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INITIATION OF ADJUDICATION UNDER CIPAA BEFORE OR AFTER ARBITRATION OR LITIGATION

Adjudication provides an alternative to the traditional methods of dispute resolution in courts, arbitration and mediation/conciliation. It is fairly new in Malaysia, having been formally introduced via statutory adjudication in the form of Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012). Aimed at facilitating payment and cash flow in the construction industry, CIPAA enables parties to construction work or consultancy contracts to demand for payment for work done and services rendered under the express terms of the contracts notwithstanding disputes which parties may concurrently litigate or arbitrate. It works on the principle of "pay first, argue later" instead of the traditional position of "argue first, get paid later".

Under s.37 of CIPAA 2012, it provides that a dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court. A question arose in *Tenaga Nasional Bhd v Malaysian Resources Corporation Bhd & Other Cases*[i] (TNB v MRCB) on the proper interpretation of the word "*concurrently*" : whether adjudication can be initiated after arbitration or court proceedings have commenced ? Ordinarily, adjudication is initiated first by an unpaid party for a payment claim against a non-paying party for payment pursuant to a construction contract, followed by either arbitration or court action on the dispute. However, in *TNB v MRCB* case, there was a dispute between TNB and MRCB (the main contractor) pursuant to a letter of award for a construction project. MRCB had at first referred the dispute to arbitration and thereafter, it pursued five separate adjudication proceedings. TNB raised a jurisdictional objection that the adjudicator lacked jurisdiction due to non-compliance by MRCB of s.37 of CIPAA 2012 in commencing the adjudication 5 months and 25 days after the reference to arbitration.

The High Court held that s.37(2) and (3) provide for the correlation between adjudication, arbitration and court proceedings by making it clear that in the situation where adjudication has commenced and subsequently the dispute

[i] [2024] 8 CLJ 134

which is being adjudicated is referred to arbitration or the court, this shall not cause the adjudication proceeding to come to an end nor affect the same at all. Reading the words '*referred concurrently*' in the context in which these words were used in s.37(1) of the CIPAA 2012, and bearing in mind the purpose or object of the CIPAA 2012, adjudication proceedings under the CIPAA 2012 could be initiated at any time, concurrently with arbitration or litigation, and even after arbitration or court proceedings have commenced and is still pending when the adjudication is initiated under s.8(1) of the CIPAA 2012.

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BANKRUPTCY / GUARANTEE

LEAVE TO INITIATE BANKRUPTCY ACTION AGAINST GUARANTOR FOR TRADE DEBTS

Under the bankruptcy law, after 6.10.2003, a judgment creditor shall not be entitled to commence any bankruptcy action against a "social guarantor". The term "social guarantor" means a person who provides, not for the purpose of making profit, the guarantee: (i) for a loan, scholarship or grant for educational or research purposes; (ii) for hire-purchase transaction of a vehicle for personal or non-business use; and (iii) for a housing loan transaction solely for personal dwelling. As against a guarantor other than a social guarantor i.e. "non-social guarantor", a judgment creditor shall not be entitled to commence any bankruptcy action unless he has obtained leave from the court. Before such leave is granted, the court shall satisfy itself that the petitioning creditor has exhausted all modes of execution and enforcement to recover debts owed to him by the debtor[i].

An interesting question arose in *Yuri Zaharin Wahab v Ann Joo Metal Sdn Bhd*[ii] -- does a guarantor for a credit facility granted by the judgment creditor (JC) to the purchaser to purchase goods from the JC fall within the term "non-social guarantor"? In that case, upon default by the purchaser in its payment for goods sold and delivered and the JC obtained summary judgment against the guarantor (judgment debtor, JD), the JC commenced bankruptcy proceedings against the JD. The JD applied to set aside the proceedings on the ground that no leave was obtained under s.5(3)(b) of the Act.

The High Court rejected such contention on the ground that s.5(3)(b) was inapplicable as what was guaranteed was a trade debt and not a loan; that there was no "borrower" in a trade debt and the said provision applied to a guarantor of a loan only.

On appeal, the Court of Appeal disagreed with the decision and held that as the meaning of "social guarantor" had been exhaustively defined, all other guarantors of

[i] See s.5(3) to (7) of the Insolvency Act 1967 (the Act). The modes of execution and enforcement include seizure and sale, judgment debtor summon, garnishment and bankruptcy or winding up proceedings against the borrower.
[ii] [2024] 6 MLRA 440

whatever sub-category necessarily fell within the meaning of "non-social guarantor". Having regard to the Parliament's intent to reduce bankruptcies that resulted from guarantees, the word 'borrower' in s.5(3) and (6) of the Act should be purposively read as having the meaning of 'debtor'. Thus, leave under s.5(4) of the Act was required before any bankruptcy proceedings could be commenced against any non-social guarantor, including the JD in the case. Since no such leave was obtained, the bankruptcy notice and creditor's petition ought to be set aside.

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COMPANY LAW

DUOMATIC PRINCIPLE ON INFORMAL ASSENT APPLICABLE BEFORE OR AFTER THE IMPUGNED ACT

Ordinarily, issuance of new shares in a company requires the prior approval of the company in general meeting pursuant to s.132D(1) of the Companies Act 1965 (CA 1965)[i]. In *Kathryn Ma Wai Fong v Wong Kie Chie and Anor*[ii], the question was whether assent of shareholders to the issuance of shares may be informal and if yes, whether the assent must occur prior to the shares being issued. This put in focus the *Duomatic* principle derived from the English decision in *In re Duomatic*[iii]. In a nutshell, the principle is that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.

In *Kathryn Ma Wai Fong*, there were 3 shareholders (WKN, WKY and WKC) holding equal shares in three related companies (WTK Realty, Southwind and Ocarina). New shares were issued to WKN which did not comply with the requirements of s.132D(1) of the CA 1965 nor the companies' articles of association. Both sides agreed that informal assent may constitute the requisite approval but disagreed on whether such assent must be given in advance prior to the issuance.

Contrary to the decision under appeal from the High Court, the Court of Appeal held that the *Duomatic* principle applies whether the assent was given before or after the impugned act in question. On the facts of the case, there were Form 11 (Notice of Resolution passed at an EGM to increase shareholding in WTK Realty) lodged with the Companies Commission of Malaysia, Form 24 (return of allotment of shares) lodged with the Registrar of Companies, directors' reports from 2005 to 2011 and other documents lodged showing the issued shares.

[i] Under the new Companies Act 2016 (CA 2016), such restriction is in s.75(1) but s.75(2) allows directors to allot shares in certain situations without prior approval of the company.

[ii] Court of Appeal Civil Appeal No.: Q-02(NCvC)(W)-42-01/2020, published on 18.9.2024

[iii] [1969] 2 CH 365

The appeals were successful with the orders of the High Court set aside.

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COMPANY LAW

LEGAL TEST TO DECIDE ON A S.346 OPPRESSION ACTION OR A S.347 DERIVATIVE ACTION

Our Federal Court set the legal test to determine whether a shareholder's complaint is actionable by way of an oppression action (under s.346 of the Companies Act 2016 [CA2016]) or a derivative action (under s.347 of CA2016), when it recently allowed the appeal in *Low Cheng Teik and 3 Others v Low Ean Nee*[i]. In the case, the plaintiff/respondent (P) had filed an oppression suit against three other shareholders (defendants/appellants, Ds) of SNE Marketing Sdn Bhd (the Company) on 8 grounds but only one single ground was held by the Court of Appeal (COA) to have been established, namely that the appellants had, by the assignment of a series of trademarks of the Company (SNE Trademarks) to one SNE Global Sdn Bhd, acted so as to benefit themselves indirectly via other corporate entity that were controlled by or related to them, to the prejudice of P and were accordingly liable for oppression. The appellants were ordered to purchase all the shares of P in the Company at a share price to be valued and determined by an independent auditor.

On final appeal to the apex court, the decision was set aside. It was ruled that P ought to have pursued her complaint concerning the assignment of the SNE Trademarks to SNE Global by way of a **derivative action** instead of an **oppression action**. Having gone through the historical origins of the two causes of action, the distinction between them and the analytical framework laid down by our neighbouring Singapore[ii], the final appellate court stated that the main difference lies in the nature of the claim. An oppression claim under s.346(1) is a personal claim made by the minority shareholder who suffers a distinct and personal loss separately from that suffered by all the shareholders generally, whereas a derivative action is brought on behalf of the company by the shareholder in a representative capacity and the harm is to the company alone.

The court went on to formulate a legal "test" or guidelines to ascertain whether a shareholder's complaint was actionable under s.346 of CA 2016 or more properly on behalf of the company under s.347 of CA 2016 as follows:

(i) What is the act or omission that one or more of the shareholders complain of ?
In short, identify the act, series of acts or omissions.

[i] Federal Court Civil Appeal NO.: 02(f)-30-04/2023(W) published on 28.08.2024.

[ii] *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33, CA S'pore and *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221, CA S'pore.

(ii) Can the act(s) or omission(s) be characterised as being:
   (a) oppressive to;
   (b) in disregard of the interests of;
   (c) unfairly discriminatory against; or
   (d) otherwise prejudicial to

one or more of the shareholders?

(iii) Does the cause of action vest in the shareholder or in the company?

(iv) Who has suffered loss or damage from the wrong done – the shareholder in his capacity as a shareholder, or the company?

(v) Is the loss suffered by the shareholder as plaintiff separate and distinct to the plaintiff in his capacity as a shareholder, or is it a loss suffered by all the shareholders?

Where the resulting injury and loss was suffered directly and specially or separately and distinctly by the shareholder in such capacity, as opposed to injury and loss suffered by the company or all other shareholders, then oppression is made out and the cause of action vested in the shareholder under s.346. If, however, it was an injury done to the company resulting in a loss to the company, then the cause of action vested in the company and s.347 was the proper remedy. Further, under the "reflective loss" principle, the plaintiff shareholder's loss might be merely a reflection of the loss suffered by the company. A diminution in the value of share capital or dividends was not a separate and distinct harm suffered by the shareholder as it was merely reflective of the company's loss. Thus, the reflective loss principle bolstered the requirement under s.346 that the loss suffered by a shareholder must be special and distinctive to the shareholder. To that extent, the apex court stated its view in an earlier decision in *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd*[i], which held that the reflective loss principle had absolutely no application in an oppression action, was to be departed from.

Applying the test to the facts of the case, the wrongful act in the assignment to a third party of the SNE Trademarks which belonged to the Company was a wrong that affected all the shareholders. The cause of action vested in the Company. The loss or damage arising was suffered by the Company and not by P alone in her capacity as a shareholder. P ought to have commenced a derivative action on behalf of the Company under s.347. P's claim could not be properly pursued by way of an oppression action under s.346.

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[i] [2018] 1 MLJ 141, FC

WHICH TEST IS TO BE USED TO STOP THE FILING OF WINDING-UP PETITION?

What is the test applicable to obtain an injunction to restrain the filing of a winding-up petition on the ground that the debt is disputed? Is it a "*bona fide* dispute" (higher threshold test) test or to merely show that there exist a "*prima facie* dispute" (lower threshold test) given the existence of an arbitration clause?

In *SwissRay Asia Healthcare Co. Ltd. v V Medical Services M Sdn Bhd*[i], the Defendant(D) claimed that its distributor, the Plaintiff (P) had purchased 2 Medical Devices for which payment remained due and owing. This was disputed by P on the ground that there were certain other terms and conditions based upon representations and understandings reached between parties which went unfulfilled. D contended a settlement had been reached and there was a default in the payment. After its notice of demand went unheeded, D issued a statutory notice of demand pursuant to s.466(1)(a) of the Companies Act 2016 (CA2016). There was an arbitration clause in the Distributorship Agreement (DA) that stipulated that all disputes in connection with the DA shall be referred to arbitration in Switzerland and in accordance with the Swiss rules of International Arbitration. P filed an application for a *Fortuna Injunction*[ii] to restrain D from presenting a winding-up petition against it on the ground that there existed a disputed debt where no award or final judgment had been obtained. The High Court (HC) granted the injunction.

On appeal, the HC order was set aside. Having deliberated decided cases in the past[iii], the Court of Appeal ruled that the applicable test was the "*bona fide* dispute" test. To hold otherwise would be to countenance the situation where frivolous disputes would be alleged just in order to stave off the presentation of a

[i] [2024] 8 CLJ 21, CA

[ii] This is the commonly known injunction to restrain the filing of a winding-up petition.

[iii] *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355, *AnAn Group (Singapore) Pte Ltd v VTB Bank* [2020] SGCA 33, *Megasteel Sdn Bhd v Perwaja Steel Sdn Bhd* [2008] 4 CLJ 352, *cf. Salford Estates (No 2) Ltd v Altomari Ltd* [2014] EWCA Civ 1575, *BDG v BDH* [2016] 5 SLR 977.

winding up petition when in fact there was no genuine dispute to the debt. The mere assertion of the existence of an arbitration clause could not simply be recited as if it was some mechanical mantra to evade what would otherwise be a legitimate claim to a debt due and owing. In the instant case, there were repeated acknowledgements of the debts and unequivocal admissions and the arrangement reached between the parties during a meeting. Further, P's conduct with unclean hands disentitled them to the grant of an equitable injunction. P had also approbated and reprobated and raised matters as disputes only after the presentation of the winding up petition. All these made the appellate court to arrive at its conclusion that there was no *bona fide* dispute that existed. D's appeal was thus allowed with cost.

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CONTRACT LAW

CONTRACT TO BE VITIATED BEFORE CLAIMING UNJUST ENRICHMENT LEADING TO *RESTITUTION*

In issue Retro Q3 & Q4 of 2021, we featured the High Court decision in *Transnasional Express Sdn Bhd & Ors v Tan Chong Industrial Equipment Sdn Bhd* which concerned unjust enrichment and coercion in a settlement agreement (the SA) between numerous operators of express bus companies (Ps) and the owner of the buses (D) which were leased to Ps and the sale and purchase agreement (the SPA) for a piece of land to be transferred by Ps to D as part of the settlement of debts due by Ps to D. After a trial, the claim of Ps that the land had been transferred at a value in excess of the debts resulting in overpayment of RM22.6 million due to coercion and unjust enrichment was allowed. The decision has however been overturned by the Court of Appeal (COA) in *Tan Chong Industrial Equipment Sdn Bhd v Transnasional Express Sdn Bhd & Ors*[i].

The COA pointed out that Ps had acknowledged the validity of both the SA and the SPA. Ps were barred from claiming against D for restitution based on unjust enrichment or coercion without invalidating or setting aside the SA and the SPA. It is a general principle that if a contract is not vitiated by any vitiating factor recognized by law such as fraud, coercion or undue influence, the court has a duty to defend, protect and uphold the sanctity of the contract. Further, the court should not rewrite the terms of the contract between the parties. If the parties have explicitly agreed to their respective obligations under the contract, the issue of restitution or unjust enrichment pertaining to those explicit terms does not arise[ii]. The law of restitution and unjust enrichment could not be utilized to override, subvert or defeat the express terms of any contract

[i] Court of Appeal Civil Appeal No.: W-02(NCVC)(W)-1405-07/2021 published on 27.8.2024.

[ii] See *Dimskal Shipping Co. S.S. v International Transport Workers Federation* [1992] AC 152; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441,* FC

between the parties[i], especially where such contract has made express provision as to the allocation of risk between the parties[ii].

On the issue of coercion, it was held that Ps had failed to prove that the SS and the SPA were made under coercion within s.15 of the Contracts Act 1965 (the CA) and that Ps were disentitled to rely on s.73 of the CA which concerned 'coercion' in general and ordinary sense as an English word and not controlled by the definition in s.15. In any event, the COA ruled that the evidence adduced disclosed that the SA and the SPA were entered by parties of their own free will without criminal intimidation. There could be no coercion when a party was making known its intention to seek to enforce its legal rights.

The appeal was allowed and the High Court decision was set aside.

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COURT PROCEDURE

ENFORCEMENT OF JUDGMENT FROM SHANGHAI COURTS FAILED DUE TO PROCEDURAL IRREGULARITIES

Can a foreign judgment from courts in China be enforced in Malaysia?

That was the question faced by the High Court in *Mah Sau Cheong v Wee Len*[iii]. Both the plaintiff (P) and defendant (D) were Malaysians. P gave a loan to D to purchase a house. Loan agreements were entered into with parties agreeing to settle any dispute arising from the loan in Putuo District, Shanghai, China. D defaulted on the loan. P commenced an action at the People's Court of Putuo District for the repayment of the loan. D's appeal to the Second Intermediate People's Court of Shanghai was dismissed (the Shanghai judgments). D subsequently refused to abide by the Shanghai judgments, hence P filed application to enforce the Shanghai judgments in Malaysia, based on the grounds that D was residing and had assets in Malaysia.

It was held that the lack of reciprocal enforcement arrangements between China and Malaysia was not fatal as common law allowed the recognition of foreign judgments even in the absence of reciprocity. D had not adduced clear evidence to show that the Shanghai courts which heard this matter were in fact not competent due to political interference or lack of judicial independence. D had also not shown vitiating factors like duress, undue influence or misrepresentation in relation to the jurisdiction and governing law clauses that could impugn its validity and enforceability.

D had further failed to discharge the heavy burden of showing the case was one

[i] See *Kosbina Konsult (K) Sdn Bhd (in liquidation) v Madu Jaya Development Sdn Bhd* [2019] 3 MLJ 471, COA

[ii] See Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia*.

[iii] [2024] 8 CLJ 501, HC

of the exceptional cases where the enforcement of a foreign judgment should be denied for public policy reasons. The alleged prejudice that arose from different legal systems did not amount to breaches of natural justice. D was given a fair opportunity to present his case and his appeal; courts in Malaysia ought not to re-open the merits of the dispute already determined by the Shanghai courts. There was also no breach of natural justice. The fact that D could not adduce evidence in the manner that a Malaysian court would have allowed, through oral testimony, did not mean that D was denied a fair opportunity to be heard.

Unfortunately, a procedural irregularity put paid to P's application. The Shanghai judgments as exhibited were "copies" in Mandarin with Chinese characters "Hanzi" and translations into the national language and the English language. The court relied heavily on the recent Federal Court decision in *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor And Another Appeal*[i] which ruled that a foreign judgment being a public document under s.74(a)(iii) of the Evidence Act 1950 (the EA) could only be admitted into evidence, under s.78(1)(f), by either producing the original or certifying in the manner commonly used in that country for the certification of copies of judicial records – s 86 of the EA. The Shanghai judgments were only copies before the court and did not comply with either s.78(1)(f) or s.86 of the EA. Therefore, P's application was dismissed.

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CRIMINAL LAW

JAIL SENTENCES – CONCURRENT OR CONSECUTIVE?

What is the guiding principle on sentencing in criminal offences to run concurrently or consecutively ? This was in focus in *Ahmad Danny Bin Jilip v Pendakwaraya*[ii]. This is a case where the accused was charged with 32 charges in 2 different courts in respect of sexual offences committed against his step-daughter between 2020 and 2023 when the victim was between the age of 12 years and 16 years. The accused pleaded guilty to all the charges and was sentenced, in a nutshell, as follows:

Session Court 3 (SCJ 3)
Charged with 6 counts under s.376(2)(d) [rape when the victim was under 16 years of age] of the Penal Code (PC), 4 counts under s.377CA of PC [sexual connection by object] and 6 counts under s.14(a) of the Sexual Offences against Children Act 2017 (Act 792) [physical sexual assault on a child].

Under Case 1, there were 2 charges for offences committed in January, **2020. 10 years imprisonment** and 1 rotan for the 1st

[i] [2023] 3 CLJ 677, FC

[ii] High Court in Melaka Criminal Appeal No.: MA-42JSKH-1-05/2023 and 11 other appeals published on 24.7.2024

charge: s.376(2)(d) PC and 6 years imprisonment for the 2nd charge: s.14(a) Act 792. Sentences to run concurrently to each other.

Under Case 2, 2 charges for offences in September, 2020. 10 years imprisonment and 1 rotan for the 1st charge: s.376(2)(d) PC and 6 years imprisonment for the 2nd charge: s.14(a) Act 792. Sentences to run concurrently.
Under Case 3, 3 charges for offences in July, **2021. 10 years imprisonment** and 1 rotan for the 1st charge: s.376(2)(d) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14(a) Act 792. Sentences to run concurrently to each other.

Under Case 4, 3 charges for offences in December, 2021. 10 years imprisonment and 1 rotan for the 1st charge: s.376(2)(d) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14(a) Act 792. Sentences to run concurrently to one another.

Under Case 5, 3 charges for offences in April, **2022. 15 years imprisonment** and 1 rotan for the 1st charge: s.376(2)(d) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14(a) Act 792. Sentences to run concurrently to one another.

Under Case 6, 3 charges for offences in April 2022. 15 years imprisonment and 1 rotan for the 1st charge: s.376(2)(d) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14(a) Act 792. Sentences to run concurrently to one another.

Session Court 2
Charged with 5 counts under s.376(2)(d) of PC, 4 counts under s.377CA of PC, 1 count under s.376(1) of PC[rape] and 6 counts under s.14(a) of Act 792.

Under Case 1, there were 2 charges for offences committed in February, **2020. 10 years imprisonment** and 1 rotan for the 1st charge: s.376(2)(d) PC and 6 years imprisonment for the 2nd charge: s.14(a) Act 792. Sentences to run concurrently to each other.

Under Case 2, 2 charges for offences in May, **2021. 10 years imprisonment** and 1 rotan for the 1st charge: s.376(2)(d) PC and 6 years imprisonment for the 2nd charge: s.14(a) Act 792. Sentences to run concurrently.

Under Case 3, 3 charges for offences in October, 2021. 10 years imprisonment and 1 rotan for the 1st charge: s.376(2)(d) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14(a) Act 792. Sentences to run concurrently to each other.

Under Case 4, 3 charges for offences in December, 2021. 10 years imprisonment and 1 rotan for the 1st charge: s.376(2)(d) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14(a) Act

792. Sentences to run concurrently to one another.

Under Case 5, 3 charges for offences in March, **2023. 10 years imprisonment** and 1 rotan for the 1st charge: s.376(1) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14 Act 792. Sentences to run concurrently to one another.

Under Case 6, 3 charges for offences in April 2022. 15 years imprisonment and 1 rotan for the 1st charge: s.376(2)(d) PC, 7 years imprisonment and 1 rotan for the 2nd charge: s.377CA PC and 6 years imprisonment for the 3rd charge: s.14(a) Act 792. Sentences to run concurrently to one another.

Both the SCJs had paired the Cases committed in the same year to run concurrently with one another although the offences were committed at different dates of that same year. However, these sentences were ordered to run consecutive to the other years. Thus, the sentences in Case 1 and Case 2 to run concurrently and commence from the date of arrest i.e. 8.4.2023 and likewise, Case 3 and Case 4 concurrently and Case 5 and Case 6 concurrently. However, the sentences in Cases 3 and 4 were to commence after the imprisonment terms in Cases 1 and 2 whilst the sentences in Cases 5 and 6 were to commence after the imprisonment terms in Cases 3 and 4. The effect was that the accused would be serving in total 35 years of imprisonment. And the maximum sentences in all 6 cases in SC3 and SC2 were to run concurrently (which would avoid 70 years' imprisonment if they were to run consecutively).

The High Court affirmed the above. The law is that where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases, sentences should be made to run consecutively. Basically, the court was guided by the one transaction rule and the totality principle. In the former, where two or more offences were committed in the course of a single transaction, all sentences in respect of those offences should be concurrent. For there to be one transaction, 4 elements must be present, namely proximity of time, proximity of place, continuity of action and continuity of purpose or design. The rule was however not absolute, such as where it was necessary to impose on the offender a crushing sentence not in keeping with his record and prospects but to properly reflect the overall seriousness of the behavior and to protect public from his criminal behavior[i].

The court did not find the sentences were manifestly excessive. Where the protector, being the accused in this case, had become an abuser, retribution would demand a longer term of imprisonment. The imprisonment terms imposed would not have a crushing effect on the accused

[i] *Bachik Bin Abdul Rahman v PP* [2004] 2 CLJ 572, CA

considering the seriousness of the offences since he would have about 10 years ahead of him when released, considering the average age of a male Malay.

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1. ULTIMATUM TO RESIGN OR BE SACKED → FORCED RESIGNATION → DISMISSAL

In *Nizatul Asmar Chek Umar v Petaling Jaya Dairy Sdn Bhd*[i], the claimant was the Head of Human Resource in the company, reporting to a new General Manager (GM). There were many complaints about the GM from the employees and she raised the same to the GM who then became confrontational and vindictive towards her. The GM's treatment of employees had also caused high turnover and bad reputation of the company as employer in the marketplace but when the claimant broached the subject to the GM, he responded that the claimant and the HR Department were to be blamed. One day, at a meeting, the GM told the claimant that things were not working out between them and she was to tender her resignation immediately. When she protested, the GM gave her an ultimatum that if she wanted to be paid her 3 months' salaries *in lieu* of notice and the 13th month salary, she would have to tender her resignation immediately and leave the company by a certain date; if she refused, she could be easily be replaced without any payment.

The claimant took a day to consider and the next day, tendered her resignation. However, she was twice told to re-submit her resignation whereupon the GM made notations and deletions on dates. The claimant issued a letter to the company to claim involuntary resignation under compulsion from the GM which was not replied by the company.

The Industrial Court allowed the claim on unlawful dismissal. The claimant had been forced out of her employment without just cause or excuse. There was no special "package/offer" as contended by the company over and beyond what the claimant was already entitled to. In the context of forced resignation, an employee is considered to have been forced to resign if he is placed under compulsion by the employer and has no option but to resign or be dismissed. Acts of compulsion may include pressure, threat, demotion or even persuasion or invitation or request to resign. *Nizatul Asmar Chek Umar* is not a case where the employee tenders his resignation in order to avoid any disciplinary action, that resignation cannot be taken as forced resignation as it is brought about by some other consideration in the state of mind of the resigning employee[ii]. The claimant was awarded compensation *in lieu* of reinstatement and backwages less 10% for

[i] [2024] 2 ILR 624

[ii] *Azffanizam Abd Halim v Prince Court Medical Centre Sdn Bhd* [2021] 3 ILR 238

post-dismissal earnings and payment of salary *in lieu* of notice.

2. *TURQUAND* RULE INVOKED AGAINST EMPLOYER

Indoor management rule or commonly known as the *Turquand* rule was in feature in the Industrial Court case of *Dalton Wen Fong Anak Simon Awang v KNM Exotic Equipment Sdn Bhd*[i]. The complainant and the company/employer reached an amicable settlement and recorded a consent award in which the company was to pay the complainant certain sum of money as full and final settlement. The company did not comply with the award. In the proceedings on non-compliance, the company contended, among others, that it was not obtained properly since its representative acted *ultra vires* when agreeing to it. The Industrial Court rejected such contention. The company was represented at all material times. Whether or not the company's representative, who appeared for the company during the hearing date, was mandated to record the consent award was an internal matter of the company's management. The complainant was entitled to rely on the principle enunciated in *Royal British Bank Ltd v. Turquand*, *ie*, the *Turquand* rule. The complainant, in dealing with the company, was entitled to assume that all actions and decisions made by the company's representative before the Industrial Court, had been properly performed; the complainant was not obligated to inquire into whether the internal management and procedure prescribed by the company had been complied with. Additionally, the representative was not an ordinary officer of the company as he held the position of Legal Advisor and Head of Legal for the company. The consent award was also recorded in the presence of both the complainant and the company and not a private settlement arrangement concluded behind closed doors. The order of compliance was accordingly allowed.

3. RETRENCHMENT BASED ON *HIGH SALARY* IS UNACCEPTABLE

A retrenchment exercise based solely on high salary was struck down by the Industrial Court (the IC) in *Tam Sheh May v Taylor's University Sdn Bhd*[ii] as discriminatory or biased against employees who had served an employer for a long period of time. The company, a private educational institution, claimed that its financial performance had been deteriorating with net sales revenue stagnant whilst costs were increasing and profit was decreasing. It decided to carry out retrenchment in its Biotechnology programme which had a surplus of manpower. The 1st and 2nd claimant who were employees with the highest salaries were identified as surpluses. They were informed accordingly and the main reason cited by the company was to reorganize its operations for sustainability and cost efficiency in view of the economic landscape in the education industry. They filed

[i] [2024] 2 ILR 648

[ii] [2024] 3 ILR 71

complaints of unlawful dismissal. The IC ruled in their favour.

Firstly, the company's attempt to rely on its deteriorating financial standing from 2014 to 2019 was rejected by the court as it had not stated the said reason in the notice of redundancy issued to the claimants. Further, the company had only produced the summary of the profit and loss accounts but failed to produce the full set of the accounts. Secondly, whilst the Code of Conduct for Industrial Harmony (the Code) is not statute law but a set of guidelines to be followed on the practice of industrial relation, the employer must provide good reasons for not applying the procedures provided therein[i] as the Code is the gold standard by which a company's action may be measured[ii]. The common practice in redundancy exercises is the principle of "Last In, First Out" (LIFO). However, the company had used high salaries as the selection criteria. It had failed to give sound and valid reasons for departing from the LIFO principle. The procedures set out in the Code were also not followed by the company. The claimants were not given any early warnings that their position was to be made redundant; they were only made known on the same day the notice of termination was served on them.

In the view of the IC, retrenchment based solely on high salary was unfair and discriminatory against more experienced employees who had worked longer for the employer. The claimants had worked for the company for 7.85 and 8.84 years, respectively. The company's action of targeting the claimants for retrenchment was grossly unjust and inequitable because the high salaries were granted by the company's own decision. It also disproportionately affected employees who had dedicated more time and efforts to the company. These individuals would have acquired valuable skills and experience over the years, contributing significantly to the employer's success. Targeting them based solely on salary overlooked their contributions and may undervalue their loyalty and dedication. Furthermore, it could perpetuate age discrimination as older employees tend to have higher salaries due to their tenure and experience. The selection criteria adopted was thus unjust and inequitable. In other words, the company's decision to target the claimants for retrenchment, based on their higher salaries, lacked good faith and was

[i] See *Kilby Jacob Atticus v Halliburton Business Services Sdn Bhd* [2022] 3 ILR 281.
[ii] See *Ng Chang Seng v Technip Geoproduction (M) Sdn Bhd* [2021] 1 CLJ 365, CA.

improper and unfair. Their dismissals were without just cause or excuse.

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FAMILY LAW

CHILD NOT COMPELLED TO UNDERGO DNA TEST TO DETERMINE PATERNITY

In issue Q1 (Jan-Mar) 2023 of THE UPDATE, we featured the High Court case of *CAS v MPPL & Anor*[i] in which deoxyribonucleic acid (DNA) test was ordered on a child (anonymized as "C") to ascertain her biological father in the suit filed by the plaintiff (P) who had claimed that C was conceived during the period that P and C's mother were still carrying on extra-marital sexual relationship. The Court of Appeal had affirmed that decision. On final appeal by the child's mother and legitimate father (D1 and D2, collectively the Defendants), the Federal Court allowed the appeal in *MPPL v CAS*[ii] and set aside the orders of both the lower courts.

Out of the seven questions of law posed to the apex court for determination, the court refused to answer three. On the question whether s.4(3) Evidence Act 1950 (EA) barred the court from making an order for DNA testing for the purposes of rebutting the conclusive proof where s.112 EA applied and provided for legitimacy of a child born during the subsistence of a valid marriage between the mother and her husband (Q.4), the court answered in the positive. For the benefit of readers, s.4(3) read:

> "*When one fact is declared by the EA to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.*"

Section 112 read:

> "*The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when could have been begotten.*"

In the court's view, legitimacy in law, as opposed to social (*de facto*) legitimacy, necessarily had a prescriptive element and would prescribe rights and benefits that were unique to legitimacy in law. Therefore, s.4(3) EA served as a bar to effectuate a safeguard against any potential challenge to conclusive proof which in this case was proof of legitimacy. Logically, that bar could only be lifted under the "no access" exception in s.112 EA. On the facts, since C was born into a valid marriage between the Defendants, and there was no evidence to show that the Defendants did not have access to each other, the conclusive presumption of legitimacy was

[i] [2022] 12 MLJ 135
[ii] [2024] 8 CLJ 359, FC

still in place at this point in time. P was attempting to obtain a DNA test with the help of the court in the light of such presumption. However, the balance of the scale did not tip in P's favour merely because he could show that on the balance of probabilities, he had an adulterous affair with D1. This was because the Defendants had the benefit of a very strong presumption. There was already a registered legitimate father for C, recognised in both the social and legal spheres, who had *de facto* custody over C. Hence, the court was not persuaded that there existed an overriding consideration to support a rebuttal of s.112 EA at the stage of P making his application. On this point, the presumption under s 112 EA must first be dislodged by way of showing "no access" before a DNA test could even be considered. Q.4 was thus answered in the positive. The provision of s 4(3) EA barred any order for DNA testing for the purposes of rebutting s 112 EA. It was meant to bar challenges to legitimacy with very little exceptions, and completely bar any party not falling under the ambit of the exceptions from seeking the court's assistance to challenge the presumption.

On the question whether the civil court could compel a child to undergo DNA testing to determine paternity when the court was without power to compel an adult to undergo DNA testing (Q.5), there were arguments against the judicial power to force persons to have their blood tested against their wishes. Firstly, the issue of being forced against one's own interest. This was premised on the principle that one should not provide one's adversary with the evidence for his case. There was also the common concern raised on the invasiveness of a DNA test on a person's body. Secondly, as far as legislation was concerned, there appeared to be no specific written statutory provision or common law providing power to the courts to order any person, be it an adult or a child, to undergo a DNA test in civil proceedings. Thirdly, the presumption of legitimacy had proven to be one of the most restraining elements in the UK and Scotland, in making an order against an individual for a blood test. Given the aforesaid, Q.5 was answered in the negative.

On the question whether the right of a child to know his/her biological parents would be the paramount consideration and would prevail over other welfare considerations in relation to the child, taking into account Malaysia's express reservations to art.7 of the United Nations Convention on the Rights of the Child which stated that every child "shall be registered immediately after birth and shall

have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents" (Q.7), the answer was negative. The "right to know" could not be the paramount consideration for assessing the best interests and welfare of a child. There must be a holistic welfare analysis before the best interests of a child could be determined. Consent from the child was part and parcel of respecting the welfare of the child, which was especially important for children who were at the stage of adolescence, as in this case (C was 15½ years old when the appeal was heard). The right to know here was vested in C and C alone. The only way someone else could consent for her was if she was incapable of comprehending the situation and a legally recognised guardian could competently consent on her behalf. To allow the application for a DNA test, would present a negative impact on C, if one was to discern from the "other orders" to be made once paternity had been determined. The aftermath of the DNA order would impact C's existing legitimate relationship with the Defendants. The very act of taking C to do the DNA test was in itself damaging, disrupting her *status quo* and putting into question the only reality she had known for the past 15½ years, i.e that D1 and D2 were her parents. She might also be exposed to odium and humiliation if found to be born out of her mother's extramarital affair and hence, an illegitimate child. When dealing with fragile familial structure, the judiciary should not be a forerunner that set social trends and ignored the pitfalls and legal implications of its decisions in the absence of clear legislative provisions. It was wise for a court of law to err on the side of caution when dealing with such matters.

The determinative question for the present appeal was the application of the welfare principle. The court's decision was very much premised on the factual matrix of the present appeal which did not warrant the court to compel the DNA test to be done, as the negative impact on C outweighed everything else. It was definitely not in the best interests of C for the court to order a DNA test. The order which compelled a DNA test to be done on the child to determine the paternity was set aside.

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LAND LAW

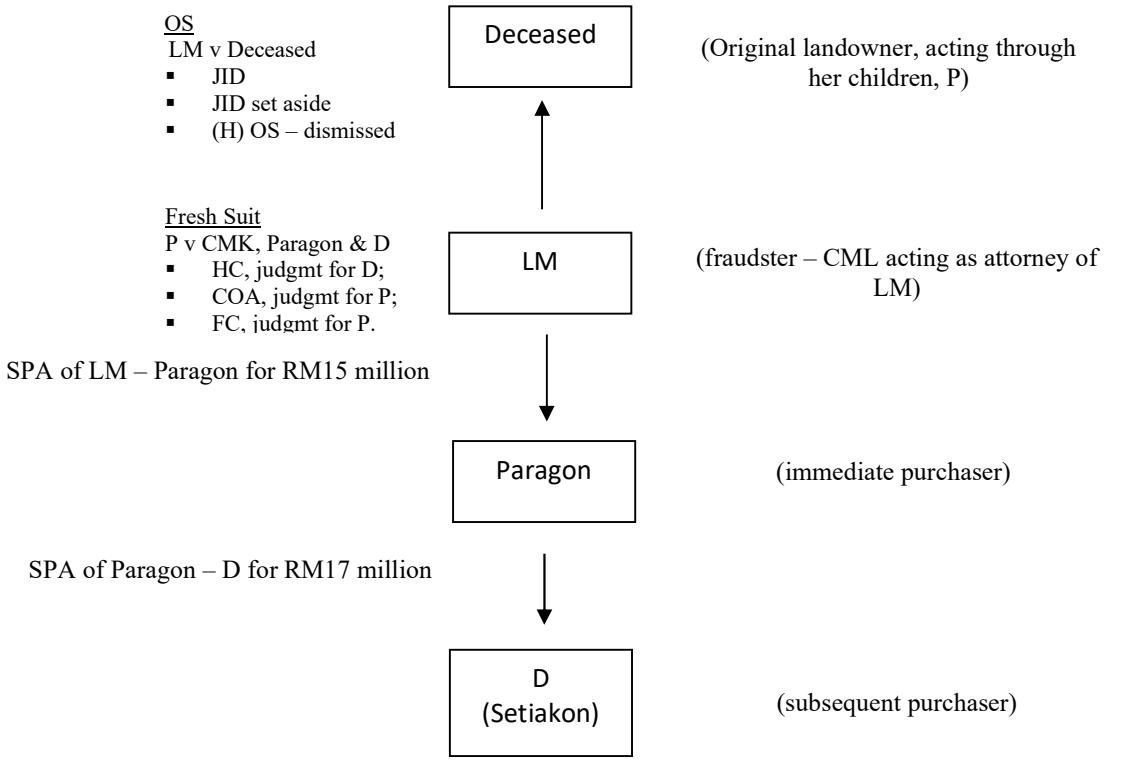
DEFEASIBILITY OF TITLE IN SUBSEQUENT PURCHASER SEEMINGLY IN GOOD FAITH WITH VALUABLE CONSIDERATION

In a split decision of 3 over 2, the Federal Court in *Setiakon Engineering Sdn Bhd v Mak Yan Tai & Anor*[i] ruled for the original landowner in a case which concerned the issue of

indefeasibility of a land title that had been transferred to a subsequent purchaser under s.340 of National Land Code (the NLC) and vested in that purchaser by virtue of s.89 of the NLC.

The land was originally owned by the Respondents/Plaintiffs(P)' mother (the deceased) since February 1975. One CMK acting as attorney of one LM had filed a legal suit (OS) to claim that the land had been used by LM as collateral for a loan granted to her by the deceased and that the loan had been repaid in full to the deceased but LM had forgotten to re-register the land in her name. A judgment in default (JID) was entered in the OS which granted a declaration that LM was the lawful and beneficial owner of the land. With the JID, CMK was able to obtain a cancellation of the deceased's title and the issuance of a replacement title in LM's name as the owner of the land.

Within a month after the JID, CMK acting as LM's attorney entered into a sale and purchase agreement with one Paragon Capacity S/B (Paragon) at the price of RM15 million in cash. Within 3 months, the land was transferred to Paragon by LM. Just over 3 months after, Paragon entered into a sale and purchase agreement with the Appellant/Defendant (D) for the sale of the land at the price of RM17 million. Three months thereafter, the land was registered in D's name. The relationship is depicted in the following chart:



About 2 years after the registration of the land in D's name, P succeeded to set aside the JID. The hearing of the OS then proceeded in the absence of CMK which resulted in the dismissal of the OS. In May 2019, P filed a fresh suit against CMK, Paragon and D (the said Suit). CMK and Paragon did not appear in the said Suit. As against D, the High Court ruled that D was a *bona fide* purchaser for value and acquired indefeasible title to the land pursuant to s.340(3) of the NLC. For the benefit of readers, s.340(1) of the NLC confers indefeasibility of title upon the person whose name appears in the register document of title as proprietor but s.340(2) makes the indefeasibility to become defeasible if it is vitiated by any of the circumstances specified thereunder (e.g. fraud, forgery and a void instrument). However, the indefeasibility of the title will be restored under the proviso of s.340(3) if the land is purchased by a subsequent purchaser in good faith and for valuable consideration but not otherwise. D succeeded on this ground.

That decision was however reversed by the Court of Appeal (COA) which held, among others, that the setting aside of the JID rendered LM's replacement title void *ab initio* (void at inception) and hence, the titles held by LM, Paragon and D were defeasible and ought to be set aside.

On final appeal to the Federal Court, the panel of five judges by a 3-2 majority affirmed the COA decision. The majority pointed out the effect of the setting aside of the JID was nullifying the court order declaring LM to be the lawful and beneficial owner of the land and destroying the whole substratum of the basis for the cancellation of the deceased's title and the issuance of the new replacement title. Then, with both CMK and Paragon not contesting the said Suit, fraud had been proven against CMK, thus rendering LM's title to the land defeasible under s.340(2) and liable to be set aside in the hands of any subsequent purchaser under s.340(3) if the land was not purchased in good faith and for valuable consideration by the subsequent purchaser, which in this case, was D.

The apex court, in the majority, rejected D's contention that the order setting aside the JID ought not to automatically operate retrospectively in the absence of an explicit order to that effect as per O.42 r.7(2) of the Rules of Court 2012 (ROC2012). In doing so, the court answered the question on "*where a judgment in default was set aside but the successful party failed to apply for or obtain an order under O.42 r.7(2) of the ROC2012 that the order should take effect from an earlier date, whether it was justifiable to treat all steps taken during the intervening period (being 3 years in this case) in reliance on the default judgment as null and void or void* ab initio", in the affirmative. This resulted in a "knock-on effect" of nullifying and wiping out all transactions in the land beginning with the fraudulent transfer of the land to LM. Section 89 of the NLC which provides for conclusiveness of title upon registration did not assist D since the land reverted to its pre-cancellation status and by

virtue of *nemo dat quod non habet*[ii], Paragon could not pass the non-existent right or benefit from the void replacement title to D.

The pinnacle court, in the majority, further held the "conclusive evidence" declaration in s.89 of the NLC did not dispense with the need to carry out due diligence or proper investigation beyond the register document of title. It did not confer indefeasibility of title upon a person which was governed by s.340(1) of the NLC. In considering whether D had proven it was a *bona fide* purchaser for value, the court took into the few factors:

(i) The haste in which the transfers of title were carried out from the time the title was registered in LM's name to the time the land was sold to Paragon which D had every reason to suspect Paragon had no financial capacity to pay the RM15 million cash to LM;
(ii) Despite the substantial price it was paying for the land, D did not even bother to obtain a valuation report to ascertain the market value of the land before proceeding with the purchase which a reasonably prudent purchaser would have taken such an ordinary precaution.
(iii) Good faith demanded more from D than merely to conduct a land search and enquiring from Paragon's solicitors when and how Paragon acquired the land and requesting for a copy of the Paragon agreement.

In the mind of the majority, D had taken advantage of the "conclusiveness" of title under s.89 and used it as a convenient excuse to turn a blind eye on the suspicious circumstances surrounding the status of the land. Elements of carelessness and negligence negated good faith.

The parting remark of the majority judgment is noteworthy in its highlighting of the *modus operandi* by fraudsters to conjure a scam to pave the way for a purchaser like D to purchase the land as "subsequent purchaser" with the objective to cleanse the title of the stain that had rendered the land defeasible under s.340(2) of NLC[iii], thus clearing the path for them to make a fortune. It would appear from this decision that an intended "subsequent" purchaser ought to exercise prudence by carrying out due diligence of the vendor's title which goes beyond conducting normal land search on the register document of title at the land registry and includes "investigation/review" of the previous dealings between the previous purchaser and vendor.

Chief Judge of Sabah & Sarawak,
Tan Sri Dato' Abdul Rahman bin Sebli

[i] [2024] 5 MLRA 791, [2024] 8 CLJ 190, FC
[ii] No one can give what he does not have.
[iii] In the words of the majority judgment, CMK had some knowledge of the law on how s.340(3) works which fraudsters like him are taking advantage of to the grave detriment of unsuspecting landowners.

A LESS DRASTIC FORM OF *ANTON PILLER* ORDER – DOORSTEP DELIVERY UP ORDER

An *Anton Piller* order is a type of injunction which compels a defendant to allow a plaintiff to enter into and search its premises for infringing articles or materials and to seize such articles and materials that may become evidence later in an action brought by the plaintiff against the defendant. It however does not allow the holder of the order to forcefully enter the defendant's premises; permission has to be obtained before the plaintiff may enter the premises. That said, the refusal to allow entry when faced with an Anton Piller order may result in the defendant being found liable for contempt of court.

Such relief was introduced in the case of *Anton Piller KG v Manufacturing Processes Ltd*[i]. It is a very powerful weapon to enable the plaintiff to act with speed and secrecy to protect their interests in assets or incriminating evidence that may otherwise be destroyed. Starting as a tool for intellectual property (IP) right owners to secure evidence of infringement of IP rights before such evidence is destroyed, it has now been extended to other types of cases.

Recently, a variation of *Anton Piller* order was the subject of two High Court decisions in *Bentley Systems, Incorporated v PUSB Engineering Sdn Bhd*[ii] and *Dimerco Express (Malaysia) Sdn Bhd v Patricia Lee Siew Mei & 2 Others and AWOT Global Logistics (M) Sdn Bhd as Intervener*[iii]. It is in a less draconian form which requires the defendant "*to deliver up or hand over documents to the plaintiff*", as compared to "*to allow a plaintiff to enter into and search its premises for infringing documents and to seize such documents*". It was described as 'Doorstep Delivery Up Order (DDO)"[iv] where the applicant/plaintiff – through its authorized representative, usually a supervising solicitor – would turn up at the doorstep of the respondent/defendant and receive from him the items and devices identified in the order. Originally created by the English High Court in *Lock International plc v Beswick & Ors*[v], it is still "sufficiently effective" although it is less intrusive.

In *Dimerco Express*, the court ruled that it was not fatal for the Plaintiff to omit specifying the address of the premises at which the DDO was going to be executed. It was also not a prerequisite to state the identity of the supervising solicitor in a DDO. On the objection that the supervising solicitor had deceptively informed a staff that he was there with agreements for the Defendants to sign in order to gain entry into the working area of the office, the court

[i] [1976] 1 All ER 779

[ii] [2024] MLJU 2048

[iii] KL High Court Civil Suit no.: WA-22IP-51-08/2020

[iv] See *Juris Technologies Sdn Bhd & Anor v Foo Tiang Sin & Ors* [2019] 12 MLJ 785, *Centek Ltd & Ors v Farrah Dheeba bt Shaiful Ridzuan & Ors* [2021] 9 MLJ 548.

[v] [1989] 1 WLR 1268

viewed it to be reasonable and acceptable for a supervising solicitor to do so under a guise. Had he informed the staff of his true intent and purpose for being there and given her a copy of the DDO to pass to the Defendants inside, that might have increased the possibility of potential loss of the confidential information. The supervising solicitor had thus made a lawful entry into the premises. In the words of the court, it would be unreasonable to place a supervising solicitor's conduct in the execution of the DDO and his every utterance and movement under microscopic scrutiny. The context in which he has conducted himself must be considered and that includes the behavior, resistance and obstinance that the Defendants had displayed and the interplay of the surroundings.

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STAMP DUTY

AD VALOREM DUTY ON TRANSFER OF PROPERTY BY WAY OF GIFT VIA RENUNCIATION OF INHERITANCE

The following are the basic facts in *Tan Nyok Chin v Pemungut Duti Setem*[i]. Y died testate and was survived by his wife, plaintiff (P) and five children. Y bequeathed a piece of land to P and five children as follows: P (20%), son (20%) and 4 daughters (15% each). By a deed of settlement and renunciation of inheritance, the 5 children agreed to renounce all their rights and entitlements to the land to their mother, i.e. P. Thus, a vesting order was issued to P and leave was granted for P to execute Form 14A and other related documents to effectuate the vesting of the title of the land. Issue: was any *ad valorem* stamp duty chargeable in any of the above instruments?

The High Court agreed with the defendant (Collector of Stamp Duty) that fixed stamp duty of RM10 was imposed on the 1/6 share of the land which was vested to P and *ad valorem* duty of RM20,800 on the 5/6 share of the land. It was held that P who was also one of the beneficiaries did not transfer the estate of her late husband according to the will. The deed of settlement and renunciation of inheritance used to release the children's entitlement and rights of the property to P had been charged with a nominal duty as it had no legal effect of transferring the land to P. However, Form 14A that effectuated the transfer was charged with *ad valorem* duty since it had the legal effect of transferring

[i] [2024] 7 CLJ 486

the title to P. Item 66(c) of the First Schedule of the Stamp Act 1949 on instrument whereby a person releases any property by way of gift, read with item 46, s.16(1) and item 32(i) of the same, attract *ad valorem* duty. Therefore, Form 14A on the transfer of 5/6 of the land to P must be charged with stamp duty accordingly[i].

The defendant was right in dismissing the plaintiff's objection as regards the duty charged.

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TAX LAW

COMPENSATION FOR CANCELLATION OF JV – *INCOME* OR *CAPITAL* IN NATURE?

In June 2005, the government of Malaysia had awarded Awan Megah S/B a contract to develop a project known as Pusat Pengajian Pertahanan Nasional with two parcels of land (the land) as the consideration. The taxpayer (T) was a company engaged in the business of property development. It entered into a Joint Venture (JV) Agreement dated 9 July 2010 with Awan Megah to develop part of the land into industrial property lots for sale and would be entitled to all sales proceeds therefrom. It was a conditional contract upon Awan Megah to obtain for T a legal and beneficial title to the land. The joint venture could not materialize as Awan Megah was unable to fulfil the said condition due to rejection from the state authority. A deed of mutual rescission (DMR) was entered into on 3 May 2013 under which Awan Megah paid to T a sum of RM7 million as compensation which included refund of RM2 million advance payment. DGIR took the position that the RM5 million was compensation for loss of income, i.e. loss of future rights to profits and not in the nature of capital receipt, and taxed T accordingly. The issue was whether the amount was in the nature of capital receipt as contended by T or trading receipt as contended by DGIR.

The above were the brief facts in *Guppyunip Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[ii]. T contended that the RM5 million was received as compensation for loss of contractual rights as opposed to compensation for loss of income under s.22(2)(b) of the Income Tax Act 1967 (ITA). Compensation for loss of rights would not attract income tax. The High Court disagreed with such contention. Applying the test by the Court of Appeal in *Suasana Indah Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[iii], the JV Agreement that was cancelled/terminated was not related to the whole structure of T's profit-making apparatus (which was a test of the nature and effect of the agreement and not of the consequences of its cancellation or termination). There was no evidence to show that T was incorporated solely for the

[i] See also *Pemungut Duti Setem Malaysia v Perbadanan Pembangunan Pulau Pinang* [2024] CLJU 982, CA.

[ii] High Court Kuala Lumpur Rayuan Sivil No.: WA-14-34-11/2022

[iii] [2006] 1 CLJ 165, CA

purpose of the JV Agreement. Neither was there any evidence that the JV Agreement affected its profit-making apparatus. The JV Agreement was an ordinary commercial contract made in the course of carrying on its business which did not restrain T from entering into other contracts. Thus, the compensation received was income receipt.

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TAX LAW

DIRECTOR'S FEES OF INDEPENDENT NON-EXECUTIVE DIRECTOR IS NOT EMPLOYMENT INCOME

What is the nature of a director's fees of an independent non-executive director for taxation purpose? Is it taxable as "employment income" under s.4(b) of the Income Tax Act 1967 (ITA) or as "business income" under s.4(a) of the ITA ? This was the core issue before the High Court in *Datuk Oh Chong Peng v Ketua Pengarah Hasil Dalam Negeri*[i].

The appellant, an individual, had sat on the board of directors (BOD) as an independent non-executive director of several public companies and also as a director of a few other unrelated companies. He also provided consultancy services to the companies where he was not a director. All the director fees and allowances and consultancy fees received were remitted to the two management companies he set up and were treated as "business income" under s.4(a) of the ITA. However, the respondent (DGIR) took the stance that the director fees, allowance and consultancy fees were "employment income" of the appellant taxable as employment income under s.4(b) of the ITA. The Special Commissioners of Income Tax (SCIT) agreed with DGIR. On appeal, the High Court set aside SCIT's decision and allowed the appellant's appeal.

It was held that the SCIT had taken a broad interpretation of the words 'employee' and 'employment' to include a person who was appointed as an independent director of a company. In doing so, the SCIT had failed to distinguish an independent director from a director within a company; and erred in law and fact when concluding that an independent director was an employee within the meaning of the ITA and for the purposes of taxation. No relationship of master-servant between the appellant and the public-listed companies had been established. The appellant was never an employee and was also never subject to the control of the companies. Therefore, the director fees received by the appellant should be taxed as business income and not as employment income. Furthermore, the Bursa Malaysia Securities Berhad Practice Note 13 set out seven requirements of an independent director that led to a clear position that an independent director could not be taken as an employee. The SCIT had erred in concluding that the definition of independent director set by Bursa Malaysia was a mere guideline and only persuasive.

[i] [2024] 2 ILR 509

One of the factors to be considered in determining if a person is an employee is the employee's contribution to the Employees' Provident Fund (EPF) and Social Security Organisation (SOCSO). However, there was no evidence showing that the appellant had received the common employees' benefits such as EPF or SOCSO from the companies in which he sat as an independent director. Evidence further revealed that the appellant, as an independent director, did not receive his director fees monthly as the fees would only be paid upon approval during the annual general meeting of a company and the approved fees would be segregated among the Board of independent non-executive directors. An employee's salary, on the other hand, was usually paid on a daily, weekly or monthly basis.

Whilst the EA form was a standard format prepared by DGIR which includes the director's fee, it did not in any way become the determining factor in deciding the appellant's status and role in the company and did not determine the appellant's chargeability to tax (either under ss. 4(a) or 4(b) of the ITA). Case law from other Commonwealth countries such as India, and Australia also took the position that an independent director was not an employee.

On the attempt of DGIR to raise additional assessments beyond 5 years after the relevant year of assessment[i] by invoking the exception in s.91(3) of the ITA ie. where there was fraud or the taxpayer has been negligent, the court found no negligence in the appellant's declaration of income. The appellant had acted in good faith at all times as he had sought professional advice from a professional tax firm, was cooperative during the audit period and had submitted his tax returns within the stipulated filing deadline throughout the years ;and the matter in dispute arose from a technical adjustment. Mere disagreements in the reading of the taxing statute did not indicate fraud, wilful default or negligence.

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TAX LAW

DOUBLE TAXATION ON GAINS FROM LAND SALE UNDER RPGT ACT AND INCOME TAX ACT

In *Kind Action (M) Sdn Bhd v Ketua Pengarah Hasil Dalam* Negeri[ii], the taxpayer applicant had sub-divided three plots of land acquired from its immediate parent company and disposed of such smaller plots in a period of 10 years. It paid taxes under the Real Property Gains Tax Act 1976 (RPGTA 1976) and was issued a certificate of clearance. Two years later, during a tax investigation, the respondent adopted the position that the proceeds from the disposal were subject to additional income tax under s.4(1) of the Income Tax Act 1967 (ITA 1967) as a business income on the basis that the applicant's activities of realizing its investments were in the nature of trade. The applicant objected but the respondent

[i] Section 91(1) of the ITA

[ii] [2024] CLJU 1778

rejected and proceeded to issue the notices of additional assessment (the Disputed Notices). The applicant filed a judicial review application simultaneously with an appeal to the Special Commissioner of Income Tax (SCIT) against the additional assessments.

The Court of Appeal (COA) ruled that the existence of a domestic remedy under the ITA 1967 (i.e. the appeal procedure to the SCIT) did not bar the applicant's application for judicial review which was always at the discretion of courts and it would only be exercised in very exceptional circumstances such as where there was illegality or abuse of power. In the present case, the conduct of the respondent in issuing the Disputed Notices under the ITA 1967 was tainted with illegality in respect of the very same transactions which had already been issued with the RPGTA 1976 assessment and certificate of clearance. It was not sufficient for the respondent to make necessary adjustments in the Disputed Notices in respect of the payment made by the applicant under the RPGTA 1976 assessment. The failure to discharge or revoke the RPGT certificate of assessments and clearance resulted in double taxation for the same land transactions and that was a clear illegality.

The decision of the first instance at the High Court was erroneous and the applicant's judicial review application was allowed.

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ABUSE OF COURT PROCESS – COLLATERAL PURPOSE?

Perak Integrated Network Services Sdn Bhd v Haji Ahmad Kamal Bin Zakaria & 3 others[i] is a case that revolves around the not so common tort of abuse of court process. The Defendant(D or PINS) was involved in the telecommunications industry. The 1st Plaintiff (P1) was the CEO of P3 (Bunga Raya ICT) and a director in P4 (Urban Domain) whilst P2 was a director and financial manager in P4. D, P3 and P4 were parties in a joint venture (JVA) to carry out concession and licence works via a special vehicle, PINS OSC. There were altogether 3 suits among the parties:

(1) Suit 1041 in which P4 filed a derivative action on behalf of PINS OSC against D and another which P4 won;
(2) Suit 154 filed by PINS against P1 to P4 for breach of the JVA and fiduciary duties which was dismissed; and
(3) the Present Suit filed by P1 to P4 which banked on Suit 154 to found their claim for abuse of court process against PINS.

[i] Court of Appeal Civil Appeal no.: B-02(NCVC)(W)-2274-12/2021 published on 30.8.2024

The essential elements to be proven to succeed in the tort of abuse of court process are :

(i) the process complained of has been initiated;
(ii) there was a collateral purpose proven other than to obtain genuine redress which the court process offers; and
(iii) damage or injury was suffered by the plaintiffs as a consequence[i].

Neither malice nor the termination of the court proceedings in the plaintiff's favour is a necessary element of the tort.

The filing of Suit 154 by PINS satisfied the 1st element.

On the 2nd element regarding oblique motive/collateral purpose, PINS contended that it had filed Suit 154 to neutralize the effect of Suit 1041 and this would have been achieved if it had won Suit 154[ii]. The neutralization of the judgment obtained in Suit 1041 could never constitute a collateral purpose in the filing of Suit 154 in itself.

The Court of Appeal (COA) disagreed with such contention. It reiterated the principle that victory in the court proceedings concerned (in our case, Suit 154) was not a necessary element.

With due respect, that was hardly the contention of PINS. PINS was not arguing that victory had to be achieved by the plaintiffs (as the defendants) in Suit 154 to constitute the 2nd element of a collateral purpose. PINS was saying that it had filed Suit 154 to achieve victory in the same which would then enable PINS to neutralize the effect of Suit 1041. In the passage in *Crawford Adjusters*:

> "*...If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper; for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it If, on the other hand, his intention is to secure the defendant's downfall – or some other disadvantage to the defendant or advantage to himself – by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper ...*"

Be that as it may, the COA also upheld other grounds of the trial Judge. It was valid for the trial Judge in the Present Suit to rely on the grounds of judgment of

[i] See: *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 425, CA.
[ii] See: *Crawford Adjusters & Others v Sagicor General Insurance (Cayman) Ltd & Anor* [2013] 3 All ER 8, PC

Suit 154 and the findings of the judge therein (the JC) on the collateral purpose behind PINS' initiation of Suit 154. In any event, there was evidence adduced on "revenge", "retaliation" and "bargaining chip" in respect of the filing of Suit 1041. There was also testimony of PINS' witness in Suit 154 that amounted to abandonment of PINS' pleaded case and the admission that the individuals, P1 and P2 were sued because they were related to Bunga Raya ICT. All these showed that PINS were not contemplating victory or seeking genuine redress in initiating Suit 154. Further, PINS elected to submit of no case to answer and called no witness in the Present Suit. Thus, evidence given by the Plaintiffs would be presumed to be true; and adverse inference was drawn against PINS[i].

Although PINS lost its appeal on liability, it succeeded in overturning the decision on the quantum of damages. The High Court had awarded special damages in the sum of RM1.295 million to P3 being the legal fees and expenses incurred in defending Suit 154. This was set aside by the COA on the ground that such legal costs were not recoverable as damages, citing the recent Federal Court decision in *Golden Star & Ors v Ling Peek Hoe*[ii] which ruled that legal costs were not recoverable as special damages in the same proceedings between the same parties.

With due respect, the situation in the Present Suit is distinguishable as the subject of legal fees and expenses claimed were those incurred in Suit 154, not in the Present Suit. It is therefore arguable that such legal costs were not incurred in the same proceedings. Further, given the nature of the claim in the Present Suit is the tort of abuse of court process and the court process refers to Suit 154, the loss and damage suffered naturally comprised the legal fees and expenses that P1 to P4 in the Present Suit had incurred and suffered in their capacity as the defendants in Suit 154.

It remains to be seen whether the highest court on the land will interfere with this COA decision.

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TORT

NO DUTY OF CARE OWED BY CTOS

In issue Q1 of 2024, we featured a groundbreaking decision of the High Court in *Suriati Mohd Yusof v CTOS Data Systems Sdn Bhd*[iii] (the HC Decision) which ruled that CTOS Data Systems Sdn Bhd (CTOS), the credit reporting agency in Malaysia, owed a duty of care to verify and provide accurate credit information not only to the financial institutions but also to persons concerned to whom the information was related; and that CTOS had no power under the Credit Reporting Agencies Act 2010 (the 2010 Act) to formulate "credit scores".

[i] See: *Takakao Sakao v Ng Pek Yuan & Anor* [2010] 1 CLJ 381, FC
[ii] [2024] 6 CLJ 487, FC
[iii] [2024] 3 MLRH 688

On 9 August 2024, the Court of Appeal (COA) overturned the HC Decision, in *CTOS Data Systems Sdn Bhd v Suriati Mohd Yusof*[i]. The appellate court held that based on the circumstances of the case, the credit reporting agency did not owe a duty of care to the plaintiff as a customer as defined in the Credit Reporting Agencies Act 2010. It remarked:-

> "*Webe Digital Sdn Bhd (Webe) is a subscriber to the services of Defendant. Defendant provides a service where a subscriber may upload information of debts owed to the subscribers by 3rd parties. This is broadly known as trade reference which is reflected in Section E of the Defendant's credit report. Webe is an internet service provider and the Plaintiff was its customer. Webe uploaded information of the Plaintiff's indebtedness in the sum of RM2,186.60.*"

The COA went on to state that even if there was a duty of care, there was still no breach of the duty as the information could not be said to be inaccurate, incomplete, misleading or irrelevant. Not only the plaintiff's indebtedness to Webe was admitted by the plaintiff in another suit, it was Webe themselves who negotiated a settlement (with the plaintiff) and there was nothing inaccurate about the fact that the plaintiff indeed had defaulted on her payment obligations to Webe.

It was also found that there was no connection proven between the rejection of her car loan application and the contents of the credit report. There was also no evidence of any rejection by banks of facilities having been applied nor that the rejection of the car loan was premised on a low credit score.

By way of *obiter dicta*, it would appear that the COA had determined that "credit reporting" under the 2010 Act encompasses any credit information that has any bearing on a customer's credit-eligibility including the use of "credit score". This means that a credit reporting agency is allowed under the law to formulate credit scoring to provide to its subscribers as part of credit information.

It is our respectful opinion that the grounds are not entirely clear as to why the COA had ruled that the credit reporting agency did not owe a duty of care to the plaintiff as a customer. It is hoped that Federal Court (if there is a final appeal) will provide clarity to the position of law in due course. Until then, the law on duty of care owed by CTOS to persons concerned to whom the credit information is related is as per the COA decision.

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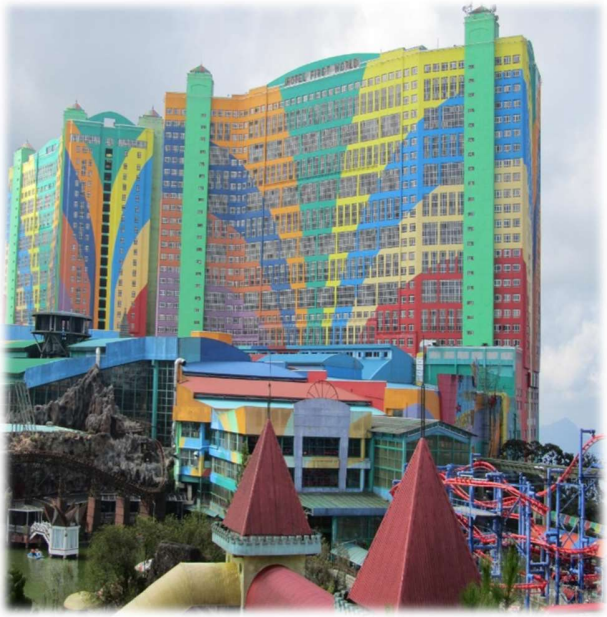
[i] Civil Appeal No.: W-02(NCvC)(W)-230-02/2024

HOTEL LIABLE FOR DEATH TO ROOM GUEST

The murder of a hotel guest (the deceased) took place in First World Hotel in June 2019. The deceased's widow filed a suit in negligence against the 3rd Defendant (D3) which owned and operated the hotel with the 1st Defendant (D1) being an employee of the hotel housekeeping department who had allowed strangers into the deceased's room and the 2nd defendant (D2) being the owner of D3. In *Wang Cuilin (suing as the lawful wife and administrator of the estate of Xie Ning, Deceased) v Nurul Suhaida Binti Dahlan & 2 Others*[i], the High Court found all three defendants liable.

D1 was found to have allowed someone unauthorized access to the deceased's room twice by using the key access card she had been issued with as a housekeeping assistant under the employment of D3. She was responsible for breaching a duty of care. D2, and by extension on the part of D3, were vicariously liable for the negligence of D1. Indeed, a hotel was held to have a duty of care to ensure not only the comfort but also the safety of the deceased as a guest[ii]. The trial judge also rejected the defendants' defence that the deceased's death was simply an unforeseeable accident.

General damages in the sum of RM200,000 was allowed for the deceased's pain and suffering. The plaintiff's claim for her pain and suffering as the deceased's widow was allowed for RM500,000. Bereavement claim was awarded with RM10,000. Special damages were awarded for the plaintiff's flight tickets, transportation costs from and to airport, fees for visas, her rental costs for her stay in Malaysia, funeral expenses and costs of obtaining letter of administration. Claim for the loss of dependency was disallowed due to lack of satisfactory evidence. Claim for aggravated damages and exemplary damages were not allowed as there was no evidence of malice, bad faith, vindictiveness or contumelious disregard.



[i] KL High Court Civil Suit No.: WA-23NCvC-1-01/2021 published on 7 August 2024.

[ii] See *John C Fleming & Anor v Sealion Hotels Ltd* [1987] 2 MLJ 440, S'pore HC.

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TORT

DOG OWNER LIABLE FOR ATTACK BY HER ROTTWEILER

A dog owner (D) was ordered to pay damages in the total sum of RM223,469.60 to two plaintiffs (P) arising out of an attack from her two Rottweiler dogs. This took place in Kepayang Height in Negeri Sembilan back in April 2019 when one of the dogs came out from D's premise and attacked P2 who was then seven years old girl with P1, her mother trying to protect her. Both Ps suffered injuries.

The Sessions Court Judge in *Yap Siew Ling & Anor v Lim Chwee Tin*[i] ruled that both the dogs were under the custody, control and ownership of D who had breached the duty of care when she failed to ensure that the dogs were kept, controlled and cared for properly as a result of which the attack occurred. D had knowledge that Rottweiler had aggressive behaviour and that her dogs had previously attacked another neighbour's dog to death outside D's premise but failed to take any reasonable steps to keep her dogs secured in her compound. On that fateful day, she left her dogs off the leash and roam freely without any supervision. She also failed to ensure the fence was secured at the material time.

D's defence that P1 had provoked the dogs using a wooden stick was rejected. The court accepted P1's evidence that she was using the stick to protect herself and P2 from the dog biting. There could not be provocation as P2, a small child, never held any wooden stick, yet she was attacked.

General damages for various injuries and stress disorder in the sum of RM87,000 was awarded to P1 whilst RM8,000 was awarded to P2. Special damages for medical bills and reports in the sum of RM36,469.60 was ordered. Loss of earnings to P1 in the sum of RM88,000.00 was also ordered.

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TORT

SUICIDE BY HANGING AT POLICE LOCKUP – COPS AND GOVT FOUND LIABLE

In yet another case of death whilst under police custody, the mother of a person under remand and held in the police custody filed a suit in *Fadhelah Binti Othman (Pentadbir Estet dan tanggungan Mohd Fadzrin Bin Zaidi, si mati) v Mohamad Sukri Bin Hat and*

[i] Sessions Court in Seremban Civil Suit no.: NA-B53-1-04/2021, published on 24.9.2024

10 others[i], against numerous defendants for negligence and public misfeasance for the wrongful death of the deceased who was found hung by his neck in his cell at the police lockup. The deceased was earlier arrested together with another person; and both were remanded for a period of 7 days under ss.39B, 39A(1) and 15(1)(a) of the Dangerous Drugs Act 1952. The CCTV recording (from a mobile phone) showed that it was the deceased who hung himself with the aid of his t-shirt. With regard to the defendants, the 1st Defendant (D1) was the arresting officer; D2 the Ketua Pegawai Lokap Ibu Pejabat Daerah Polis, Seberang Perai Utara (IPD SPU); D3 the police officer on duty as a lockup sentry in the Lokap IPD SPU; D5 the Pegawai Lokap Wanita, IPD SPU; D6 the Ketua Balai Polis; D7 the investigating officer of the deceased death; D8 the Ketua Polis Daerah SPU; D9 the Ketua Polis Pulau Pinang; D10 the Ketua Polis Negara; and D11 the government of Malaysia.

It was not in dispute that the deceased was under the care, custody and control of the Defendants when he was in the Lokap IPD SPU. It was also trite that there was a common law and statutory duty of care[ii] owed by police officers to take reasonable care for the safety of detained in custody. The core issue was whether the Defendants had breached the duty of care towards the deceased.

The High Court in Penang ruled that the fact that the deceased appeared to be healthy did not absolve the (2nd, 3rd and 6th) Defendants of their mandatory obligations to send the deceased for medical examination as provided under Rule 10 of the Lockup Rules 1953. The failure to ensure the deceased was examined by a medical officer was a breach of their duty of care. There were also non-compliances with the Perintah Tetap[iii] in not monitoring the CCTV recordings on a 'live' basis and not making '*rondaan*' every hour. All such non-compliances by the 1st to 6th Defendants had led to the deceased's death. Further, the failure of the Defendants to adduce the entire CCTV recordings at trial added by the fact that the short recording produced before the court was one recorded by a mobile phone was totally unacceptable especially when no evidence was led to explain why the actual CCTV recordings could not be produced in full.

It is noteworthy that the Perintah Tetap has stated that a presumption of negligence against '*anggota bertugas mengawal lokap pada waktu itu*' arises whenever there is a case of suicide by detainee. The fact that D2, D3 and D5 were meted disciplinary actions over the suicide incident of the

[i] [2024] 7 CLJ 916

[ii] Article 5 of the Federal Constitution, Police Act 1967, Lockup Rules 1953, Police Regulations 1952, *Lim Gaik Suan & Anor v Mohamad Norhafiz Md Haron & Ors* [2017] MLRHU 1926, *Selvi a/p Narayan & Anor v Koperal Zainal bin Mohd Ali & Ors* [2017] 9 MLJ 300 and *Janagi a/p Nadarajah & Anor v Sjn Razali bin Budin & Ors* [2021] MLJU 2023.

[iii] Perintah Tetap (Untuk Menahan Orang Tahanan di Bilik Tahanan/Lokap) Ketua Polis Daerah SBU, no. warta: PU(B) 404 dated 18.9.2008

deceased was held to be indicative that they did not rebut the presumption and were punished and that they were negligent in their duties.

The court distinguished cases such as *Orange v Chief Constable of West Yorkshire Police*[i], *Kunasekaran Renggaga v ASP Heisham Harun, Ketua Balai Polis Sentosa & Ors*[ii], *Sushila Rani Ramasamy (Nenek yang sah mendakwa sebagai tanggungan kepada Sasikumar Selvam, Simati) v Kerajaan Malaysia dan 2 lagi*[iii] on the facts; and opted to adopt the judgment in *Lim Gaik Suan*(supra) and *Robinson v Chief Constable of West Yorkshire Police*[iv].

The court found that there was no sufficient evidence adduced to show the causal link between the negligence of D1 to D6 and D8 to D10. There was no liability on the part of D8 to D10 on failing to control and/or supervise the other Defendants in carrying out their duties and obligations. The Plaintiff had also failed to prove that the Defendants had exercised their powers in bad faith with the specific intention to injure the deceased nor did they exercise their powers with reckless indifference about the consequences of such exercise[v]. The claim of misfeasance in public office against the Defendants was thus unsuccessful.

[i] [2001] EWCA Civ 611, CA(UK)
[ii] [2012] 4 CLJ 237
[iii] [2023] 1 LNS 1358
[iv] [2018] UKSC 4, SC (UK)
[v] See *Ketua Polis Negara & Ors v Nurasmira Maulat Jaffar & Ors & Other Appeals* [2017] 6 MLRA 635.

Having established that D1 to D6 were negligent in their duties leading to the death of the deceased, the court consequently found that D11 was vicariously liable pursuant to ss.5 and 6 of the Government Proceedings Act 1959.

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