THE UPDATE

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PROTECTIVE COVENANTS ON BASIS OF GROUP OF COMPANIES

Do confidentiality agreement and conflict of interest agreement signed by an employee of a company bind him when he was transferred to another company within the same group of companies? That was the question posed before the Court of Appeal in *Acumen Scientific Sdn Bhd v Yeow Liang Ming*[i]. D was an employee of Fumakilla Malaysia Bhd (Fumakilla). It was a term of his employment that he may be transferred to any associate or subsidiary companies within the Texchem Group of Companies. He also signed two agreements, confidentiality agreement and conflict of interest agreement, during his tenure in Fumakilla. He was later transferred to P, a company within the Texchem Group, and promoted to a working director. Four years later, D resigned; and five months after his resignation, he joined Amcen Lab S/B (Amcen) as general manager. It was P's case that D had in breach of the confidential and conflict of interest agreements disclosed and made use of its confidential information for his personal interest and to the detriment of P's interest; that whilst he was still in P's employment, D had used P's property for matters relating to Amcen's operations and attempted to entice or solicit directly or indirectly, P's existing customers. D defended by taking the position that Fumakilla and P were two distinct legal entities despite the fact that they were part of the Texchem Group; and P could not enforce the two agreements.

It was held that the confidentiality agreement and the conflict of interest agreement must be read together with the terms of employment and any other contemporaneous documents relating to D's employment under any of the companies of the Texchem Group and not in isolation. Even if the terms of the confidentiality agreement had expired three years after he was transferred from Fumakilla, he was nonetheless bound by the terms of the conflict of interest agreement as P was part of the Texchem Group. Having regard to the factual matrix and the evidence, despite the separate legal identities of the companies within a group, D was bound by the terms of the agreements.

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[i] [2020] 1 AMR 681, CA

COULD BREACHING LAWS BY COMPANY BE 'JUST AND EQUITABLE' TO WIND IT UP?

The High Court had in *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors*[i] ordered to wind up two companies, TEH Paper and TEH Holdings on the ground that the two companies, directly and indirectly, had committed "illegalities", namely the breaches of various laws, i.e. ss 136, 169, 171 and 364(2) of the Companies Act 1965 (CA 1965), ss 193, 199 and 200 of the Penal Code (PC) and s 114 of the Income Tax Act (ITA) (collectively "the said statutory provisions"). The CA 1965 provisions concerned the duty of directors to produce accurate financial reports, to give a true and fair view of the state of affairs of companies, not to make false statements in accounts and not to use company funds to pay their income taxes. The PC provisions concerned statutory declarations by directors to confirm the correctness of company accounts. The ITA provisions related to directors who had evaded pr assisted to evade payment of taxes. The Court of Appeal affirmed such finding.

At the final appeal, the Federal Court overturned the concurrent decisions. It was held that it was NOT just and equitable to wound up a company under s.218(1)(i) of the CA 1965 merely on the ground that the said statutory provisions had been breached which could be regularized by provisions in the statutes themselves providing for penalties or fines.

Before winding up corporations, the court must be satisfied that the illegality or contravention of the law was related to or bore sufficient nexus to the activities or business of the company and/or for which the company was incorporated. Not all breaches of statutory requirements would result in a company being wound up even if the breaches attracted criminal sanctions. In the instant case, none of the companies was formed with an illicit purpose or intent to circumvent any law. The object and activities of TEH Paper and TEH Holdings were not in question.

The apex court further held that in the context of winding up, s.218(1)(b), (c) and (d) expressly provided the specific type of contravention of the CA 1965 that merited a winding up. Those grounds should not be expanded. Those were prescribed situations where it would be just and equitable to wind up a company. The court should always be slow to import into the 'just and equitable' ground, the right to wind up company for contravention of other provisions of the CA 1965. Further, violations of the CA 1965 by directors, unless they fell within some ground in s.218(1), should not be ascribed to the companies themselves in order to form the basis for winding them up. The 'just and equitable' jurisdiction had to be exercised carefully and judiciously, with special regard to the irreversible and drastic nature of winding up and the irreparable damage such

[i] [2021] 3 MLJ 914, FC

action would cause to the interests of innocent shareholders.

That said, there were two situations where the pinnacle court regarded as appropriate to wind up the company concerned : (i) where the cessation of the illegality complained of could only be achieved through or by dissolution of the company itself and there was no other avenue or recourse available; and (ii) where the company was fraudulently established and was itself engine of fraud, its continued existence had to be immediately apprehended.

The appeals of TEH Paper and TEH Holdings were allowed and the winding up orders were set aside.

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CONTRACT

PARTY OUGHT NOT TO BENEFIT FROM ITS OWN WRONG

P had entered into sale and purchase agreements (SPA) with D, a property developer, to purchase semi-detached houses (units). Under the SPA, vacant possession of the units shall be delivered to P in the manner stipulated within 24 months of the date of the SPA failing which D shall be liable to pay P liquidated and ascertained damages (LAD). D's architect signed off the certificate of compliance and completion (CCC) but there was no certification of fitness (CF). D then issued a notice informing P that they could collect the keys upon payment of the final 20% progressive payments. Such notice of delivery of vacant possession cautioned P that they could not occupy the premises as the CF had yet to be issued by the local authority (MPS). In spite of such caution, P proceeded to occupy and renovate their units. As a result, D could not procure the CF from MPS and was required to amend and re-submit the building plans. Eventually the CF was issued two years later. P filed suit against D to claim for LAD.

On the above facts in *Zara Aida Razali & Ors v Sungei Lalang Development Sdn Bhd*[i], the High Court dismissed P's claim. Based on s.28 of the Uniform Building By-Laws 1984, a purchaser who contravened the said provision and occupied a house before the issuance of the CF for occupation attracted penal consequences. Under s.70 of the Street, Drainage and Building Act 1974, a purchaser who carried renovations without the prior written of the local authority also committed a criminal offence. It would be an affront to justice and public policy to allow a party in breach of its contractual obligations to rely on its very breach to either evade its obligations or to assert that the other contracting party must accept the consequences of that breach. The court could not appear to condone a breach of the law. P occupied and undertook renovations to their units in breach of the express prohibition of law. LAD was awarded to compensate a purchaser for losses he would suffer when he was forced to look for alternative accommodation consequent

[i] [2021] 1 CLJ 144

upon delay in the delivery of vacant possession. However, P could not claim they had suffered losses. The principle that a party would not be allowed to take advantage of its own wrong operated to prevent P from claiming the LAD. P's conduct created an estoppel.

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CONTRACT

NON-COMPLIANCE WITH TERMINATION CLAUSE RENDERED TERMINATION INVALID

There are two lessons to be learnt from the Court of Appeal decision in *That's Life Sdn Bhd v Dato' Haji Ismail bin Karim (as the president of Persatuan Bolasepak Negeri Johor) and another appeal*[i]. The first is the importance of abiding by the contractual provision. In *That's Life*, the Joint Venture Agreement (JVA) contained a termination clause which read : "*Both parties shall be at liberty to terminate the Agreement without assigning any reason(s) by giving either party thirty (30) days' notice of termination, in such event both parties shall agree to pay liquidated damages of a sum equivalent to two (2) quarterly payments of that particular year of intended termination*." The defendant however merely informed the plaintiff that he was terminating the JVA with immediate effect. The appellate court ruled that the defendant had failed to give the requisite 30 days' notice. This rendered the termination invalid and wrong.

Secondly, the plaintiff had failed to prove the damages they alleged they had suffered. It is trite law that the party claiming the damages bears the burden of proving the fact and quantum of damages suffered. If he proves neither, the action will fail or he may be awarded only nominal damages[ii]. Therefore, the plaintiff in *That's Life* succeeded in the appeal in having the termination of the JVA held as invalid but failed to obtain any award of damages.\

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COURT PROCEDURE

***FUNCTUS OFFICIO* v POWER TO GRANT CONSEQUENTIAL ORDER TO A FINAL JUDGMENT**

In *Stone World Sdn Bhd v Engareth (M) Sdn Bhd*[iii], P succeeded in its claim founded on

[i] [2020] 5 MLJ 235, CA

[ii] *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

[iii] [2020] 9 CLJ 358

the tort of detinue against D. The trial court ordered that the subject of the claim, marble stones, be delivered up or that P collected the same. This original judgment was later amended such that D was bound to deliver up the stones to a specific site within an allocated time. D did not comply with the order. 4 years later, P sought a consequential order from the trial court for damages to be assessed rather than for the delivery up of the stones as the stones had been effectively ravaged or damages by time and environment. The consequential order was granted. D's appeal to the Court of Appeal (COA) was dismissed. D then initiated a fresh action to impeach the consequential order on the ground that the trial court had no jurisdiction to grant such an order as it was at that time *functus officio*. D's "impeachment action" was dismissed by the High Court and COA.

At the final appeal before the Federal Court, D also lost. In an illuminating judgment, the apex court remarked that "liberty to apply" for consequential orders in order to work out or give effect to the final judgment or order of the court was well within the inherent jurisdiction of the court[i]. To this extent, the rule of *functus officio* had not been transgressed. D was literally 'stonewalling' and refusing to comply with the final judgment of the court. The net result was that P was deprived of the fruits of its litigation, requiring it to procure a consequential order to give support to the final judgment so that it would not be rendered nugatory. The conduct of D necessitated the making of the consequential order. The doctrine of *functus officio* was not infracted when the orders sought were purely to give effect to the original final judgment which was to substitute the delivery up with damages to be assessed equivalent to the value of the marble stones. This was a recognized and accepted relief for a finding of detinue. The substitution in itself could not amount to a variation calculated to infringe the *functus officio* rule. Further, the original judgment and the findings were in no way impaired, reopened, varied or altered by the grant of the consequential order. The finding of liability for detinue against Stone World was intact, meaning that the essence of the finding and judgment of the trial court remained intact.

D could not have succeeded in its current impeachment action as it was to impeach solely the consequential order while keeping the rest of the original suit intact. Generally, any attempt to impeach a judgment would encompass the entire judgment and not on a piecemeal part of the action. That was a fundamental flaw which precluded D from prosecuting such an action. Indeed, *res judicata* and issue estoppel were fully applicable to preclude D from prosecuting this action. Additionally, this fresh 'impeachment suit' was brought several years after the event, and after all avenues of appeal in the original suit had

[i] See *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226, FC, *Kanawagi Seperumaniam v Penang Port Commission* [2002] 8 CLJ 503, *Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No 2)* [1997] 2 SLR 209, *Koh Ewe Chee v Koh Hua Leong & Anor* [2002] 3 SLR 643.

been exhausted. There could be no clearer example of *res judicata* and issue estoppel being attracted in relation to the re-agitation of the consequential order. When D's appeal to the COA against its grant was dismissed without further application for leave to the apex court and hence exhaustion of all avenues of appeal, the consequential order became final and binding between D and P at that juncture.

In the circumstances, D's impeachment suit stood dismissed.

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1. "GROUP ENTERPRISE" THEORY TO LIFT CORPORATE VEIL TO ASCERTAIN EMPLOYER

Citizenship Irrelevant To Decide Permanent Or Fixed Term Employment

In issue Retro Q1 & Q2 of 2020 of THE UPDATE, we have featured the decision of the Court of Appeal (COA) in *AIMS Cyberjaya Sdn Bhd v Ahmad Zahri Mirza Abdul Hamid*[i] under the heading "Expatriate Cannot be a Permanent Employee". This has however been reversed by a five-member panel of our Federal Court as reported in *Ahmad Zahri Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd*[ii].

The apex court ruled that the citizenship of the appellant/employee had no bearing in deciding whether he was a permanent employment or in employment under a fixed term contract. The decision of the COA that a foreign national could not have a permanent contract of employment was erroneous and was set aside.

The COA had also erred in deciding that the respondent/company and AIMS Data Centre 2 Sdn Bhd (ADC) were two separate legal entities; and since there was no evidence to show any fraud or unconscionable conduct of the company, there was no ground to lift the corporate veil. In the view of the pinnacle court, a court may lift/pierce the corporate veil where the relationship between companies in the same group was so intertwined that they should be treated as a single entity to reflect the economic and commercial realities of the situation. An argument of 'group enterprise' was that, in certain circumstances, a corporate group was operating in such a manner as to make each individual entity indistinguishable, and therefore it was proper to lift/pierce the corporate veil to treat the parent company as liable for the acts of the subsidiary. Lifting/piercing the corporate veil was one way to ensure that a corporate group, which seeks the advantages of limited liability, must also accept the corresponding responsibilities. In the employment law perspective, the application of the 'single economic unit' test or 'functional integrality' test was particularly significant in ascertaining the continuity of employment for the scope of dismissal protection.

On the facts and evidence, ADC and the company were part and parcel of the

[i] [2020] 1 ILR 273, CA

[ii] [2020] 3 ILR 233, FC

same group – 'an essential unity of group enterprise', one of the five non-exhaustive circumstances in which the court would lift/pierce the corporate veil and find a group of companies to be common employers. The COA was wrong when it held that ADC and the company were two separate legal entities and failed to treat the appellant's contract of employment as a continuous one from ADC to the company. The purpose of the doctrine, whether categorized as 'essential unity group enterprise' or 'common employer'[i], was to permit the corporate veil to be pierced in order to establish or identify the true labour relationship between parties in terms of the existing labour relation realities. The COA's failure to identify the employer-employee relationship ran contrary with the fundamental purposes of the IRA.

The Federal Court remarked that a fixed term contract was a contract of employment for a specific period of time, *ie*, with a defined end. As a general rule, such contract could not be terminated before its expiry date except for gross misconduct or by mutual agreement. In the instant case, the appellant's contract of employment beginning with ADC before being terminated under the company, was not one-off, seasonal or temporary employment. It was an ongoing and continuous employment without a break from 2009 to 2013. Hence, the COA erred in not recognizing the industrial law principle of lifting/piercing the corporate veil in the circumstances and the ongoing nature of the appellant's contract of employment with both the companies. In answering the leave question in the affirmative, the court concluded that a contract of employment which was renewed successively without application by the employee and without any intermittent breaks in between, was in reality permanent employment.

It is noteworthy that the highest court on the land had also set out, by *obiter dicta*, the three (3) considerations points on whether an employer had a genuine need for the service of an employee for a fixed duration: (i) the intention of the parties; (ii) employer's subsequent conduct during the course of employment including the total duration or length of service with an employer; and (iii) nature of the employer's business and the nature of work which an employee is engaged to perform.

2. VICTIM OF DOUBLE JEOPARDY

In *Hasrin Abdul Hamid v Learning Port Sdn Bhd*[ii], the claimant was an IT Manager with a company which was in the business of e-education and a MSC status company. In October 2017, a software company, Adobe conducted review on all the computers in the company and reported that there was a pirated copy of the Adobe software on one of the computers and there was an over deployment and over usage of Adobe

[i] The approach of 'Common Employer' was adopted in the context of industrial jurisprudence in the jurisdictions of Canada, South Africa and the United Kingdom.

[ii] [2020] 3 ILR 400

Software. The company issued a stern written warning to the claimant for failing to ensure that only original software had been installed in the computers in the company as per its policy. 2 weeks later, the company issued a show cause letter on the same charge. This was followed by a domestic inquiry (DI) and at the conclusion, he was found guilty of the charge and was dismissed. The Industrial Court ruled that the dismissal was without just cause or excuse. The claimant had been punished twice for the same offence, *i.e.* strict warning and dismissal which constituted unfair labour practice. There had been nothing to suggest that he had repeated his misconduct after receiving the stern warning. The earlier offence had been deemed spent and could not be used to dismiss him.

3. FOREIGN WORKERS NOT TO REMAIN EMPLOYED AT THE EXPENSE OF LOCALS

The claimant(s) in *Jaya Kumar Vadivel v Associated Pan Malaysia Cement Sendirian Berhad*[i] were some of the employees in the Supply Chain – Locomotive Section of the respondent company who were retrenched. However, the foreign workers in the Section were transferred to other plants to carry out other functions. The Industrial Court Chairman viewed this unfavourably against the company. If the company had been aware that eventually the Locomotive Section would be closed down, they could have prepared the claimant(s) to take over the jobs carried out by the foreign workers and given the claimant(s) the first option for jobs upon their impending retrenchment.

Further, the Industrial Relations Act 1967 (IRA) was a social legislation governing the employer-employee relationship and the employer has a corporate social responsibility towards the wellbeing of its employees. The company had failed in its CSR to safeguard the interests of its employees when it continued to employ foreign workers albeit to carry out general manual work. Although the court did not in any way question the company's prerogative as to who it employed, particularly so where the cost of outsourcing and employing foreign workers was significantly lower, it could not help but intervene in a situation where foreign workers remained in employment at the expense of citizens, especially when the company had had ample time to plan for manpower.

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Lastly, whilst there were ample authorities to state that employees need not be

[i] [2020] 4 ILR 288

consulted over retrenchments, there was certainly a need for employers to give employees sufficient notice to enable them to find alternative employment. In this case, the claimant(s) only knew about their termination one day before. This had given rise to more suspicion if the exercise had been carried out in good faith. Taking all the facts into consideration, the court concluded that the termination of the claimant(s) was without just cause or excuse.

4. DON'T DELAY IN PAYMENT OF SALARY, EPF, SOCSO, PCB TAX DEDUCTIONS

It is essential for an employer to make payment of the salary, statutory contributions towards EPF, SOCSO and income tax deductions on time failing which it is a breach of fundamental terms of the employee's contract of employment which goes to the root of the contract and constitutes a ground for constructive dismissal. The Industrial Court decision in *Theva Pragash Kanapathy v Matrix Power Network Sdn Bhd*[i] drove home this critical point.

For about a year, the company had started to delay payment of the claimant's salary and then failed to pay completely. The claimant then discovered that his EPF and SOCSO benefits had not been remitted to the authorities concerned despite deductions made from his salary. Thereafter, his income tax deductions (PCB) had also not been remitted to LHDN. When the company shifted premises, he was not provided with an office and his official work e-mail was deleted. All these culminated in him walking out of his employment claiming constructive dismissal. The Industrial Court ruled in his favour.

On the company's failure in performing its statutory obligations towards the claimant in respect of EPF, SOCSO and PCB, the evidence had shown that these payments had been regularized only after the claimant had claimed constructive dismissal. The company's reasons for the delay in remitting these payments had been that it had been facing serious cash flow problems but these payments had constituted fundamental terms of the claimant's contract of employment, apart from being statutory obligations under the law. The company was under a statutory obligation to remit these payments, especially when it had already been deducted from the claimant's salary. Its failure to do so had amounted to a fundamental breach of the contract of employment which went to the root of the contract of employment, giving him a right to claim constructive dismissal.

On the company's actions of delaying payment of his salary and then completely failing to pay the same, its similar reason, *ie*, that it had been facing cash flow problems, had not been supported by evidence. Non-payment of salary when it fell due was a fundamental breach of the contract of employment and the company's actions in first delaying his salary payments and then

[i] [2020] 3 ILR 320

failing to pay it in full, resulting in amounts being due to him, had justified him walking out of his employment and claiming constructive dismissal.

On the claimant's contention that the company had obstructed the performance of his duties by failing to provide him with an office when it had shifted premises and by deleting his official work e-mail, the company's actions had been a breach of the basic entitlement of an employee to be provided with a workplace and had effectively disrupted his workflow. The company had, by its actions, evinced an intention to no longer be bound by the contract of employment.

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LAND LAW

BANK AS *BONA FIDE* IMMEDIATE CHARGEE FOR VALUE COULD NOT INVOKE PROVISO TO S. 340(3) OF NLC TO SHIELD ITS INDEFEASIBILITY

The bare trusteeship and doctrine of indefeasibility under s.340 of the National Land Code (NLC) were brought into play in *He-Con Sdn Bhd v Bulyah Ishak & Anor and Another Appeal*[i]. The deceased had in December 1997 purchased a property from the 1st Defendant (D1) pursuant to a SPA. The purchase price had been paid in full. D1 appointed and named the deceased as the attorney of the property by a duly registered power of attorney dated 26 April 2002 (PA2). Subsequently, the deceased appointed the 1st Plaintiff (P1), his wife, as the substitute attorney (PA3). The deceased died a month later in June 2002. The Plaintiffs were appointed as administrators of the estate of the deceased. At that time, the title of the property was ready to be issued but the developer refused to consent to direct transfer to P1. P1 had been paying the quit rents and fees due to the property and collect rentals for the property without objections from D1.

Towards end of 2011, P1 discovered that D1 had actually charged the property to the 4th defendant, Ambank (M) Berhad (D4). The name of D1 was registered as the owner of the property without P1's consent. D4 sought an order for sale of the property after D1 had defaulted in its financing facilities. The plaintiffs filed an action for, *inter alia*, declaration that the deceased was the beneficial owner of the property.

At the final appeal in the Federal Court, D1's attempts to put in issue the alleged non-payment of the purchase price under the SPA and hence non-conclusion thereof and to contradict the contents of PA2 were rejected. The apex court held that on the facts and evidence, the deceased had become the beneficial owner of the property and D1 had become a bare trustee. Even on the terms envisaged by *Borneo Housing Mortgage Finance Berhad v. Time Engineering Bhd (Formerly Known as Time Engineering Sdn Bhd)*[ii] that required 'something more' be shown, the evidence led by the plaintiffs were sufficient to fulfil such requirement to evince

[i] [2020] 7 CLJ 271, FC

[ii] [1996] 2 CLJ 561, FC

the fact that D1 had intended to divest its interest in the property *via* PA2. Hence, there was nothing invalid about the equitable interest of the deceased, hence the plaintiffs, in the property. D1 was rendered a bare trustee and could not, in law, pass any interest in the property to D4 by way of creating a security by way of the charge over it in favour of D4. It was void *ab initio*.

Once a donor of the power of attorney (in this case, D1) became a bare trustee, he stood in the same shoe as a vendor similarly circumstanced. Both were incapable of further dealing with the property, including creating a charge under the NLC over the property to D4. D4 thus obtained no valid interest from the charge transaction.

D4 sought to avail itself to the proviso under s.340(3) of NLC. Under s.340(1) of NLC, the title to the land and the rights of all persons holding an interest therein, upon registration, are indefeasible. However, indefeasibility can still be challenged on one of the grounds stated in s.340(2), namely in case of fraud or misrepresentation, forgery, insufficient or void instrument or unlawful acquisition of title or interest in the purported exercise of any power or authority conferred by any written law. In such a case, s.340(3) states that the title or interest of the person is defeasible and it shall be liable to be set aside in the hands of any person to whom it may subsequently be transferred; and any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested PROVIDED that nothing in s.340(3) shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person claiming through or under such a purchaser (the Proviso). The Torrens system in Malaysia recognizes deferred indefeasibility of title or interest and not immediate indefeasibility[i].

The apex court endorsed the test laid down in *Kamarulzaman Omar &b Ors v Yakub Husin & Ors*[ii] and *Samuel Naik Siang Ting v Public Bank Bhd*[iii] on the operation of the Proviso: firstly, whether the party that seeks the shield of indefeasibility of its title or interest, shows through evidence that it was a subsequent purchaser and not an immediate purchaser since it is the subsequent purchaser that can avail the protection under the Proviso; and secondly, a subsequent purchaser must prove itself to be a *bona fide* purchaser for value.

Under the Proviso to s.340(3) of the NLC, only a *bona fide* subsequent purchaser for value was protected. At the material time when D4 had its loan to D1 secured by registering a charge over the property, D1 no longer had any interest to be dealt with because D1 was then only a bare trustee for the deceased. Thus, no interest passed to D4

[i] *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 CLJ 269, FC, *Low Huat Cheng & Anor v Rozdenil Toni & Anor Appeal* [2017] 3 CLJ 257

[ii] [2014] 1 CLJ 987, FC

[iii] [2015] 8 CLJ 944,FC

when the charge was registered by D4. The transaction between D1 and D4 was a direct and immediate purchase. It was a transaction that was vitiated by s. 340(2) of the NLC as it was based on an insufficient or otherwise, void instrument. Being an immediate purchaser, D4 could not invoke the Proviso to s. 340(3) of the NLC.

The *fides* of D4 was thus irrelevant. A title or an interest registered that was obtained through the vitiating factors enumerated under s. 340(2) of the NLC shall not be indefeasible and was liable to be set aside by the rightful owner of the subject property. D4 had a registered interest in the charge that was defeasible, as it was obtained from D1 *via* a void instrument. The plaintiffs, being the administrators of the estate of the deceased, who was a beneficial owner of the property, were therefore the rightful owner, *albeit* an equitable one. Hence, the interest, *albeit* registered, of D4 in relation to the charge was not indefeasible. The charge transaction was null and void pursuant to s.340(2) of NLC and ordered to be set aside.

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LAND LAW

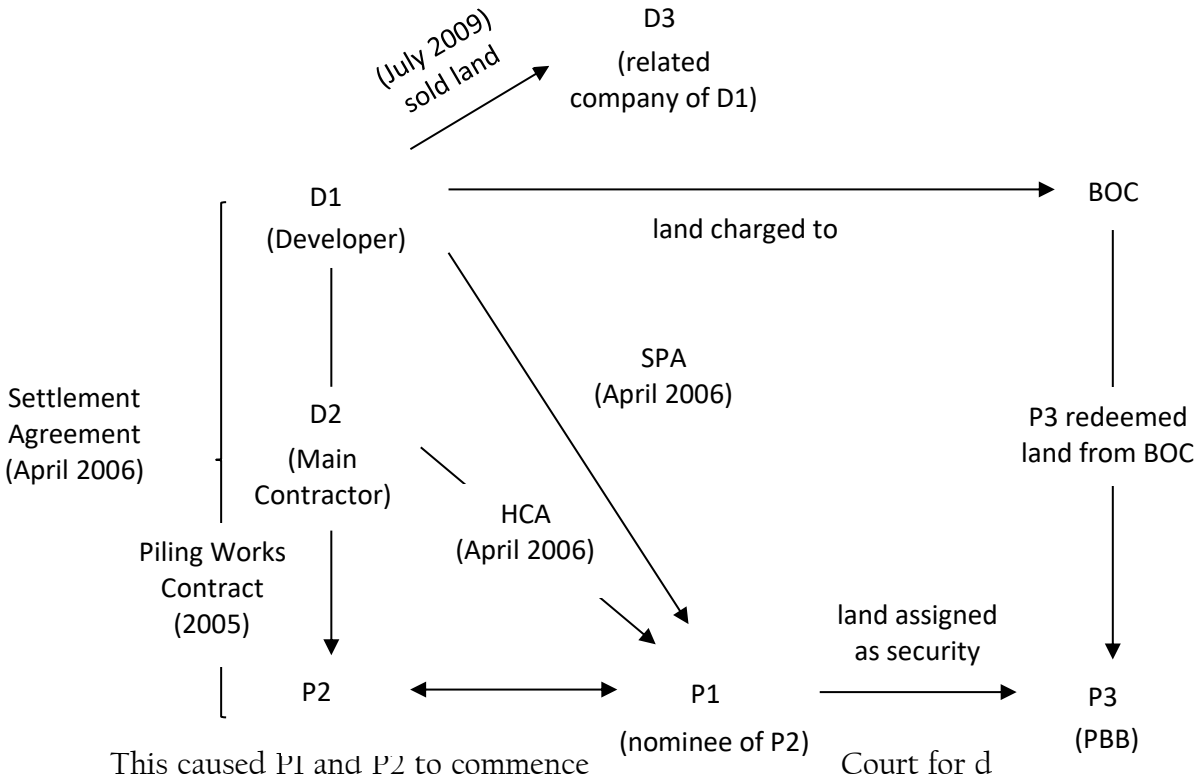
FRAUD BY RELATED COMPANIES TO CHEAT SUB-CONTRACTOR

The Federal Court case of *Yeo Ping Tieng & Ors v Elitprop Sdn Bhd*[i] concerned collusion to commit fraud, beneficial interests in land, *locus standi* to challenge registration and competing interests in land. D1 was the housing developer of a project whilst D2 was the main contractor. In 2005, D2 had awarded P2 a contract for piling works on the project land. P2 completed the works but D2 failed to pay for the works done. To resolve the sum due, P2, D1 and D2 entered into a settlement agreement where D1's land was transferred to P2 and/or its nominee, D1. The parties also entered into two inter-related agreements, namely (i) a sale and purchase agreement (SPA) between D1 and P1 for the sale of the land; and (ii) a house construction agreement (HCA)

[i] [2020] 1 CLJ 776, FC

between D2 and P1 for the construction of a bungalow on the land. Pursuant to the SPA and the HCA, D1 was to deliver vacant possession and D2 was to complete the remaining construction of the bungalow within 36 months from April 2006.

In August 2006, P1 obtained banking facilities from Public Bank Bhd (P3) to, *inter alia*, redeem the land then charged by D1 to Bumiputra Commerce Bank (BOC) with the land to be assigned to P3 as security. P3 redeemed the land on behalf of D1 and D1 gave a counter undertaking that the separate title, once issued, would be released to P3. However, D1 sold the land to D3, making D3 the registered proprietor of the land. The relationship of the parties can be depicted in the following diagram: -



This caused P1 and P2 to commence Court for d ert their legal rights over the land and to invali . The plaint he High Court, which set aside D3's title on the ground that D3 was not a *bona fide* purchaser of the land and that D1 and D3 had committed fraud on the plaintiffs with 'full planning' to achieve the purpose. On appeal, the High Court's decision was reversed by the Court of Appeal which did not address the question of fraud but instead, the Court of Appeal (COA) decided that D1 as the vendor had only a beneficial interest in the land since the title was in the name of PKNS. Only a registered proprietor could create a beneficial estate out of its title and validly pass a beneficial interest. D3 had thus acquired good title.

The apex court overturned the COA flawed decision. D3 was a party or privy to fraud. Evidence showed that D1 never really intended to fulfill the obligation of the SPA to sell the land to P1; all it wanted was to get the land transferred to D3. D3 must have known what was going on, as D1 and D3 were related companies. D1 and D3 colluded and conspired to get the land registered in the name of D3 and to defraud the plaintiffs. There was a deliberate and dishonest act and intention to cheat and deprive P1 of his existing legal right in the land.

The proposition advanced by the COA that only a registered proprietor of land could validly pass a beneficial interest therein was erroneous in law. The pinnacle court pointed out that the equitable interest created in the land where purchase price was paid in full was referred to by the cases variously as equitable ownership, beneficial ownership or an equitable estate in the subject land. The principle applied whether or not title or sub-divided titles were available immediately to vest a registrable title in the purchaser. The law that had been consistently followed by the courts was that a purchaser of land who had paid the purchase price, until registration as the legal owner, acquired an equitable interest in it. It may well be that the proposed subdivided lots which they purchased did not have the legal status of being separate pieces of land until legally sub-divided. Nevertheless, that fact did not prevent these purchasers from acquiring equitable interests to the extent of the area they had purchased. This principle applied to the present case as P1 and P2 (as purchasers) were awaiting the sub-division of the master title held by PKNS into sub-lots for transfer to them. D1 as the beneficial owner entitled to the transfer from PKNS was to forward the sub-divided title and registrable instruments in favour of P1 to P3. An equitable owner as the purchaser of a property may exercise his contractual rights over the land *albeit* not having obtained registration yet in his name (see s.206(3) NLC). In some cases, the equitable owner may decide to on-sell the property to another buyer. There was no legal impediment in this regard except that the equitable owner could not act in fraud and engage in multiple sale of the same property.

The appeal was allowed, the COA orders were set aside, the registration of the title in the name of D3 was set aside and P1 be entered in the register as the proprietor of the land.

BENEFICIARIES HAVE NO RIGHT TO SELL PROPERTY UNTIL LA IS OBTAINED

A deceased person passed away without will, leaving behind properties. There were 4 lawful heirs who were each entitled to ¼ share. All four of them, in their capacity as the beneficiaries, entered into a sale and purchase agreement (SPA) as vendors to sell the properties to P. Pursuant to the SPA, P paid the 10% deposit; and the vendors were obliged to apply for the grant of letters of administration and requisite court order for the sale of the properties to P. This was not done. P filed a suit, seeking specific performance of the SPA whilst the vendors as defendants filed application to strike out P's action on the ground that they lacked capacity to contract as they were neither the registered nor beneficial owners of the properties which rendered the SPA invalid.

Based on the above essential facts, the Court of Appeal struck out the action in *Amanah Raya Bhd v Ong Chin Hoo*[i]. Under s.39 of the Probate and Administration Act 1959 (PAA), it provides that when a person passes away without leaving a will, all his property will first vest in Amanah Raya Bhd until the grant of letters of administration. After the grant of letters of administration, the property of the deceased will vest in the administrator. Further, pursuant to s. 60(3) and (4) of the PAA, before any land of the deceased may be sold, the personal representative of the deceased must obtain permission of the court. Under the National Land Code (NLC), s. 346 provides that no personal representative of the deceased may sell land until his name has been registered upon the title as representative. Therefore, until the grant of letters of administration, the personal representatives of the deceased cannot even apply for their names to be registered upon the issue document of title as provided for in s. 346(3), let alone sell the property of the deceased.

Beneficiaries do not amount to personal representatives under the PAA. If beneficiaries were allowed to sell land of the deceased persons who died intestate, it would put them on the same footing as executors who obtain the power to deal with the deceased's properties from the will. This would amount to circumventing the provision which stipulated that administrators must obtain sanction from the court before selling property of the deceased, as beneficiaries would then escape the requirement to take out grant of letters of administration, and to register their status as representatives upon the original issue document of title under s. 346 of the NLC.

The vendors were mere beneficiaries of the estates of the deceased who passed away intestate. At the time the SPA was executed, the grant of letters of administration had not been obtained. Therefore, the vendors had no legal right to sell the properties in the unadministered

[i] [2019] 6 CLJ 41, CA

estates of the deceased. They should have only executed the SPA after the estate of the deceased had been fully administered and the properties distributed to them as beneficiaries. The net result was that the SPA was null and void for lack of capacity. The plaintiff's action in seeking specific performance of the SPA was obviously unsustainable and therefore, the striking out application was allowed.

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SUCCESSION

USE OF SECRET TRUST BY TESTATOR IN HIS LAST WISHES – IT OPERATES OUTSIDE THE WILL

A secret trust was created under a will – is the concept of secret trust valid in Malaysia? In a decision by a bench of 5 judges and probably the first of its kind concerning secret trust in this land, our Federal Court in *Chin Jhin Thien & Anor v Chin Huat Yean & Anor*[i] answered in the affirmative. In the case, the deceased had left: (i) 3 wives, with only the first marriage registered; (ii) 2 children with the first wife, the plaintiffs; (iii) 4 children with the second wife; and (iv) a brother and a nephew, the defendants. The deceased left a will under which he gave all his assets and properties to the defendants who obtained a grant of probate. The plaintiffs filed a suit to challenge the grant of probate on the ground that the defendants had cheated and unduly influenced the deceased who was terminally ill and had no testamentary capacity to make the will. The defendants contended that the deceased was mentally alert, lucid and capable of making the will and that the will was a secret trust and the defendants were only trustees, and not the true beneficiaries, for the benefit of the deceased's second wife and her children.

Secret trusts enable a testator to direct the disposition of his property upon his death without specifying the actual beneficiary in the will whereby the property is bequeathed to a 'legatee' who holds it as a trustee for the secret beneficiary. The advantage of a secret trust is that the testator may use a will to implement his wish to establish a trust upon his death without disclosing the intended beneficiary or the terms under which he holds. There are two types of secret trusts. A "full" secret trust is an obligation which is fully concealed on the face of the will. The obligation is communicated to the legatee during the lifetime of the testator and the will transfers the property to the legatee without the mention of the existence of a trust, i.e. the

[i] [2020] 4 MLJ 581

existence and the terms of the trust are fully concealed on the face of the instrument creating the trust, namely the will, for example a disposition by will "*to A absolutely*". The other type is a "half" secret trust when the will indicates or acknowledges the existence of the trust but the terms are concealed from testator's will. The trustee will take the property as communicated on the terms effected *inter vivos*, for example a deposition by will "*to A on trust for the purpose communicated to him*". Both types of secret trust essentially involve property being left in the will without naming the person to whom the property is being left to. The property is held on trust by someone who made a promise to the testator to hold the property on trust for the eventual recipient.

In *Chin Jhin Thien*, the apex court gave due recognition to the concept of secret trust in Malaysia subject to s.3(1) of the Civil Law Act 1956 unless there was an explicit abrogation, variation, restriction or modification by written law. There was none[i]. In fact, by virtue of s.30 of the Wills Act 1959 and s.100 of the Evidence Act, the applicable law for the interpretation of will made in Penang, as was in the case, which purported to create a secret trust, was the English law and rules of equity.

On the facts and evidence, the deceased had intended to provide for his second wife's children as they were the only next of kin who were dependent on the deceased for financial support and some of them were still studying at the material time. The deceased trusted the 1st defendant (his brother) and the 2nd defendant (his nephew) to manage the estate wisely to take care of the second wife's children's needs. It was in the interest of justice that the secret trust was upheld so that the deceased's estate was also not given to benefit the defendants but to uphold the wishes of the deceased.

The apex court went further to rule that secret trust was not contradictory to the Wills Act 1959 or against public policy (as it could be abused). The overriding purpose behind a secret trust was to enable a property to be left in a will, without explicitly naming who the property was being left to, by a bequest to a person who had previously promised to hold that property as trustee for the intended recipient. As wills were, by nature, public documents open to scrutiny, the concealment of identity that a secret trust provided was vital for those desiring a degree of privacy in the final disposal of their estate. It would not be in "good conscience" to deny a testator the ability to distribute his estate as he saw fit. Secret trusts were enforced to promote the main policy behind the Wills Act; to protect the testamentary freedom of testators. Any inconsistency or contradiction between the doctrine of secret trust and the Wills Act was, in the view of the court, a non-starter.

[i] The Malaysian Wills Act 1959 or other statutes of Parliament do not explicitly abrogate the application of secret trust.

There was sufficient evidence adduced by the defendants to establish that the deceased had the testamentary capacity to make the will. The Federal Court thus affirmed the decision of the Court of Appeal, all the requirements of the formality of a valid will having been satisfied whilst the plaintiffs were not able to demolish the defence of secret trust, the will made was valid and the estate of the deceased would be used for the benefit of the deceased's second wife and children and not for the defendants' own benefit.

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TORT / EVIDENCE

"IRRESISTIBLE CONCLUSION" TEST TO PROVE IDENTITY OF MAKER OF ANONYMOUS PUBLICATION

In anonymous publication of defamatory words, how does a complainant/plaintiff prove that the publication was made by the defendant? The former has to prove the identity of the tortfeasor of the anonymous publication as the latter has denied his involvement. In *Stanislaus J Vincent Cross v Ganesan Vyramutoo & Anor*[i], in the absence of any direct evidence on identity of the tortfeasor, the plaintiff entirely relied on circumstantial evidence to establish the identity; and since the impugned defamatory materials were physical posters, it was held that the test was that of 'irresistible conclusion'. The plaintiff had to prove: (i) the circumstances from which an inference of commission of tort was sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency, unerringly pointing towards the commission of the tort by the defendants; and (iii) the circumstances, taken cumulatively, should form a chain so complete that there was no escape from the conclusion that, within all human probability, the tort was committed by the defendants and none else. The traditional principles on circumstantial evidence laid down in decided cases[ii] (the common law) were thus relevant.

On the other hand, where the impugned words are contained in any website, blogpost or any internet source, the plaintiff will be able to call in aid the statutory presumption in s.114A of the Evidence Act 1950 to prove the identity of the tortfeasor.

In the instant case, the applicable principles were the common law. It was held that while there were items of the circumstantial evidence which pointed towards the defendants, there were also items of circumstantial evidence which pointed towards persons other than the defendants as the likely persons who published or caused to be published the defamatory posters. In the absence of such other persons named as co-defendants, the

[i] [2020] 10 CLJ 263

[ii] *PP v Cheah Chong Tatt* [2011] 1 LNS 575, *Chan Chwen Kong v PP* [1962] 1 MLJ 307, *Hamzah Abdul Majid* [2014] MLJU 1858, *Sunny Ang v PP* [1966] 2 MLJ 195, *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai* [2016] 12 MLJ 251

items of circumstantial evidence did not point wholly or predominantly towards the single and inescapable conclusion of the guilt of the defendants. The plaintiff thus failed to meet the higher threshold of "irresistible conclusion" that the tort of defamation was committed by the respondents and no one else; and the claim was dismissed with costs.

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