brought to P's attention; and P must be given the period of 14 days to remedy the breach [Clause 5.1(a)]. Hence, the termination clause was not complied with in the instant case. The Termination Letter was bad as it did not refer to any purported breaches by P in accordance with Clause 5.1(a) to (c) of the agreement and did not give P 14 days to remedy any alleged breach[i]. The COA thus affirmed the finding of the trial Judge that the termination of the agreement was unlawful.

On the point on proof of damages, P had relied on Part C of the documents at the assessment of damages stage to claim for "wasted expenditure" as special damages. P ought to have discharged the burden of admitting such "disputed" documents as exhibits and proving the same as per the Evidence Act 1950 by fulfilling the 2 conditions as lucidly set out in *KTL Sdn Bhd & Anor v Leong Oon Lai & Other Cases*[ii]. Unfortunately, P failed to do so. In the result, there was no evidence to support P's claim for damages.

The COA dismissed D's appeal on liability but allowed D's appeal on damages and the order of the High Court on damages was set aside.

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[i] Reference was made to the recent Federal Court decision in *Catajaya Sdn Bhd v Shoppoint Sdn Bhd* [2021] 3 CLJ 159 on the party in breach must be notified of the identified reason for termination and be given the opportunity to rectify the breach, based on the contractual provisions, to give effect to the requirements of a termination clause, failing which a notice of termination would be defective.

[ii] [2014] 1 LNS 427

WARRANTY CLAIM FOR CAR BY OWNER AGAINST CAR DISTRIBUTOR AS 3RD PARTY

The facts in *Sime Darby Auto Connection Sdn Bhd v Suria TWT Enterprise Sdn Bhd & Anor*[i] as decided in High Court, Muar could have happened to any one of us. It was a claim for costs incurred for total replacement of engine under product warranty by a vehicle owner (P) against the car dealer (D) which brought in the distributor of the vehicle as a 3rd party (3rd Party). The purchase of the vehicle on 8.12.2013 came with a manufacturer's warranty for 3 years or 100,000 km from the date of purchase (whichever comes first). P also purchased an extended warranty for an "additional two years or 100,000 km, whichever comes first".

The warranty was subject to the conditions that "the vehicle is serviced following the guidelines stated in the owners manual at an authorized service centre and that the company shall be under no obligation unless the vehicle has been served in accordance with the manufacturer's recommended service schedule" which was "*every 10,000 km or 6 months, whichever comes first*" with maximum "*allowance given at 1,000km from the mileage allowed or 30 days from the time stated*". However, the extended warranty stipulated in the brochure that the service intervals for Malaysia was "*every 12 months or 10,000 km (whichever comes first)*".

In the instant case, the car was sent for service on 9.6.2012 and 13.1.2016. On 9.6.2016, P sent the car to D's service centre and upon inspection and advice, a total change of the entire engine was carried out. The 3rd Party rejected P's claim under the extended warranty on the basis that P had failed to send the car for service on 9.12.2015 but on 13.1.2016 which was 6 months plus 30 days plus an extra 5 days. The extra 5 days was beyond the maximum allowance of 30 days.

It was held that the term in the brochure *i.e.* the service booklet was part and parcel of the extended warranty and was legally binding on P, D and the 3rd Party. The service interval between the two service dates (9.6.2012 and 13.1.2016) was 7 months and 5 days within the phrase "*every 12 months or 10,000 km (whichever comes first)*". P was therefore not in breach of the terms and conditions of the extended warranty.

It is noteworthy that the court ruled that there was privity of contract in respect of the warranty and extended warranty issued by the 3rd Party as the sole distributor for the brand of the cars in Malaysia to P upon which the parties had acted. D was merely a conduit pipe in facilitating the sale and connection between P and the 3rd Party. In law, a product warranty may cover a product such that a

[i] [2021] 3 AMR 612

manufacturer provides a warranty to a consumer with which the manufacturer has no direct contractual relationship.

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COURT PROCEDURE

PLAINLY WRONG TEST TO REVERSE FINDINGS OF FACTS ON APPEAL

The Federal Court decision in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng*[i] once again demonstrated the difficulty to overturn decision, particularly a finding of fact, by a trial judge (High Court) on appeal. The apex court re-visited its numerous decisions as well as recent cases from UK Supreme Court to clarify the state of law in Malaysia relating to an appellate court interfering with decisions of the lower trial court.

It is trite that the applicable test is the 'plainly wrong' test[ii]. This test operated on the principle that the trial court had had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that had merely acted on the printed records. The 'plainly wrong' test was not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. As long as the trial court's conclusion could be supported on a rational basis in view of material evidence, the fact that the appellate court felt like it might have decided differently was irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed; the trial judge should be accorded a 'margin of appreciation' when his treatment of evidence was examined by the appellate court. Unless the trial judge's conclusion was one which could not be reasonably explained or justified and so was one which no reasonable judge would have reached[iii], his conclusion on that point should be left undisturbed.

[i] [2020] 12 MLJ 67

[ii] See *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 4 CLJ 309 (FC) ; *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 (FC) and many subsequent cases cited in [67] and [70] of *Ng Hoo Kui*.

[iii] See *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600 (UK SC). The Federal Court in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd* [2018] 2 CLJ 641 (FC) had adopted this *Henderson* approach of the 'plainly wrong' test to determine whether the trial court's finding of fact is reversible.

In the instant case, the Court of Appeal (COA) had reversed the findings of fact by the trial judge merely because on a particular point of evidence, it had disagreed with the trial judge's conclusion on whether one party or the other was to be believed on the evidence adduced. Although there might have been inconsistencies in the evidence – which meant that another judge might have reached a different conclusion – this was not relevant when considering if a trial judge's findings could be overturned. The trial judge's findings of fact were based on what he heard and saw from the main witness of the plaintiffs who had direct knowledge about the payments whereas the defendants' witnesses had no such personal knowledge. Thus, it could not be said that the trial judge's findings of fact were one which no reasonable judge would have made. The assessment of credibility of the witnesses was within the purview of the trial judge and it was not for the COA to interfere. The COA therefore erred in intervening and reversing the findings of fact of the trial judge. The appeal by the plaintiffs was allowed.

The Federal Court acknowledged the approach taken in UK Supreme Court in which Lord Reed in *Henderson v Foxworth Investments Ltd* separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test:

(a) a material error of law;
(b) a critical finding of fact which has no basis in the evidence;
(c) a demonstrable misunderstanding of relevant evidence; and
(d) a demonstrable failure to consider relevant evidence,

all of which justify appellate intervention. It pointed out the apex court in *Gan Yok Chin* had effectively included them under what amounted to the trial judge as being 'plainly wrong'. It also reiterated that the phrase 'insufficient judicial appreciation of the evidence' was not a new test but merely related to the process of evaluation of the evidence of the trial judge and thus was consistent with the established 'plainly wrong' test.

The Federal Court also refused to subject the 'plainly wrong' test by appellate court in reversing the findings of facts by a trial court to rigid guidelines or demarcated boundaries. The test should be retained as a flexible guide.

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COURT PROCEDURE

ARE JUDGMENT DEBTORS TO BE JOINTLY AND SEVERALLY LIABLE, UNLESS STATED OTHERWISE IN THE JUDGMENT?

It is a simple yet seemingly unsettled question : "*In a judgment order, whether the liability of the judgment debtors, if not expressed to be joint and several, was 'joint' with a consequence that each judgment debtor was only liable for an equal fraction of the judgment debt*?"

In *Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong*[i], an order was made in dismissing the petition pursuant to s. 181 of the former Companies Act 1965 against the respondent (R) and the other petitioners to pay costs of RM50,000 to the appellant. The costs were never paid. The appellant commenced bankruptcy proceedings against R. It was contended by R that the amount R was indebted to was not RM50,000 as stated in the bankruptcy notice and creditor's petition (the bankruptcy papers) as the order for costs against him and the other petitioners (totalling 5) did not state whether their liability for that sum was joint and several. Their liability was 'joint'. This meant that 5 of them were each only liable to an equal portion of the RM50,000 awarded i.e. RM10,000. The amount stated in the bankruptcy papers was excessive and RM10,000 was also below the statutory limit to commence bankruptcy.

The High Court agreed with R's contention. On appeal, the Court of Appeal (COA) comprehensively recapitulated a long line of cases in UK, Australia and Malaysia and came to the conclusion that a judgment entered for payment of a sum of money against several judgment debtors imposed upon them and each of them, a joint and several liability to honour the entire judgment debt, and not merely an equal portion of it, unless otherwise stated.

However, there was an earlier COA decision in *Sumathy Subramaniam v Subramaniam Gunasegaran & Another Appeal*[ii] which ruled that where a judgment or order was entered against several judgment debtors, their liability was joint and the court may not read into the judgment or infer that the liability of the judgment debtors was "joint and several" if those words did not appear in the judgment. Thus, a judgment against two or more judgment debtors created a joint liability such that each of the joint debtors was only liable for an aliquot portion of the judgment sum.

The COA acknowledged that their conclusion was at variance with the decision in *Sumathy*. It however decided that by the doctrine of *stare decisis*[iii], it was unable to depart from its earlier decision, in this case *Sumathy*, unless one of the four exceptions identified in *Young v Bristol Aeroplane*[iv] existed. None existed which rendered it to have no choice but to follow the conclusion in *Sumathy*. The appeal was thus dismissed.

One noteworthy point was the resolute adherence of the COA panel to the doctrine of *stare decisis* and their

[i] [2021] 5 CLJ 1

[ii] [2018] 2 CLJ 305, CA

[iii] This is a rule of judicial precedent which dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions.

[iv] [1944] KB 718

unwillingness to hold a prior decision of the court to have been made *per incuriam*. Instead, it ended its judgment with a remark to the apex Federal Court in future to regard it fit and proper to consider the decision in *Sumathy*.

The answer to the question stated at the outset is, at least for the time being, an affirmative yes by virtue of *Sumathy*. It is hoped that the Federal Court will soon have the opportunity to reconsider and rule accordingly on this question and settle the law in this area.

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COURT PROCEDURE

SUIT AGAINST 'PERSON UNKNOWN'

The High Court case of *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor*[i] concerned a cross-border cyber fraud known as 'push payment fraud' where through exchanges of emails, the fraudster (the 1st defendant, D1) deceived the plaintiff (P) into making payment of EUR123,014.65 into a CIMB bank account in Malaysia belonging to the 2nd defendant, D2 under the belief that it was making a genuine payment to its South Korean counterparty for a commission payment. Since then, D1 had siphoned P's monies away. P sought for a proprietary injunction and Mareva injunction against both the defendants.

The interesting feature of the case lies in the fact that P did not know the identity of D1. This however did not deter the court from allowing P to describe D1 as 'person unknown'. The learned Judicial Commissioner referred heavily to English authorities[ii]. In cases involving cyber fraud and fake email addresses, the fraudster(s) were unknown but injunctive orders had been allowed against 'persons unknown'. There was nothing in our Malaysian Rules of Court that would prevent the writ of summons and applications from being filed against 'persons unknown'. P merely needed to establish 'a good arguable case' for the court to apply the persons unknown jurisdiction. The court could grant parallel reliefs of a proprietary injunction and a Mareva freezing injunction.

[i] [2021] 7 MLJ 178

[ii] *CMOC Sales & Marketing Limited v Persons Unknown and 30 others* [2018] EWHC 2230 (Comm), *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 2 All ER 1 (SC), *World Proteins KFT v Persons Unknown* [2019] EWHC 1146 (QB), *AA v Persons Unknown* [2020] 4 WLR 35.

The persons unknown in *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken* were defined as a particular class of persons as follows :-

(a) any person or entity who carried out and/or assisted and/or participated in the fraud;
(b) any person or entity who received any of the EUR123,014.65 misappropriated from P (including any traceable proceeds thereof) other than in the course of a genuine business transaction with either another defendant or a third party; and
(c) in either case of para (a) or (b), other than by way of the provision of banking facilities.

As to the service of cause papers on D1, the learned JC acknowledged that it was impracticable to effect personal service on D1 being persons unknown. P was thus allowed to effect service through sending emails to the two fake email addresses that were used by and in the control of D1 and by inserting an advertisement in the local newspaper.

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ENFORCING ORDER FOR SPECIFIC PERFORMANCE TO COMPEL PURCHASE OF SHARES

How do you enforce an order of specific performance against a buyer to proceed with the purchase of shares? That was the issue before the High Court Kuala Lumpur in *MIDF Amanah Ventures Sdn Bhd v Lim Thiam Chye*[i]. P had entered into a subscription agreement dated 13.3.2007 with a BTS Holding S/B to subscribe for 500,000 redeemable convertible cumulative preference shares of RM1 each in BTS which P did subscribe. By a put and call option agreement of the same date between P and D, D irrevocably granted to P a put option to require D to purchase up to 500,000 of the option shares from P at the subscription price of RM5 mil and an additional 25% p.a. of the subscription price; and the put option might be exercised by P at any time during the put option period by serving a written notice to D. The following events took place:

4.1.2011	By the put option notice, P notified D that D was required to purchase the option shares at the put option price of RM9.8 mil and the completion was to take place on 25.1.2011. D failed to do so.
29.12.2016	P filed the suit.

[i] [2020] 12 MLJ 553

29.8.2017	Summary judgment was allowed under O.81 r. 1 of the Rules of Court 2012 in which D was to, among others, specifically perform his obligations to purchase the option shares at the put option price as stated in the put option notice in accordance with the terms of the put and call option agreement within 14 days thereof (Order for SP) and pay damages to be assessed for the breach of the put and call option agreement. Such Order for SP contained a penal notice[i].
13.4.2018	D's appeal to the Court of Appeal was dismissed.
15.8.2018	P's application for assessment of damages for breach of the put and call option agreement was allowed.
29.1.2019	P's demand to D to comply with the Order for SP to purchase the option shares was not met.

P filed an application for further orders in the same suit directing D to complete (Encl. 65) before proceeding to execution. Under Encl. 65, among others, P be at liberty to deposit in court the share certificate of the option shares and a share transfer form duly executed in escrow by P and shall notify D or his solicitors of the deposit within 7 days from the order; and D do pay P the sum of RM9.835 mil by way of a banker's draft to be delivered to P's solicitors within 7 days from the said notification.

The learned Judge held that the Order for SP contained an order which gave P 'liberty to apply'. This provision enabled P to seek the court 'for assistance in working out the rights declared' in the Order for SP. Where an order for specific performance is made, the court continues to maintain control over the working out of the order[ii]. And if a defendant fails to comply with an order for completion, the plaintiff cannot immediately proceed to execution but must first apply for a further order directing the defendant to complete: see *Cheah Tjeng Siong v Lim Sin On & Ors*[iii]. The principle in the English case of *Sudagar Singh v Nazeer*[iv] was endorsed, ie. when an order for specific performance of a contract is made, the contract itself does not merge in the order and the order is made by reference to the

[i] A penal notice is essentially a warning attached to a court order stating that if the other party to whom the order is directed fails to comply with the order, he will be held in contempt of court.

[ii] See *Gee Boon Kee v Tan Pok Shyong as legal representative of the estate of Tan Ah Tong* [2018] 1 MLJ 155 (FC), *Malpac Capital Sdn Bhd v Yong Tai Mee & Ors* [2017] 1 MLJ 262 (CA)

[iii] [1991] 3 MLJ 38

[iv] [1978] 3 All ER 817

rights of the parties under the contract, it is the provisions of the order and not those of the contract which govern the future performance of the contract. Encl. 65 was therefore allowed with costs.

It is noteworthy that D's contention that Encl. 65 if granted was tantamount to specifically enforcing a claim for money which would entail committal proceedings if there was non-payment was rejected by the court.

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DIGEST OF EMPLOYMENT LAW CASES

1. REQUEST FOR DEFERMENT OF RESIGNATION

An interesting twist happened in the Industrial Court award in *Cheah Aei Ling v HKS Infra & Earthwork Sdn Bhd*[i]. The claimant had tendered her resignation on 13.8.2018 but at the company's request to defer it for 3 months, she stayed on until she was terminated in January 2019. Could she claim for unlawful dismissal by the company? The answer was "Yes". When she had resigned in August 2018, her contract of employment had come to an end. The law had not required the company to accept her resignation before it became effective. Any withdrawal of her resignation had required the consent and mutual agreement of the other party. As such, once she had resigned, her status as a permanent employee had ceased. In the company's letter to her in December 2018 entitled "Surat Pemberhentian Kerja" (Termination Letter), dismissing her for misconduct, no reference had been made to her resignation letter and the company had also not asked her to re-submit her resignation. If her resignation had remained valid, her last day of employment should have been 14.9.2018. The fact that she had stayed on until 31.1.2019 had corroborated her version of events, coupled with the fact that she had still been on the payroll for 135 days after her resignation and been allowed the use of the petrol card. On the other hand, the company had failed to prove that her continued service had merely been an agreed extension of three months to her resignation for the purposes of handing over her job functions. An inference could be drawn that the claimant had been induced by the company, through its conduct, to continue working for it after the expiry of the three-month deferment period. Thus, the issue of whether her resignation had been withdrawn by mutual consent of the parties had not arisen. She had been dismissed by the company vide its Termination Letter.

2. PERKS THAT WERE MERELY PRIVILEGES WITH NO CONTRACTUAL EFFECT

The claimant in *Abdul Halim Zainal Abidin v Olio Resources Sdn Bhd*[ii] was the Head-Group Business Development (HGBD) of the company with benefits such as a company

[i] [2020] 4 ILR 369

[ii] [2020] 4 ILR 470

car, car maintenance allowance, reimbursable petrol, corporate credit card and golf membership. The company faced a financial crisis and had to operate on a tight cash flow budget. All managers including the claimant were briefed on the company's financial predicament and initiatives to be undertaken to turn it around including re-organization of the company structure. The claimant was removed from his previous role and position and his entitlements were withdrawn. This irked the claimant who protested and demanded for reinstatement. He walked out from the employment claiming constructive dismissal.

On the removal of his perks/benefits, it was held that he had neither been contractually entitled to a company car nor a corporate credit card. Therefore, it had been insufficient to constitute a breach of fundamental terms of his employment contract as it had not formed a term of the contract to start with. Benefits and perks that come with certain jobs are nothing more than special privileges which can be withdrawn by the employer at any time, unless the employment contract itself specifically provides for it. The golf membership that had been given to him had been a special privilege. Further, he had undertaken to return or transfer the club membership to the company or any other assigned person within 7 days from the date he served notice to cease employment but instead of doing so, he had sold it to the golf club and kept the money for himself. He had thus failed to prove that the company had breached a fundamental term of his contract of employment in withdrawing his golf club membership.

3. INVOLUNTARY RESIGNATION IS NO RESIGNATION

A resignation not freely or voluntarily given cannot be a valid resignation. This was the lesson drawn from the Industrial Court award in *Paat Yuk Cheong v Sealink Sdn Bhd*[i]. The claimant was alleged to have embarrassed a representative of a Nigerian company with whom the company was trying to secure a business deal. At a meeting urgently convened, the claimant claimed that he had been forced to resign whilst the company contended that he had verbally resigned.

Thereafter, the claimant was instructed, on numerous occasions, to tender his resignation letter but he had declined to do

[i] [2021] 1 ILR 231

so and continued to work as usual. The Industrial Court held that although the claimant had not disputed saying "I resign" in the meeting with the Managing Director (MD), he had stated that he had done so as he was under duress and undue influence, had felt intimidated and humiliated by the actions of the MD and in order to prevent a further escalation of the matter. It had been highly probable that the MD had raised his voice, pounded the table and demanded the claimant's resignation. He must have caused great unease to all present and more so the claimant. Various factors also showed that it had not made any sense for the claimant to have simply walked away from his job. In short, he had only uttered the words at the meeting because of what the MD had done in it and he had not wanted to escalate the situation. The court thus rejected the company's contention that the claimant had resigned verbally which could not be withdrawn unless the company allowed it.

4. MISCONDUCT BY NEGLIGENCE THAT CAUSED DEATH

In *Dalip Singh Jeswant Singh v Tenaga Nasional Berhad*[i], the claimant was found to be negligent in supervising the works by a contractor in failing to switch off the power supply when the works were being carried out which had resulted in the death of the contractor. The company dismissed him on such misconduct. The Industrial Court, however, ruled that the punishment had been manifestly harsh and disproportionate vis-à-vis his record of employment. He had no serious disciplinary record during his 38-year tenure with the company and he had been in the twilight of his career. It was unfortunate to lose an innocent life due to the claimant's negligence but two wrongs could not make a right. Human failure is innate in every person. The claimant surely had never intended to harm anyone. The court had to temper justice with mercy. He ought to have been imposed with a less severe punishment than termination. He could not be reinstated to his employment as he had surpassed the mandatory retirement age. Following the Federal Court decision in *Unilever (M) Holdings Sdn Bhd v So Lai & Anor*[ii], he shall not be entitled to receive compensation *in lieu* of reinstatement when he could not be reinstated. He was thus only allowed the backwages which was scaled down by 60% due to his contributory misconduct.

5. CHANGE IN SALES COMMISSION AND COVERAGE AREAS

In *Sanbos (Malaysia) Sdn Bhd v Gan Soon Huat*[iii], the claimant was a sales representative of the company since 1977 with basic salary and sales commission under a sales commission scheme which was revised in October 2009 and then May 2016. In the 2nd revision, the company revised the scheme and increased the claimant's monthly sales targets, reorganized its sales outlets and removed

[i] [2020] 4 ILR 169

[ii] [2015] 2 ILR 265

[iii] [2021] 3 AMR 833

Negeri Sembilan from his sales coverage area. The claimant objected on the ground that his monthly sales commission would be reduced.

The Court of Appeal ruled that the revision of the sales commission rate and change of the claimant's area of sales coverage did not amount to fundamental breach of the claimant's employment contract and hence not a constructive dismissal case. His letter of appointment clearly stated that the sales commission was an "incentive" for "good performance" and based on "sales volume". It was not a fundamental term of the contract. On the authorities[i], there was no fundamental breach where there was a downward revision or removal of commissions which were not fixed. Given the fact that the payment of commission was referred to as an "incentive" in the contract of employment, the claimant could not take the position that the sales commission rate was unalterably cast in stone. The High Court had therefore erred in holding that the revision of the sales commission rate was a fundamental breach.

The review of sales coverage areas was a matter for management judgment and discretion alone and could not be a fundamental breach if it was not a term of the contract in the first place. In the absence of evidence that the claimant was deliberately victimized by the change in his area of coverage and the fact that the review of the coverage areas affected other sales representatives as well and was for the purpose of reducing overlapping of coverage areas and costs, the High Court thus had erred in holding that such change in the claimant's area of coverage constituted a breach of a fundamental term.

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INHERITANCE

SALE OF PROPERTY BY ADMINISTRATORS IN INTESTATE ESTATE

In *Wee Poon (as co-administrator of the estate of the deceased, Gwee Lau @ Gwee Choon Pang) v Gwee Hong Hong @ Wei Hong Chong (as co-administrator of the estate of the deceased, Gwee Lau @ Gwee Choon Pang)*[ii], P and D were respectively the surviving daughter and grandson of the Gwee Lau, the deceased, who had died intestate. Both were the co-administrators of the estate of the deceased (the Properties). P applied for an order pursuant to s.60(4) of the Probate and Administration Act 1959 (the Act) for the sale of the Properties by way of private treaty and for the net proceeds, after deducting all liabilities and expenditure, to be distributed amongst the beneficiaries who included P and D. The application was opposed by D on the grounds that he had

[i] See *UMW Industries (1985) Sdn Bhd v Tay Heong Kin* [2001] 2 ILR 317, *Afindi Ramli v Awana Vacation Resorts Development Bhd* [2012] 1 ILR 262, *Lim Hun Beng v Awana Vacation Resorts Development Bhd* [2013] 2 LNS 1257

[ii] [2021] 3 AMR 526

made improvement to the Properties by crops cultivation and that he had paid the taxes including the quit rent and assessment and hence he was entitled to hold the Properties. Further D alleged that the other beneficiaries had indicated opposition to the sale and as co-administrator, he had the right to determine the sale price as well the appointment of a qualified valuer to conduct a valuation.

It was held that the estate of the deceased was a trust and that the administrator became the trustee and not the owner of such estate, even if he was one of the beneficiaries. Both parties being co-administrators were duty bound by the law of trust. The right to deal with the property of a deceased died intestate was governed by s 60 of the Act. The sale, transfer, conveyance or assent in respect of the Properties shall be made with the concurrence of all the personal representatives i.e. both the administrators: see s.60(2) of the Act. Failing such concurrence, an order might be obtained from the court. However, it would appear that under s 60(4) of the Act, in a case of an administrator of an estate, obtaining leave of the court to sell an immovable property of the estate was mandatory[i]. Upon an order for sale made under s 60(4), the duty was on the administrators to act in the best interests of the estate by selling the Properties at the highest price available which must not be lower than the reserve price. The learned Judicial Commissioner stated that, based on past cases, a sale by private treaty in this instance was allowed by law, subject to the following conditions:

(a) The sale should only be at the best price for the benefit of the beneficiaries; and
(b) The best price be ascertained by way of a proper valuation of the Properties.

In the event the Properties cannot be sold by way of private treaty, they be sold by way of a public auction open to all and sundry including the beneficiaries and the administrators, with the reserve price to be ascertained by the court.

The Court therefore made such orders accordingly including an order that D be paid any expenditure that had been borne by him for the preservation and betterment of the Properties out of the sale proceeds.

It is to be noted that by virtue of s.60(3) of the Act, in a case of an estate of a deceased who died leaving a will, an executor may dispose of any property of the estate notwithstanding any restriction imposed by the will of the deceased if the executor does so in accordance with an order of the court.

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[i] See *Md Zubir Hamid & 5 Ors v Zahari bin Salleh & 3 Ors* [2018] 10 CLJ 571

WHEN DOES TIME START TO RUN IN A CLAIM UNDER AN INDEMNITY INSURANCE POLICY?

When does an insured's cause of action in an indemnity insurance policy against his insurer arise (the Issue)? This was the issue for determination in *Shiva Kumar Day v Allianz Life Insurance Malaysia Berhad & Anor*[i]. P was diagnosed some time in 2014 as being totally and permanently disabled resulting from injuries that he had sustained at work in 2013. On 24.7.2014, P submitted a claim for total and permanent disability (TPD) benefits under the five life insurance policies he had taken out from D1. The claim was declined by D1 via a letter dated 3.9.2014 on the basis of the conditional coverage letter executed by P prior to purchasing the policies which expressly excluded TPD coverage following P's pre-medical examination outcome. P commenced the suit on 2.9.2020 for declaration that the rejection of his TPD claim was invalid and for damages.

D1 filed application to strike out P's claim on the ground of time bar. It was D1's contention that P's cause of action accrued on 24.1.2014 on which date P must have suffered his alleged TPD or, alternatively, by 24.7.2014 on which date his claim for TPD benefits was submitted. The suit filed in September 2020 was thus more than 6 years after the occurrence of the event. P argued that his cause of action accrued when his TPD claim was declined vide D1's letter dated 3.9.2014 and thus, P's suit filed on 2.9.2020 was within the time prescribed by of the Limitation Act 1953 (the Act)[ii].

The High Court ruled for D1. P's claim was barred by limitation. There were two lines of decisions at the High Court level on the Issue but the learned Judicial Commissioner opted to follow the decisions[iii] which held that the insured right to indemnity arose as soon as the loss

[i] [2021] 4 AMR 809

[ii] See *Tan Boon Yean & Ors lwn Mayban General Assurance Bhd* [2002] 5 MLJ 315 and *Ayob bin Salleh v AmGeneral Insurance Berhad & Anor* [2015] 5 AMR 123.

[iii] See *Mohd Sultan Dastagir bin Syed Ibrahim & Anor v AXA Affin General Insurance Berhad* [2020] 5 AMR 287 and *Su Hock Guan v AXA Affin General Insurance Berhad* [2021] 1 AMR 205.

was suffered which was in January 2014. The limitation period of six years under s 6(1)(a) of the Act would have expired by January 2020 which barred P's suit.

Additionally, in view of the definition of "TPD" in the terms of the policies that "*...our liability shall accrue as from the date of commencement of the disability*" and that "*... such liability must last for a continuous period of not less than six (6) months in duration*", when P submitted his claim form on 24.7.2014, he would have suffered TPD on 24.1.2014 and the six years would have run out on 24.1.2020. Even assuming that time began to run from 24.7.2014, the six years would have run out on 24.7.2020. P's suit filed in September 2020 was therefore statute-barred.

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INTELLECTUAL PROPERTY

OWN NAME DOCTRINE IN TRADE MARK AND DECLARATION OF NON-INFRINGEMENT

To what extent will the court protect or recognize trade mark under 'own name doctrine'? Does the court have power to grant a negative declaratory order or declaration of non-infringement (DNI) in respect of infringement and if yes, what are the applicable principles? These are the two core issues before the Court of Appeal (COA) in the case of *Diesel S.p.A. v Bontton Sdn Bhd*[i].

The founder of P in *Diesel S.p.A.* had created the trade mark 'DIESEL' in 1978 which had evolved with several variants (P's Diesel marks). They were used in relation to the entire range of its goods. As the proprietor and common law owner of P's Diesel marks worldwide, P protected its rights in the P's Diesel marks by embarking on a worldwide trade mark filing program, owning more than 1429 trade mark registrations around the globe including Malaysia. As a result of its trans-border acts of trade, numerous registrations and applications, extensive usage, promotions and advertisements and online presence on websites and portals regarding its goods bearing the P's Diesel marks, the P's Diesel marks were associated and/or identified with P and had become distinctive of P and/or distinctive of and identified with the goods of P and of their manufacture. As such, P claimed that it had a significant reputation and goodwill in the P's Diesel

[i] [2021] 2 CLJ 65

marks globally and had thus acquired common law proprietary rights in the P's Diesel marks entitling them to the exclusive use.

In Malaysia, the P's Diesel marks were found in a total of 25 trade mark registrations in numerous classes (P's registered Diessel trade marks). P intended to commence sales and distribution of its products using its P's Diesel marks in Class 25, for clothing and footwear. The defendant (D) also has goods bearing the word 'Diesel' in Class 25. D was in the business of retailing and distribution of the 'Bontton' brand of ready-made casual wear and related accessories. D had 4 registered trade marks in Class 25 bearing the word 'Diesel' (D's Registered Diesel Trade Marks). Like P, D claimed that as the common law proprietor of the D's registered Diesel Trade Marks in Malaysia, it owned goodwill and reputation in relation to the use of the Diesel trade mark as this mark was distinctive of its goods. P filed a legal suit to seek, among others, a declaration that "*the use in good faith by P of the P's Diesel marks do not infringe D's Registered Diesel Trade Marks as it would be considered as use by P of its own name and/or its own trade marks*." The High Court dismissed P's application.

On appeal, the COA held that the Trade Mark Act 1976 (TMA) implicitly recognized the the "own name doctrine" i.e. right of a person or a company to use his or its own name and that such use did not infringe another trade mark, though the same and registered, provided that such use was in good faith. This right justifiably merited protection by the grant of the DNI sought even in the absence of a trade mark infringement action.

Section 40(1)(a) of TMA provides, *inter alia*, that notwithstanding anything contained in this Act, the use in good faith by a person of his own name or the name of his place of business does not constitute an infringement of a trade mark. Such use amounted to a legal entitlement within the meaning of s 41 of the Specific Relief Act 1950 (SRA) for which the DNI ought to have been issued to protect and allow for such *bona fide* use. The COA disagreed that s 40(1)(a) of TMA was only available as a defence to an action for infringement of trade mark. The legislative intent was clear which was to declare, pronounce or provide for certain acts as not constituting infringement of trade marks. Further, the right conferred by s 40(1)(a) was not constrained by the need to establish pre-requisites such as proof of the existence of some threatened infringement action being brought before the remedy was available. P had established a genuine and real interests in having its rights or legal position declared. The intention to use its own name and mark was *bona fide* and the subjective intent had been satisfactorily proven. P's appeal was thus allowed and the declaration sought by P was granted.

The COA decision will be a significant relief to the those in the business community in Malaysia who have been

using their own name in good faith to market, distribute and sell their goods under that name without having to fear of any threat of an action for trademark infringement.

On the broader sense, the COA decision also signifies the power of the court to grant declaratory reliefs in negative terms and that there should be a liberal approach when it comes to declaratory orders. Section 41 of the SRA did not restrict the power of the court to grant declaratory order to positive orders such as a plaintiff was entitled to terminate a contract. Orders pronouncing in negative terms such as a plaintiff was not in breach or certain acts were not unlawful might be granted. All that was required was for the applicant to prove entitlement to any legal character and the court would make the appropriate pronouncements, unless there was clear evidence of abuse of process or express language excluding or prohibiting the grant of declaratory orders in a given set of circumstances.

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LAND LAW

PROHIBITION TO USE APARTMENT FOR AIRBNB PURPOSE

The legality of using apartment units in a condominium for Airbnb purpose was the subject of appeal at the Federal Court in *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp*[i]. The plaintiff as the management corporation to maintain and manage 'Verve Suites' sued the defendants for using their apartment units for a commercial purpose by letting them out for short-term rentals to tourists, holiday-makers and others who had booked the apartments through on-line platforms. In response to the circular from the Commissioner of Buildings Kuala Lumpur to ban such practices, the plaintiff voted in an extraordinary general meeting overwhelmingly to pass House Rule No 3 which prohibited units in the condominium from being used for any commercial purpose especially short-term rentals as aforesaid. Notwithstanding this, the defendants continued to engage in short-term renting which resulted in the plaintiff applying for injunction to stop the defendants from breaching House Rule No 3. Only a sole question was to be decided, i.e. whether House Rule No 3 violated s 70(5) of the Strata Management Act 2013 (SMA). The latter provides, among others, that "*No additional by-law shall be capable of operating to prohibit or restrict the transfer, lease or charge of, or any other dealing with any parcel of a sub-divided building or land*." If the question was answered in the negative, the plaintiffs would have obtained the injunctive reliefs prayed for. But if the answer was in the affirmative, the plaintiffs would have lost the case.

The apex court held that the terms of the letting out by the defendants of their

[i] [2020] 12 MLJ 16

premises to third-party vacationers or lodgers suggested that they intended their premises to be used like a hotel or a lodging facility. The term 'Host' was used to describe the defendants and 'Guests' to describe the short-term renters. It was safe therefore to assume that whatever be the online sites for the booking of apartment units, those platforms were only intended to be vehicles for the singular activity of short-term rentals for profit. There was no proof of exclusive possession on the part of the short-term renters, nor did the evidence suggest that the nature and quality of the occupancy of the said renters was ever intended to be a tenancy. The arrangements between the parcel owners and the short-term renters were nothing more than mere licences and thus did not amount in law to 'dealings' within the ambit of s 70(5) of the SMA. Accordingly, House Rule No 3 was not ultra vires s 70(5). It was enacted for the many legitimate purposes under s 70(2) of the SMA.

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ESCAPE OF EFFLUENTS FROM NON-NATURAL USE OF LAND

In *Petronas Gas Bhd v DWZ Industries (Johor) Sdn Bhd & Anor*[i], P was a company in the business of separating natural gas into components, transporting and distributing such components and sale of industrial utilities. Both defendants, D1 and D2 were in the business of providing surface finishing for metal parts for electric and electronic industries as well as providing a wide range of cleaning, washing and electroplating services to contract manufacturers. The defendants' factory was adjacent to P's land. P sued the defendants for negligence, nuisance, trespass and breach of statutory duties arising from the discharge of industrial effluents from the factory through an illegal bypass thereby damaging P's gas pipeline located underneath P's land. It was not disputed that D1 was charged under the Environmental Quality Act 1974 (EQA) for offences committed at the factory.

It was held that the defendants owed a duty of care to P as the owner or occupier of the adjoining land and breached its duty when it failed to take reasonable care in preventing highly acidic industrial effluents from being discharged into P's land. Further the defendants had also

[i] [2021] 7 MLJ 283

deliberately, without obtaining P's permission, encroached and/or trespassed onto P's land to construct the fitting for the sole purpose of discharging untreated industrial effluents in contravention of the EQA. In addition, the defendants had not taken care of the fitting which had a broken outside sump as well as the inside sump which had cracks in the acid-resistant fibre glass lining. Such breach led to damage to the pipe.

In relation to trespass, the evidence was that the defendants had constructed the fitting on P's land without consent and discharged the industrial effluents from the fitting. The defendants were also liable under the rule of strict liability in *Rylands v Fletcher*. The collection of highly acidic industrial effluents in the inside sump amounted to the accumulation on the defendants' land of something likely to do mischief if it escaped. The act of constructing and using a by-pass to avoid industrial effluent from being treated in the wastewater treatment plant and instead diverting to nearby inland waters through the construction pf the fitting on P's land clearly amounted to the non-natural use of the defendants' land. And there had been escape of the industrial effluents from the defendants' land into P's land. The defendants were therefore found liable towards P.

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