THE UPDATE

The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

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In conjunction with our firm's 25th Anniversary, we are honoured to present to you our special bumper issue with 30 over write-ups coupled with a sneak peak into our recent celebration with our dedicated team. We would like to herein express our heartfelt thanks for your support over the past 25 years. Inspired, we look forward to continue to giving you only our very best with utmost care and diligence.

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WHEN DOES LIMITATION PERIOD STOP RUNNING – WHEN ACTION WAS FILED IN COURT OR WHEN NOTICE OF ARBITRATION WAS SERVED ?

Generally, the law imposes a period of limitation during which a right to a cause of action must be enforced by filing a suit in court or commencing arbitration (limitation period), failing which no suit or arbitration shall be brought after the expiration of the limitation period. Under s.6(2) of the Limitation Act 1953 (LA 1953), the limitation period for a cause of action in contract is six years. Insofar as an arbitral proceeding is concerned, the limitation period stops running when an arbitration is deemed to have been commenced when one party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or to agree to the appointment of an arbitrator[i]. Under s.23 of the Arbitration Act 2005 (AA 2005), the arbitral proceeding in respect of a particular dispute shall commence on the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent.

In *Bongsor Bina Sdn Bhd v SH Builders & Marketing Sdn Bhd*[ii], there was a contractual dispute over construction works. The letter of award contained an arbitration agreement. The plaintiff (P) however filed a suit in Sessions Court (KLSC Suit), on 6.8.2019, to claim for the unpaid final progress sum. The defendant (D) filed an application to stay the KLSC Suit pending reference of the dispute to arbitration. The stay was granted. On 1.7.2020, P served its Notice of Arbitration on D to commence the arbitral proceeding. D however claimed that limitation has set in.

Based on the facts, the cause of action of the dispute accrued either on 25.9.2013 or 18.3.2014. Therefore, if the time stopped when the KLSC Suit was filed, then it was well within the limitation period of six years and there was no time bar. On the other hand, if the time stopped running only when P served the Notice of Arbitration, then limitation would have set in and the action was time-barred.

Both the High Court and the Court of Appeal decided in favour of P, that there was no time bar. The KLSC Suit was in their view a valid action even though it was eventually subjected to the stay application under s.10 of the AA 2005 to refer the dispute to arbitration. Further, the Notice of Arbitration was a consequence and continuation process flowing from the KLSC Suit and hence, the process of issuing the Notice of Arbitration could not be viewed in isolation. Section 30 of the LA 1953 and s.23 of the AA 2005 were only applicable to cases where the dispute was directly referred to the arbitration *ab initio* in the absence of a prior court action that had been stayed. In the instant case, when P commenced an action via the KLSC Suit on 6.8.2019, the limitation period stopped based on s.6(2) of the LA 1953. P's claim against D was thus not time-barred when P served the Notice of Arbitration on D

[i] Limitation Act 1953, section 30(3)

[ii] [2024] 4 MLRA 763, CA

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following the stay order pending arbitration.

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BANK / CONTRACT

BANK NOT LIABLE FOR FORGED CHEQUES; CUSTOMER'S OWN NEGLIGENCE

Claim by customer against its bank for allowing forged cheques to be paid out was not allowed in the Court of Appeal case of *Starfish Holdings Sdn Bhd v Hong Leong Bank Berhad and Anor*[i]. The plaintiff (P) maintained a current account with the 1st defendant bank (D1). There was a sole authorized signatory of the account, namely SP1 but the 2nd defendant (D2) as P's accounts clerk also handled P's cheque books. There was a total of 37 cheques which were forgeries and presented by D2 to D1 without P's authority or knowledge, out of which 34 cheques were cash cheques. P filed a suit for declaration and repayment of the sum involved.

The COA affirmed the decision of the High Court which dismissed P's claim. Whilst a bank has no mandate to pay on cheques that were forged and is strictly liable for conversion and pursuant to s.24 of the Bills of Exchange Act 1949 (BEA), the bank's duty is now qualified by s.73A of BEA. The customer and authorized signatory are required to ensure that they do not knowingly or negligently facilitate or make it easier for a person who is not the authorized signatory to commit forgery.

In the instant case, SP1 had negligently contributed to the forgery or making of the unauthorized signature by entrusting the cheque books with D2; and the cheque books were kept in a steel cabinet under the possession of D2. P had also failed to check the monthly bank statements against the cheque buds which would have revealed the fraud of D2. The forgeries of the 37 disputed cheques took place over a prolonged period of more than three years in respect of which P had been lackadaisical in failing to detect the missing funds. There was also no breach by D1 of its SOP to check specimen signature and call customer for verification if the sum exceeded the threshold of RM30,000.00 as the impugned cheques were all below the threshold amount.

The COA therefore did not intervene to set aside the High Court's decision and P's claim stood dismissed.

i [2024] CLJU 747, CA

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CREDIT LIMIT, CREDIT TERM

The interplay between credit limit and credit term was the flavour of the day in the High Court case of *Central Sugar Refinery Sdn Bhd v Holsten Marketing (M) Sdn Bhd*[i]. Credit term is the period of time given by the seller to the buyer to make payment for the goods purchased. Credit limit is the limit of the amount which can be ordered by the buyer. This credit limit is the businessman's common practice of controlling and limiting the credit risk exposures vis-à-vis various customers. In *Central Sugar Refinery* case, the credit limit was RM700,000.00 and credit term was 30 days. Thus, the credit system had 2 limbs in parallel co-existence; the credit limit (in terms of amount) could not be interpreted to the extent of erasing or obliterating the credit term (time period for payment). A buyer under the combination of credit limit and credit term mechanism cannot refuse to pay the invoices on the excuse that the total amount owing is less than the credit limit amount and thereby try to postpone the payment obligation indefinitely although the invoices have exceeded the credit term in terms of the timeframe. Thus, the plaintiff was entitled to stop delivery of the sugar to the defendant as from November 2020 onwards on the ground of the defendant's failure to adhere to payment term, independently of the issue whether the credit limit had been exceeded. It had then become the obligation of the defendant to quickly remedy the payment breach before the plaintiff resumed the obligation to deliver the balance of goods to the defendant.

[i] [2024] CLJU 68

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COMPANY (DERIVATIVE)

NOVEL QUESTIONS ON STATUTORY DERIVATIVE ACTION

There are several takeaways from the Federal Court decision in *Dato' Seri Timor Shah Rafiq v Mautilus Tug & Yowage Sdn Bhd (and Another Appeal)*[ii] (*Timor Shah Rafiq*) with regards to the "statutory derivative action" under ss.347 to 348 of the Companies Act 2016 (CA 2016). Ordinarily, the proper party to bring an action for a wrong done to a company is the company itself[iii]. However, this may not be possible if the wrongdoers are in control of the company and they use that position to disallow any legal action to be taken against them by the company. Thus, common law has created a device to enable a minority shareholder to pursue legal action in a representative capacity for and on behalf of the company which is known as "derivative action". Leave must be obtained from the court before the derivative action can be proceeded with. For decades, we have relied on such common law derivative action which has strict procedural requirements and high threshold on the merits. In 2007, however, statutory provisions on derivative action were introduced to ss. 181A to 181E of the Companies Act 1965; and this was

[ii] [2024] 3 AMR 589, FC
[iii] The twin principle in *Foss v Harbottle* (1843) 67 ER 189.

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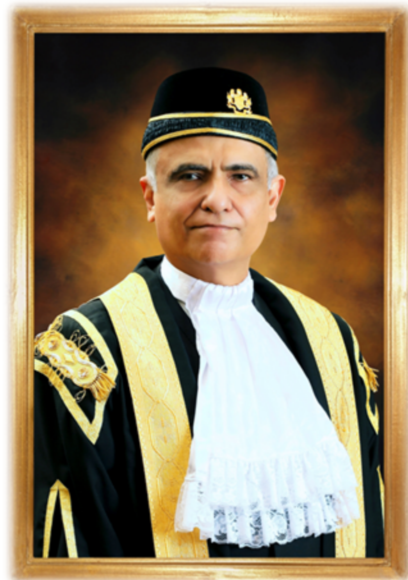
subsequently followed by ss. 347 to 350 of the CA 2016.

In *Timor Shah Rafiq*, numerous novel issues on the nature, scope and meaning of the statutory derivative action were raised and decided. Under s.348(4), there are 2 requirements that an applicant/complainant for leave to initiate derivative action must satisfy: (a) the complainant is acting in good faith; and (b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted. The apex court held that the element of "good faith" was not merely a factor to be taken into account but was a pre-requisite. The test for assessing an honest belief comprises both subjective and objective components. The subjective component is that whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. The objective component is that a reasonable person in the circumstances can hold that belief. Further, the applicant is required to ensure that the application for leave is not brought for a collateral purpose. There is no good faith if the applicant possesses collateral purpose which amounts to an abuse of process unless the applicant proves that it is sufficiently consistent with the purpose of doing justice to the company.

The question of *prima facie* best interest is a wide one, involving consideration of factors beyond the merits of the proceedings. Apart from the prospects of success of the action, other factors are the likely costs of the action including legal fees, likely recovery if the action is successful, likely consequences to the company if the action is unsuccessful and commercial considerations for the company not to pursue the action. When the board had made what appeared to be a *bona fide* commercial decision that it was not in the interests of the company to commence the proceedings, the courts would be slow to intervene.



Harmindar Singh Dhaliwal FCJ in *Timor Shah Rafiq*

The apex court also held that it was not necessarily be the case that leave would be refused if an alternative remedy was available to redress the disputes. The availability of alternative remedies merely serves as a factor which the court may consider in relation to the element of 'best interest of the company'. Further, an

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applicant will not be disqualified from commencing a derivative action for the benefit of the company if he will receive any other benefit from the claim. The applicant must however not be pursuing an ulterior motive unrelated to the subject matter of the claim which is an abuse of process.

The principles in relation to "clean hands' or "proper person" or whether one should have control over the derivative action are more associated with the common law derivative action regarding the issue of *locus standi* to bring a derivative action. In this respect, the common law derivative action has been replaced by the statutory derivative action in that the principles under common law cease to apply for leave applications under s.348 of CA 2016. Thus, in the view of the apex court, it was less appropriate to rely on the principles in relation to "clean hands" to determine whether an applicant was a proper plaintiff. That said, common law principles for interpreting the statutory elements of "good faith" and "best interest of the company" within the meaning of s.348 of CA 2016 would still be relevant.

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COMPANY (DERIVATIVE)

DERIVATIVE ACTION FOR CORPORATE LOSS

There are 4 shareholders in a company P1, namely P3 and P4 representing Tan Family owning 60% of its shares and D1 and D2 representing Lim Family owning the balance 40%. At the material time, P1's board of directors consisted of P2, D1 and D2; and D1 and D2 were only removed 9 months later after a suit was filed. A suit was filed against D1 and D2 for over-using the monies of P1 to settle its outstanding loan. Was the suit legally sustainable?

The answer is 'Yes'. Generally, a wrong committed against and suffered by a company is a corporate wrong. The proper plaintiff to bring an action to redress the injury is the company which ordinarily requires approval from the board of directors to pursue the legal action. Alternatively, leave of the court for a "derivative action" under s.347(1) and (2) of the Companies Act 2016 must be obtained prior to filing an action for the benefit of P1 against the wrongdoer. None of these two was obtained, but the High Court in *Roda Berlian (M) Sdn Bhd & 4 others v Lim Titt Huat & 4 others*[i] allowed the P1's suit to proceed to trial, on the ground that the suit was filed at the instance of its majority shareholders (P3 and P4) and the outcome of any motion at a general meeting to authorize the bringing of the suit would be clear and a foregone conclusion, relying upon *Avel Consultants Sdn. Bhd. & Anor v Mohd. Zain Yusof & Ors*[ii]. Be that as it may, the court went on to hold that P1 did not suffer any loss for using its monies to settle its own outstanding loan. The claim was thus dismissed.

What if it was in another company, D5 which was equally owned by P3 and P5 representing Tan Family and D1 and D2

[i] [2023] 1 LNS 264
[ii] [1984] 2 CLJ 169

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representing Lim Family with P2 and D1 as its directors, and there were complaints that D5's vehicles and insurance proceeds had been misappropriated? These were (directors') misconduct and a wrong done to the company, D5. The principle as advanced in the preceding paragraph is obviously inapplicable since the shareholding of D5 is 50/50 in equal proportion where there is a deadlock.

The answer given by the learned Judge in *Roda Berlian* was to opt for derivative action, applying the analytical framework propounded by the Singapore Court of Appeal in *Ho Yew Kong v Sakae Holdings Ltd*[i] and relying on our Federal Court case of *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor*[ii]. As it was a corporate wrong done to D5, D5 was the proper plaintiff to sue; or P3 and P5 could resort to a derivative action to commence action on behalf of D5. The claim thus failed for flouting the proper plaintiff rule.

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COMPANY (DIRECTOR'S DUTY)

LIABLE FOR ***BENEFITTING PERSONALLY*** FROM COMPANY'S ASSETS

A former Minister (D1) was found liable for unlawfully using a condominium unit (Unit A) at "The Troika" without the approval of the board of directors (BOD) of the company (P) in which he was the chairman and non-independent non-executive director.

Purchase and Use of condominium units in The Troika

In *FGV Holdings Berhad v Mohd Isa bin Abdul Samad & Anor*[iii], P had filed a suit against D1 and D2 (who was then P's CEO and later Group President) for breach of fiduciary duties primarily on account of, *inter alia*, the purchase and use of two condominium units without the knowledge of the BOD. On the purchase of the units, the High Court held that although the proposal to purchase was not referred to and considered by the investment committee before putting it before the BOD, it was carried out with the express approval of the BOD. There was no evidence that the purchase price of the units was dictated by the defendants or agents or inflated to benefit them or that there was secret profit made by them. There was also no realized loss suffered by P from the purchase of the units which remained in P's possession and control. The price paid for the units might have been at a higher market value but that did not mean that the defendants should be liable; the price paid was within the mandate agreed to by the BOD.

That said, it was found that the use of Unit A by D1 was not approved by P's remuneration committee and BOD. D2's excuse of allowing the use of the unit to save costs incurred by P for paying hotel

[i] [2018] SGCA 33
[ii] [2018] 4 MLJ 1
[iii] [2024] 4 AMR 971

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charges incurred by D1 as part of his entitlement as the then chairman was rejected by the court. P's BOD members were only entitled to hotel allowance if they were attending official functions on behalf of P and there was no right given to D1 and D2 to have their stay at the premises covered by P. D1 had thus wrongly used Unit A in breach of his fiduciary duties. The BOD had only allowed the units to be used for P's guests or business associates and not by the defendants. There was evidence to show that D2 and his family had also utilized Unit B. Further, the furnishing of the units was dictated by D2 and his wife and family members. In the circumstances, both the defendants were held liable for breach of their duties owed to P under s 132 of the Companies Act 1965 and for failing to ensure that their personal interests did not conflict with those of the company.

Carpool System

Although the BOD had agreed to set up carpool system for the use of the senior management and BOD members, evidence showed that D2 had abused his powers by utilizing three such cars (together with the company drivers) for his own use and allowing a director to solely keep and use one of the cars. There was no evidence that the cars were made available to the senior employees or other directors of P and there was no system set up. D2 was also held to be liable for not returning the petrol card (which was found to have been abused by D2) with his official car. In short, D2 had committed breaches of his fiduciary duties.

Damages[i]

The expenses incurred by P for the furnishing of the units must be repaid by the defendants. The claim for loss of use of the units based on the rentals that could have been obtained was also allowed. D2 was additionally liable for the loss of use of the pool cars[ii] and petrol card. For using the company assets for one's own benefit in disregard of the directives of the BOD and contrary to the best interest of P, an award of exemplary damages was imposed against

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[i] The court cited the Singapore Court of Appeal decision in *Sim Poh Ping v Winsta Holdings* [2020] SGCA 35 on the methods of measuring damages attributable to a person who committed a breach of his fiduciary duties.

[ii] The court accepted the formula of :- [Value when the leased cars were delivered] – [Price of the car when eventually sold] + [Maintenance costs from date of delivery to date of the sale] = Loss claimable from D2.

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D1 in the sum of RM300,000 and D2 in the sum of RM500,000.

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COMPANY (FRAUD)

FRAUDULENT DIRECTORS LIABLE PERSONALLY FOR DISSIPATING MONIES OF COMPANY

Carrying out business of a company with a dishonest intent to defraud creditor(s) of a company is likely to land director(s) of the company in trouble despite the general concept of separate legal entity under which, among others, a director will not be held personally liable for the acts or debts of the company. This is because s.540 of the Companies Act 2016 creates personal liability onto a director for carrying on fraudulent trading. In the recent case of *Tetuan Sulaiman & Taye v Wong Poh Kun & Anor*[i], the Court of Appeal (COA) found both former directors (WPK and WPL) of a company (BL) liable under the provision to pay RM5.9 million to the plaintiff (P).

The COA reiterated that in actions against directors for fraudulent trading, the elements that must be proved were: (i) the business of the company has been carried out with intent to defraud creditors, or for any fraudulent purpose; and (ii) the defendants were knowingly parties to the company's carrying on of the business in that manner with intent to defraud creditors or for any fraudulent purpose. Intention by the defendants to defraud the creditors of the company was inferable inferred from the fact that the company did not have a profit-generating business at the material time but placed unusually large orders, without explaining how they were going to honour the company's obligations. A similar inference may also be made when the defendants dissipated the company's assets when the company was not facing any dire financial hardship.

On the facts and evidence, BL had received the sum of RM71 million prior to being wound up, which was more than enough to satisfy any creditor. Despite receiving such sum, both WPK and WPL had allowed BL to fall into liquidation, with no explanation as to where the proceeds had gone to. This was clear evidence to support WPL's alleged intent to defraud BL's creditors. WPL's defence that he was merely following his co-director's instruction was untenable – he was a mandatory co-signatory of BL. WPL was thus knowingly a party to the carrying out of the dissipation of the monies. To be knowingly a party to the fraud, the person did not have to know every detail of the fraud or how it was to be perpetrated. Merely turning a 'blind eye' to the fraud being perpetrated (deliberately shutting his eyes to the obvious) would suffice to implicate him and hold him liable to the company's creditors.

P was entitled to draw an adverse inference from WPL's inability to provide any explanation as a mandatory cheque signatory of BL on how the money received was dealt with. Further, WPL's refusal

[i] [2023] 4 CLJ 699, CA

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and/or inability to provide any explanation was a conscious withholding or suppression of evidence as he was in a position to provide such information; and that the monies were dissipated when WPL was still in control of BL.

An unsecured creditor, such as P, is entitled to obtain an order or judgment against directors personally pursuant to s. 540 of the Companies Act 2016. The circumstances of the instant case called for personal liability against WPL as the director. As P's pleaded case was purely concerned with P's own claims, it was not an action whereby P was seeking to make WPK and WPL to be liable for other and/or all creditors' claims. Hence, the High Court's decision to order WPK and WPL to be liable to other creditors whose debts were still outstanding was set aside. Nevertheless, a creditor who remained an unsecured creditor would retain the right to recover the debt directly from the directors personally if they are shown to have acted wrongfully, as in the instant case, where there was ample evidence of WPL's wrongful act in dissipating the company's assets fraudulently to deny P from recovering their debt. Hence, it was concluded that the High Court had erred in principle when it decided that the monies were to be paid to the liquidator as contribution to the company's assets. Both WPK and WPL were ordered to make direct payment of the sum claimed to P. Such an order would also not offend the priority of payment principle as the action was against the delinquent directors personally and not against the wound-up company.

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COMPANY (SCHEME)

PRACTICAL END TO A DOOMED SCHEME

The High Court put a halt to the proceedings relating to a scheme of arrangement proposed by a subsidiary in KSK Group Berhad, which was the property developer for the project known as '8 Conlay', in *Damai City Sdn Bhd v Grand Dynamic Builders Sdn Bhd & Ors*[i]. The applicant had suffered massive losses and cash flow issues with the amounts due to creditors exceeding the realisable value of assets by RM535 millions. It appointed a scheme advisor to formulate a scheme of arrangement pursuant to s.366 of the Companies Act 2016 (the CA) and applied for a restraining order under s.368 of the CA (the RO). Aggrieved creditors applied to intervene (which was granted) in the proceedings and to set aside the RO.

The RO was set aside on 2 main grounds. Firstly, there was non-compliance of the mandatory requirement[ii] in s.368(2)(d) of the CA, *to wit*, the court approves the person to be nominated by a

[i] [2024] 5 CLJ 467

[ii] See *Mansion Properties Sdn Bhd v Sham Chin Yen & Ors* [2021] 1 CLJ 609, FC; *Barakah Offshore Petroleum Bhd & Anor v Mersing Construction & Engineering Sdn Bhd & Ors* [2019] CLJU 551.

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majority of creditors[i] to act as a director of the applicant. The proposed director was suggested by 5 related parties to the applicant (Related Creditors) whose total debts were RM292.92 million whilst the value of the total scheme creditors was RM1,146 million and that of the total unsecured creditors was RM956 millions. In either case, the total debts of the Related Creditors were below 50% total in value of the creditors, one was 25.55% and the other was 30.64%. That did not meet the requirement under s.368(2)(d). Thus, the RO was invalid and set aside on this ground.

Secondly, the total debts of the 2 interveners formed more than 30% of the total debts admitted by the applicant. Under s.366(3) of the CA, in order for a proposed scheme to succeed and be binding, it must be agreed by a majority in number of the 75% of the total value of the creditors. Therefore, the proposed scheme was bound to fail as the creditors whose total claim exceeded 30% of the total debts had stated their objection to the proposed scheme. There was no prospect of the proposed scheme being ultimately approved and hence the court ought not to act in vain[ii].

By way of *obiter*, the court regurgitated the principles laid down by the Federal Court in *MDSA Resources Sdn Bhd v Adrian Sia Koon Leng*[iii] that related parties were to be categorized as a separate group of creditors from other independent creditors as their interests would not be in line with the interests of other creditors.

" 8 CONLAY "

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[i] See *Re Sumatec Resorts Bhd & Anor* [2011] CLJU 1538 where the phrase "a majority of creditors" was construed as "a majority in value of the creditors".

[ii] See *Re Ng Huat Foundation Pte Ltd* [2005] SGHC 112, *Eastern Pretech Pte Ltd v Kin Lin Builders Pte Ltd* [2004] SGHC 195

[iii] [2023] 7 CLJ 843, FC. See also *Airasia X Bhd v BOC Aviation Ltd & Ors* [2021] CLJU 188. Both cases were featured in THE UPDATE issue Q3 of 2023 and issue Retro Q3 & Q4 of 2021 respectively.

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HOW CAN A COMPANY DIRECTOR BE LIABLE PERSONALLY FOR HIS ACTION ON BEHALF OF THE COMPANY?

In *Handskar (M) Sdn Bhd v Qube Medical Products Sdn Bhd & Anor*[i], P had entered into a supply contract to purchase gloves with D1 company. P had made an upfront payment of 35% of the contract sum with the balance 65% to be paid upon the gloves being made for deliveries. D1 and its director and shareholder, D2 then indicated that the balance of P's undelivered gloves was subject to a price increment due to the hike in raw material prices. Unbeknownst to P, the delivery terms were altered from 'December 2020' to '2021' without P's consent. D1 eventually failed to complete the deliveries despite P put D1 on notice. P terminated the contract and sued D1 premised upon contract and D2 premised upon tort for causing loss to P's economic interest by unlawful acts and means through D1's personnel acting under D2's control, instructions and/or directions.

The High Court struck out the claim against D2. The learned Judge prefaced his judgment by laying emphasis on the nature of directorship in a company:-

> " *In a claim against a company for breach of contract, it is becoming increasing common for the plaintiff to also include as defendants, the directors of the company with the view to make the directors personally liable for the claim based on a cause of action in tort eg, unlawful interference with the contract and/or conspiracy with the company to injure the plaintiff. ...*
> *What is often ignored is the trite principle that when a director acts in the exercise of his functions as a director and within the scope of his authority, he essentially acts in the company's capacity and not his own. In other words, he is effectively the company. ... if the law is to hold that the directors to be personally liable for the acts taken by the company in relation to a contract entered into by the company, when the directors are merely acting in the company's capacity and in fulfilment of their duties towards the company, the separate legal personality doctrine will be effectively undermined.*"

The court went on to apply the principle that a director acting on the company's behalf does not incur tortious liability if he has acted *bona fide* within the scope of his authority, citing the century-old case of *Said v. Butt*[ii].

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[i] [2024] 1 CLJ 865

[ii] [1920] 3 KB 497

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Reference was also made to the Singapore Court of Appeal decision in *PT Sandipala Arthaputra and Others v St Microelectronics Asia Pacific Pte Ltd and Others*[i] where the scope of the *Said v Butt* principle was more clearly demarcated. Directors are exempted from personal liability for the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not themselves in breach of any fiduciary duty (to act in the best interest of the company) or other personal legal duties owed to the company. The applicability of the principle focuses on the director's conduct and intention in relation to his duties towards his company, and not towards the third party. The relevant focus of the *bona fide* inquiry is vis-à-vis the company and not the third party. If the directors acted in the best interests of the company and not in breach of any of his other duties to the company, notwithstanding that he also possessed the intention to injure the third party or to induce a breach of contract as against the third party (as the case may be), he would still be entitled to the protection of the *Said v Butt* principle.

In Handskar, P's pleas had not stated that:

(i) the decisions or actions by D2 as a director of D1 were not made in the course of D2's duties as a director or officer of D1;

(ii) the decisions or actions were beyond or outside the scope of D2's authority;

(iii) the decisions or actions were in breach of D2's fiduciary duties or other personal duties owed to D1; or

(iv) the decisions or actions were not made or taken by D2 in the best interests of D1.

The mere fact that D2 as a director of D1 and was involved in making the decisions on the supply contract on behalf of D1, without more, could not in law give rise to any sustainable cause of action against him for the tort of causing losses by unlawful means and/or unlawful interference; the acts of D2 were the acts of D1. P's claim against D2 was therefore struck out.

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[i] [2018] 1 SLR 818, CA(Spore)

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VALUATION OF SHARES IN A MINORITY BUY-OUT IN S.346 OPPRESSION ACTION

" ***…it did not necessarily follow that in the event of a majority buy-out, the price to be paid would be the same as the price fixed for the minority buy-out.***"

In a relatively rare but interesting case, the High Court in *Yudisthiran a/l Doraisamy v Sugumaran a/l Sinnasamy & 6 Ors (No.2)*[i] demonstrated how valuation of shares for the majority "oppressor" shareholders to buy out minority "oppressed" shareholder's shares in a minority oppression case was to be carried out and the legal principles applicable for determination by the court of the "fair value" of the shares to be purchased[ii].

Yudisthiran was a s.346[iii] oppression action instituted by the plaintiff (P) who held 49% shareholding in the company, VAL against 4 defendants (D1 to D4, or the defendants) who held the balance majority 51% of the shares in VAL. The court found in favour of P and ordered D1 to D4 to purchase 490,000 shares as held by P in VAL (the said Order). Based on the said Order, the valuation of VAL's shares must take into consideration, the value of: (i) a Rolls Royce car (the Rolls Royce); (ii) a land situated in Bandar Kangar, Negeri Perlis (the Vimal Land); (iii) the office of VAL built on the Vimal land (Vimal Auto Office) as the assets of VAL; (iv) and the loss of the Honda Malaysia's body and paint (Honda) business opportunity that was subsumed into the 6th defendant, VBSB.

UHY was appointed as the court-appointed valuer/expert to determine the fair value of the VAL's shares; whilst the defendants appointed PKF and P appointed Perun as their respective advisors. All three experts provided their own valuation reports, which upon comparison, contained significant disparity in their valuation of VAL's shares as each expert differed on the valuation methodologies, discount rate, projections, treatment of loss in body and paint business, and treatment of Vimal Land and Vimal Auto Office.

Generally, there are generally three approaches to the valuation of shares of a company, namely:-

(a) The asset based method (ABM) of valuation which calculates the value of the company based on historic documents showing the assets and liabilities of the business

[i] [2024] 4 AMR 200
[ii] The learned Judge did acknowledge the earlier decision in *Karen Thomas v Santhi a/p Shanmugam & Anor* [2010] MLJU 1311 as setting out the principles and guidelines related to valuation.
[iii] Section 346 of the Companies Act 2016

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at a point of time. It does not incorporate expectations of future performance and growth potential of the company;
(b) The price to earning ratio method (PE) where a value of the business is computed by dividing the company share price by the earnings per share or by identifying a suitable PE ratio to apply to its earning. To apply this method, there is a need to ascertain the PE of comparable businesses;
(c) The discounted cash flow (DCF) method of valuation which estimates the value of a company by using its expected future cash flows. A DCF valuation determines the company's present value by adjusting future cash flows to the time value of money.

Perun, PKF and UHY were all unanimous in their agreement that the DCF method of valuation was appropriate for businesses operating as a going concern.

However, both UHY and PKF had adopted the ABM method of valuation, mainly prompted by the concerns over the viability and continuity of business as expressed by VAL's management which was not supported by any evidence. Coupled with their refusal to provide 5-year forecast projections and unsupported assertion that Honda may not renew the dealership, all these were held by the learned Judge as a continuation of the defendants' oppressive behaviour or a tactical manoeuvre to depress the valuation price of the shares in order to achieve an undervaluation of the fair value. The learned Judge thus ruled for the usual method of valuation of the shares of VAL on an on-going business concern basis, namely the DCF methodology adopted by Perun.

The revenue forecasts that Perun had used in deriving its valuation of RM32.79 million as the value for 100% of VAL shares was not unreasonable, based on a conservative steady growth rate of 2.66% per annum which was the average growth rate of VAL for the pre-pandemic years.

In arriving at its valuation of VAL by the DCF method, UHY had applied a discount rate of 15%, as opposed to the rate of 10.75% applied by Perun. P disputed two parts of this discount rate, being (i) illiquidity discount of 4%; and (ii) projection risk of 2%. The learned Judge pointed out that in the case where the court had found oppression and the oppressing party was ordered to buy out the minority party who was oppressed, the court had consistently directed that the sale of the minority's shares to the oppressing majority be on a without discount basis[i]. To allow the defendants to acquire the shares of P (as it were) at a discount in these circumstances of found oppression would give rise to a real risk of unjust enrichment at the expense of the oppressed plaintiff. The said Order had also directed for VAL's shares to be valued without discount for minority holding. Since there was no basis for the fear of non-

[i] See *Re Bird Precision Bellows Ltd* [1984] 3 All ER 444

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renewal of the dealership agreement with Honda, there was no basis for the discount to be given for the projection risks. Hence, UHY should have not applied the illiquidity discount and/or discount due to projection risk in arriving at its discount rate for the valuation of VAL by the DCF method. Accordingly, the rate of 10.75% discount applied by Perun was adopted by the court.

With regards to the valuation of the Vimal Land and Vimal Auto Office, the court took into account the valuations of the valuers engaged by UHY and PKF respectively and other relevant factors such as the initial construction costs before deciding to accept and adopt the valuation by UHY's valuer.

On the Rolls Royce, P contended that he was not notified of the disposal of the Rolls Royce and the disposal sum of RM760,500 was RM104,500 less than the purchase consideration, which failed to factor in: (i) financing cost, and (ii) loss of opportunity cost. By reason of the aforesaid, based on the principle that the value to be placed on the shares to be purchased must take into account inappropriate circumstances i.e., the gains which the oppressors have made and the losses which the oppressed have suffered, some value representing the loss to P and the gain to the oppressing parties arising from the purchase of the Rolls Royce, ought to be included in the valuation. Failure to do so would mean that the defendants as the oppressing parties would have obtained a gain from their oppressive conduct at the expense of P. It was this unilateral action of D1 to D4 in purchasing the Rolls Royce that had led to the court earlier finding oppression against D1 to D4. The shares should be valued on a basis that would place the oppressed party in the position as if there had been no oppression. Therefore, the sum of RM104,500 together with the financing costs for the purchase of the Rolls Royce ought to be taken into consideration in deriving the valuation of VAL's shares.

The excuse by D1 to D4 that they had insufficient funds to purchase the plaintiff's shares was not a good ground to refuse or reject an order of a minority buy-out[i]. Further, if the management's representation to PKF was true (that there was uncertainty if the dealership agreement would be renewed without D1 in VAL), this would mean that there would indeed be an "uncertainty" in the case of P buying the shares of D1 to D4 in VAL (majority buy-out) as this would entail D1 to D4's departure from the management of VAL (and VBSB). The learned Judge however did not wish to make any ancillary orders pertaining to the majority buy-out until it was clear that the minority buy-out order based on the price as determined by the court could not be proceeded with since **it did not necessarily follow that in the event of a majority buy-out, the price to be paid would be the same as the price fixed for the minority buy-out.**

[i] See Re Cumana Ltd [1986] BCLC 430

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In arriving at the fair price for the minority buy-out, the court had included VAL's loss of the body and paint business and the loss due to the unauthorised purchase of the Royce Rolls. This was based on the principle that the shares should be valued on a basis that would place the oppressed party in the position as if there had been no oppression. In the event of a majority buy-out, the fair value could not include these losses since the defendants had already enjoyed the benefits of the body and paint business and the use of the Rolls Royce.

If D1 to D4 were indeed unwilling to purchase P's shares at the fair value as determined by the court, it must mean that D1 to D4 were of the view that the said "fair value" did not reflect the true and fair value of the shares. Could D1 to D4 then insist on P purchasing their shares based on the same fair value, or should D1 to D4 be ordered to sell their shares based on their own valuation by PKF? Or should the court order for VAL to be wound up[i]?

For the purpose of the judgment, the court had decided to only determine the fair value in respect of the purchase by D1 to D4 of P's shares. On the facts and the evidence adduced, the fair value for P's shares was RM15,827,000 which D1 to D4 were ordered to pay within 14 days in exchange for P's shares. In the event such minority buy-out was not proceeded with, then the second part of the said Order kicked in, i.e. P be entitled to purchase the entire shares of D1 to D4. Parties were at liberty to apply for further orders and directions.

Ong Chee Kwan J in *Yudisthiran*

[i] In *Kong Yin Siong & Anor v Chin Chee Fui* [2019] 1 LNS 1128, the Court of Appeal affirmed the High Court decision which had ordered winding up of the company when the majority shareholders failed to purchase the minority shareholder's shares by a certain deadline in a minority oppression action.

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'*JUST AND EQUITABLE*' GROUND TO WIND UP A FAMILY COMPANY RUNNING ON MUTUAL TRUST AND CONFIDENCE BASIS

Is the 'just and equitable' ground to wind up a company under s.465(1)(h) of the Companies Act 2016 (CA2016) limited to companies that are incorporated partnership or are akin to a *quasi*-partnership?

In *WTK Realty Sdn Bhd v Kathryn Ma Wai Fong & Anor Appeal*[i], WTK Realty Sdn Bhd (WTK, the company) was founded by the late Wong Tuong Kwang (deceased) in 1981. Since then, the management and ownership of the company had, for all intents and purposes, been the exclusive preserve of the members of the Wong family. After the passing of the founder in 2004, the management of the company was passed on to his three sons, WKN, WKC and WKY. In fact, even before the passing of the founder, WKN became the managing director of the other companies in the WTK Group until 2013 when he passed away. Subsequently, the children of the three brothers also participated in the management. The three brothers also passed on their own shares to the children. It was the finding of the High Court that the company was indeed a family company running on the basis of mutual trust and confidence between its shareholders.

WKN's widow (Kathryn) as the executor of WKN's estate had petitioned to wind up the company under s.465(1)(h) of the CA2016. WKC and WKY and the company objected. The High Court ruled and the Court of Appeal affirmed that the categories for the invocation of the 'just and equitable' ground were not closed; and it was not limited to *quasi*-partnership company only. The court could take into account all relevant circumstances that led to the filing of the petition, including the fact that other winding up petitions had been filed against related companies by same parties and there were 40 sets of legal suits in Sarawak alone between the two warring factions of the Wong family. The fact that the contributories had taken an opposite stand in a petition to wind up a related company controlled by Kathryn's family was relevant although not necessarily determinative of the petition in question. Therefore, the relationship of mutual trust and confidence between the family of Kathryn and those of WKY and WKC had completely broken down since the death of WKN. Breakdown of mutual trust and confidence among shareholders in a family company was sufficient to invoke the 'just and equitable' ground for winding up.

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[i] [2024] 6 CLJ 33, CA

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The decision to wind up the company was upheld by the appellate court.

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CONSTRUCTION (CIPAA)

ADJUDICATION DECISION ENFORCED PURSUANT TO S.28 CIPAA AS AN ORDER OF COURT CANNOT BE STAYED

As generally known, the Construction Industry Payment and Adjudication Act 2012 (CIPAA) was enacted to address issues common in the construction industry relating to cash flow problems for the unpaid party and to ensure regular and timely payment of claims for works done through adjudication involving payment. It advocates a system of "pay first and settle dispute later" whereby the adjudication under CIPAA effectively offers "temporary finality" to the resolution of the payment dispute whilst the subject matter of the adjudication decision can still be finally determined in arbitration or the court.

Under CIPAA, the procedure from making of payment claim leading to making the **adjudication decision** is set out in s.5 to s.12. Once an adjudication decision is pronounced, an aggrieved party may apply **to set aside** the adjudication decision under s.15 of CIPAA on any of the grounds set out therein. Under s.16(1) of the CIPAA, a party may apply to the High Court **for a stay** of an adjudication decision where: (a) an application to set aside the adjudication decision under s.15 has been made; or (b) the subject matter of the adjudication decision is pending final determination by arbitration or the Court. Section 28 of CIPAA provides that a party to the adjudication process may enforce an adjudication decision by applying to the High Court for an order **to enforce the adjudication decision as if it is a judgment or order of the High Court**.

In *Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd & Another Appeal*[i],

[i] [2024] 3 AMR 933, FC

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Econpile had obtained an **Adjudication Decision** against ASM for a sum of RM59.76 million (the Adjudicated Sum). There was also pending arbitration proceedings. Econpile filed an application to enforce the Adjudication Decision pursuant to s.28 of CIPAA (**the Enforcement Application**) whilst ASM filed an application to set aside the Adjudication Decision under s.15(b) and (d) of CIPAA on the grounds of denial of natural justice and the adjudicator acting in excess of his jurisdiction (**the Setting Aside Application**) and another application to stay the Adjudication Decision pending conclusion of the arbitration (**the Stay Application**).

The High Court allowed the Enforcement Application and ordered ASM to pay Econpile the Adjudicated Sum (**the Enforcement Order**); and dismissed ASM's Setting Aside Application and Stay Application. On appeal to the Court of Appeal (COA), ASM's appeals against the Enforcement Order and the Setting Aside Application were dismissed. However, the COA granted ASM the Stay Application. Basically, the COA reasoned that there was no express prohibitions in CIPAA against the court granting a stay after the enforcement order had been granted. An order for enforcement obtained pursuant to s.28 of CIPAA merely permitted the adjudication decision to be enforced as a judgment of the court but was not a judgment in itself (and hence it was not merged into a judgment); a stay could be granted provided the threshold under s.16 of CIPAA was satisfied.

On final appeal, the Federal Court reversed the COA decision. The apex court looked at the Hansard to ascertain the intention of the Parliament in legislating CIPAA. It considered previous decisions of the Federal Court and COA. It then ruled that there was no provision in CIPAA for a stay of adjudication decision after an enforcement order had been given pursuant to s.28 of CIPAA. The COA had acted in excess of its jurisdiction under CIPAA by granting the stay when the Adjudication Decision remained intact and not set aside under s.16 (*sic* s.15) of CIPAA.

As conclusion, the apex court definitively answered Question 1 posed in the negative that was, an adjudication decision after having been enforced pursuant to s 28 CIPAA as an Order of the Court cannot be stayed pursuant to s.16(1)(b) of CIPAA. This effectively means that the pending determination of the subject matter of the adjudication decision by arbitration or the court is not a ground to obtain a stay of the adjudication decision once it has been enforced by way of a court order of the High Court under s.28 of CIPAA.

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CONTRACT

GUARANTEED RETURN MERE PUFFERY AND NON-BINDING

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In *Amy Tee San San & 29 others v Magic Coast Sdn Bhd & 4 others*[i], the Plaintiffs who were the purchasers of units of hotel suites in the project known as Dua Sentral (the Project) claimed for guaranteed rental return of 7% of the purchase price per annum for 5 years (GRR) and damages for loss of capital value of the hotel suites. D1 (the registered proprietor of the land which housed the Project) and D2 were the developer of the Project whilst D5 entered into management agreements with the plaintiffs for the purpose of managing the hotel units and to let them out as accommodation as a hotel known as Best Western Premier Dua Sentral (BW). D2 and D3 were subsidiary of D4 (Amanah Raya) and although D1 to D4 were not parties to the management agreement, the Plaintiffs also sued them.

The crux of the claim was that there were purported representations by the Defendants individually or collectively that the units of the hotel suites came with GRR (the GRR Representation) in the form of promotional materials [advertisements, brochures and marketing materials] which marketed the Project as a development project by D4. However, none of the parties, i.e. D1 to D4 were a party to the management agreements. Evidence was led that only D5 that had guaranteed the GRR vide the management agreements and the Plaintiffs understood BW (the world's largest hotel chain) to be liable to pay GRR.

More significantly is the fact that the promotional materials contained disclaimers or qualifications that stated "Terms and Conditions Apply" and "Subject to terms and conditions". Those terms were for the purchasers to enter into the management agreements with D5 which they did. Further, the promotional materials were not an offer but an invitation to treat, following past decisions[ii]. They were mere puffery[iii]. The Plaintiffs' claims against D1 to D4 in respect of the GRR were thus dismissed with costs. Since their claims for capital losses were pegged to the Defendants being held liable to make good on the GRR scheme, these claims were also dismissed.

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[i] [Kuala Lumpur High Court Civil Suit No.: WA-22NCVC-57-01/2020

[ii] See *Bounty Dynamics Sdn Bhd v Chow Ming Tan & Ors* [2015] 9 CLJ 422, CA

[iii] See *Keesaik Holdings Sdn Bhd & Anor v Magic Coast Sdn Bhd & 2 Ors* (KL High Court Suit No.: WA-22NCVC-89-02/2018, CA)

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COMPLY WITH SUBJECT OF AN INJUNCTION APPLICATION ONCE NOTICE IS GIVEN

Breach of Loan Agreement by Bank Did Not Exonerate Borrower from Liability to Repay Loan

If you go against a court order, you may well end up in jail for being in contempt of court. What if no court order has been made but you are well aware that an application for an injunction has been filed against you, restraining you from doing certain things and the application is pending hearing at the court? Can you ignore it and just proceed as usual since no court order has been made?

1. Notice of Injunction Application

In *Bank Kerjasama Rakyat Malaysia Berhad v GM Healthcare Sdn Bhd & 5 Ors*[i], the Appellant bank (Bank) granted financing facilities to GMH, the sub-contractor for a construction project in consideration of which a 3rd party assignment of the monies (contract proceeds) which the main contractor, SF would receive from the employer, JKR, was made in favour of the Bank as security. Under such contractual arrangement, once a claim by GMH was certified and the contract proceeds were paid by JKR to SF, SF would pay such monies into a designated account with the Bank (the Project Account); the Bank would then deduct an agreed amount towards repayment of the financing facilities and release the balance to GMH. Dispute arose between GMH and SF as to the entitlement to some interim payments which resulted in legal action initiated by SF in which *Mareva* injunction[ii] was, among others, sought against GMH and the Bank to restrain them from dealing with any of the surplus amounts from the contract proceeds.

Four days after the Bank had received interim payment certificate no.29, notice of an application for a Mareva injunction was served on the Bank. The Bank decided to with-hold payments to numerous parties (with the application still pending in court) but GMH disputed this and contended that the Bank had breached the Financing Facilities Agreement (FFA) by failing to make those payments to GMH's third party contractors. Both the High Court and Court of Appeal ruled in favour of GMH against the Bank. The Federal Court however set aside the decisions. It held that the Bank having been served with notice of the application for an injunction, could not simply proceed to disburse monies to third party contractors under the

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[i] [2024] 5 CLJ 175, FC

[ii] *Mareva* injunction is a court order that freezes the assets of a defendant from being dissipated pending the final determination of the legal suit concerned. The purpose is to prevent the plaintiff/applicant from being deprived of the fruits of judgment it may eventually obtained against the defendant.

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guise of "ordinary course of business" clause. Nallini Pathmanathan FCJ in an *ex-tempore* judgment said:

> " … *The entirety of the monies were in dispute, save for instalment repayments to the Bank. If the Bank chose to disburse the monies notwithstanding having notice of the pending Mareva, and the Mareva was subsequently granted as was the case here, it would have meant that the Bank had disbursed monies which were rightfully to be "frozen" or kept, pending the determination of the full dispute between SF and GMH. The deliberate act of the Bank in choosing to disburse the monies despite having notice could very well be said to amount to an interference with the adjudication of the matter because the very subject matter of the dispute, was being disbursed or distributed, notwithstanding the fact of adjudication pending before the Courts. This is tantamount to pre-determining the dispute and could therefore be viewed as amounting to contempt*."

The learned Judge went on to cite an excerpt from an English decision[i] that "even if there is no injunction in place to preserve the subject matter of an action, '*a wanton destruction of that subject matter with the intention of impeding a fair and fruitful trial is capable of being a contempt of court*'." Thus, the fact that the Bank was notified of the application to obtain a Mareva injunction by SF was, in itself, sufficient to put the Bank on notice to be vigilant about the monies sought to be preserved; and the Bank could not be faulted for taking the prudent step to stay its hand in the face of the adjudication by the Court and not to take the risk of pre-empting or rendering nugatory any subsequent order the Court might make. The Bank was not in breach of the FFA.

The apex court's answer to the question of law posed is that where a bank is given notice of a pending application for a Mareva injunction in respect of monies it holds, the bank is legally justified in withholding payment pending determination of the said application[ii].

2. Effect of Breach of Bank on Repayment of Loan

Both the courts below had also ruled that the breach of the FFA by the Bank had exonerated the primary debtor, GMH and the guarantors from repaying the remaining indebtedness owing to the Bank. The apex court disagreed. A breach of the FFA resulted in a claim in damages accruing to the borrower which was separate and distinct from the overriding obligation of the borrower to repay the monies disbursed and used by the borrower[iii]. Therefore, the answer to the question of law posed is a breach of a facility agreement by a bank does not disentitle it, as a matter of course and without more, from recovering monies owed to the bank by the borrower from the borrower or guarantors.

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[i] *Harrow London Borough Council v. Johnstone* [1997] 1 WLR 459

[ii] See also *Monatech (M) Sdn Bhd v Jasa Keramat* [2002] 4 CLJ 401, FC

[iii] The court reiterated the Supreme Court decision in *BBMB Kuala Trengganu v Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495.

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3. Relation Back Theory Inapplicable to Counterclaim as Separate Action

A matter of civil procedure also arose for determination. The main suit filed by SF was on 11.6.2010. The Bank filed its defence on 14.7.2010. The Bank only made demands against the guarantors on 27.10.2010. The Bank then amended its defence to include its counterclaim against GMH and guarantors on 1.3.2011. Both the courts below applied the "relation back" theory to rule that the Bank's amendment related back to either the filing of the suit by SF (June 2010) or the filing of the Bank's defence (July 2010); on either date, the bank enjoyed no valid cause of action against the guarantors (since the cause of action only arose upon demand made which was in October 2010). The Federal Court invoked s.31 of the Limitation Act 1953 which deemed a set-off or counterclaim as separate action as well as O.15 r.2 of the Rules of Court 2012 to reverse the lower courts decision; and ruled that the Bank's claim against the guarantors was separate and distinct from SF's or GMH's action against the Bank and there was no basis to apply the "relation back" theory[i].

The Federal Court allowed the Bank's appeal with costs and entered judgment against GMH and the guarantors.

[i] See also *The "Jarguh Sawit"* [1997] 1 SLR(R) 213

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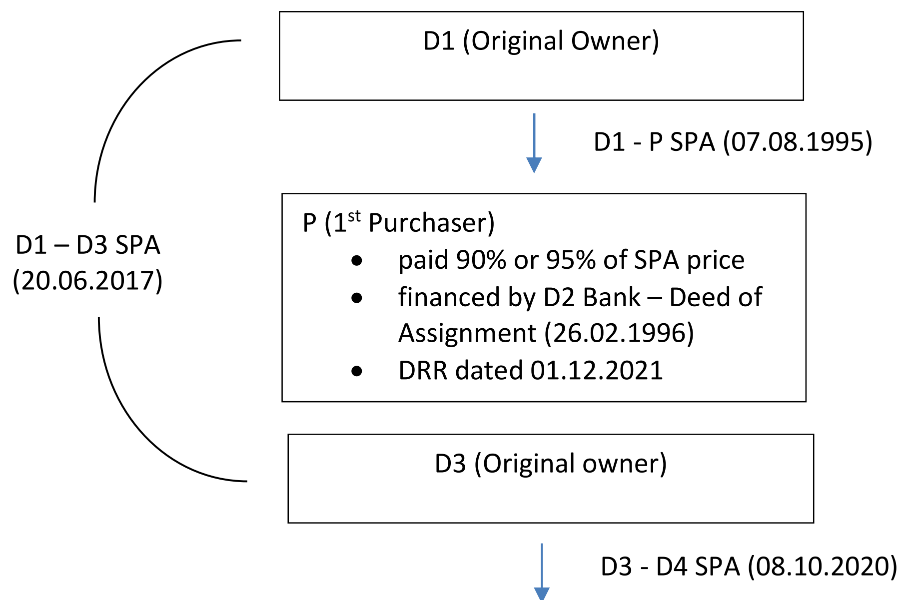
TO PLEAD PROPERLY, TO ACT PROMPTLY, TO LODGE CAVEAT TO PROTECT INTERESTS ON LAND

The importance of proper formulation of claims and pleas in the statement of claim in a legal action cannot be overstated. This can be seen in a High Court case in Penang, *Leong Quee Meng v Genting Perkasa Sdn Bhd & 3 others*[i]. D1 was the original owner of the subject land which had entered into a sale and purchase agreement dated 7.8.1995 to sell to P and to build a factory thereon (D1—P SPA). The factory was never completed and the land was never transferred to P who also did not lodge any private caveat. P only paid 95% of the purchase price. P's purchase was financed by D2. The deed of assignment (dated 26.2.1996) in favour of D2 as security for the financing was revoked by Deed of Receipt and Reassignment dated 1.12.2021. In 2017, D3 purchased the land from D1 *vide* a sale and purchase agreement dated 20.6.2017 (D1—D3 SPA) by which time, the land had been issued with an individual title. In 2020, D4 purchased the land from D3 *vide* a sale and purchase agreement dated 8.10.2020 (D3—D4 SPA). the sale was duly completed and presently, D4 is the registered proprietor of the land. The relationship of the parties vis-à-vis numerous sale and purchase agreements can be depicted in the following diagram:



[i] Penang High Court Suit No.: PA-22NCvC-97-06/2022

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D4 (Present registered proprietor)

P commenced a legal action against all the four defendants. D1 and D3 filed application to strike out P's claims as not disclosing a reasonable cause of action, frivolous, vexatious and an abuse of the process of the court.

On P's claim against D1 and D3 in conspiracy, P had not pleaded the factual ingredients to support such a plea in its statement of claim. It did not identify with any degree of particularity:- (a) a conspiratorial agreement between D1 and D3; (b) a predominant intention to harm P; and (c) the overt acts allegedly done by D1 and D3 in support of the purported conspiracy. It was also unclear it is premised on lawful means conspiracy or unlawful conspiracy. P merely pleaded his 'belief' that there was conspiracy or collusion between D1 and D3 in relation to the transfer of the land. That was insufficient.

On the pleas of fraud and misrepresentation, there was no particulars. Again, it was mere belief by P that representations were made which induced or deceived D2 into releasing certain legal charges over the land. P did not specify whether the representations in question were innocent, negligent or fraudulent. On the plea of negligence against D3, no particulars were pleaded.

It is interesting to note that the learned Judge also struck out P's claim against D1 and D3 on the ground that such claim was time-barred. Between P and D1, the breach of the D1—P SPA was the failure to deliver the factory within 36 months from the date of the SPA hence 7.8.1998. The six-year limitation period under s.6(1) of the Limitation Act 1953 (the LA) started to run from that date to expire on 7.8.2004. However, P only filed this action on 28.6.2022 which was about 24 years after P's cause of action had accrued. Even under s.9(1) of the LA in respect of action to recover any land which has a limitation period of 9 years, it would likewise been time-barred. Since P's action against D3 was premised on his case against D1, the court found that P's action against D3 was similarly time-barred.

Under s.29 of the LA, limitation period is postponed in case of fraud. However, if an action has already been time-barred, an allegation of fraud does not extend the limitation period. In the instant case, the alleged fraud occurred in 2017 when D1 was said to have fraudulently sold the land to D3 via the D1—D3 SPA. P's cause of action accrued on 7.8.1998 and expired on 7.8.2004 (in respect of the cause of action in breach of contract) or 7.8.2010 (in respect of the cause of action in recovery of the land).

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Further, under s.22(1) of the LA, no period of limitation shall apply to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy. Arguably, D1 was a trustee of the land for P hence the limitation period was not applicable to him. However, the learned Judge rejected such argument. The full purchase price of the land had not been paid. As such, P did not possess beneficial interests in the land and P's rights in the land at most were purely contractual. Beneficial right or interests only arise upon full payment of purchase price[i].

Finally, the learned Judge also held against P on laches[ii] and unreasonable delay by invoking s.32 of the LA: the length of gross inordinate delay (24 years) and unexplained inaction on the part of P. Consequences of such delay rendered the grant of reliefs sought by P unjust.

It is noteworthy that if P were to take step to protect his interests by lodging a caveat on the land, D3 would have notice of his rights and would not have purchased the land from D1 and the saga would not have happened.

The court granted order in terms for the striking out application of D1 and D3 with costs.

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[i] See *Takashimaya Construction & Development Sdn Bhd & Anor v My Influx Sdn Bhd and other appeals* [2020] 6 MLJ 289, CA.
[ii] See *IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor* [2022] 1 MLJ 860, CA.

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MAREVA OR PROPRIETARY INJUNCTION?

Different Threshold Requirement

An injunction is an order of a court requiring a party either to do a certain act(s) (called *mandatory* or *positive* injunction) or to refrain from doing a specific act(s) (called *prohibitory* or *negative* injunction). There are also many other classifications, based on the period of time for which an injunctive order is28emainn in force or its nature. If the injunction is granted after a full trial on the merits of the case, it is called *perpetual* or *permanent* injunction which is a final judgment. If it is granted as an interim or provisional measure at an early stage of the proceedings before the case is tried in full, then it is called *interlocutory / interim* injunction. Other types of injunction include *Mareva* (freezing) injunction, *quia timet* injunction, *Anton Piller* (search) order, 'springboard' injunction, *Fortuna* injunction, *Erinford* injunction, anti-suit injunction, without notice (*ex-parte*) injunction and *inter-partes* injunction.

In *OTM Solution Sdn Bhd (in liquidation) v Azlan Bin Muhamad*[i], the court concisely set out the systematic series of questions required to be answered in an application for interlocutory prohibitory injunction which is presented as follows:

1. Whether there exists a serious question to be tried.
   If the answer is negative, the application is immediately dismissed.
   If affirmative, then move to the next question.
2. Whether the applicant would be adequately compensated by damages if the interlocutory injunction is not granted, or alternatively, whether the applicant would suffer irreparable harm.
   If damages are an adequate remedy or that no irreparable harm would occur, the application is dismissed.
   Conversely, if damages are not sufficient or irreparable harm is likely, the court then examines the position of the respondent.
3. To assess whether the respondent could be adequately compensated by damages or might suffer irreparable harm should it later be determined that the interlocutory injunction was wrongly granted.
4. If the respondent would not suffer significantly or could be compensated, the inquiry concludes and the injunction is granted.
   However, if it emerges that both parties could suffer irreparable harm, whether the injunction is granted or denied, the court then proceed to the next inquiry.

[i] Shah Alam High Court OS No.: BA-24NCC-161-12/2023

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5. The court undertakes a "balance of convenience" or, as some called, a "balance of justice" or "balance of the risk of doing an injustice" test. Should this balance not decidedly favour either party, the *status quo* is maintained which means no interlocutory injunction will be issued.

However, the framework outlined above did not apply to *OTM Solution* which concerned two types of interlocutory injunction: the *Mareva* injunction and the proprietary injunction. *Mareva* injunction is a court order to restrain a defendant from removing his assets from the jurisdiction, or from dealing with (dissipating) assets (whether located within the jurisdiction or not) so as to render them unavailable or untraceable to avoid execution of judgment that may be entered against him. The methodical approach for a Mareva injunction was set out and reproduced as follows:

A. Whether the applicant has a good arguable case on a substantive claim.
B. Whether the respondent has assets within the jurisdiction.
C. The balance of convenience lies in favour of granting the injunction.
D. There is a real risk of dissipation of assets or their removal from the jurisdiction.

The learned Judge pointed out that the requirement of "a good arguable case" was a higher threshold than the test for an interlocutory prohibitory injunction which merely required an applicant to establish "a serious question to be tried".

"Kompleks Mahkamah Shah Alam"

However, in the instant case, the applicant was applying for a proprietary injunction (also known as proprietary freezing order) to assert a proprietary claim over assets in the possession of the respondent over which the applicant had a proprietary claim so that they could be turned over to the applicant if it was successful in the action. The applicant must thus show that first, there was a serious question to be tried as to "whether the applicant was the rightful owner of the assets"; second, whether damages would be an adequate remedy; and third, the balance of convenience lies in favour of granting the proprietary injunction. The court held that there was no need to prove risk of dissipation in order to obtain a proprietary

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injunction, making it easier to obtain than a *Mareva* relief[i].

Upon evaluating evidence and facts, an interim injunction was granted to preserve the monies in the bank accounts which were alleged to beneficially belong to the plaintiff and held by the defendants in trust for the plaintiff until the disposal of the main action.

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DIGEST OF EMPLOYMENT LAW CASES

1. CONTRACT TEST, NOT REASONABLENESS TEST, TO DETERMINE CONSTRUCTIVE DISMISSAL

The applicable test concerning constructive dismissal was revisited by our Federal Court in *Tan Lay Peng v RHB Bank Berhad & Anor*[ii]. For years, it has been accepted that the test is one of contract and not of reasonableness. The contract test is whether the conduct of the employer, in its action or series of actions or omission(s), constitutes a fundamental or repudiatory breach that goes to the root of the employment contract or is such that the employer has evinced an intention no longer to be bound by the terms of the contract. The employee would have to prove that in order to claim for "constructive dismissal", which entitles him to walk out and treat himself as discharged from his employment on the ground that he has been constructively dismissed by his employer[iii]. On the other hand, the reasonableness test looks into the reasonableness of the employer's conduct (i.e. what a reasonable, honest and right-minded persons considers the usage concerned to be fair and proper based on the facts and circumstances of the case)[iv] in deciding whether there is any fundamental breach in the terms of the employment.

The apex court reviewed past cases in our jurisdiction as well as the development in England, Singapore, Australia and Canada and came to the conclusion that the contract test remained intact and relevant for determining a constructive dismissal case. The reasonableness of the employer's conduct was a factor that may be taken into consideration in determining whether there was any fundamental breach of the contract of employment or an intention on the part of the employer no longer to be bound by the contract but it could not be a legal requirement in constructive dismissal cases. And there was indeed a difference between both tests. The contract test was more certain whilst the reasonableness test was very subjective, too wide and indefinite and could lead to abuse and unsettled industrial relation.

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[i] See *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor* [2021] 4 CLJ 446

[ii] [2024] 2 ILR 33, CA

[iii] The *locus classicus* is the Supreme Court decision in *Wong Chee Hong v Cathay Organization Malaysia Sdn Bhd* [1988] 1 CLJ 45.

[iv] See *Preston Corporation Sdn Bhd v Edward Leong & Ors* [1982] 2 MLJ 22, SC

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On the facts, the transfer or repatriation of the claimant from Thailand to Malaysia was in accordance with the transfer clause of the contract of employment. The Industrial Court had thus not adopted the correct contract test but the wrong reasonableness test in emphasizing the lack of *bona fide* on the employer's part concerning the claimant's repatriation to Malaysia. The Court of Appeal (COA) was correct to set aside the Industrial Court award and the ensuing High Court decision, in allowing the appeal by the employer[i]. The Federal Court therefore affirmed the COA's decision.

2. OBLIGATION ON DGIR TO REFER REPRESENTATION WITHOUT DISCRETION

In 2021, a major change was made to the Industrial Relations Act 1967 (IRA). Under s.20(1) of the IRA, a workman who considers that he has been dismissed without just cause or excuse by his employer may make "representation" in writing to the Director General of Industrial Relations (DGIR) to be reinstated in his former employment within 60 days of the dismissal. Upon such representation, the DGIR will hold what commonly known as "conciliation meeting" with a view to reach settlement. If a settlement is not reached, then the DGIR shall notify the Minister (charged with the responsibility for human resources): s.20(2). The Minister may, if he thinks fit, refer the representation to the court for an award: s.20(3). Thus, the Minister has discretion whether to refer the representation to the Industrial Court or not. However, with effect from 1.1.2021, where the DGIR is satisfied that there is no likelihood of the representation being settled, the DGIR shall refer the representation to the court for an award. The issue that arose for determination at the Court of Appeal (COA) in *Shankarkumar a/l Sanpathkumar v Ketua Pengarah Jabatan Perhubungan Perusahaan*[ii] was whether the amendment to s.20(3) of the IRA took away the discretion of the DGIR in that he shall refer the representations of the dismissed workmen to the Industrial Court for so long as there was no settlement.

In *Shankarkumar*, the claimant was dismissed without a domestic inquiry. He made his representation under s.20(1) of IRA to be reinstated to his former employment. Following conciliation meetings held, the company extended to him an offer to reinstate him subject to terms in the agreement which he did not accept because he could not agree to reinstatement with no apology and no admission of liability by the company and with a new line of reporting directly to the managing director. The DGIR took the view that the "reinstatement" with the same pay and with arrears of salary being paid had been unreasonably rejected. The representation was one which could have been settled but for the unreasonable conduct of the claimant and so the DGIR

[i] *RHB Bank Berhad v Tan Leong Huat* [2024] 4 CLJ 378, CA

[ii] [2024] 1 ILR 494, CA

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did not refer the representation to the Industrial Court and instead closed the file.

The claimant's bid to challenge the DGIR's decision at the High Court was unsuccessful. However, on appeal to the COA, it was held that so long as there was no settlement of the representation of the workman, the DGIR had no discretion but to refer the matter to the Industrial Court. The discretion on the part of the Minister (prior to the amendment) to refer or not to refer the representation to the court had been removed completely. In its place was an obligation on the part of the DGIR to refer if there was no settlement of the representation. If the DGIR did not refer the dispute to the Industrial Court in the absence of a settlement, then his decision would be quashed by the High Court and a mandamus issued to compel him to refer the dispute to the Industrial Court. The COA thus set aside the High Court order and granted a mandamus to compel the DGIR to make the reference to the Industrial Court.

The only occasion that the DGIR need not refer the matter to the Industrial Court is when the workman does not attend any of the conciliation meetings without any reasonable excuse: s.20(9). The representation shall be deemed to have been withdrawn.

3. GROUNDS MUST BE PROPERLY STATED IN THE TERMINATION NOTICE

In *Melipoly Enterprise Sdn Bhd v Ong Hong Yeok & Anor*[i], the grounds stated in the letter of termination of employment of the claimant were "*the prevailing economic recession and prolonged period of poor sales revenue*". However, at the Industrial Court (IC), the company relied on other grounds, namely "*unsatisfactory performance, conflict of interest due to failure to disclose the claimant's personal interests in a company and sexual harassment*". The Court of Appeal agreed with the IC that the company could only rely on the reasons stated in the letter of termination and no other reasons. With regard to the stated grounds, there was evidence of the company suffering financial losses from its statement of comprehensive income but the company failed to prove redundancy. The claimant's function and work as a Marketing Manager was not eliminated but reduced and hence, the retrenchment was not *bona fide*.

The claimant had testified that he did not wish to be reinstated. Does this affect the jurisdiction of the IC to hear the dispute between the employer and employee? The answer is "No" as the COA reiterated the position of law propounded not quite long ago in *Sanbos (Malaysia) Sdn Bhd v Gan Soon Huat*[ii] that the IC was seized with jurisdiction once the Minister of Human resources had made a reference pursuant to s.20(3) of the Industrial Relations Act 1967 even if the claimant stated that he did not wish to be 'put back

[i] [2024] 4 CLJ 692, CA
[ii] [2021] 6 CLJ 700, CA

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into employment'. Further, the Federal Court case of *Unilever (M) Holdings Sdn Bhd v So Lai & Anor*[i] was distinguishable from the instant case because by the time the award was made, the workman in *Unilever* had reached his retirement age which rendered reinstatement not possible and that being the case, the issue of compensation could not arise. Compensation could not be *in lieu*/in substitution of reinstatement when reinstatement did not or could not exist. In the instant case, the legal basis to reinstate the claimant still existed.

4. CONDONATION NOT APPLICABLE AGAINST EMPLOYEE

Can the concept of condonation be applied to a workman/employee? Oftentimes, we read about a claimant in a wrongful dismissal case raised the defence of condonation against his employer. Basically, condonation arises when an employer with full knowledge of its employee's misconduct elects to continue him in service. So, when misconduct has been condoned, the employer will not be able to rely on the same misconduct to dismiss the employee concerned. Condonation serves as a waiver of the employer's right to punish for misconduct[ii].

In *Chong Fui Thung v Sena Diecasting Industries Sdn Bhd*[iii], the claimant/employee was a director and shareholder of the respondent/company who had treated himself as constructively dismissed. The company raised the fact that the claimant still signed the company's cheques despite claiming constructive dismissal. The High Court (HC) at the judicial review proceedings found this fact as condonation applicable against the claimant.

At the Court of Appeal, it was on the facts held that the claimant had signed the company's cheques in his capacity as a director of the company, not as an employee. As an authorized signatory, the claimant had to carry out his responsibility, otherwise the company could face financial outflow problems. This fact ought not to be held against the claimant.

On the law, the HC was wrong to invoke condonation against the claimant. The concept of condonation could not be applied against an employee and should not be confused with waiver, acceptance or acquiescence by the employee of the employer's conduct in the context of constructive dismissal. The employee's conduct of not protesting against the employer's repudiatory breach or of continuing to work for a considerable period of time despite the employer's repudiatory breach is deemed as affirmation or acquiescence of the unilaterally-varied contract of employment. Such employee's conduct is not an act of condonation but a

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[i] [2015] 3 CLJ 900, FC

[ii] See *Public Services Commission Malaysia & Anor v Vickneswary RM Santhivelu* [2008] 6 CLJ 573, FC; *Azman Abdullah v Ketua Polis Negara* [1997] 1 CLJ 257, CA; *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681, CA.

[iii] [2024] 2 ILR 1, CA, [2024] 4 AMR 498

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waiver of his right and/or an acceptance of or acquiescence to the employer's repudiatory breach. The COA thus set aside the HC judgment and reinstated the Industrial Court award.

As a parting shot, the COA remarked that an employee must act with haste and protest against the repudiatory acts by the employer; the longer the employee waits, the more difficult it becomes for him to complain of constructive dismissal. However, if the employee works under protest and carries on whilst making overtures to the employer to rectify the situation, then there is no waiver or acceptance or acquiescence[i].

5. EMPLOYER PREFERRED TO PAY COMPENSATION *IN LIEU* OVER REINSTATEMENT

From dismissal of the claimant's claim on wrongful retrenchment from her employment at the Industrial Court to the order of reinstatement with back wages by the High Court and finally to the award of compensation *in lieu* of reinstatement at the Court of Appeal (COA), that sums up the legal journey trodden by the claimant in *Osram Opto Semiconductors (Malaysia) Sdn Bhd v Ooi Mei Chein @ Wei Mei Chein & Anor*[ii].

The Court of Appeal (COA) affirmed the decision of the High Court which had earlier quashed the award of the Industrial Court and granted reinstatement and back wages of 24 months amounting to RM772,464.00 and punitive damages of RM50,000.00. The COA agreed that the retrenchment was not done *bona fide* having regard to the claimant's roles, functions and duties continued to exist after her dismissal. The alleged outsourcing of the company's accounting and treasury functions to a Global Shared Services Organisation (GSS) only involved 3 of the 19 roles the claimant was tasked with as the Head of Treasury and Commercial Administration. Her roles, functions, duties and responsibilities had not ceased to exist but were re-distributed to 3 separate managers, 2 of whom were new intakes. Further, once she had been retrenched, the company brought back Accounts Payable (A/P) and Accounts Receivable (A/R) functions GSS in-house again. Her department continued to exist and was just re-named wherein "Accounting and Taxation" was added in front of "Treasury & Commercial Admin". Her 7 staff were parked in this department. In short, her position, role and job scope remained post-GSS effective. She was not redundant. It was thus wrong for the company to single out her alone to be retrenched. Further, the company's business showed positive prospects and growth. There was no evidence of cost-cutting measures, financial downturn or organization rationalization.

After the High Court order of reinstatement, the claimant went back to work. At the same time, she was ordered to pay back the *ex-gratia* amount of

[i] *CIMB Bank Bhd v Ahmad Suhairi Mat Ali & Anor* [2023] 4 ILR 1, CA.
[ii] *Court of Appeal Rayuan Sivil No. P-01(A)-525-09/2021* published on 29.5.2024

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RM775,008.61 to the company. In appealing to the COA against the order for reinstatement that was made after a lapse of 6 years, the company contended that positions had been filled by other Heads, dynamics in the workplace had changed dramatically and there had been a breakdown of the element of mutual trust and confidence. The claimant however wanted to work to feel fulfilled and fruitful as a productive person. The COA went through the statistics on reinstatement cases out of the cases decided and past decisions of courts; and decided to vary the High Court order in respect of reinstatement and award compensation *in lieu* of reinstatement, on the basis of one month's pay for every year including the reinstated period totalling 25 months at RM804,650.00. The award of back wages and punitive damages remained.

6. WATCH OUT FOR EMPLOYEE HAVING AGREED TO A NEGOTIATED MSS CONTRACT BUT TURNED AROUND TO CLAIM "FORCED RESIGNATION"

Premises of B Braun Medical

Execution of the "mutual separation scheme" (MSS) as a "forced resignation" was the crux of dispute in the Court of Appeal (COA) case of *B.Braun Medical Industries Sdn Bhd v Mugunthan a/l Vadiveloo*[i]. The claimant (C) was a senior manager in the respondent (R) company. R faced financial problems and had explored some restructuring measures. At a meeting (1st Meeting), C was handed a document showing 2 tables that showed the terms of a MSS and of a "Retrenchment Package" and the respective amounts receivable by C; and a draft MSS Agreement. C made 3 requests on the draft MSS Agreement relating to serving of three months' resignation notice period, absorption of tax by R for C's *ex gratia* payment of 4 months' salary and payment of EIP Bonus to C. The first two requests were accepted by R. In the 2nd Meeting on the same day, C informed R of his acceptance of the draft MSS Agreement with four amendments which were accepted by R. C signed on the MSS Agreement. At the 3rd Meeting on the same day, C submitted his resignation notice. 5 days later, C requested for an early release as he had an offer from another company. C obtained confirmation from R that R would still pay C's salary for the 3 months' resignation notice period in respect of which he requested for early release, the MSS Sum and the tax for the MSS Sum. Both parties agreed to C's early release on those terms. C nonetheless made a representation under s.20(1) of the

[i] Court of Appeal Civil Appeal No.: A-01(A)-590-08/2022 published on 12.6.2024

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Industrial Relations Act 1967 that he had been dismissed by R without just cause or excuse.

The COA ruled that if an employee had been forced to agree to a MSS contract with his employer under a threat by the employer that the employee's employment had become redundant and the employer would retrench the employee if the employer did not agree to the MSS contract (Forced MSS Contract [Retrenchment Threat]); and the employer had not threatened to dismiss the employee, the court could decide that the employee's execution of the MSS contract constituted a dismissal of the employee by the employer without just cause or excuse in the form of "*forced resignation*". The legal burden is however on the employee (not the employer) to prove the existence of a Forced MSS Contract [Retrenchment Threat]. The conduct of C and R with regard to the negotiations on the draft MSS Agreement at the 1st, 2nd and 3rd Meeting showed that C had acted on his own volition. R did not force C to accept the draft MSS Agreement but C was given time to consider. The COA remarked that R as an employer had *walked the extra mile* to accommodate C's early release request and paid the MSS Sum in full despite C's request for early release. In their view, the Industrial Court should be wary in deciding a claim for an unlawful dismissal in the form of a forced resignation by an employee who had willingly entered into a negotiated MSS contract with an employer and had received all the benefits under the concluded MSS contract.

7. TOTAL CLOSURE OF BUSINESS IS NOT RETRENCHMENT

The century old retail outlet, Robinsons could not withstand the devastating effects of the global outbreak of the Covid 19 pandemic and shut down for good in 2020. Their employees claimed that they had been dismissed from employment by the company in bad faith and without just cause or excuse. What transpired was that the company's management had summoned a town hall session to inform all employees of the company's decision to be placed in voluntary liquidation; and the appointment of an interim liquidator to take control of the affairs and winding up administration of the company. The company was subsequently wound up by creditors' voluntary winding-up under s.439(1)(b) of the Companies Act 2016. Liquidators were appointed. The company then issued termination letters to the employees that they were being terminated from their employment.

The Industrial Court was satisfied with the evidence adduced by the company that it had suffered financial losses and was no longer able to resolve the mounting liabilities from creditors. It could not continue its business. Following the decisions of past cases[i], the claimants were terminated as a result of the total closure of the company's business and could not be described as retrenchment where the

[i] See *Hotel Jaya Puri Bhd* [1979] CLJU 32, *Pipraich Sugar Mills Ltd* AIR (SC) (1957) 95, *Unilever (M) Holdings Sdn Bhd v So Lai* [2015] 3 CLJ 900

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business was being continued. The claimants were thus in no position to be reinstated. The termination cannot be described as retrenchment. There was therefore no legal obligation for the claimants to be paid with any compensation.

8. NO TERMINATION WITH **REINSTATEMENT** OFFERED BUT **REJECTED** BY EMPLOYEE, CASE DISMISSED

In *Moorthi Patchai v Sigma Water Engineering (M) Sdn Bhd*[i], the claimant was involved in a workplace accident and was given medical leave for a total of 102 days from April 2021 to March 2022. The company had terminated his employment effective 22.3.2022 as he had exhausted his entitlement for the medical leave and frustration by his prolonged illness and absence from work. Upon complaint lodged by the claimant with the Industrial Relations Department, and during reconciliation stage, the company decided to issue a notice of reinstatement dated 6.7.2022 to reinstate him to his former position with back-wages. However, he did not report for duty. On this point, the Industrial Court ruled against the claimant. The termination of the claimant's employment was effectively withdrawn by the company by reason of the issuance of the reinstatement letter. As the termination was withdrawn, his claim for unjust termination became non-existent. The termination letter had been effectively nullified and negated by the issuance of the reinstatement letter. There was no termination after 6.7.2022 but it was the claimant himself who had refused to accept the reinstatement. The claimant's case was dismissed.

Having stated that, in the light of the COA decision in *Shankarkumar a/l Sanpathkumar v Ketua Pengarah Jabatan Perhubungan Perusahaan* (item 2 above under this section), this part of the decision of *Moorthi Patchai* may open to arguments.

[i] [2024] 1 ILR 686

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The other part was regarding entitlement to salary when a person is receiving temporary disability benefits from the Social Security Organisation (SOCSO). In *Moorthi Patchai*, the claimant was quietly receiving salary from the company from May 2021 to March 2022 and temporary disability benefits payment from SOCSO at the same time. The Industrial Court held that he could not be entitled to his salary from the employer at the same time of receiving such benefits from SOCSO. This amounted to unjust enrichment[i] and violated s.60F(4) of the Employment Act 1955 and r.109 of the Employees' Social Security (General) Regulations 1971.

9. *SECRETLY* RECORDED AUDIO ADMISSIBLE AS EVIDENCE

Adducing evidence through secretly recorded meetings, using mobile phone, was one of the issues in the Industrial Court case of *Jagen Manoharan v Agarcorp Sdn Bhd*[ii]. In that case, the company had secretly recorded the meeting with the claimant/employee unbeknownst to him and sought to admit such audio recordings as evidence.

The Industrial Court Chairman made reference to the oft-cited case, *Mohd Ali Jaafar v PP*[iii], on the test for admissibility of audio recordings which had 10 requirements. However, *Mohd Ali Jaafar* was a criminal case in civil court, unlike *Jagen Manoharan* which was a proceeding under the Industrial Relations Act 1967 that was not bound by stringent rules governing evidence and criminal procedure. Thus, as long as the recording was relevant for the court to determine a fact in dispute, it would be admissible even though it was illegally obtained[iv].

Reference was then made to the Court of Appeal case of *Dato' Kanagalingam Velupillai v Majlis Peguam Malaysia*[v], a case which laid down the test for a video recording, as the most appropriate to be used for the situation where an audio recording was made via a handphone. The test was met where: the person recording it[vi] was called as a witness (COW1); the recording was to be played in court; he was able to identify the voices in the recording; and the handphone was tendered as an exhibit[vii]. Although *Dato' Kanagalingam Velupillai* did not require an expert to recognize the person and his voice in the recording, the company in *Jagen Manoharan* had produced a forensic report (Scribe's Report) to fortify the authenticity and veracity of the audio recording on COW1's handphone. There

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[i] See *K S Lee Energy LLP v Toyo Ink Group Berhad* [2023] CLJU 1978

[ii] [2024] 2 ILR 315

[iii] [1998] 4 CLJ Supp 208

[iv] References were made to *Suberan Chandran v Xerox Business Services Malaysia Sdn Bhd & Anor* [2019] CLJU 597, HC.

[v] [2022] 2 CLJ 858

[vi] It could also be the person in whose presence the recording was made.

[vii] The recording must be played, in the presence of those whose voices were recorded, in the proceedings before the court for them to confirm the accuracy of the conversation recorded.

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was no reason to disbelieve Scribe's Report and COW1's testimony that the audio recording was not altered or tampered with. The audio recording was eventually allowed to be admitted as evidence.

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EVIDENCE / COURT PROCEDURE

PRESUMPTION OF DEATH BY A *STAND-ALONE* APPLICATION

There is a presumption of death under the laws of evidence in Malaysia whereby a person is presumed dead if "*it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive*" ; and the burden of proving that he is alive is shifted to the person who affirms it (the presumption of death): see s.108 of the Evidence Act 1950 (the EA). The question however is whether such an application for a declaration of death by presumption may be made on its own without any other pending application.

In *Abu Hanipah Bin Malek*[i], the applicant was the son of one Jeriah. He averred that he and all the children of Jeriah had witnessed her to be buried at the burial ground in Desa Baru Purun in 1963. At that time he was 10 years old. The application made in 2024 was supported by a letter from the village head, a letter from Jeriah's cousin and a photo showing the tombstone of Jeriah.

There are 2 lines of authorities to the question. On the one hand, there are cases where the presumption of death was invoked in the course of proceedings of another application such as petition for letter of administration or proceedings for maintenance in marriage or claim for tenancy. Thus, if there is no "other" proceedings before the court, the application for presumption of death would be dismissed[ii]. On the other hand, there are cases which had allowed application for presumption of death pursuant to s.108 of the EA although there was no other pending proceeding[iii].

The court in *Abu Hanipah* pointed out amendments made in 2017 to the Akta

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[i] Temerloh High Court OS No.: CB-24NCVC-37-02/2024, published on 31.5.2024

[ii] *Re Gun Soon Thin* [1997] 2 MLJ 351, *Re Ex Parte Application of Ridzwan Ibrahim* [2002] 4 CLJ 502, *Mohd Aslam Khan Syed Gulam v C Mageswary Chandran & Ors* [2020] 1 CLJ 402, CA

[iii] *Re Gun Soon Thin* [1997] 2 MLJ 351, *Re Ex Parte Application of Ridzwan Ibrahim* [2002] 4 CLJ 502, *Mohd Aslam Khan Syed Gulam v C Mageswary Chandran & Ors* [2020] 1 CLJ 402, CA

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Pendaftaran Kelahiran dan Kematian 1957 and its regulations which appeared to have recognized an order from a court that has been granted pertaining to a person's presumed death. Adopting the rules governing statutory interpretation in the Federal Court case of *Tebin bin Mostapa*[i], the learned Judge referred to Hansard on the purpose of such amendments and stated that the view in *Ex parte Ramlah @ Ras bt Abdullah* was not in consonant with the amendments. It was therefore ruled that the court has the jurisdiction to hear an application and grant an order on presumption of death under s.108 of the EA despite the absence of any proceeding which involves the applicant other than the application for presumption of death. On the facts and evidence, Jeriah was pronounced as dead.

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FAMILY / CONTRACT

POST-NUPTIAL AGREEMENT ENABLING HUSBAND TO HAVE A MISTRESS

In a ground-breaking decision, the High Court in *HLC v PTL*[ii] upheld a marital agreement in which the wife consented to the husband to have a 'mistress' during the subsistence of their marriage. The wife had petitioned for divorce, spousal and child maintenance, division of matrimonial assets and damages from the co-respondent whom she had accused of committing adultery with her husband/respondent which had allegedly caused the breakdown of the marriage.

There was a post-nuptial agreement dated 9.8.1997 (the Marital Agreement), after their marriage was registered in July 1997. It contained provisions on the custody, care and control of child(ren) born out of the marriage and alimony/maintenance in the event of a separation and/or divorce. The wife had also agreed that the husband could at any time have one other woman partner in his life besides the wife and it shall not be treated as adultery or used as a ground for divorce (Clause 6). The wife however took a diagonally opposite position at the hearing of her petition when she contended that the Marital Agreement was not valid and unenforceable on the ground, among others, that it sanctioned adultery within the institution of marriage hence illegal and immoral pursuant to s.24(a) and (e) of the Contracts At 1950 (the Act).

The learned Judge rejected such contentions. In her view, adultery did not constitute an illegal or criminal act among non-Muslims in Malaysia. There was no provision in Penal Code that criminalizes adultery. She was also reluctant to regard Clause 6 as inherently immoral and contravened public policy, such public policy objection being of less importance now that divorce was so commonplace. Further, s.54(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 (LRMDA) delineated that the irretrievable breakdown of a marriage was not solely contingent

[i] [2020] 4 MLJ 721
[ii] [2024] 5 CLJ 117

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upon the establishment of adultery but hinged crucially on whether such adultery had made it intolerable for the petitioner to cohabit with the respondent. On that score, given that the wife had consented to Clause 6 which signaled her prior tolerance and acceptance of the husband's extramarital activities, her assertion that the alleged adultery between the husband and co-respondent had caused the irretrievable breakdown of the marriage was untenable.

On the provisions on custody and care of the child(ren) and maintenance for the child(ren), the learned Judge ruled that they were invalid. Parents could not oust the protective/parental jurisdiction entrusted to the court over their children in matters of custody and maintenance.

The provision which compelled the party initiating the divorce to provide maintenance to the other party was also struck down by the court. No spouse should be compelled to make financial payments solely based on initiating divorce proceedings. It was unreasonable and punitive in coercing parties to remain in an undesirable marriage solely to avoid financial penalties. And under LRMDA, award of maintenance predicated upon means and needs of the parties as well as the underlying causes of the breakdown of the marriage. The provision was thus in violation of s.24(b) of the Act which rendered unlawful the consideration or object of an agreement if it was such a nature that, if permitted, it would defeat any law.

Eventually, the divorce was granted and the decree *nisi* was made absolute immediately. The husband was ordered to pay spousal and children maintenance, and the matrimonial assets were divided accordingly between the parties. No damages were awarded to the wife from the co-respondent. The wife had not proven adultery between the husband and co-respondent on a balance of probabilities at a higher degree of such standard[i]. The cause for the irretrievably breakdown of the marriage was not adultery. On the final analysis of all other facts and events, the learned Judge ruled that both parties bore equal responsibility for the breakdown,

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LIMITATION PERIOD NOT SUSPENDED DUE TO SUPERVENING DISABILITY

One Dato' Ng Kong Yeam (NKY) was diagnosed with dementia of moderately advanced stage in September 2012 and was gradually unable to take care of himself, much less his business concerns. He had been staying, since 1995, with one Madam Kay who had the sole control of the respondent company. In December 2013, the family members of NKY (the wife and their children) (the Appellants) applied under the Mental Health Act 2001 (MHA) and obtained an order, on 6.12.2013, declaring

[i] For differing degrees of the balance of probabilities standard, see *Teoh Meng Kee v PP* [2014] 7 CLJ 1034, *Bater v Bater* [1950] 2 All ER 458, *PP v Kuala Dimensi Sdn Bhd & Ors* [2021] 2 MLJ 469.

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NKY was of unsound mind and incapable of managing himself and his affairs due to his mental disorder; and the right to act as the next friend of NKY in legal proceedings to be instituted against such person(s) or company who may be liable to NKY or his estate and to act as the next friend or guardian *ad litem* of NKY in legal proceedings generally (the committee order). Armed with the committee order, the Appellants on 29.4.2015 filed a suit against the respondent for the sum of RM5 million being the purchase price remaining unpaid for the sale of NKY's shares in Pahlawan Sdn Bhd *vide* a sale of shares agreement dated 16.10.2006 (the shares sale agreement). The shares were registered in the respondent's name on 18.12.2007. On the aforesaid factual matrix in the Court of Appeal (COA) case of *Ling Towi Sing & Ors v Sino America Tours Corporation Pte Ltd*[i], the critical issue was whether the Appellants' action was barred by limitation.

The Limitation Act 1953 (LA 1953) via s.24(1) provides for a suspension of the limitation period if the person suing was already under disability when the cause of action arose. It is suspended for the period during which the disability is operating and comes to an end when the disability ceases or when a committee is appointed under the MHA to manage the affairs of the person under disability. Section 24(1) of the LA 1953 is set out below:

> " *If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability,* ***the action may be brought at any time before the expiration of six years,*** *or in the case of actions to which section 6(4) or section 8 of this Act applies, one year* ***from the date when such person ceased to be under a disability or died****, whichever event first occurred notwithstanding that the period of limitation had expired:*
>
> *Provided that in any case to which the provisions of section 29 of this Act apply, this subsection shall apply as if the date from which the period of limitation begins to run were substituted for the date when the right of action accrued.*" **(emphasis added)**

However, in *Ling Towi Sing*, when the cause of action arose (on the date of registration of the shares on 18.12.2007), no disability (of NKY) had set in yet. The disability only set in subsequently (the earliest in September 2012 and the latest in December 2013). The LA 1953 did not provide for a suspension of the limitation period for a case where the cause of action had arisen before the disability set in. In other words, once the cause of action has accrued and the limitation period has started to run, any subsequent/supervening disability will not suspend the period. In such a scenario, it was, in the view of the COA, difficult if not impossible to identify

[i] [2022] 6 CLJ 836, CA

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at what point in time limitation should be suspended. There was also the prejudice caused to the respondent if the appellants' family members were to apply for a committee order many years after the limitation period was over for not only would memory fade and vital documents may no longer be retrievable but that the sword of Damocles would be hanging over the heads of such a respondent for a long time until the family members should decide to apply to court for a committee order.

It was for the Legislature and not the Judiciary to extend s.24 of the LA 1953 to a person who suffered a disability subsequent to the date the cause of action had arisen. If the person did not come within the exception provided by s.24, the court could not, under the guise of doing justice, legislate on behalf of Parliament.
In the instant case, the cause of action arose on 18.12.2007. The six-year limitation period expired on 18.12.2013. The committee order was obtained on 6.12.2013. Thus, there were about 12 days left for a legal suit to be filed against the respondent before limitation set in. The suit filed eventually by the appellants on 29.4.2015 was time-barred. The High Court decision was correct and the COA dismissed the appeal.

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REMEDY (INJUNCTION)

EX-PARTE MAREVA & ANTON PILLER ORDERS SET ASIDE

…but *Inter-Partes* Orders Granted in the interests of justice

The *Mareva* injunction and *Anton Piller o*rder, the so-called "the law's two 'nuclear' weapons"[i] were the remedies sought for in the case of *IOUPay Limited & Others v Kuan Choon Hsuing & Others*[ii]. For the benefit of readers, both types of court orders are usually applied for on *ex-parte* basis and when proceedings are commenced, with a view to prevent a defendant from doing further damage to the plaintiff in different manner. The *Mareva* injunction basically imposes a temporary 'freezing' order against the assets of a (potential) defendant. The purpose is to prevent the defendant from dissipating or disposing of such assets by removing them from or within the jurisdiction in a manner that would frustrate a potential judgment and leave the plaintiff with a 'paper' judgment. On the other hand, the *Anton Piller o*rder is a form of pre-suit discovery that allows the plaintiff to search the defendant's premises and seize items or documents that might become evidence later in an action brought by the plaintiff against the defendant. The purpose is to prevent a defendant from destroying evidence or documents before trial[iii]. Both are extraordinary orders that offer swift

[i] Borrowing the phrase coined by Lord Donaldson in *Bank Mellat v Nikpour* [1985] F.S.R. 87, 92, CA (UK)
[ii] KL High Court Suit No.: WA-22NCC-137-03/2023
[iii] See Kern Alexander, "The Mareva Injunction and Anton Piller Order: The Nuclear Weapons of English Commercial Litigation", *Florida Journal of International Law*. Vol. 11: Iss.3, Article 8.

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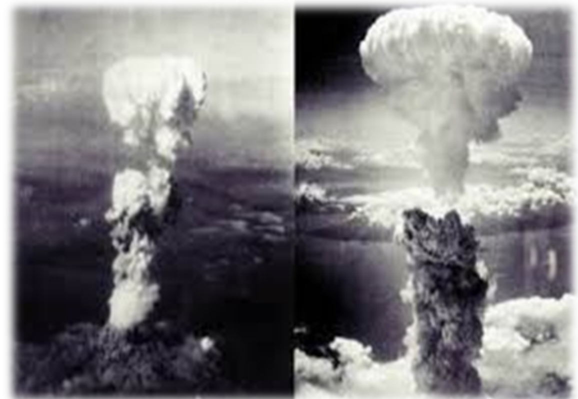
preliminary remedies, allowing the plaintiff to act with speed and secrecy in protecting their interests in assets that would otherwise be dissipated or destroyed without giving any notice to the defendant and without the court hearing out the defendant. Their draconian nature has thus earned them the label of being "the law's two nuclear weapons".

In *IOUPay Limited*, the Plaintiffs had resorted to these two weapons in their pursuit against the Defendants for fraudulent misappropriation of monies by its former senior employee cum Group CFO (D1) as aided and abetted by his wife (D2), sister-in-law (D3) and their company (D4), breach of fiduciary duties and conspiracy. An *ex-parte Anton Piller* order and a *Mareva* injunction order were obtained against the Defendants and executed on various dates against the Defendants.

The Defendants subsequently moved the court to set aside both the *ex-parte* orders on the ground of non-disclosure of material facts by the Plaintiffs when applying for the orders. The learned Judge agreed with the Defendants that there had been non-disclosure of facts in five (5) instances regarding numerous amounts of monies that were relevant (to be properly taken into consideration) to the making of the decision[i]. Those undisclosed facts provided important context and explanations for the impugned transactions which would have made the court aware that the Plaintiffs' case in fraud and misappropriation against the Defendants were not as straightforward as presented and that there were potentially legitimate explanations. The court therefore discharged and set aside the ***ex-parte*** *Mare*va injunction order and the *Anton Piller* order[ii].



"The law's 2 nuclear weapons"

The court however proceeded to consider whether the court should still grant an ***inter-partes*** *Mar*eva injunction order and *Anton Piller* order, applying the principles set out in *Damayanti Kantilal Doshi & Anor v Jigarlal Kantilal Doshi*[iii] and *Brink's Mat Ltd v Elcombe*[iv]. It was **in the interests of**

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[i] See *Saling Capital Ltd* case [2022] 1 MLJ 316, CA; *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316, CA; *The "Vasiliy Golovnin"* [2008[4 SLR(R) 994, CA (Spore); *PECD Bhd & Or*s [2010] 5 MLJ 357, CA; *All Kurma Sdn Bhd v Teoh Heng Tat & Ors* [2022] MLJU 1739.

[ii] See *Mohamed Zahid Yon bin Mohamed Fuad & Anor v Fat Boys Records Sdn Bhd and other appeals* [2022] 5 MLJ 764, CA.

[iii] [2004] 1 MLJ 456

[iv] [1988] 2 All ER 188

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justice that despite the Plaintiffs' non-disclosure of material facts, inter-partes *Mareva* injunction order and *Anton Piller* order would be granted. The undisclosed facts did not go to the heart of the Plaintiffs' case or negate the "good arguable case"[i] established by the Plaintiffs for their claims. Evidence presented by the Plaintiffs included the suspicious transactions directed by D1, the use of law firm to channel substantial funds without proper documentation, D1's attempt to conceal the misappropriation of RM11.75 million through a fake e-mail address and fraudulent e-mail and the placement of D2 on the payroll of P4 (a subsidiary of P2) despite her not actually working for the company, provided compelling grounds to grant the injunctive reliefs[ii]. The Defendants' complex scheme to misappropriate funds from the Plaintiffs, fabrication of evidence to conceal wrongdoing and blatant disregard of court orders (refusal to disclose assets and providing untruthful statements under oath) clearly showed a high likelihood that they would dissipate assets and destroy evidence if not restrained by the court. Therefore, whilst the *ex-parte* orders were sei aside, *inter-partes* injunctive reliefs were granted to serve the interest of justice.

[i] The test for *Mareva* injunction. It means one which is more than barely capable of serious argument, but not necessarily one which the judge believes to have a better than 50% chance of success" – *Ninemia Maritime Corp* [1984] 1 All ER 398

[ii] The test for Anton Piller order is higher, i.e. an "extremely strong *prima facie*" case or "*prima facie* evidence that essential documents are at risk"— Yousif v Salama [1980]3 All Ern 405.

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STAMP DUTY

CHALLENGING THE MARKET VALUE OF PROPERTY AND THE ENSUING STAMP DUTY

Under our Stamp Act 1949 (the Act), instruments evidencing transactions are chargeable with the respective stamp duties as specified in the First Schedule thereof. In *Prima Cahaya Sdn Bhd v Pemungut Duti Setem*[iii], the Collector of Stamp Duty (D) had assessed the stamp duty chargeable on the Deed of Assignment dated 13.12.2021 (D/A) between Bestinet Sdn Bhd (Bestinet) and the Plaintiff (P) based on the "market value"[iv] of the property of RM227.25 million as valued by Jabatan Penilaian dan Perkhidmatan Harta, Kuala Lumpur (JPPH). P paid the stamp duty for RM9.5 million under protest and lodged an appeal to D but it was unsuccessful which resulted in P filing an application to the High Court to appeal against the Notice of Assessment pursuant to s.39 of the Act.

The property is a freehold land in Putrajaya together with 15-storey office tower and 10-storey office tower with respective single storey retail podium, 2-storey food court and 2-storey basement car

[iii] Kuala Lumpur High Court Saman Pemula No.: WA-24-40-07/2022

[iv] See *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288, *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] 1 MLJ 69, Malaysian Valuation Standards Sixth Edition (2019).

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park known as Menara Tulus. The original owner of the property defaulted in their financial obligations whereupon it was put under receivership. The Receiver and Manager (the R&M) had appointed VPC Alliance to conduct valuation which determined the estimated market value as RM170 million. This became the 1st Reserved Price of the public auction held but aborted. At the 2nd auction, the reserve price went down by 10% but was also unsuccessful. Likewise, the 3rd auction with the reserved price down by another 10% to RM137.7 million. It was only a year later that one Bestinet made an offer to buy the property at RM115 million which was accepted by the R&M by entering into a SPA at RM117 million (the Purchase Price). Having paid 10% of the Purchase Price, Bestinet were unable to complete the sale. P agreed to take over from Bestinet by entering into the D/A by which Bestinet assigned and transferred absolutely into P which accepted the assignment and transfer of all rights, title and interests of Bestinet under the SPA by paying the balance RM105.3 million (the Balance Purchase Price).

Upon submitting the D/A for adjudication, D issued notice of assessment (ad valorem) based on JPPH's market value of RM227.25 million, instead of the transacted Balance Purchase Price of RM105.3 mil or the Purchase Price of RM117 mil under the SPA between the R&M and Bestinet.

The High Court ruled in favour of P that the stamp duty chargeable for the D/A, according to s.4 and s.12A(b) of the Act read together with item 32(a) of the First Schedule, ought to be on the value of RM117 mil as stated in the said SPA. Firstly, the date of D's JPPH valuation report was after the Notice of Assessment. Thus, there was no proper valuation conducted prior to the Notice and was not a fair valuation but an afterthought. Secondly, the primary method of valuation was the comparison method. The 4th, 6th and 7th comparables relied by D were inappropriate comparables as they were never successfully transacted/completed rendering them of no relevance[i]. The 1st comparable was not a transaction made on a 'willing buyer willing seller' basis but a purchase at a higher value by one government entity from another statutory body (Lembaga Tabung Haji) as part of a corporate rescue. The 2nd and 3rd comparables were transactions made 7 years before the D/A. The 5th comparable was purportedly a 'special purpose building' (a bespoke building) and D sought to characterize the subject property as such but the learned Judge rejected such description and regarded it as a simple office building without any special request or specification. The 8th comparable was in 2011 which was the peak of economy whilst the D/A was during the COVID-19 pandemic time which ought to be taken into account.

D also employed the cost method which depended on the cost of construction

[i] See *Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor & another appeal* [2016] 8 CLJ 804, CA

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of a new equivalent building and the estimates for physical deterioration, functional and economic obsolescence. This should be the last approach. In any event, there were deficiencies in the manner of D using this method. On investment method, the court found it questionable based on the discrepant dates and also without affording any explanation as to how it was derived at. There was contemporaneous evidence of value produced by D but merely opinion evidence.

It was therefore illogical that the "market value" as assessed by JPPH for D which was far higher than the amount anyone was willing to pay in an auction was reflective of "market value", a willing buyer and willing seller was ready to transact at without any compulsion bearing in mind the 'market value' as assessed was a value after the pandemic when businesses and general economy were struggling to pick up and normalize again. The sale price of RM117 mil. was the 'market value' which the present owner was prepared to sell at the best price in the open market. The stamp duty chargeable on the D/A should be based on this value.

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TAX

BADGES OF TRADE IN ACTION IN TAX DISPUTE – BUSINESS INCOME OR CAPITAL GAINS?

The taxability of gains from the disposal of land as an asset of a taxpayer company or as its stock-in-trade was featured in issue Q2 of 2023 (April-June 2023) of THE UPDATE with respect to the High Court decision in *Ketua Pengarah Hasil Dalam Negeri v Selectcool Sdn Bhd*[i]. Recently, the same issue came up for determination at the appellate level, in the Court of Appeal (COA), in *Ketua Pengarah Hasil Dalam Negeri v Revenue Point Sdn Bhd*[ii]. The respondent (R) taxpayer had disposed of some 59 apartment units in the building known as Fahrenheit 88. The Special Commissioners of Income Tax (SCIT) had decided that there were badges of trade in the transactions; and the gains ought to be taxed under s.4(a) of the Income Tax Act 1967 (ITA) as trading receipts and not under the Real Property Gains Tax Act 1976 (the RPGT Act) as capital receipts. R's appeal by way of Case Stated to the High Court (HC) was successful whereby the SCIT's decision was overturned. However,

[i] [2023] 3 CLJ 558
[ii] Mahkamah Rayuan Rayuan Sivil No.: W-01(A)-103-02/2022

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on appeal to the COA, the HC decision was reversed.

It is hardly an easy task to interfere with decisions of SCIT. Findings of facts by SCIT are unassailable. The HC is not entitled to interfere with such findings even if it would not have come to the same conclusion on the same material. The court may only set aside SCIT's decision if the SCIT had acted without any evidence or on a view of facts which could not reasonably be supported[i]. Therefore, it is within the remit of the SCIT to determine whether the badges of trade exist such that the sale is to be subjected to income tax, and that outcome is a question of fact that should not be readily interfered with. In *Revenue Point*, the COA went on to evaluate the 5 badges of trade considered by the HC, in over-turning the lower court and arriving at its decision that the disposal transactions of the 59 apartments were trading in nature.

Firstly, on the subject matter of the transaction, 'accounting treatment' of the properties where R had consistently classified them as non-current assets in its financial statements was not conclusive evidence that they were held for "investment" and not "trading". It was important to determine whether the acts and conduct of a taxpayer in relation to its business amounted to trading or investment[ii]; and one must look at what business it actually carried on and not what business it professed to carry on[iii]. An asset which did not provide its owner income or enjoyment was more likely to have been acquired for trading whilst one which yielded rental income was generally construed as being held for investment purpose. Intention at the point of acquisition of the asset for investment was relevant but it could later change and be for trading and *vice versa*. Thus, the conduct of a taxpayer subsequent to its acquisition of the asset was relevant[iv].

Generally, property intended for trading was realized within a short time after acquisition. The longer the period of ownership, the greater the likelihood the property was to be regarded as an investment rather than a trade[v]. In the instant case, the holding period of 3 years must be considered with other facts and circumstances of the case.

Frequency of transactions in the sense of disposal of similar properties taking place in succession over a period of time (repetitious transactions) was indicative of trading. The badge of trade on the frequency of transaction was present in the case because the 59 apartments were disposed of in 4 separate transactions: 3

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i See *International Naturopathic Bio-tech (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2024] 2 MLJ 706, CA

ii *Director General of Inland Revenue v LCW* [1975] 1 MLJ 250

iii *I Investment Ltd v CGIR* [1975] 2 MLJ 208

iv See *Simmons v Inland Revenue Commissioners* [1980] 2 All ER 798, HL, *Taylor v Good (Inspector of Taxes)* [1974] 1 WLR 556, CA (UK)

v See *Wisdom v Chamberlain* [1969] 1 All ER 332

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sold within a period of 3 days and balance 56 sold five months later.

On changes/renovation made to the property as a badge of trade, such changes would make the property more tenantable and fetch a higher rental hence an investment. Further, the presence of rentals may ordinarily indicate the property was for investment but this was not conclusive. Two aspects were to be considered relating to changes made to the property: the extent of the changes and if there was no change, greater consideration on the circumstances of the case. In the instant case, R did not at any time before or after taking over ownership of the 59 apartments, undertake any refurbishment or renovation works on the same, unlike what other ordinary owners of investment assets would have done.

The circumstances responsible for the sale of the property was the final badge of trade raised. If a sale was due to emergency or immediate unanticipated need for funds, it would suggest that the sale was not for trading. The sale by R due to 'irresistible offer' was not attributed to an immediate need of funds but merely something which must have been envisaged at the point of acquisition of the assets in the most strategically located Pavilion Bukit Bintang, Kuala Lumpur. The admission by R's director that, whilst R's intention was to hold the assets for investment and rental income, R would hold until it was time to resell at profit when the value appreciated fit into the scenario in *Kota Kinabalu Industries Sdn Bhd v Director General of Inland Revenue*[i] which held such as engaging in an adventure in the nature of trade.

All in all, the COA opined that the SCIT's findings on the existence of the badges of trade were unimpeachable. The gains derived by R from the disposal of the apartments were trading receipts and taxable under the ITA as business income and not capital receipts taxable under the RPGT Act.

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TAX

BADGES OF TRADE TEST ON GAINS FROM SALE OF IP RIGHTS – INCOME OR CAPITAL?

In *Keysight Technologies Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[ii], the

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[i] [1981] 2 MLJ 186, SC

[ii] Court of Appeal Civil Appeal No.: W-01(A)272-05/2021 published on 21.6.2024

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Appellant was a full-fledged manufacturer of various microwave devices, test accessories, amplifiers and transceivers. It developed technical know-how in manufacturing and marketing activities (IP Rights). Following a restructuring, it converted from a full-fledged manufacturer into a contract manufacturer for Agilent Technologies International S.a.r.l (ATIS). It sold its IP Rights to ATIS by way of an Intellectual Property Transfer Agreement (IT Transfer Agreement) for RM821.6 million. After the sale, by way of a Manufacturing Services Agreement, ATIS granted the Appellant a license to use the IP Rights for the sole and exclusive purpose of contract manufacturing for ATIS. In filing its tax return, the Appellant reported the receipt from the sale of the IP Rights as a gain which was capital in nature and hence not taxable. The Respondent disagreed and contended it was income in nature and subject to income tax.

The Court of Appeal (COA) disagreed with the decision of the Special Commissioners of Income Tax (SCIT) and the High Court (HC). The "Badges of Trade" test[i] to determine whether a receipt was capital or income was held to be applicable even though it was a case of disposal of intellectual property rights. Applying such test, the appellate court ruled that the receipt from the sale of the IP Rights was not income in nature as the Appellant was not in the business of selling intellectual property rights but of manufacturing testing devices for electronic appliances. The IP Rights were not in the Appellant's stock in trade but were a capital asset used in the production of the products sold by the Appellant when it previously acted as an exclusive manufacturer. It had held and developed the IP Right for 9 years before its disposal thus indicating some length of ownership. The sale was a one-off transaction as there was no other sale of know-how. It did not display, in the context of the Badges of Trade test, frequency of transactions. The circumstances of the sale of the IP Rights were also carried out pursuant to a corporate restructuring exercise to fit its new business model and not as a profit-taking exercise. The IP Rights were sold on an as-is basis and no alterations were done to increase its merchantability.

The Respondent's attempt to argue that there was no proof of outright sale of the IP Rights as both IT Transfer Agreement and the Manufacturing Services Agreement did not show any evidence that legal rights or title had been transferred to ATIS was rejected by COA. The SCIT and HC had misunderstood the nature and concept of ownership of intellectual property rights. Due to the confidential nature of the information, technical know-how were not registrable or patentable rights but protected under the law of confidential information and contract law and hence there was no "legal title" under the IP Rights that could be legally transferred from the Appellant to ATIS. The fact that the Appellant required a license to continue using the IP Rights was evidence that it no

[i] The test was first applied in *NYF Realty v Comptroller of Inland Revenue* [1974] 1 MLJ 182

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longer retained any form of ownership over the IP Rights. There was in fact an actual sale of the IP Rights. Any sums paid by the Appellant to the Respondent by way of tax was ordered to be refunded.

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TENANCY / CONTRACT

BREACHES "*TETAP*" BREACHES

In a landlord-tenancy dispute case of *Tetap Tiara Sdn Bhd v Hatching Education Group Sdn Bhd*[i], the developer of Jaya One in Petaling Jaya (D) rented out two premises for a period of three years to a company (P) that ran a special needs education centre at The School. P subsequently discovered that internal renovations done in the premises had deviated from the original building plan without approval from the local authorities, MBPJ as a result of which P was unable to apply for trade licences to operate its business. P terminated the tenancy agreement on the ground that it was void for illegality and vacated the premises 15 months later.

In a suit filed by P against D for refund of rental payments that had been made to D, D relied on various provisions in the letter of offer: (i) clause 2 that no warranty was given by D that the premises shall be fit for the purposes of special needs education centre; (ii) clause 12 that P had agreed to the premises on an "as is where is" basis; (iii) clause 15 that P had agreed to D reserving its right to amend, alter, vary or change the specification and building plans for the project and/or carry out any construction or renovation works for which D shall not be liable to P for any damage or costs; and (iv) clause 19 that P shall at its own costs obtain relevant approval to operate its business: and P was entitled to terminate tenancy for one of the premises within six months if P was unable to procure the requisite approval/permit. It was contended that P had not terminated the tenancy within time even after gaining knowledge of the alleged "deviation"; and that the "non-compliances" were capable of being "regularized".

The High Court held that the agreement between the parties had breached various provisions of the law relating to the premises (i.e. Street, Drainage and Building Act 1974). Clauses 2, 12 and 15 did not advance D's case; the parties in a contract could not through an "agreement" or a "waiver" validate any non-

[i] [2024] 4 AMR 189

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compliance with the provisions of the law. Despite P continued to occupy the premises after it was aware of the "deviation", it was held that P was entitled to terminate the agreement notwithstanding Clause 19.

However, P was estopped from relying upon the deviation committed by D to seek a refund of the rentals that it had paid, save for the deposit it had paid to D. P was precluded from seeking restitution pursuant to s.66 of the Contracts Act 1950. D had received the rentals and thus, an advantage but the same applied to P for being in occupation of the premises. D's counterclaim for damages to be assessed for loss of rental for unexpired term of the tenancy was also dismissed since P was entitled to terminate the agreement.

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TORT (LIBEL)

THE STAR LIABLE FOR LIBEL AGAINST MALAYSIAN ARTIST

The owner of *The Star*, its chief content officer and two journalists were sued for defamation over two articles in *The Star Online* and *The Star Exclusive* (the impugned articles) and a Facebook posting published without naming the plaintiff in *Jason Jonathan Lo v Star Media Group Berhad & 3 Ors*[i]. The High Court applied the test as whether the words would reasonably lead people acquainted with the person to the conclusion that he was the person referred to. If an ordinary reader reading the article reasonably identified the plaintiff in the article, then the impugned article was said to refer to the plaintiff[ii]. In the present case, the fact that the readers through tweets could swiftly identify the plaintiff effectively demolished the defence contention that the plaintiff was not the person referred to in the article.

On the attempt by the defence to rely on the fact that they were merely reporting from another source by the use of the words such as "*allegedly*", "*reported history of drug and domestic abuse problems*" and "*it is learnt*", the court held that the defendants could not expect to hide behind the use of such words by attributing the source of the information for such publication to a third party which went against responsible journalism.

On the defence that the defendants could not be held liable for merely reporting what was already stated elsewhere, the 'repetition rule' was that repeating someone else's libelous statements could not form a defence; a defendant who has repeated an allegation of a defamatory nature of the plaintiff could only succeed in justifying it by proving the truth of the underlying allegation—not merely the fact that the allegation has been made[iii]. The defendants

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[i] [2024] 3 AMR 887

[ii] *Knuppfer v London Express Newspaper Ltd* [1944] AC 116, *Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani b Hashim* [2009] 2 AMR 34

[iii] See *City Team Media Sdn Bhd & Ors v Tan Sri Datuk Nadraja a/l Ratnam* [2022] 2 MLJ 608, CA, *Mark v Associated* Newspapers Ltd [2002] EWCA Civ 772

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could not avoid liability on the basis that they were merely reporting an allegation made by another person. The impugned article taken as a whole was not a case of neutral reporting or merely attributing what was reported to some other third party source but was an insinuation of guilt.

On the *Reynolds* privilege defence, the defendants were required to establish that the impugned articles were on a matter of public interest and the public had a corresponding interest in receiving the same; and then the defendant must act reasonably in publishing the impugned articles, the test of 'responsible journalism'[i]. However, there were a number of factors to be taken into account in determining the issue of responsible journalism. The defendants were obliged to verify the information by responsible steps. However, there were only feeble attempts made to obtain the plaintiff's version. It would appear that the defendants were eager to publish the breaking news ahead of the other press. The requirements stipulated in Reynold's case were thus not fulfilled and the defence of qualified privilege failed.

The defendants were found liable and an award of RM200,000 as general damages was made.

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Tort (Harassment)

CLAIM IN HARASSMENT AGAINST EX-EMPLOYEE

If you encounter an ex-employee who had carried out acts which included sending messages, e-mails, video-call and screenshots to your employees, business partners and clients that arguably imputed disreputable conduct on your part, threats to harm you unless you pay moneys in exchange for peace and harassment by circulating persistent emails and screenshots of WhatsApp messages laced with sarcasms and threats to numerous group-chats and social media platform, what is the avenue open to you to stop such nuisance?

In *Aspirenxt Sdn Bhd v Nirmlina Amal Das*[ii], the Plaintiff (P) filed a legal action and sought injunctive reliefs against the Defendant(D) based on numerous causes of action: tort of defamation, intimidation, harassment and unlawful interference with trade. However, P only succeeded in the tort of harassment. In defamation, P failed as there was no statement made by the

[i] See *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee* [2017] 7 AMR 317, FC

[ii] Kuala Lumpur High Court Civil Suit No.: WA-22NCvC-346-06/2022

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Defendant that accompanied those screenshots; and P as a company had not proven that the contended statement had hurt its pocket and/or trade[i]. On intimidation, the court made a finding that P was not intimidated by D's threats[ii]. On interference with trade, P had failed to prove that an injury had occurred to P's trade[iii].

The tort of harassment was made out as D's repeated acts of sending e-mails and the dissemination of numerous screenshots of selected WhatsApp messages from P's director and the video call screenshot to numerous groups and P's employees and business partners and at D's social media platforms all amounted to the tort of intentional harassment[iv]. They had served to distress and annoy P's business and caused P hardship and costs to take steps to disassociate themselves. The court awarded P a sum of RM20,000 as damages and costs of RM65,000.

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TORT / LIMITATION

DISCOVERABILITY OF ACTUAL LOSS AND NOT CONTINGENT LOSS AS THE START OF LIMITATION PERIOD FOR NEGLIGENCE

A claim in civil matter is subject to limitation bar, which means a claim must be filed in court within the period prescribed under the statute of limitation failing which it will be time- barred and denied of access to remedies. A claim or cause of action based on torts of negligence or breach of contract is generally six years from the date on which the cause of action accrued: section 6 (1) of the Limitation Act 1953. The critical question is when does the limitation period begin to run in a claim based on negligently prepared agreement: does it start from the date of the impugned agreement or the date of infringement or threat of infringement of the claimant's right caused by the impugned agreement?

That was the question of law before the Federal Court case of *Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor*[v]. The facts are fairly simple. The respondents/solicitors (D) prepared both the sale and purchase agreement (the SPA) and construction agreement (dated 22.4.2004) for the appellants/purchasers (P) to purchase landed property. D did not conduct any land search on the property; and left the column in the SPA for details on 'Name of Bank/Financier" blank. This signified that the property was unencumbered and not charged to any bank. On 15.6.2011, the developer was wound up. In November 2011, P received a letter from the land office informing them that the landowners who did not have letter of disclaimer would be

[i] See *Mak Khuin Weng v Melawangi Sdn Bhd* [2016] 8 CLJ 831
[ii] See *Rookes & Barnard [1964] AC 1129*
[iii] See *Leo Pharmaceutical Products Ltd A/S v Kotra Pharma (M) Sdn Bhd* [2009] 5 MLJ 703
[iv] Applying *Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Md Nor* [2016] MLJU 277 (FC) and *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379.

[v] [2024] 4 MLRA 131, FC

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required to pay a redemption sum to Bank Islam Bhd which was the chargee of the property in order to redeem it. In February 2012, in a meeting at the land office, P learnt that their property was charged to Bank Islam Bhd. On 2.9.2014, Bank Islam Bhd issued a formal notice to foreclose or proceed for an order of sale (the Foreclosure Notice) and demanded the redemption sum of RM900,000. On 28.7.2015, P sued D for professional negligence and negligent misstatement.

P succeeded at the re-trial at the High Court. The Court of Appeal (COA) however overturned the decision by ruling that the claim was time-barred as the six-year period started to run from the date when the SPA was executed in April, 2004, and not from the date P discovered the damage in September 2014. The COA chose to follow its decisions in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*[i] and *Vista Specialist Eye Centre Sdn Bhd v Dato' Loo Son Yong & Anor Appeal*[ii].

The Federal Court disagreed with the COA decision. The apex court noted the claim was founded not on the contractual relationship between the parties but in tort of negligence. That being the case, the cause of action was complete only when damage was suffered[iii] and not from the act which caused the damage. There must be actual as opposed to only a prospective or contingent loss or damage which might never be incurred[iv]. Therefore, D's negligence in the preparation of the SPA only gave rise to a contingent loss, dependent on whether Bank Islam Bhd would enforce the charge. When the bank did by issuing a formal notice to foreclose or proceed for an order of sale on 2.9.2014, that was when there was damage suffered by P. Thus, P's claim initiated in 2016 was not time-barred.

In doing so, the apex court endorsed the COA decisions in *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor*[v] and *Sabarudin Othman & Anor v Malayan Banking Berhad*[vi] which recognized the principle of knowledge or discoverability of the breach with reasonable diligence as material for the purpose of determining when a cause of action in negligence had accrued. Accordingly, the highest court of the land answered that the COA decision in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* was no longer good law.

On a separate but related note, the apex court also drew attention to the amendments made to the Limitation Act 1953 by the new section 6A which was however not applicable to the case as it was filed before the new section came into force on 1.9.2019. The new provision generally allows an action for damages for negligence not involving personal injuries (i.e. non-

[i] [2010] 7 MLJ 663, CA
[ii] [2016] 1 LNS 1127, CA
[iii] The cause of action in contract accrues from the breach of the contract.
[iv] See *Wardley Australia Ltd v Western Australia* [1992] 109 ALR 247, HC (Aust); *Law Society v Sephton & Co (a firm)* [2006] 2 AC 543, HL
[v] [2013] 5 MLJ 448, CA
[vi] [2018] 1 LNS 357, CA

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personal injury negligence claims) to be brought within the latter of the following limitation periods:

(a) six (6) years from when the cause of action accrued; or
(b) three (3) years from the date when the claimant had knowledge or ought to have known:
    (i) the material facts about the damage in respect of which damages are claimed;
    (ii) that the damage was attributable, in whole or in part, to the act or omission that is alleged to constitute negligence; and
    (iii) the identity of the defendant.

Where situation in (b) applies, no action shall be brought after 15 years from the date on which the cause of action accrued.

It is advisable for parties involved in transactions which are governed by the law of Malaysia to be aware of the new provisions which will have impact and implications on any non-personal injury negligence claims arising therefrom.

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TORT / VICARIOUS LIABILITY

PRIVATE HOSPITAL IS NOT VICARIOUSLY LIABLE FOR A NON-EMPLOYEE CONSULTANT

… BUT Owing a Non-Delegable Duty of Care to Patients is the Latest Law

P2 was a patient of D2, an obstetrician and gynaecologist who carried out her practice within D1's premises which was a hospital. P2 was under the care, management and treatment of D2 and underwent the procedure for induced labour. D2 successfully delivered P1 but both she and P1 sustained injuries as a result of which P1 was admitted into D1's neonatal intensive care unit. Both the plaintiffs filed a suit against D1 and D2 for medical negligence, D1 being vicariously liable for the negligence of D2 as D2 was an employee of D1.

Based on the above facts, the Court of Appeal (COA) in *Avisena Healthcare Sdn Bhd v Ezra Mohd Saffuan (An Infant Suing Through His Lawful Parents And Next Of Kins, Monica Gill & Mohd Saffuan Johari) & Ors*[i] struck off the action against D1. From the perusal of the resident consultant agreement (RSA), D2 was a self-employed person practising at D1. She was required under the RSA to pay rental charge and management fee to D1 for using D1's facilities and equipment during the course of treating P2. This fact showed that there existed no employer-employee relationship between the defendants. D1 had no control over D2's advice given at any time during the period of care, treatment and management of P2. Although cl. 6.8 of the RSA directed its independent contractor to obey the schedule of the Private Healthcare Facilities and Services Act 1998, it was grossly wrong to say that the 'control' in terms of charging P2 medical fees to be an

[i] [2024] 4 CLJ 852, CA

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element that was akin to employment. It was mere reminder by D1 to D2 to charge its patients fees according to the law.

The COA therefore concluded that the plaintiffs did not have any sustainable cause of action against D1 and struck out the suit against D1 accordingly with costs.

In our considered view, this decision which was handed down on 15.12.2023 must be read and treated with prudence in the light of the Federal Court decision in *Siow Ching Yee v Columbia Asia Sdn Bhd*[i] on 23.2.2024. The apex court had in *Siow Ching Yee* ruled that the private hospital in that case owed a "non-delegable" duty of care to its patient who was admitted to its emergency services which duty was breached when there was negligence found on the part of its consultant anaesthetist. The defence of independent contractor was rejected. In *Avisena Healthcare Sdn Bhd*, the plaintiffs did raise as an alternative the non-delegable duty of care owed by D1 towards P2 in the Reply. Unfortunately, the COA took the view that this plea was not stated in the plaintiffs' statement of claim hence the court refused to entertain it and regarded it as an after-thought.

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TORT (SPORTS)

RECKLESS TACKLE IN RUGBY, CAUSING PARALYSIS

Are injuries suffered in the course of contact sports such as rugby, football and soccer actionable? That was the pivotal issue in the English High Court case of *Czernuska v King*[ii]. The claimant (C) and the defendant (D) were playing in a competitive match of rugby. D tackled C heavily and caused C to suffer a T11/12 fracture dislocation and spinal cord injury, leaving her paralysed from the waist downwards. C sued D in negligence.

The learned Judge went through the authorities on the duty and standard of care in the sporting context. The test was "*whether the defendant had failed to exercise such degree of care as was appropriate in all the circumstances*". There was no rule that, in sporting event, the conduct complained of had to be reckless or demonstrate a very

[i] [2024] 3 AMR 485. See also *Dr Kok Choong Seng & Anor v Soo Cheng Lin & Anor Appeal* [2017] 6 MLRA 367, FC, *Dr Hari Krishnan & Anor v Megat Noor Ishak Megat Ibrahim & Anor and Anor Appeal* [2018] 3 CLJ 427, FC.

[ii] [2023] 4 All ER 824

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high degree of carelessness in order for liability to be established.

On the facts, D, without any regard for the well being or safety of C and intent only on exacting revenge, had executed the 'tackle' in a manner that was not recognized in rugby and with reckless disregard for C's safety. D was so angry that she had closed her eyes to the risk of injury to which she was subjecting C. D was not attempting to play within the laws of the game. The tackle had been a reckless and dangerous act and had fallen below an acceptable standard of fair play. Although there was no legal requirement to establish recklessness, D had indeed been reckless and so satisfied that higher, more stringent, test in any event. D was thus liable to C for the injuries sustained.

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TORT (NEGLIGENCE)

STANDARD OF DUTY TO ADVISE TREATMENT ALTERNATIVES

The UK Supreme Court (UKSC) had recently in *McCulloch and others v Forth Valley Health Board*[i] decided on the legal test for doctors performing advisory role i.e. discussing with the patient any recommended treatment and possible alternatives and the risks that may be involved. For a doctor in diagnosis or treatment, the test has been well established in *Bolam v Friern Hospital Management Committee*[ii] i.e. whether the doctor has acted in accordance with a practice accepted as proper by a responsible body of medical opinion (*Bolam* test or the 'professional practice test'). This test was however decided by the apex court in *Montgomery v Lanarkshire Health Board*[iii] to be inapplicable to the doctor's advisory role. Instead, the doctor in performing advisory role was to take reasonable care to ensure that the patient was aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The standard of care imposed may go beyond what would be considered proper by a responsible body of medical opinion.

In *McCulloch*, the family of the deceased brought a claim against the hospital for damages for negligently causing his death as a result of cardiac tamponade. It was alleged that the death was caused by the negligence of a consultant cardiologist for whom the defendants were vicariously

[i] [2023] 4 All ER 943, SC(UK)
[ii] [1957] 2 All ER 118
[iii] [2015] 2 All ER 1031

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liable. It was contended that the consultant ought to have advised the deceased of the option of treatment with a non-steroidal anti-inflammatory drug (NSAID) (e.g. ibuprofen) for pericarditis; had such an advice been given, the deceased would have taken the NSAID and he would not have died. The consultant's evidence was that she had not, in her professional judgment, considered it necessary or appropriate to prescribe NSAIDs because the deceased had not been in pain at the time she had seen him and there had been no clear diagnosis of pericarditis (the Consultant's View), and the defendants' medical expert gave evidence supporting that view.

The UKSC reviewed the legal position and came to the conclusion that the *Bolam* test (the professional practice test) was the correct legal test in determining what were the reasonable treatment options that a doctor had a duty of reasonable care to inform a patient about. A doctor's duty of care was to inform the patient of all reasonable treatment options applying the professional practice test, NOT all possible treatment options. Knowledge of risk, and the identification of possible *and reasonable* alternative treatments, were all matters of professional skill and judgment to which the professional practice test should be applied. It was only once the reasonable alternative treatment options had been identified that the second stage advisory role (to inform the patient of the reasonable alternative treatments and of the material risks of such treatment options) arose.

To require a doctor to outline the risks of all possible alternative treatments, even those considered not to be reasonable, was unlikely to be in the patient's best interest and might impair good decision making. Extending the advisory role in the manner contended would render the doctor's task inappropriately complex and confusing and create real practical difficulties, which could result in doctors practising defensive medicine, advising on all possible alternative treatments options, however numerous or clinically inappropriate they might be. Provided the doctor's assessment of what was and what was not a reasonable alternative treatment was supported by a responsible body of medical opinion, the doctor would not be liable for a failure to inform a patient or other possible alternative treatments, even where the doctor was aware that there was a responsible body of medical opinion that regarded that other possible alternative treatment as reasonable.

In the present case, the Consultant's View was supported by a responsible body of medical opinion as established in evidence hence no breach of the duty of care to inform.

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HOTEL LIABLE FOR *DROWNING DEATH* IN POOL

A citizen of the People's Republic of China (PRC) (the Deceased) drowned whilst swimming in the pool (Pool) at Sunway Putra Hotel in Kuala Lumpur (the Hotel) which was open to all the guests of the Hotel. His parents and dependents (P) filed an action in *Qi Qiaoxian & Anor v Sunway Putra Hotel Sdn Bhd*[i] against the owner of the Hotel (D) based on tort of negligence and tort of occupier's liability. The trial in the Sessions Court culminated in favour of D and P's appeal was dismissed. On final appeal to the Court of Appeal (COA), P succeeded when the COA reversed both the lower courts' decision.

On the attempt by D to dispute the fact that P were the parents and dependents of the Deceased, the COA pointed out that D's top management (D's GM) had dinner with P during which D's GM had offered compensation to P for the drowning incident on the condition that P did not disclose the incident to the press and social media (D's Settlement Proposal). If P were not the parents of the Deceased, D's top management would not have invited P for dinner and made D's Settlement Proposal to P. Thus, D was *estopped* by these facts from denying that P were the Deceased's parents.

The lower courts were right in dismissing P's claim in the tort of occupier's liability. There were three elements of such a tort. The first two elements, namely that D had a sufficient degree of control of the Pool at the time of the incident as an 'occupier' and that the Deceased was a guest of D in the Hotel, had been satisfied. However, the 3rd element was not satisfied because swimming in the Pool did not constitute an 'unusual danger' to the Hotel's guests including the Deceased for which D had failed to take reasonable care as an occupier of the Pool to prevent the drowning.

D was however liable to P for the tort of negligence. It was common that D's duty of care existed. There was a breach of the duty. The deepest part of the Pool was 3 metres. D operated a '5-Star' hotel and the Deceased had paid for D's services as a '5-Star' Hotel. Any reasonable operator of a '5-Star' hotel should have ensured that a certified lifeguard should be on duty at the Pool when the Pool was open to the Hotel's guests and at the time of the incident, an employee of D should be monitoring the closed circuit television installed at the Pool. The breach of such duty had caused the death of the Deceased.

There was a signboard at the entrance of the Pool which stated that no lifeguard was on duty at the Pool and the Pool was used by a person at his or her own risk (Warning Signboard). The COA, however, decided that it did not absolve D of any liability. Before D accepted the Deceased as a guest of the Hotel, D did not require the Deceased to agree to an 'disclaimer of liability' for any injury or death which might befall the deceased when the Deceased was staying at the

[i] [2024] 4 MLRA 49

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Hotel. The contract between the Deceased and D did not contain any clause which would exclude D's liability for the incident. There was no evidence that the Deceased understood English, namely the contents of the Warning Signboard. Further, D's Settlement Proposal was held to constitute an admission of D's negligence as the cause of the Deceased's death.

"Sunway Putra Hotel"

The COA also ruled that the defence of *volenti non fit injuria* was inapplicable. The Deceased as an adult person and with full knowledge of all the risks of swimming in the Pool had voluntarily swam in the Pool but he had not voluntarily agree to assume the risk of any harm to him which might be caused by D's negligence[i].

The COA allowed the appeal with costs and awarded the damages as computed by the High Court (in the event the High Court decision was reversed by the COA).

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VICARIOUS LIABILITY / TORT

PRINCIPLED BOUNDARIES FOR MODERN VICARIOUS LIABILITY

Religious bodies not vicariously liable for rape committed by elder

Whilst attending services of a congregation of Jehovah's Witnesses, the claimant and her husband became close friends with S, a ministerial servant and later an elder of the congregation, and his family. About 5 years later, the claimant noticed a change in S's behaviour, including sexually inappropriate conduct towards her, and spoke to his father, also an elder who advised her that S was suffering from depression and needed support. A year later, S raped the claimant at his home, after they had been out evangelising together. About 24 years later, S was convicted of the rape and several counts of indecent assault against two other individuals. The claimant filed an action for damages for personal injury against both the charitable corporation that supported the worldwide religious activities of the Jehovah's Witnesses and the trustees of the congregation, alleging that they were vicariously liable for the rape (i.e. the tort of trespass to the person) committed by S. Both the High Court and Court of Appeal in England ruled in favour of the claimant. The final appeal to the Supreme Court was

[i] See *Slater v Clay Cross Co Ltd* [1956] 2 QB 264, CA (UK)

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however successful, in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses and another*[i].

The highest court in England undertook a thorough review of the English law on vicarious liability which had been redrawn and expanded since 2001 and set out the modern law on this area of law that was last clarified in *Various Claimants v Wm Morrison Supermarkets plc*[ii] (*Morrison*) and *Various Claimants v Barclays Bank plc*[iii] (*Barclays Bank*).

There were invariably two stages to consider in determining vicarious liability and both had to be satisfied to establish the liability:

(1) Whether the relationship between the defendant (in this case, the Jehovah's Witnesses organisation) and the tortfeasor (S) was one of employment or 'akin to employment' – the 'akin to employment test'; and
(2) Whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorized to do that it could fairly and properly regarded as done by the tortfeasor while acting in the course of his employment or quasi-employment – the 'close connection' test.

In applying (1), features of the relationship that were similar to or different from a contract of employment must be carefully considered. Relevant features might include: whether the work was being paid for money or in kind; how integral to the organisation the work was; the extent of the defendant's control over the tortfeasor; whether the work was for the defendant's benefit or the organisation's; the situation with regard to appointment and termination; and any hierarchy of seniority into which the role fitted. However, economic dependence was not a necessary feature of a relationship being akin to employment whilst non-payment was an indecisive indicator that the relationship was not akin to employment. The 'akin to employment' expansion did not moreover undermine the traditional position that there was no vicarious liability where the tortfeasor was a true independent contractor[iv].

As to (2)[v], the link between the wrongful conduct and the tortfeasor's authorised activities must be carefully examined on the facts. The apex court cautioned that a causal connection (i.e. 'but for' causation) was not sufficient in itself to satisfy the test and gave 2 illustrative examples. Sexual abuse of a child by someone who was employed or authorized to look after the child would generally satisfy the test; but carrying out the wrongful act in pursuance of a personal vendetta against the employer, designed to harm the employer, would not. Bearing in mind the underlying policy justification for

[i] [2023] 3 All ER 1, SC (UK)
[ii] [2020] 4 All ER 1, SC (UK)
[iii] [2020] 4 All ER 19, SC (UK)
[iv] See *Barclays Bank*, supra
[v] See *Morrison*, supra

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vicarious liability (the core idea of which was that the employer or quasi employer, who was taking the benefit of the activities carried on by a person integrated into its organization, should bear the cost [and the risk] of the wrong committed by that person in the course of those activities), in difficult cases, having applied the tests to reach a provisional outcome on vicarious liability, it could be a useful final check on the justice of the outcome to stand back and consider whether that outcome was consistent with the underlying policy.

Applying the tests to the facts of the case, the relationship between the Jehovah's Witnesses organisation and S, in his role as elder, was akin to employment. S was carrying out work on behalf of, and assigned to him by, the organisation and performing duties in furtherance of, and integral to, its aims and objectives; there was appointments and removal process for elders; and there was a hierarchical structure. Thus, the 1st 'akin to employment' test was satisfied.

However, the 2nd 'close and connection' test was not satisfied. The wrongful conduct i.e. the rape was not so closely connected with acts that S was authorised to do that it could fairly and properly be regarded as committed by him while acting in the course of his quasi-employment as an elder. S had not committed the rape while carrying out any activities as an elder on behalf of the Jehovah's Witnesses, nor had he been exercising control over the claimant because of his position as an elder. The primary reason the rape had taken place was because he was abusing his position as a close friend, not because he did so as an elder. Whilst his role as an elder was a 'but for' cause of their continued friendship, 'but for' causation was insufficient. S had not been wearing his 'metaphorical uniform as an elder. And the situation had not been equivalent to the gradual grooming of a child for sexual gratification by a person in authority over that child, and there had been no relevance except as background in the role played by S's father. As a final check on policy, there was no convincing justification for the Jehovah's Witnesses organisation to bear the cost or risk of the rape committed by S.

The appeal was allowed and the judgment against both defendants was set aside.

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