THE UPDATE

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ILLEGALLY TRANSFERRING PUBLIC SERVANT TO PRIVATE ENTITY

The validity of the transfer of a public servant to the private sector was questioned in *Dr Thomas Samuel v Pertubuhan Keselamatan Social (PERKESO) & Anor*[i]. In 2012, the Appellant (A) was offered by way of a letter of offer of employment the position of 'Pegawai Perubatan Gred 27' by the 1st Respondent (R1) i.e. SOCSO. In 2018, A was transferred from the PERKESO Head Office, Kuala Lumpur to Pusat Rehabilitasi PERKESO Tun Abdul Razak, Melaka (Melaka Centre). The Melaka Centre was an entity that was not established under the Employees' Social Security Act 1969 (the SOCSO Act) but the Companies Act 1965 and wholly owned by R1. The 2nd Respondent (R2) was the SOCSO Board established under s.59B(1) of the SOCSO Act which was entrusted with the responsibility of dispute resolution between the management and employees of PERKESO/SOCSO. R2 did not interfere with R1's decision. A applied to the High Court (HC) for judicial review for, *inter alia*, orders of *certiorari* to quash R1's decision to transfer A and R2's decision in not interfering; and *mandamus* to compel R1 to transfer him back to the PERKESO Head Office. A lost at the HC but succeeded at the Court of Appeal.

It was held that PERKESO which employed A was a public body established and governed by the SOCSO Act but the Melaka Centre was an entity that was legally separate from SOCSO and was not established under the SOCSO Act but the Companies Act 1965. Clause 4 of the letter of employment only authorized SOCSO to transfer its employees including A to any of its offices. But the Melaka Centre could not be legally construed as an office of SOCSO within the meaning of the SOCSO Act. The term 'office' in the SOCSO Act was confined to offices within the organisational structure of SOCSO as the statutory body. Such an office must be purely for the sole purpose of the 'efficient functioning' of R1 and not for the purpose of maintaining any other entity. The Melaka Centre was obviously not an entity 'within' the structure of R1 as it was owned by a private company which was managed by the company's own Board of Directors independent of SOCSO.

Further, a private corporation is essentially profit-driven as opposed to a

[i] [2024] 1 CLJ 228

public body whose highest object must be the public interest even at its own expense. The Melaka Centre remained an essentially commercial enterprise whose primary motive was to maximise profits and returns to its shareholders. Therefore, R1's decision to transfer A, a public servant who had chosen employment with a statutory body, to continue his service with an institution owned by a private limited company was *ultra vires* the SOCSO Act and contrary to the terms of Clause 4 of the employment contract. It was tainted with illegality. As to R2, it had wrongfully abdicated its decision-making responsibility on the validity of the transfer by shifting it to R1.

A's appeal was allowed with costs and orders of *certiorari* and *mandamus* were granted accordingly.

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ARBITRATION

ENFORCING A FOREIGN ARBITRAL AWARD IN MALAYSIA

In *Tumpuan Megah Development Sdn Bhd v ING Bank NV & Anor*[i], the judgment creditor (JC) had applied for the registration of a judgment of a United Kingdom High Court (the UK Judgment) under the Reciprocal Enforcement of Judgments Act 1958 (the REJA). The UK Judgment had emanated from an arbitral award with its seat in London. The judgment debtor (JD) had applied to set aside the *ex parte* registration under ss 5(1)(a) to (v) and (3)(b) of the REJA (Encl. 17). The JD had also applied under O.67 r.9(2) and/or O.92 r.4 of the Rules of Court 2012 (ROC) for several issues to be tried concerning the arbitrability of the dispute between the parties and the jurisdiction and validity of the arbitral tribunal in London (Encl. 24).

The objection of the JD was that there was no arbitration agreement at all as the alleged arbitration agreement was contained in two invoices which were issued fraudulently. It was contended that such challenge was to the jurisdiction of the arbitral tribunal which could be raised even at the enforcement court at Kuala Lumpur. The High Court however disagreed and held that the JD was estopped as it did not apply to set aside the arbitral award at the court where the seat of arbitration (the seat court) was namely UK. Neither did the JD oppose the recognition and enforcement of the arbitral award in the UK court despite being aware of the same.

On appeal, the Court of Appeal overturned the HC decision. It was held that the matters of "Recognition and enforcement" of arbitral award were governed by s.38 and "Grounds for refusing recognition or enforcement" by s.39 of the Arbitration Act 2005 (the AA). Section 8 of the AA provides that no court shall intervene in matters governed by the AA except where so provided. Therefore, to proceed under the REJA would fly in the face of the clear language of s.8. The REJA which was of

[i] [2024] 2 AMR 264

general application to all judgments could not supersede the AA which came later and was a more specific legislation governing all matters relating to or arising out of arbitration including enforcement of an arbitral award.

As both ss. 37 and 39 of the AA are applicable to international arbitration, there was no bar to an award debtor who did not apply to set aside an arbitral award in the seat court (i.e.UK courts) or to resist the enforcement of the award there to later oppose an enforcement application under s.39 of the AA in the enforcement court (i.e. Malaysian High Court) and to raise the issue on lack of jurisdiction. There was no estoppel against the JD. Availability of the passive remedy[i] debunked the argument of *res judicata* or issue estoppel having set in. The JC had chosen the REJA route instead of the AA but the JD should not be disadvantaged or suffer any prejudice in any way as opposed to s.38 of the AA.

In a nutshell, the JC cannot deprive the JD of the passive remedy by strategically electing to enforce the arbitral award that had been enforced in the UK High Court as a judgment of that court by way of registering the foreign judgment in the High Court of Malaya under the REJA.

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SHAREHOLDERS' PRE-EMPTIVE RIGHTS AND SHAREHOLDERS' APPROVAL FOR SUBSTANTIAL PROPERTY TRANSACTION

The failed merger of two stockbroking and corporate advisory businesses between JF Apex Securities Bhd and Mercury Securities Sdn Bhd in April 2021 (the Proposed Merger) was the subject of dispute in the recent Federal Court (FC) case of *Azizan Abd Rahman & 2 Others v Concrete Parade Sdn Bhd & 5 Ors*[ii]. The proper construction of sections 75, 85 and 223 of the Companies Act 2016 (the CA2016) and the inter-play among these provisions were the pivotal questions for determination by the highest court of the land. At the heart of the dispute were the rights of the company management to raise capital through issuance of new shares, the pre-emptive rights of existing shareholders to buy newly issued shares and the point in time the directors of a company are to procure shareholders' approval for the acquisition or disposal of the property or undertaking of a substantial value.

Section 75 of the CA2016 prohibits the directors of a company from exercising any power to allot shares without the prior approval of the company in general meeting; whilst section 85 reads:

[i] Passive remedy refers to a challenge to resist the recognition and enforcement of an arbitral award by an award debtor in the court before which the arbitral award is sought to be enforced (the enforcement court) as opposed to active remedy which is a challenge at the seat court by an award debtor in setting aside the arbitral award.

[ii] Federal Court Civil Appeal No.: 02(F)-77-08/2022(W)

> "85. *Pre-emptive rights to new shares*
> (1) ***Subject to the constitution***, *where a company issues shares which rank equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders.*" (emphasis added)

Background Facts in Brief

On the facts, under the Proposed Merger, Mercury would transfer its business to JF Apex which would have become one merged entity, in consideration of which Apex Equity Holdings Berhad (Apex Equity), the holding company of JF Apex, would pay RM140 million in cash and issuance of new shares; and part payment of the cash consideration was via issuance of new shares for private placement (the Proposed Private Placement). The Proposed Merger was conditional upon, *inter alia*, the approval of the shareholders of Apex Equity (which was also condition precedent to the Proposed Private Placement), the approvals of Bursa Malaysia and Securities Commission, and a vesting order from the High Court pursuant to Capital Markets and Services Act 2007.

A Heads of Agreement by Apex Equity and Mercury (the HOA) was entered into in September 2018, followed by a tripartite Business Merger Agreement between Apex Equity, JF Apex and Mercury (the BMA) three months later in December 2018. Eight conditional Subscription Agreements for the Proposed Private Placement were also executed. Two months later in February 2019, Concrete Parade, a minority shareholder of Apex Equity filed a minority oppression suit pursuant to s.346 of the CA2016 to, among others, invalidate the HOA, BMA and Subscription Agreements (the HC Oppression Suit) on the grounds of non-compliance by Apex Equity with the pre-emptive rights under s.85 and that the entering into the HOA was without condition precedent and the execution of the BMA was without the shareholders' prior approval in violation of s.223.

Pending the disposal of the HC Oppression Suit, the Proposed Merger and the Proposed Private Placement were approved by the shareholders of Apex Equity at an EGM. Following that, the HC had dismissed the HC Oppression Suit in August 2019. On appeal to the Court of Appeal (COA), Concrete Parade's appeal was allowed in August 2022. By then, Mercury had decided not to extend the timeline and the Proposed Merger came to an end in April 2021. The matter was further taken up to the final appellate court, the FC which eventually delivered its decision on 26.3.2024.

On Section 85 on Shareholders' Pre-emptive Rights

As s.85 of the CA2016 is qualified by the words "*Subject to the constitution*", the

constitution of Apex Equity in Article 11 provides that:

> "***Subject to any direction to the contrary*** (the said Phrase) ***that may be given by the Company in general meeting***, all new shares or other convertible securities shall be offered to such persons as at the date of the offer are entitled to receive notices from the Company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled…" **(emphasis ours)**

The COA had construed the said Phrase to refer only to the manner and proportion in which the new shares proposed to be issued have to be offered to the existing shareholders; and could not mean any direction not to offer at all to existing shareholders, relying on an Indian High Court decision (*Shanti Prasad Jain*) which was purportedly on a provision similar to s.85 of the CA2016[i]. In other words, the COA had regarded the pre-emptive rights of existing shareholders were mandatory and not capable of being renounced at all.

The FC rejected such interpretation. In doing so, the apex court applied the purposive approach of statutory interpretation; and considered the legislative history of shareholders' pre-emptive rights, provisions in the precursor to s.85 of the CA2016[ii] and relevant provisions of existing subsidiary legislations[iii]. Writing the grounds of judgment for the FC, Nallini Pathmanathan FCJ (*pic*) also pointed out that section 81 of the Indian Companies Act 1956 was in fact NOT in *pari material* with our s.85 as the opening words "*Subject to the constitution*" in the latter were not present in the former; and that the Indian Supreme Court had in fact ruled the decision of the Indian High Court in *Shanti Prasad Jain* as incorrect! The FC went on to hold that where the constitution of a company provides that shareholders' pre-emptive rights under s.85 of the CA2016 are "*subject to direction to the contrary that may be given by the company in general meeting*", shareholders may at general meeting vote on a resolution <u>to disapply or waive</u> their pre-emptive rights <u>in full</u>, not just in relation to the manner and proportion in which shares are offered to existing shareholders[iv].

The FC further held that it was not necessary for the proposed resolution to expressly stipulate or explain, the nature of pre-emptive rights under s.85(1) of the CA2016, and that the passing of the proposed resolution as amounting to a waiver of those rights, in order for the

[i] *Shanti Prasad Jain v Kalinga Tubes Ltd and others* [1965] AIR 1535

[ii] i.e. Companies Ordinance 1940 and Companies Act 1965

[iii] i.e. Capital Markets and Services Act 2007 and Main Market Listing Requirements

[iv] The COA decision effectively elevated the pre-emptive rights in s.85 to the status of a mandatory and obligatory entitlement in every instance of the issuance of shares, a construction that is, in the FC view, contrary to the legislative intent.

resolution to constitute a valid waiver of pre-emptive rights.

Further, an agreement for the allotment of shares to third party placees, other than existing shareholders, which is conditional on shareholders' approval at general meeting, does not contravene s.85(1) of the CA2016. This is more so where the shareholders' approval in general meeting was obtained prior to any allotment or issuance of the shares.

On Section 223 on Shareholders' Approval for Substantial Property Transaction

Section 223 of the CA2016 reads:

> "*Approval of company required for disposal by directors of company's undertaking or property*
>
> *223. (1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for –*
>
> *(a) the acquisition of an undertaking or property of a substantial value; or*
> *(b) the disposal of a substantial portion of the company's undertaking or property unless –*
>
> *(i) the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or*
> *(ii) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution."*

The Federal Court interpreted s.223(1)(i) and (ii) above as to be read **disjunctively**. Thus, where a company enters into any arrangement or transaction for the acquisition or disposal of an undertaking or property of a substantial value (substantial property) falling within s.223 of the CA2016, EITHER the agreements relating to the said arrangement or transaction are expressly made subject to the approval of the company by way of a resolution; OR, alternatively, the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.

The apex court further ruled that where two or more agreements are construed as forming <u>one composite transaction</u> constituting an arrangement or transaction falling within s.223 of the CA2016 for the acquisition or disposal by a company of substantial property, then s.223(1)(i) would be satisfied if at least one of the agreements forming the composite transaction contains an express condition precedent requiring a resolution of the shareholders of the company for the said arrangement or transaction. Another option was under s.223(1)(ii) by the passing of a resolution of the company in a general meeting approving the said arrangement or transaction before the arrangement or transaction becomes unconditional and binding on the parties to the arrangement or transaction and is carried into effect.

In the BMA in *Concrete Parade*, it contained an express condition precedent to the effect that the acquisition was **subject to shareholders' approval at a general meeting** and therefore, it was compliant with section 223(1)(b)(i). There was no necessity for **a second set of shareholders' approval to be obtained prior to the actual acquisition taking effect.** The decision of the COA that had interpreted s.223(1)(i) and (ii) to be read **conjunctively** in effect required two sets of shareholders' approval to be obtained, once before entering into any form of agreement for a proposed acquisition or disposal of a substantive property and a second time prior to the actual transfer or putting into effect of the transaction. This was, in the words of the FC, irrational, unreasoned, unreasonable and absurd, and the FC overturned it. Further, as the BMA could **not** possibly have the effect of '**carrying into effect**' or '**implementing**' or '**executing**' the agreement by reason of the existence of the condition precedent, it was incorrect to say that the BMA was in breach of section 223(1)(b)(i) or (ii).

The apex court also held that section 223 (1) of the CA2016 does not impose an "*incumbent duty on the directors to inform shareholders*" of **any intention** to '*enter into*' *and/or* '*carry into effect*' an acquisition or disposal of substantial assets of a company based on the decisions in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor and Other Appeals*[i] and *Smithton Ltd (formerly Hobart Capital Markets Ltd) v. Naggar*[ii].

In short, for the compliance of s.223(1)(b) in respect of the disposal of the company's substantial property, it is sufficient if either s.223(1)(b)(i) OR (b)(ii) is adhered to. It is not necessary to comply with both limbs of the sub-paragraph. In practical terms this means that:

(a) At the outset of a proposed corporate transaction, it is open to the directors/management to enter into an agreement which is conditional upon the obtaining of shareholders' approval for the transaction. This is to be gleaned from the words '**subject to**'. In the event the condition is not complied with and shareholders' approval not obtained, the corporate transaction will fail; or

(b) Alternatively, the directors/management can choose to obtain shareholders' approval at general meeting at a later stage prior to the actual implementation or execution or transfer of ownership of the substantial property.

The apex court reiterated that there was no new or onerous condition that has been enacted under the said provision in comparison to its predecessor, s.132C of the Companies Act 1965. On the contrary, the existence of sub-paragraphs (b)(i) and (ii) in s.223(1) of the CA2016 clarified and made it easier for the management to decide which option to adopt in respect of a corporate transaction.

[i] [2012] 5 CLJ 169, FC

[ii] [2015] 1 WLR 189

Other Aspects

Due to space constraint, we have not dwelled on the aspects of the FC decision on minority oppression and retrospective validation of shares buy-back exercise.

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COMPANY LAW

POWERS OF COURT POST-SANCTION ORDER IN A S.366 SCHEME OF ARRANGEMENT

The jurisdiction or powers of the court to make subsequent order relating to a scheme of arrangement after the grant of the approval/sanction order under s.366(4) of the Companies Act 2012 (the CA 2016) and if so, the limits (if any) were in issue in the High Court case of *Top Builders Capital Berhad & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors*[i]. Incidentally, it was the same Judge who had decided and delivered the seminal decision on s.366 of the CA 2016 in *AirAsia X Berhad v BOC Aviation Limited & Ors*[ii].

In *Top Builders*, the 4th respondent (R4) was one of the creditors in the schemes of arrangement proposed by the applicants (the Schemes). The Schemes were passed by the requisite majority in the creditors' meetings and then, the approval/sanction was granted by the court (Sanction Order). Within a month, the 1st applicant (A1) was categorized as a Practice Note 17 (PN17 of the Main Market Listing requirements) listed issuer. R4 thus applied, *inter alia*, to set aside the Sanction Order on the ground that the Schemes were no longer 'operable' as the A1 had been classified as a PN17 listed issuer. A1 was hopelessly insolvent and not in any position to implement the Schemes or to make payments to settle the debts by certain timelines.

The learned Judge noted the 2 divergent views on the treatment of the order sanctioning the scheme of arrangement in UK, Australia, Singapore and India. Having deliberated the decisions from different jurisdictions, he disagreed that a scheme of arrangement when approved by the court took effect as an order of court and was to be treated like a court order (the Australian position). He held that the

[i] [2023] CLJU 449

[ii] [2021] 10 MLJ 942. We featured this case in The Update, issue Retro Q3 & Q4 of 2021.

scheme derived its force from the statute and constituted a statutory contract between the company (applicants) and scheme creditors, which the court only gave its sanction upon satisfaction that it was procedurally fair to all creditors and substance was one that an intelligent and honest man of the particular class would agree.

The primary role of the courts in sanctioning a scheme was to ensure compliance with the statutory requirements, to safeguard procedural fairness in the scheme and to ensure the statutory majority were acting *bona fide* and not coercing the minority to promote interests adverse to them due to the 'cram-down'[i] provisions. Such were the supervisory powers exercisable by the court to ensure the scheme was fair and effective. Such powers must continue to remain in the court *post* the Sanction Order until the completion of the scheme.

Further, by virtue of the words in s.366(4) '*such alterations or conditions as the Court thinks just*', the court possesses an inherent jurisdiction to dispense ancillary or supplemental orders to augment or substitute the original orders so as to give effect to the intent and purpose of the order. Those words were absent from the UK Companies Act.

That said, and drawing analogy with consent judgment, given that the scheme was essentially an agreement between the creditors and the applicants, the court has no jurisdiction to vary or set aside the scheme by reason of any repudiatory breach which effectively terminated the scheme *prospectively* and released the scheme creditors of their obligations therein. The Sanction Order being a statutory contract, the court could not set it aside even if it was the case that the same had been rendered inoperative. Be that as it may, the learned Judge ruled that the case was not one in which the Sanction Order was inoperative but rather, if at all, a breach of the terms of the Scheme which was in dispute and which would have to be determined in a separate action.

R4's application was thus dismissed with costs.

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COMPANY LAW (WINDING UP)

CONDITIONAL WINDING-UP ORDER

Is a court hearing a winding- up petition empowered to make a conditional order that unless a judgment sum is paid by the company within a certain period of time, the company shall be wound up? The Court of Appeal (the COA) answered it in

[i] This refers to s.366(3) of the CA 2016 which makes the scheme to bind the affected creditors if it is agreed by a majority of 75% of the total value of the creditors or class of creditors present and voting at the creditors' meeting and which has been approved by the order of the court. This will prevent a minority in a class frustrating a beneficial scheme.

affirmative in *Prolink Marketing Sdn Bhd v Ambank Islamic Bhd*[i].

In *Prolink*, the petitioner (P) had obtained a final judgment against the respondent company (R). P served on R the statutory notice of demand pursuant to ss.465(1)(e) and 466(1)(a) of the Companies Act 2016 (the CA2016) (the said notice), demanding the judgment sum. R failed to pay within the stipulated 21-day period in the said notice. P filed winding-up petition. Having heard submissions, the High Court (the HC) ordered a conditional winding-up order that "*R pays monies owed to P within 5 months from the date of the order, i.e. on or before on 5 January 2021, the full sum demanded by P under the petition and the said notice*" and "*in the event R fails to pay the full sum demanded as stated, R shall be immediately be wound up by the court on 5 January 2021.*"

On appeal to the COA, it was held that the HC had the power to make such an order by virtue of the wordings "*or any other order as the court thinks fit*" in s.469(1)(c) of the CA2016. However, such an order must relate to the winding-up petition. The conditional order made by the HC entailed the ultimate result of granting the application for the winding-up of R or of dismissing it. The condition imposed was not an entirely independent remedy outside the application for the winding-up but related to the winding-up. It was a fair and reasonable condition and it benefited R as R was given time to pay the judgment debts.

This decision put to rest the proposition that the COA had seemed to have put forth in an earlier decision in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors*[ii] when the court remarked that "*despite the rather wide words appearing in s.221(1) of the Companies Act 1965 (which are similar to s.469(1) of the CA2016), the only **final** order a companies Court may make is either to direct a winding-up or to dismiss the petition.*"

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CONSTITUTIONAL / CRIMINAL LAW

LAW ON ENTICING MARRIED WOMAN IS UNCONSTITUTIONAL

A man enticing a married woman was actually a crime under s.498 of our Penal Code (PC) as held in the first ever case of its kind several years ago involving a Malaysian female celebrity which resulted in a public apology from the guilty enticer to the celebrity's then husband for causing the latter's embarrassment and humiliation. Recently, the Federal Court in *Lai Hen Beng v PP*[iii] ruled that this provision was unconstitutional in that it was unlawfully discriminatory on the ground of gender (i.e. against women) in violation of article 8(2) of the Federal Constitution (FC).

[i] [2022] 10 CLJ 247, CA
[ii] [1997] 2 CLJ 299, CA
[iii] [2024] 1 AMR, 249; [2024] 1 CLJ 681, FC

Article 8(2) stipulates that there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in, among others, any law except as expressly authorized by the FC. In the view of the apex court, s.498 of the PC only entitled a husband to rely on the said provision and protected his right by allowing him to seek prosecution of any person who had enticed his wife; but conversely, there was no recourse to a wife whose husband was enticed by another woman. It would thus seem that a woman may entice a married man without any repercussions in law. In other words, there was no law which criminalizes a woman for enticing a married man. This constitutes discrimination on the ground of gender only. Since there was no provision in the FC that expressly authorized such discrimination in the form that s.498 connoted, s.498 was held to be inconsistent against Article 8(2) of FC and was therefore unconstitutional.

Section 498 of the PC was however a pre-Merdeka law and in the light of Article 162(6) and (7) of the FC, the apex court could not immediately take the approach of simply striking it down, unlike post-Merdeka laws. Article 162(6) of the FC required s.498 to be applied "*with such modifications as may be necessary to bring into accord with the provisions of this Constitution*". That said, the apex court refused to make any judicial amendment as that would not only have totally changed the original legislative intent (i.e. to protect husbands against enticers of their wives) but would also be tantamount to making a new law (i.e. to protect wives against enticers of their husbands) which was properly the function of the legislature and not that of the judiciary. Thus, repeal was, in the judgment of the apex court, the only possible outcome to make that law not inconsistent with the FC. Following such decision, the offence in the PC against enticing married woman has been outlawed.

Tengku Maimun CJ delivering judgment in *Lai Hen Beng v PP*

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CONSTRUCTION LAW

UNPLEADED CAUSE OF ACTION FATAL TO CLAIM UNDER CIPAA

It is important that the cause for a claim filed under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") must be pleaded properly to clothe the adjudicator with the requisite jurisdiction in adjudicating the claim under CIPAA. In *Anas Construction Sdn Bhd v JKP Sdn*

Bhd & Another[i], the respondent ("R") had appointed the Appellant ("A") as the main contractor for a certain project under a construction contract ("the Contract"). There was a dispute on the fees claimed by A resulting in the matter brought to an adjudicator for adjudication under CIPAA after A had terminated the Contract.

In both the Payment Claim and the Adjudication Claim, A had pleaded clauses 28, 55 and 56 of the Contract to ground its cause of action whilst R in the Adjudication Response contended that clause 36.5 of the Contract was the relevant clause. However, in arriving at the Adjudicator's Decision in favour of A, the Adjudicator relied on clause 36.6 of the Contract which was not submitted by either party. At the High Court, A's application to enforce the Adjudication Decision was allowed. On appeal to the Court of Appeal ("COA"), the High Court's decision was set aside on the ground that the Adjudicator had acted in excess of his jurisdiction when deciding on the clause of the Contract which was not relied upon by A in its Payment Claim and Adjudication Claim to support its cause of action.

On final appeal to the Federal Court, the COA's decision was affirmed, by majority of 2 to 1. The majority relied on its earlier decision in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd*[ii], that it is mandatory to identify the applicable clause of the construction contract which relates to the cause of action as the Adjudicator's jurisdiction and power to adjudicate (pursuant to s.27(1) of CIPAA) is limited to matters referred to him pursuant to ss 5 and 6 of CIPAA. Section 27 reads:

> "27. ***Jurisdiction of Adjudicator***
>
> *1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to ss 5 and 6.*
>
> *2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to ss 5 and 6."*

The relevant sections 5 and 6 read:

> "5. ***Payment Claim***
>
> ...
>
> *2) The payment claim shall be in writing and shall include:*
>
> ...
>
> *b) Details to identify the cause of action including the provision in the construction contract to which the payment relates; ... "*

> "6. ***Payment Response***
>
> ...
>
> *2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute. ... "*

[i] [2024] 2 MLRA, FC

[ii] [2018] 1 MLRA 460

In the present case, the Adjudicator had held clause 36.6 of the Contract as the most applicable provision for A's claim against R; and allowed the claim based on the said clause which was not relied upon by A in its Payment Claim filed under s.5 of the CIPAA nor mentioned by R in the Payment Response filed under s.6. In addition, nowhere in the Adjudication Decision had the Adjudicator relied on clauses 28, 55 and 56 of the Contract which, as stated above, were the provisions pleaded and relied upon by A in its Payment Claim to establish its cause of action. As the Adjudicator's jurisdiction by virtue of s. 27(1) of CIPAA was limited to matters referred to the Adjudicator under ss 5 and 6 of CIPAA whilst the cause of action based on clause 36.6 of the Contract was not relied upon in the Payment Claim, the Adjudicator had exceeded his jurisdiction in deciding the dispute based on the said clause 36.6.

Further, parties had not been given the opportunity to submit on the cause of action under clause 36.6 of the Contract before the Adjudication Decision was handed down. The principle of natural justice included allowing parties to present their case effectively. The Adjudicator's failure to let parties submit in that respect was therefore a denial of natural justice.

A's appeal was, by majority, dismissed with costs; the COA's decision was affirmed. R succeeded in setting aside the Adjudication Decision.

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TO WHAT EXTENT DOES GARNISHEE ORDER ATTACH MONIES CREDITED INTO JD'S ACCOUNT?

One of the modes of execution of judgment is garnishee proceedings pursuant to Order 49 of the Rules of Court 2012 (ROC). Armed with a monetary judgment, the judgment creditor (JC) will apply for a garnishee order to show cause (GOTSC) which, upon service on a garnishee (commonly a financial institution), will freeze the sum outstanding from the garnishee to the judgment debtor (JD). Upon hearing and barring any objection or challenge by the JD or garnishee, GOTSC will be made absolute (GOA); the amount garnished will then be paid out to the JC.

In *Affin Bank Berhad v Energypeak FZE*[i], the question arose for determination was whether the amount owing from the garnishee to the JD was limited to the amount outstanding as at the date of the service of the GOTSC on the garnishee or would include all sums subsequently owing by the garnishee to the JD. The High Court (HC) had held that the final amount payable by the garnishee bank to the JC under the GOA included three additional sums that had come into the JD's account with the garnishee bank after the service of the GOTSC.

[i] [2024] 1 AMR 151, COA

Lee Swee Seng JCA delivering judgment in *Affin Bank Berhad v Energypeak FZE*

The Court of Appeal disagreed with the HC decision. It held that once an amount was attached or 'frozen', there could be no movement in the account, be it of money leaving or being added in. The only exception was when there was a sum of money accruing due from the garnishee to the JD. It was an exception that underscored the rule that ordinarily the GOTSC would not bite on future amounts but the amounts owing as at the date of service of the GOTSC. Thus, it was wrong to freeze the amount paid in after the GOTSC was served on the garnishee. The garnishee was under no obligation to continuously and continually monitor each affected account and to further attach subsequent amounts that may be banked into the account of the JD with the garnishee bank after the service of the GOTSC until the decision for GOA. The amount attached as at the date of the service of the GOTSC was 'frozen' and could not admit of fresh funds nor be depleted of existing funds.

The garnishee's appeal was thus allowed.

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DAMAGES

LOSS OF PROFIT ≠ LOSS OF REVENUE

The Court of Appeal decision in *Peninsular Home Sdn Bhd v Ko Lim Tristar Sdn Bhd*[i] made a very pertinent point on the distinction between loss of profit and loss of revenue that has often been mixed up. In the case, the plaintiff (P) had succeeded in its claim against the developer (D) for breach of sale and purchase agreements for 22 units of development in Menara UOA for being deprived of the use of the said premises. At the assessment of damages proceedings, D contended that P's claim for losses from January 2010 (due date for D to deliver vacant possession) until March 2014 (actual date P received vacant possession) was in essence a claim for loss of gross revenue and not loss of profit.

The Court of Appeal upheld such contention. The loss of revenue could not be equated to loss of profit. Granted P appeared to be claiming for loss of profit by relying on loss of rental. However, P had to prove the

[i] [2024] 2 AMR 248, [2024] 3 CLJ 1

profit which it would have made from the rental of the said premises and not merely the total rental income that it would have received. That did not amount to loss of profit. The rental value has to be subject to deductions that P would have to spend in order to produce the revenue. Thus, P was not entitled to claim the entire gross rental without having to bear the corresponding expenditures in relation to the said premises such as quit rent, assessment, insurance, maintenance and tax payable on rental income.

The appellate court also noted that it was not probable for the rental income to be calculated on 100% occupancy. D made a concession on the loss of profit which P could have made to be RM228,926.18. This was accepted by the court which made order accordingly in substitution of the award of RM7,234,457.46 by the High Court.

It is also noteworthy that the COA had regarded that this was exceptional circumstances where the concurrent findings from the assessment of damages by the deputy registrar and High Court judge ought to be disturbed by reason of serious error of principle.[i]

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1. COSTS AWARDED AGAINST SERIAL VEXATIOUS CLAIMANT IN INDUSTRIAL COURT

Ordinarily in a civil litigation case in the civil court, costs will be awarded in favour of the winning party against the losing party. In cases before the Industrial Court, however, the court generally does not award costs and each party generally bears their own costs, although regulation 5 of the Industrial Relations Regulations 1967 empowers the court to make order with respect to costs and expenses. The practice is not to order costs.

That said, in the recent case of *Ching Suet Yeen v Lepcon Tools (M) Sdn Bhd*[ii], the Industrial Court awarded costs against the claimant who was termed as "serial vexatious litigant". She had brought not less than 10 unfair dismissal claims against her former and present employers including her employer after she was terminated from the respondent company. The propensity of the claimant in filing cases was not only limited to the Industrial Court but also the Labour Court and civil courts. The *modus operandi* and the frequency in which she had dragged her employers to the Industrial Court certainly showed a worrying trend where the court might be seen to be more of a goldmine than a place to seek justice. Under such circumstances, it was justified to order costs against the claimant as a deterrence to

[i] *Goo Sing Kar v Dato' Lim Ah Chap & Ors* [2013] 2 CLJ 936 (CA)

[ii] [2024] 1 ILR 136

herself and other litigants from filing multiple claims against their former employers in order to seek financial gain. Costs of RM3,000 were thus awarded against the claimant.

2. TEST TO MEET TO SACK EMPLOYEE FOR POOR PERFORMANCE

How can an employer in Malaysia validly terminate the services of its employee on the ground of poor performance? The Industrial Court (IC) recently *in Tengku Yusri Tengku Yaacob v Malayan Banking Berhad*[i] reiterated the three-tier test laid down in *Ireka Construction Berhad v Chantiravathan Subramaniam James*[ii] to be satisfied before dismissing an employee justifiably from his employment:

(i) the claimant had been warned about his poor work performance and attitude;
(ii) the claimant was accorded sufficient opportunity to improve on his work performance; and
(iii) despite the opportunity given by the company, the claimant failed to sufficiently improve on his work performance.

In *Tengku Yusri Tengku Yaacob*, the claimant was given a period of almost 2 years to achieve the targets set under 8 performance reviews although under the company's Consequence Management Internal Guidelines, it was only required to place the claimant under 3 performance reviews. The claimant failed to meet the targets set for him under 8 consecutive performance reviews. The claimant's dismissal was held as done with just cause and excuse.

The IC also seized upon the opportunity to remind that in cases of senior management employees, the test in *Ireka Construction Berhad* was less likely to apply. This is because a person holding a senior management position is expected to know the standard of job performance required of him and capable to judge for himself whether he is achieving that requirement, making the need for warnings and improvement opportunities less necessary[iii].

3. GUIDELINES TO ABIDE BY TO SACK A PROBATIONER

It is not uncommon for the employment of an employee to be terminated during his probationary period. This would typically be easier and involve fewer legal complications than terminating an employee after he was confirmed as permanent staff after the probationary period. That said, the Industrial Court in *John Chiew Siew Kiong v Persatuan Pemeliharaan Pendidikan Tiong Hua Malaysia*[iv] set out some key points to consider regarding the termination of an employee during the probationary period which we reproduce as follows :

(i) Probationary period agreement:

[i] [2023] 4 ILR 583
[ii] [1995] 2 ILR 11
[iii] See *Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor* [2000] 1 CLJ 180
[iv] [2023] 4 ILR 637

It is essential to have a clear employment contract or offer letter that outlines the terms of the probationary period, including the duration and any specific conditions. This agreement should also specify the rights of both the company and the claimant during this period.

(ii) Performance feedback:
The company should provide regular feedback to the employee during the probationary period. This helps the claimant understand expectations and areas for improvement. Documenting performance issues and discussions can be valuable if termination becomes necessary.

(iii) Reasons for termination:
The company should have valid and documented reasons for terminating an employee during the probationary period. This could include issues related to job performance, behaviour, or a mismatch between the employee's skills and the requirements of the position.

(iv) Communication:
it is important to communicate the decision to terminate the claimant professionally and respectfully. Clearly explain the reasons for the termination and any steps taken to address performance concerns during the probationary period.

(v) Legal compliance:
While termination during the probationary period is generally easier, the company must still adhere to employment laws and regulations. Be aware of any specific legal requirements in the company's jurisdiction regarding probationary periods and termination.

(vi) Final pay and benefits:
Ensure that the terminated claimant receives any final pay.

4. SACKED FOR REFUSING TO GET VACCINATED

Refusal to be vaccinated amounted to a serious misconduct of insubordination. Thus, in *Mazuna Begum Binti Kadir Mira v Malaysia Airlines Berhad*[i], the dismissal of the claimant who had refused to comply with the Company's Covid-19 Immunisation Policy due to her concerns on the purported side effects of the vaccine was held to be justified and with just cause or excuse. Whilst she has a legitimate right to be concerned about the side effects of any vaccine, that concern must be reasonable and be supported by sound medical

[i] Case No.: 4/4-1443/22, Award no.: 196 of 2024, Industrial Court at Kuala Lumpur

justification. She had not furnished any such cogent evidence. Her refusal would put at great risk the Company's efforts to provide and ensure a safe working environment for all employees and the public considering the Claimant's job as a Leading Cabin Crew. The Claimant's assertion of discrimination was held to be without any merit as the Immunisation Policy was made compulsory for all employees of the Company.

5. SACKED FOR MISHANDLING OF CASH IN A BANK

The teller/service associate of a local bank was justifiably dismissed for misappropriating the bank's cash money amounting to RM1,000 from the cash excess under his care at the bank's Ipoh branch. The Industrial Court in *Sasikumar Paramasivam v United Overseas Bank (Malaysia) Bhd*[i] came to such conclusion despite the staff concerned having 17 years of service with the bank. The bank as a public financial institution and the custodian of public funds demands from its employees integrity, absolute honesty and impeccability. A high quality of discipline, care and conduct of the highest order is expected of an employee in the banking industry in order to serve public confidence. Any mishandling of cash is a serious misconduct. Such a breach of integrity was a gross misconduct warranting summary dismissal.

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FAMILY LAW

SPOUSAL MAINTENANCE AND ACCESS TO CHILD – INHERENT RIGHT?

Is there an inherent right for a wife to receive spousal maintenance from her husband in divorce proceedings? Is access to a child an inherent right belonging to the child or the parents? These were the 2 main issues before the High Court in the divorce petition in *ACH v PAY*[ii].

On spousal maintenance, by the use of the term "may" in s.77(1) of the Law Reform (Marriage and Divorce) Act 1976 (the Act), the court has discretionary power in adjudicating the validity of the petitioner wife's claim for maintenance. There is no inherent right for a wife to receive spousal maintenance from her husband, particularly when she possesses the capacity to generate her own income to sustain an independent livelihood. In the words of the learned Judge, "*compelling a man to pay maintenance to his wife solely based on gender contradicts the principle of*

[i] [2024] 1 ILR 155

[ii] [2024] 2 CLJ 223

gender equality." To determine spousal maintenance, the court is guided by the '*means and needs*' test outlined by s.78 of the Act and the degree of responsibility assigned to each party for the breakdown of the marriage[i].

In the instant case, the petitioner had not adduced evidence to substantiate her list of claimed essentials. In the view of the court, as an insurance agent, she had the ability to earn an income sufficient to cater to her needs[ii]. Taking also into consideration that the marriage only lasted 5 years, it would be unjust for the respondent to bear the burden of perpetual monthly spousal maintenance. Spousal maintenance is not intended to perpetuate an enduring financial reliance by the former wife. Further, the court found that the irretrievable breakdown of the marriage was due to the petitioner's actions.

Whilst the court had granted sole custody, care and control of the sole child from the marriage to the petitioner, she sought restrictions or limitations on the respondent's access to the child. The court refused to accede to that. It was held that access to the child should be recognized as an inherent right belonging to the child rather than solely the parents. Therefore, any attempt to restrict the respondent's access to the child would inherently constitute a violation of the child's rights. That said, the court took cognizance of the suitability of unsupervised and overnight access due to the child's current estrangement from the respondent and adopted a phased access strategy, designed to facilitate a gradual and supportive reconnection between the child and the respondent.

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LAND LAW / LOCAL GOVERNMENT / TORT

MONSOON DRAIN ENCROACHING ON LAND WITHOUT LANDOWNER'S PERMISSION

In *R Meyyanathan Retnasamy v Dewan Bandaraya Kuala Lumpur*[iii], the Defendant, DBKL had constructed a monsoon drain on the Plaintiff (P)'s land without P's permission. Despite repeated requests, DBKL failed to remove the structure which had encroached upon P's land. DBKL further committed continuous trespass onto P's land for the maintenance and improvement works on the monsoon drain.

In allowing P's claim against DBKL in trespass, the High Court held that although the monsoon drain was part of a drainage system necessary to prevent any catastrophes such as flash floods, DBKL being the local authority statutorily responsible for the maintenance of the same

[i] The court also drew guidance from *Dr Shameni Pillai PB Rajendran v Dr S Arulselvam Sanggilly & Anor* [2011] 6 CLJ 782 and *V Sandrasagaran Veerapan Raman v Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474.

[ii] See also *Choong Yee Fong v Ooi Seng Keat (Joint Respondent)* [2006] 5 CLJ 144.

[iii] [2024] 1 CLJ 570

was not immune from tortious liabilities. Thus, the location of the monsoon drain on the landowner, P's land and entry by DBKL on the land for purposes of carrying out maintenance works amounted to encroachment and trespass to the land.

The Street, Drainage and Building Act (SDB) could not over-ride P's rights as guaranteed under the Federal Constitution. The requirement under SDB of giving reasonable notice to the landowners before the execution of D's statutory works was mandatory but had not been observed. Thus, DBKL's defence of justification failed.

However, the court refused to grant mandatory injunction to order DBKL to remove the structure from P's land. To remove or relocate the monsoon drain would disturb and disrupt the efficient flow of water. In the absence of alternatives, it would not be in the public interests to do so.

Whilst P had bought the land with full knowledge of the location of the monsoon drain on his land, taking part of P's land without P's permission was not legally acceptable. Thus, DBKL was ordered to acquire from P the portion of land it had encroached at the prevailing market price. The court also allowed damages for as long as the trespass and encroachment were not addressed, at the rate of RM200 per day until the date of the judgment.

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LAND LAW

INVALID TRANSFER OF LAND BASED ON POA WITHOUT SPA

The purchaser of land (D) in *Mustaqeem bin Zolkerflee*[i] became the registered proprietor of land upon allegedly purchasing it from the plaintiffs (P) by way of an irrevocable power of attorney (POA). P admitted that they had signed the POA but they were under the impression that they were executing a sale and purchase agreement with one Dato' Salleh. They denied receipt of any sum of money. They filed a suit in Muar High Court to declare the POA as null and void and to

[i] [2024] 2 AMR 814

cancel the registration of the transfer of the land.

It was held that since P did not dispute signing on the POA, the POA was not invalidated. However, given that there was no mention of any valuable consideration in the POA, the POA had fallen foul of s.6 of the Powers of Attorney Act 1949 and was invalid. In any event, the POA had no life of its own and did not confer any proprietary right to D. It was only a subsidiary instrument and not a sale and purchase agreement for the land that contained all the terms and conditions for the sale. D had no right to use the POA to transfer the land. The transfer of the land executed by D as the transferor and transferee using the POA was null and void. It was defeasible under s.340(2) of the National Land Code on the ground of using the POA and the memorandum of transfer which were void instruments.

NO ADVERSE POSSESSION OF LAND IN MALAYSIA

The doctrine of adverse possession has no place in Malaysia. Regardless of the inexorable passage of time during which a piece of land may have been occupied by occupiers, the sovereign authority and ownership vested in the state remain unassailable. This message was reiterated by our High Court in *TARC Education Foundation v Semua Orang Yang Menduduki Di Atas Tanah Yang Dipegang Di Bawah Hak Milik HS (D) 69596 PT 2890, Mukim Setapak, Daerah Kuala Lumpur, Wilayah Persekutuan Malaysia*[i].

In 1971, the Government of Malaysia granted an estate, on which the land held under HS (D) 69596 PT 2890, Mukim Setapak, Daerah Kuala Lumpur (the land)

[i] [2024] 2 AMR 713

sit, to P's precursor entity (TAR College) for the construction of P's campus. In 1973, the land was alienated to Pesuruhjaya Tanah Persekutuan (PTP). In 1979, P purchased the land from the government. P was aware of the squatters problems on the estate. Subsequently, Badan Kerajaan Masyarakat Kampung Wirajaya Setapak requested consent from P for the installation of electrical poles on the land. P agreed on conditions, including one which required such poles to be removed when P decided to reassert its possession of those parts of the land. In 2022, P issued demand letters requiring the occupiers to vacate the land but all in vain. P filed for summary possession of land under O.89 r.1 of the Rules of Court 2012.

P succeeded. There was no triable issue. The occupiers were squatters *simpliciter*. They did not have the consent and/or licence of either PTP or P to remain on the land which belonged to P as the registered owner. The issue regarding P's knowledge of the occupiers on the land and that it had given permission to erect the electric cables was not a triable issue. In fact, it cemented the fact that the land belonged to P whereby permission was required for such installation. The right to remain on the land was terminated upon receipt of the notices to quit from P. Further, exploration of land, construction of buildings and infrastructures, payment of utilities and assessments did not make the occupation of the land lawful.

Order was made against the occupiers to vacate the premises on the land within 18 months from the date of the judgment,

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TORT

REVERSAL OF BURDEN OF PROOF TO TORTFEASOR FOR CLAIM ON BREACH OF CONFIDENCE

Two former employees had used the company's confidential information for their own benefit and the benefit of the company which they had set up to do a similar business in the same industry (provision of cross-border transportation and warehousing services). The company (P) thus sued both for breach of confidence and conspiracy to injure in the High Court case of *OTL Asia Sdn Bhd v Lee Yik Chief & Ors*[i].

On the facts, the first employee (D1) had stopped work on the next day after asking for an early release (Early Release Request) while serving out the notice period in respect of his resignation from P; and D1 had founded a company (D3) to run the same business as P. The second employee (D2) joined D3 about three months after he left P. D1 became the CEO of D3 whilst D2 was the COO.

D1 had downloaded P's confidential information and documents (CIAD) contained in his work laptop onto an external hard drive on the day before his

[i] [2024] 3 CLJ 84

Early Release Request and two days before he stopped work. His excuse that he did so because of a ransomware attack in the past that required P's personnel to back up the data in their respective computers and he was merely diligently complying with work protocol was rejected by the learned Judge as an incredible explanation given the timing and his Early Release Request. Evidence also showed that on the same day of his downloading, D1 had already struck an agreement with a customer of P to finance D1 to start D3 and its business.

D2 had downloaded the same CIAD and forwarded the same by email to his personal accounts on two occasions, i.e. 2 days and 7 days after he resigned. His explanation that he needed to be able to access the CIAD when he did not have access to his work laptop disclosed his wrongful purpose, i.e. to have access to the CIAD when he no longer worked for P.

The court acknowledged the 3 elements to establish breach of confidence:

(i) The information has the quality of confidentiality or a confidential nature;
(ii) The information was communicated or imparted in circumstances that contain an obligation of confidence;
(iii) Unauthorized use of the information to P's detriment[i].

P's CIAD had a confidential quality (prices and variable factors affecting the price) that was used by the defendants to get an unfair advantage for their own business, to P's detriment, such as undercutting P's prices to its customers and diverting businesses from P to D3. The communication and impartation of P's CIAD to D1 and D2 were done in circumstances that called for an obligation of confidence on the part of the two defendants.

However, instead of the burden conventionally placed on P that the defendants used the confidential information to P's detriment, the court modified the approach so that the burden was shifted to the defendants to prove that there was no unauthorized use of P's confidential information to P's detriment.[ii] The defendants did not produce any evidence that directly proved, or any evidence from which it could be inferred, that there was no unauthorized use of the P's CIAD to P's detriment.

P's claim was allowed with injunction, discovery orders and damages against the defendants to be assessed.

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[i] *Coco v AN Clark (Engineers) Ltd (No 2)* [1969] RPC 41; *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* [2016] 6 CLJ 176 (FC)

[ii] Adopted from the Singapore Court of Appeal case of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting And Others* [2020] 1 SLR 1130 (SGCA)

PRIVATE HOSPITAL LIABLE FOR ITS DOCTOR'S NEGLIGENCE

May a private hospital be liable for the negligence of a medical practitioner who is not an employee or servant of the hospital but an independent contractor under contract for services? That is in essence the pivotal issue in the recent Federal Court case of *Siow Ching Yee v Columbia Asia Sdn Bhd*[i]. The facts are simple. The plaintiff (P) had undergone a tonsillectomy, palatal stiffening and endoscopic sinus surgery at a private hospital, SJMC but 10 days later, he suffered bleeding at the site of the operation. He was brought to the accident and emergency department of Columbia Asia Hospital, the 3rd defendant (D3) by his family. He was attended to by a medical officer, a consultant ear, nose and throat surgeon, the 1st defendant (D1) and a consultant anaesthetist, the 2nd defendant (D2). Complications developed before the surgery started. Although the surgery was eventually performed uneventfully, P suffered hypoxic brain damage. P was permanently mentally and physically disabled by reason of the massive cerebral hypoxia.

In a suit launched, through his wife, against the three defendants, D1 was held not negligent but D2 was held liable as her conduct had fallen below the standard of skill and care expected from an ordinary competent doctor professing the relevant specialist skills. D3 was absolved of any liability as D1 and D2 were independent contractors hence D3 did not owe any vicarious duty. This High Court decision was upheld by the Court of Appeal.

In the final appeal, the apex court by a majority of 4-1 overturned the ruling against D3 and held that D3 owed a "non-delegable" duty to P which duty was breached when there was negligence found on the part of D2. D3 was a private healthcare facility or hospital used for the reception, lodging, treatment and care of persons who required medical treatment. From the reading of the provisions in the Private Healthcare Facilities and Services Act 1998 and regulations, it was clear that the legislative scheme intended private hospitals such as D3 to remain responsible for the treatment and care of the patients, regardless whom they might have employed, engaged or delegated that task, and even if

[i] [2024] 3 AMR 485. See also *Dr Kok Choong Seng & Anor v Soo Cheng Lin & Anor Appeal* [2017] 6 MLRA 367 (FC)

they were rendering emergency care services.

The pinnacle court also proceeded to apply the common law test known as *Woodland* features[i] to the facts of the case; and held that all five features were met which thus gave rise to a non-delegable duty of care. Firstly, P was a patient in a vulnerable position and was totally reliant on D3 for his care and treatment; more so for being admitted to its emergency services. Secondly, there was an antecedent relationship between P and D3, independent of the negligent act or omission, which placed P in the actual custody and care of D3 and from which it was possible to impute to D3 the assumption of a positive duty to protect P from harm. Thirdly, P had no control over how D3 chose to render the emergency care and treatment whether personally or through employees or 3rd parties such as professionals it had engaged. Fourthly, having assumed a positive duty of care to P in respect of emergency services, D3 had delegated to its medical officer, D1 and D2, the performance of its obligations and these persons were indeed performing those delegated functions. Fifthly, the 3rd party, D2 was negligent not in some collateral respect but in the performance of the very function (i.e. rendering proper emergency care and treatment for P) assumed by D3 and delegated by D3 to her.

With all five features satisfied, D3 had assumed a "non-delegable" duty of care that it owed personally to P, a patient who was admitted to its emergency services. The defence of independent contractor was not sustainable in law and was rejected. P's appeal was allowed with judgment entered against D3 accordingly.

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TORT

DUTY OF CARE OWED BY CTOS

It is common knowledge that CTOS Data Systems Sdn Bhd (CTOS) is tasked, under the Credit Reporting Agencies Act 2010 (the 2010 Act), with collating credit reports from various sources including Bank Negara and other agencies for the purposes of dissemination to subscribers which included financial institutions. In a landmark decision, the High Court in *Suriati Mohd Yusof v CTOS Data Systems Sdn Bhd*[ii] held that the defendant, CTOS owed a duty of care to verify and provide accurate credit information not only to the financial institutions but also to persons concerned to whom the information was related. It was further held that CTOS had no power under the 2010 Act to formulate credit scores.

In the instant case, due to a negative report from CTOS, the plaintiff's loan application was rejected. The plaintiff had subsequently discovered that the data collated by CTOS was inaccurate and false. Despite alert by the plaintiff that the information against her was inaccurate,

[i] *Woodland v Swimming Teachers Association & Others* [2014] AC 537

[ii] [2024] 3 MLRH 688

CTOS chose to ignore and continued to maintain the said data. CTOS had also given the plaintiff a low credit score based on inaccurate un-updated criteria. Both the inaccurate information and wrong credit score had resulted in the plaintiff to be considered as "serious delinquent" leading to the rejection of the loan application and losses suffered by the plaintiff.

In deciding in favour of the plaintiff, the learned Judge rejected CTOS' defence that the duty was on the recipient of the credit information to independently verify such information and that its role was merely to collate the information and not to verify its accuracy. CTOS did owe a duty of care to the plaintiff to provide accurate credit information. CTOS had clearly breached such duty by choosing to be indifferent even after being alert.

Further, the High Court remarked that CTOS was merely a repository of the credit information to which subscribers had access. It was not empowered under the 2010 Act to formulate a credit score or create its own criteria or percentage to formulate a credit score. By doing so, it had gone beyond its statutory functions.

The plaintiff succeeded in negligence and was awarded RM200,000 as general damages and RM50,000 as costs.

This decision is however not final as we understand that CTOS had lodged an appeal to the Court of Appeal.

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TORT

LOCAL AUTHORITY'S DUTY TO MAINTAIN TREES ON PRIVATE LAND FROM ENDANGERING USERS OF PUBLIC ROADS

Right on the heels of the High Court decision in *Pengurus Kawasan, Selia Selanggara Selatan Sdn Bhd & Anor v Iqmal Izzuddeen Mohd Rosthy & Ors & Anor Case*[i] as featured in issue Q3 of 2023 of THE UPDATE, another High Court had recently reiterated the "expanded" scope of duty on the local authority on the maintenance of public roads to be free from dangers. In *Syaiful Amri Bin Matimbang & 5 Ors v Datuk Bandar Kuala Lumpur*[ii], a woman whilst walking on her rented business premise was hit by a huge branch from a tree which fell on her head and died. Her family sued Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur (the Defendant) for negligence and breach of statutory duty under the Local Government Act 1976 (the Act). The Defendant applied to strike out the claim on the ground that it had owed no duty of care as the tree was on private land.

[i] [2023] 6 CLJ 476

[ii] Kuala Lumpur High Court Civil Suit No.: WA-23NCVC-4-01/2023

The court dismissed the application. It held that the Defendant owes a common law duty of care and statutory duty under the Act to members of the public to maintain trees which are on private land but with branches protruding out to a public road. In doing so, the learned Judicial Commissioner relied on the Federal Court's decision in *Ahmad Jaafar Abdul Latiff v Dato' Bandar Kuala Lumpur*[i] which had ruled that although a tree might be on a private land, the Dato' Bandar of Kuala Lumpur could require the owner/occupier of any premises to remove or trim the tree; and could also enter any private land to cut or trim trees that posed a danger to the public. Section 101(cc)(i) of the Act[ii] was construed to impose statutory duty on the Defendant to act and ensure that public roads were kept safe from trees aligned to it. The court also went on to hold that such duty could be extended to a tree which is wholly on private land but to which the public have access or a right of way, relying on the definition of "street" under the Act which includes any road over which the public have a right of way.

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TRUST

PLAN ILL-CONCEIVED BY CHILDREN TO STRIP FATHER OF HIS EMPIRE WORTH HUNDREDS OF MILLIONS OF RINGGIT

In *Looh Keo @ Looh Lim Teng v Looh Chee Peng & 13 Ors*[iii], an octogenarian plaintiff (P) had filed a suit against his 5 children (the individual defendants, D1 to D5) for the return of the shares in companies presently registered in their names allegedly on trust for him. He claimed that he never intended to give the shares to them. The individual defendants, in various combinations, controlled the companies (D6 to D9, D11, D13 to D14) at the board and/or shareholder levels. They replied that P had given away 70% of his wealth to them and that P had never alleged that the shares held in their names were beneficially owned by P or held on trust for P; and that a presumption of advance/gift arose in relation to all such shares transferred to them by or at the behest of P.

The learned trial Judge ruled in favour of P on numerous grounds. Firstly, P

[i] [2014] 9 CLJ 861, FC

[ii] Under s.101(cc)(i), a local authority shall have power to require the owner or occupier of any premises to, *inter alia*, remove, lower or trim to the satisfaction of the local authority any tree, shrub or hedge overhanging or interfering in any way with the traffic on any road or street...which in the opinion of the local authority is likely to endanger the public safety or convenience.

[iii] [2024] 1 AMR 295

had rebutted the presumption of advancement (arising out of the close relationship of father and children which gave the individual defendants as recipients of the shares an advantage). Such presumption could only operate if P's intention could not be discerned; but in this case, P had despite aged 80 years old and undergoing dialysis treatment given evidence in the 49-day trial of his intentions regarding the transfer which was eventually accepted by the court.

P was in control and the primary decision-maker in the companies. Several of his family members gave consistent evidence that the shares they had in P's companies were held on trust for him and they followed his instructions; and each of them returned the shares when asked to by P without receiving any consideration and if they had been directors, they resigned at his request. The individual defendants also paid nothing for the transfers or allotment of shares to their names; they also took instructions from P. The court found their evidence that the transfers or allotment of the shares were gifts to them as weak and inherently improbable and unbelievable. Hence, the presumption of advancement was rebutted.

P's explanation on why no nominee arrangement with the individual defendants was not inherently improbable. Since they were P's children, there was no basis for P not to trust them. From documentary evidence, it was plain that P had no intention of gifting shares in the companies to anyone but had instead always intended to retain beneficial interest in such shares. It was his long-standing practice and intention that members of his family and third parties including the individual defendants always held shares in his companies as trustees and if they were directors, as his nominees. He remained consistent throughout in his wishes and objectives including a fair and equitable distribution of his assets to his 9 children after his demise (instead of 70% of P's assets divested to only D1 to D5), non-division of his assets, preservation of generational wealth and looking after the larger and extended Looh family. Such was a consistent course of conduct by P to warrant a presumption of intention in favour of P pursuant to s.114(d) of the Evidence Act 1950. By merely proffering bare denial and feigning no knowledge of P's practice, the individual defendants had failed to discharge the onus to rebut such presumption.

P was adjudged to be entitled to all the shares registered in the names of D1 to D5 on the basis of pleaded trust, resulting as well as constructive. The facts and circumstances demonstrated that it was an unconscionable plan conceived by them to strip their father of his assets. Their conduct besides being dishonest was also fraudulent, whether equitable fraud or common law fraud. To prove equitable fraud, P need not demonstrate that the individual defendants have an intention to deceive; he only needed to show that there was a relationship of trust and confidence between P and D1 to D5 and there had been unconscionable conduct by them. Their clinging on to the 70% wealth of P, taking over his business and to enrich themselves at P's expense was held to be unconscionable. The beneficial interests

thus "resulted" back to P as a matter of resulting trust which was an implied trust by operation of law that was meant to restore back the equitable interest in property to its original beneficial owner based on the presumed intention[i]. The elements of "constructive trust" were also present such that to allow the individual defendants to retain the shares would be unconscionable. Therefore, P got back his shares.

The court went on to award exemplary damages against the individual defendants. As children and trustees, it was their bounden duty to protect the interests of their aged, sickly and illiterate father and not to let their own interests and self-vested agendas conflict with their duties to him. They took advantage of their father's trust in them, of his ill-health, illiteracy and old age. P was a victim of the individual defendants' greed and avarice. There were exceptional circumstances and the cumulative conduct of the individual defendants justified the award of exemplary damages to P in the sum of RM500,000 against each of them.

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[i] See the deliberation by the Judge on the law on resulting and constructive trust at the outset of her judgment.