THE UPDATE

T&HW LAW PRACTICE ● AMALAN GUAMAN

The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

Retro Q1 & Q2 of 2020 (January - June 2024) PP16300/03/2024(033194)

TABLE OF CONTENTS		Page

IMPORTANT

Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

Published on [.]

If there is any query, please direct it to:

Tay Hong Huat
hhtay@thw.com.my
Tel: +6019-3160987; +603-79601863

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

BANK'S *QUINCECARE* DUTY OF CARE V ATTRIBUTION OF FRAUD BY CUSTOMER'S DIRECTOR

The infamous *Quincecare* duty of care was operative again in the UK Supreme Court decision in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd*[i]. To recap, in *Barclays Bank plc v Quincecare Ltd*[ii], a bank was held to be in breach of the implied term of contract between the bank and its customer to use reasonable skill and care in and about executing the customer's order if the bank executed the order knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make; and the bank should refrain from executing an order if and for so long as it was put on inquiry by having reasonable grounds for believing that the order was an attempt to misappropriate funds. This had given rise to the so-called *Quincecare* duty of care.

In *Singularis*, Daiwa was the bank and brokerage firm which held huge amounts of cash to the account of the company. AS was the sole shareholder, a director and the chairman of the company which had 6 other directors who did not exercise any influence over the management of the company. The company, with AS's approval, instructed Daiwa to make 8 payments out of the money which Daiwa did. The company was subsequently wound up; and its liquidator brought a claim against Daiwa based on, among others, breach by Daiwa of its *Quincecare* duty of care to the company in executing the orders. Both the High Court and Court of Appeal of UK ruled against Daiwa in negligence for breach by Daiwa of its *Quincecare* duty of care. The trial judge had indeed found, among others, that any reasonable banker would have realized that there were '*many obvious, even glaring, signs that AS was perpetrating a fraud on the company*'; AS was clearly using the funds for his own purposes and not for the purpose of benefiting the company. Daiwa was well aware of the dire financial straits in AS and the Saad group (AS's other business group) found themselves and that the company might have other substantial creditors with an interest in the money. There was plenty of evidence to put Daiwa on notice that there was something seriously wrong with the way AS was operating the company's account. In short, '*everyone recognized the account needed to be closely monitored but no one in fact exercised care or caution or monitored the account themselves or checked that anyone else was doing that …*'. This finding was not further challenged leaving only with the issue of defence available to Daiwa.

On final appeal at the Supreme Court, two broad issues arose on attribution and its consequences. To the question when could the actions of a dominant personality such as AS, who owned and controlled the company even though there were other

[i] [2020] 1 All ER 383, SC (UK)

[ii] [1992] 4 All ER 363

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

directors, be attributed to the company, the pinnacle court ruled that there was no principle of law that where a company was suing a 3rd party for breach of a duty owed to the company by that 3rd party, the fraudulent conduct of a director was to be attributed to the company if it was a one-man company. The answer to any question was always to be found in consideration of the context and the purpose for which the attribution was relevant[i].

In the instant case, the context was the breach by the company's bank and broker of its *Quincecare* duty of care towards the company. The purpose of that duty was to protect the company against just the sort of misappropriation of its funds as taken place which was done by a trusted agent of the company who was authorized to withdraw its money from the account. To attribute the fraud of that person to the company would be to denude the duty of any value in cases where it was most needed. Thus, for the purpose of the *Quincecare* duty of care, the fraud of AS was not to be attributed to the company.

The UK court went further that even if it were attributed, none of the defences (i.e. illegality, lack of causation and/or a countervailing claim in deceit) would succeed. This was a case where the exceptional circumstances needed for the *Quincecare* duty of care to arise and be breached were found to be present. To deny the claim on ground of illegality would undermine the carefully calibrated *Quincecare* duty of care that struck a balance between the interests of the customer and the bank; it would have a material impact upon the growing reliance on banks to play an important role in reducing and uncovering financial crime and money laundering.

On the defence of causation (that it was the company inflicted the harm on itself), it was held that this was just an instance of the rare case of a duty to protect a person of full understanding from causing harm to himself: the purpose of the *Quincecare* duty was to protect a bank's customers from the harm caused by the people for whom the customer was, one way or another, responsible. The fraudulent instruction to Daiwa had given rise to the *Quincecare* duty of care which Daiwa had breached, thus causing the loss. On countervailing claim in deceit, it was that breach of duty ie. Daiwa paying away the company's money on the fraudulent instructions, and not AS's

[i] See *Bilta (UK) Ltd (in liq) n Nazir* [2015] 2 All ER 1034, SC (UK)

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

misrepresentations, that was the cause of their exposure to the claim for the company's loss.

Daiwa's appeal was thus dismissed.

****

COMPANY LAW

DIRECTOR'S FRAUD ATTRIBUTED TO THE COMPANY

Like the UK Supreme Court decision in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* (featured above), the story of a sole-shareholder company committing fraudulent acts was the theme in the Singapore Court of Appeal (COA Spore) case of *Red Star Marine Consultants Pte Ltd v Personal Representatives of Satwant Kaur d/o Sardara Singh, deceased and another*[i]. However, there were some factual differences and the outcome also differed.

In *Red Star Marine*, husband and wife, Singh and Rappa were the only directors and shareholders of the appellant company with Singh as the managing director. The late Kaur was the personal secretary of Singh. The estate of Kaur was the respondent (Kaur's Estate).

Kaur was accused of misappropriating the company's moneys but she claimed it was done with Singh's knowledge and consent. She was criminally charged but granted a discharge not amounting to an acquittal. Not long after, she died. The company then filed a legal suit to claim from Kaur's Estate losses resulting from Kaur's alleged fraud, breach of trust, fiduciary duties and/or duty of loyalty and fidelity.

It was held that Kaur was privy to the fraud. She could not explain why Singh had transferred large sums of the company's money to her. The law would regard her as a constructive trustee of the company and she was liable to account to the company for the money. Singh was also privy to the fraud. The company was effectively a two-person operation run by Singh and Kaur. It was difficult to believe that Singh remained blissfully unaware of the fraud perpetrated against the company when the amount drained out from the company's coffers were many times its profits.

[i] [2020] 1 SLR 115, CA (Spore)

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

With the finding that Singh and Kaur perpetrated a joint fraud against the company, the overarching issue was whether the company was precluded, by the doctrine of illegality, from claiming against the Kaur Estate. For the defence of illegality to operate, the company (as the claimant) must personally and primarily (and not vicariously) be responsible for the wrong. It meant that the company must itself be involved in wrongdoing, through the concept of attribution of acts and intentions of human agents to the company[i]. The COA Spore acknowledged the three rules of attribution[ii]: (i) primary rules of attribution (e.g. the company's constitution or general company law); (ii) general rules (e.g. principles of agency and vicarious liability in tort); and (iii) special rules (fashioned by the courts in situations where a rule of law excluded the attribution on the basis of the general principles of agency or vicarious liability).

The primary rules (i) were not relevant here. There was no evidence that the payments to Kaur were authorized by any resolution or that informal assent of its other remaining director on those payments. The general rules (ii) were also not relevant.

The special rules (iii) were relevant. The defence of illegality operated on the premise that the court as a matter of public policy would not involve itself in a dispute between parties where both sides were equally tainted by the same wrong. The critical question was whether allowing the company's claim (which could only be done if Singh's knowledge and acts were <u>not attributed</u> to the company) would be consistent with the purpose of the defence of illegality.

The answer was an emphatic "No". Singh owned 99% of the company. If the company's claim against Kaur's Estate was allowed, Singh would be effectively the sole beneficiary of the claim. This meant the court would effectively be assisting Singh to recover the fruits of his illegal conspiracy with Kaur to defraud the company of its money. The case was distinguishable from other cases where the relevant company in question had been compulsorily wound-up and the liquidators were suing the auditors on behalf of unsecured creditors and thus, there was no question of the fraudulent directors benefiting from a successful claim.

In conclusion, Singh's knowledge and acts relating to the fraud were attributed to the company which was precluded from claiming against Kaur's Estate. The claim and appeal were dismissed.

****

[i] *Ho Kang Pang v Scintronix Corp* [2014] 3 SLR 329, CA Spore

[ii] Adopted by the COA Spore in *Scintronix* from the UK case in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

FORMATION OF A CONTRACT FOR SALE OF GOODS | CONDITIONAL LEAVE TO DEFEND IN AN O.14 APPLICATION FOR SUMMARY JUDGMENT

The High Court made pronouncements in two areas of law in the claim for the sale of goods in *Builder Enterprise Sdn Bhd v Hang Nee Enterprise Sdn Bhd*[i]: (1) on formation of a contract; and (2) on conditional order that may be granted by the court in an application for summary judgment.

On (1), a contract may be evidenced by statement of accounts, faxed confirmations and e-mails from the defendant to the plaintiff. Mere absence of purchase orders and invoices does not mean that there could not be a contract between the parties.

On (2), in summary judgment proceedings, the court is entitled to grant the defendant a conditional leave to defend by furnishing security when there is a doubt as to the *bona fides* of the defence. In the instant case, the defendant had made some payments as shown from the statement of account exhibited by the plaintiff and the payment vouchers, emails and faxes from the defendant itself but had been unable to explain why these payments were made. The defendant's bare denial in a case of goods sold and delivered was bad in law; the defendant must plead any facts which negatived the existence of the debt or which showed that the claim was not maintainable on other grounds[ii].

The learned Judge thus had serious doubt as to the *bona fides* of the defence. Based on high authorities[iii], and as the plaintiff was amenable to a conditional leave being granted to the defendant to defend the action by the defendant paying the amount claimed into the plaintiff's solicitors account, an order for conditional leave to defend was granted to the defendant by depositing the amount claimed of RM5.15 million to the plaintiff's solicitors as stakeholders together with interests within a month from the date of the order failing which the plaintiff would be entitled to enter summary judgment.

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

****

[i] [2019] 1 LNS 56

[ii] See *Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139, HC;

[iii] *Cho Chin Huat v Lee Boo Hock* [1970] 1 MLJ 112, FC, *Foong Weng Tat v Siew Chin* [1974] 2 MLJ 20, FC and three other cases.

IMPORTANT

Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

SAFARI EGM V TIGER EGM – COMPETING

A tale of 2 competing EGMs was in play in the High Court case of *Safari Alliance Sdn Bhd v Tiger Synergy Bhd & Anor Case*[i]. Safari held 11.83% of the issued share capital of Tiger Synergy. On 2.1.2020, Safari gave notice to Tiger Synergy of its intention to move resolutions to remove certain directors and to reconstitute the board of directors of Tiger Synergy (Safari Special Notice) pursuant to s.206(3) of the Companies Act 2016 (CA 2016). In the Safari Special Notice, it was indicated that the general meeting would be convened on 2.3.2022 (Safari EGM). Safari also issued the notice of extraordinary general meeting of Tiger Synergy in respect of Safari EGM (the Safari Notice of EGM) and attached the resolutions, consents and profiles of the candidates who sought to be appointed as directors of Tiger Synergy at the Safari EGM.

On 20.1.2020, Tiger Synergy issued a letter to Safari stating that Tiger Synergy's Board of directors had decided to convene an EGM on 20.2.2020 (Tiger Synergy EGM) where the resolutions tabled thereto would be the Safari resolutions with two additional resolutions (the Safari resolutions and the additional resolutions collectively referred to as "the Tiger Synergy Resolutions"). The reason proffered was that its board had received multiple requests for the appointments and/or removal of directors from various shareholders; and the Tiger Synergy EGM would facilitate the orderly manner for the tabling of the proposed resolutions for the consideration by the shareholders in order to save time and costs of convening multiple general meetings. On 21.1.2020, Tiger Synergy issued its notice of EGM in respect of the Tiger Synergy EGM to be convened on 20.2.2020 (the Tiger Synergy Notice of EGM).

On 11.2.2020, Safari filed an action in court (OS 67) seeking to invalidate the Tiger Synergy Notice of EGM and to nullify the Tiger Synergy EGM, if held, and injunctive reliefs. Tiger Synergy in turn filed an action (OS 74) to declare the Safari Notice of EGM as redundant and invalid and injunctive reliefs.

The High Court ruled in favour of Safari in OS 67. Once a members' meeting had been convened under s.310(b) of the CA 2016, the company should not be taking any action to interfere with the meeting, more so where there were already steps put into motion by the members to convene the meeting, for example, where the notices and announcement of the meeting had already been sent out and/or published. The company must show compelling and/or good reasons when it sought to convene a competing meeting[ii] either prior or subsequent to the members meeting. The onus was on the company to show that the exercise of its power to convene the

[i] [2022] 5 CLJ 542

[ii] A competing meeting is one which involves tabling before the members identical and/or substantially identical resolutions as the members meeting.

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

competing meeting had not been made *mala fide* or for an improper purpose.

Tiger Synergy had deliberately called for a competing meeting on a date prior to the Safari EGM. It was an abuse of powers by the board of directors of Tiger Synergy when it sought to convene a competing meeting. Tiger Synergy's board's decision to call the competing Tiger Synergy EGM had the effect of taking away or rendering impotent Safari's exercise of its statutory right under s.310(b) of the CA 2016 to convene a members' meeting. Tiger Synergy had effectively hijacked the Safari EGM. It was a blatant improper exercise of powers by its board as by calling for it, it had caused (i) confusion among the members as to the proper meeting to attend; (ii) the competing Tiger Synergy EGM unnecessarily put to waste costs expended by Safari in arranging for the Safari EGM, and would result in Tiger Synergy having to incur costs and expenses unnecessarily against the interests of the members; and (iii) interference with Safari EGM as the five nominated directors had indicated their consent was only for the Safari EGM which meant that the five would not be offering themselves for appointment at the Tiger Synergy EGM. Further, the two additional resolutions to appoint new directors were merely requests from two shareholders who were not substantial shareholders and who could not requisition a general meeting at all; the company had no obligation to table such resolution. In the circumstances, there was hardly any urgency nor necessity to disrupt the Safari EGM by calling the Tiger Synergy EGM. The board of Tiger Synergy had exercised their powers for an improper purpose and the Tiger Synergy Notice of EGM was *mala fide* rendering the convening of Tiger Synergy EGM invalid.

Further, there was no special notice to move the Tiger Synergy Resolutions at the Tiger Synergy EGM as required under s.206(3) of the CA 2016. The company could not rely on the Safari Special Notice for the Tiger Synergy EGM because the Safari Special Notice expressly stated that the Safari resolutions that were intended to be moved would be moved at the Safari EGM convened on 2.3.2020. The board of Tiger Synergy could not rely upon the Safari Special Notice to move the Tiger Synergy Resolutions at a meeting fixed on a different date, venue and time. Under s.322(1) of the CA 2016, the Tiger Synergy Resolutions would not be effective as the same would not be properly moved at the Tiger Synergy EGM rendering the said meeting futile and a waste of the company's resources.

****

COMPANY LAW / DAMAGES

DIVERSION & DESTRUCTION TO KILL OFF COMPANY

It does not pay to divert business and assets of a company to a new company with a view to destroy the former and to benefit the latter. That took place in the case of *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors*[i].

[i] [2020] 5 CLJ 426

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

Asdion Bhd bought over 51% of shares in Taz Logistics Sdn Bhd (P) which was in logistics and stevedoring business from 5th defendant (D5) for RM6 million pursuant to a share sale agreement, which left D5 and the 4th defendant (D4) with 49% of P. P was dependent on Asdion to provide financing for its stevedoring business. Unfortunately, it was subsequently found that P's business was deliberately and systematically destroyed by the defendants in a series of events which were aimed to preclude P from securing essential requirements for its business such as land space and also to divert assets, employees and potential business to a new RM2 company, the 1st defendant, which was set up by the 2nd and 3rd defendants shortly after the share sale agreement. P filed action against the defendants based on breaches of fiduciary duty, knowing receipt and conspiracy to injure and succeeded whereby the court (COA) ordered that the business and assets of D1 in whatever form and wherever situated were constructively held for the benefit of P and damages in the form of general, special and exemplary damages.

In the assessment of damages proceedings before the High Court (HC), it recognized the sum of **RM1,003,761.00** as the value of the property, plant and equipment of D1 in its financial statements for the financial year ended 2016. These assets had been ordered by the COA to be held for the benefit of P. Whilst these assets were no longer in the possession of D1 as it had ceased its entire business and had been dormant, the HC held that P was entitled to the value.

Based on available data, P began to make more consistent profits from June to July 2015. The probability was that P would have continued to make profits save for any unexpected intervening event. Therefore, the court took the average net profits for the said two months i.e. RM900,000.00 as loss of profits per month. P's primary source of revenue was linked to the mining of bauxite which was slapped with moratorium by the government in January 2016. P's income would therefore have been reduced substantially from January 2016 onwards. Since the wrongs were committed after August 2015, the claim for loss of profits of RM900,000.00 per month was allowed for the period of four months from September 2015 to December 2015, totaling **RM3.6 million**.

As to the exemplary damages, it must be awarded in a principled and proportionate manner, the objective being to

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

punish and deter the wrongdoers. The nature of the wrongs on the defendants involved the 'transplantation' of P's business to D1 lock, stock and barrel including staff with clear intent of the consequences of their wrongs. The amount of general damages awarded should be taken into account when considering exemplary damages which, although not compensatory, had been described as a 'windfall'[i]. The HC awarded a sum of **RM900,000.00** as exemplary damages.

****

COMPANY LAW / EMPLOYMENT

COMPETING PRIORITY BETWEEN SECURED CREDITORS & EMPLOYEES FOR SALE PROCEEDS

Competing priority to receive payment from the sale proceeds of the place of employment of a company under securities created was the focal issue in the High Court decision in *Perwaja Steel Sdn Bhd v RHB Bank Bhd & Ors*[ii]. The ailing Perwaja Steel (P) had created charges and debentures over its properties (charged lands) to several financial institutions (debenture holders). Prior to P being wound up, P had ceased operations on the charged lands and had terminated the employment of its employees. Upon winding up, a receiver and manager (the Receiver) was appointed under the terms of the debentures. The Receiver took steps to dispose the charged lands. However, valuation reports showed that the total sale proceeds were not expected to satisfy P's total debts owed to the debenture holders. About 780 former employees of P claimed that their wages ought to be paid out from the sale proceeds in priority over the debenture holders by virtue of s.31 of the Employment Act 1955 (the EA). As a result, the Receiver went to court for directions with regards to the order of payment of the sale proceeds of the charged lands.

Section 31(1) of the EA provides in essence, among others, that the receiver or manager of the company shall not authorize

[i] Indeed Lord Woolf in *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403 at p.418 remarked that it would be unusual for the exemplary damages to produce a result of more than three times the basic damages being awarded (as the total of the basic aggravated and exemplary damages).

[i] [2020] 4 CLJ 535

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

payment of the proceeds of the sale of the place of employment in the exercise of rights under a debenture to the debenture holder until the receiver or manager shall have ascertained and paid out of such proceeds, the wages due to former employees of the company which the company was liable to pay at the date of such sale.

In an illuminating decision, the High Court ruled in favour of the former employees over the debenture holders *qua* secured creditors. Firstly, despite the absence of the word '*priority*' in the substantive part of s.31(1) of the EA, the learned Judge held that its effect was clearly to provide for payment of wages, from the proceeds of sale, in priority over payment of debts to the debenture holders. On the argument that the operative provision on priority of payment was s.527(1) of the Companies Act 2016 (the CA) [which provides priority of wages to only unsecured debts] and not s.31(1) of the EA, the learned Judge disagreed. On a proper construction, interpretation as well as the legislative purpose of the amendment to s.31(1) of the EA, s.31(1) was intended to provide priority of payment of wages over the debt of a secured creditor. It was a specific statutory provision relating to priority of wages in specific circumstances whereas s.527(1) of the CA catered generally for priority of payment in respect of "all other unsecured debts" in a winding-up.

Secondly, on the question whether the employees who were entitled to payment under s.31(1) must be working at the place of employment at the time of the sale by the Receiver, factually the P's factory was on the charged lands which would have thereby been a place of employment for the employees. In the opinion of the court, the express words in s.31(1) of the EA did not make it a requirement that the employees must be working at the place of employment that was sold, at the time it was sold. Instead, s.31(1) applied to the sale of a place of employment at which the employee was employed or worked at the time when such wages were earned. The emphasis was when and where the wages in question were earned, rather than whether the employee was still working at the place of employment at the time of its sale.

Thirdly, by virtue of the para.(a) under the second proviso to s.31(1) of the EA, the total amount of "wages" due by an employer to an employee that enjoyed priority in the substantive part of s.31(1) was not to exceed the amount of wages for four consecutive months. However, by virtue of s.31(2), payments such as termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance (statutory payments) were not subject to the limit imposed under para.(a) of the second proviso to s.31(1). Therefore, in making payment of "wages" under the substantive part of s.31(1) of the EA, the Receiver would be required to pay salary not exceeding four months but there would be no limit on the statutory payments.

****

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

LIQUIDATOR PURSUING DIRECTOR FOR FRAUDULENT TRADING

In *Wong Chu Lai v Wong Ho Enterprise Sdn Bhd (in Liquidation) & Anor Appeal*[i], the liquidator of a company pursued against a director of the company to recover monies belonging to the company under ss. 304 and 305 of the then Companies Act 1965 (the CA1965) (the precursor of ss. 540 and 541 of the Companies Act 2016) on account of his fraudulent conduct in the business of the company.

The company was the sub-contractor of 2 construction projects which had in turn sub-contracted to one THT. THT completed the works but were not paid in accordance with the agreements; and THT filed 2 suits against the company and its two directors. The claim against directors in both suits were dismissed by the court on the basis that there was no separate and distinct liability on the part of the directors to pay THT the money that was owed by the company and no evidence to pierce the corporate veil.

Subsequently, the company was wound up. About 5 years later, the liquidator of the company commenced a suit against one of the two directors (Wong) [the other was already adjudged a bankrupt] for carrying out business of the company to defraud creditors within the ambit of ss. 304 and 305 of the CA 1965 in order to restore property or monies belonging to the company. The High Court ruled in favour of the company which decision was affirmed on appeal at the Court of Appeal (COA).

Wong contended the liquidator/company was caught by the doctrine of *estoppel* since the court had earlier in the suits brought by THT against the company refused to lift the corporate veil against both the directors including Wong. The COA however decided that *res judicata* did not apply to the claims by the liquidator. The earlier suits were filed in 2005 and 2006 by THT (who later became a creditor of the company) whilst the liquidator only came into being in 2011 when the company was wound up. The liquidator had not made any representation or engaged in any conduct or brought those suits or participated in such suits which might be the subject of *estoppel* against him. Further, it is trite law that no estoppel can apply against the liquidator for carrying out his statutory functions[ii]. The liquidator was also not bound by the prior actions of the company or its creditors[iii].

On the facts, the directors had siphoned off the company's monies by giving themselves loans or advances. They had also paid out monies to related companies and when the liquidator took over the company,

[i] [2020] 4 MLJ 120, CA

[ii] See *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, FC: no estoppel can operate against statute.

[iii] See *Re Exchange Securities & Commodities Ltd (in Liquidation)* [1988] 1 Ch 46.

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

there was nothing much left to pay its creditors. Thus, on the balance of probabilities, the business of the company had been carried out with the intent to defraud its creditors. The liquidators succeeded in its claims based on s.304 of the CA1965.

****

CONTRACT

IS PUBLIC POLICY AGAINST SALE OF INFLUENCE APPLICABLE TO PRIVATE ARRANGEMENT BETWEEN PRIVATE PARTIES ?

Years ago in 2015, our Federal Court had in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay Abdullah*[i] (*Merong Mahawangsa*) laid down the proposition that '*an agreement to provide services to influence decision of a public decision maker to award a contract is a contract opposed to public policy falling under s.24(e) of the Contracts Act 1950* (the Act) *and is therefore void*'. Does this principle extend or apply to private arrangements between private parties (the Question of Law) – this was the pivotal question of law posed to the Federal Court in *Wong Yee Boon v Gainvest Builders (M) Sdn Bhd*[ii] (*Wong Yee Boon*).

In *Wong Yee Boon*, a wholly-owned subsidiary of the Ministry of Finance (Pembinaan BLT Sdn Bhd) appointed Mitisa Holdings Sdn Bhd (Mitisa) as the main contractor for the whole project to construct an additional building for Ibu Pejabat Polis Kontinjen Kuala Lumpur (the project). Mitisa in turn appointed CRBC (M) Sdn Bhd (CRBC) as the main sub-contractor. The respondent, Gainvest Builders (M) Sdn Bhd (R) was interested to bid for the sub-contract for structural concrete works. The appellant/plaintiff (P) represented to R that he had some influence and connection with CRBC to enable R to be engaged by CRBC to perform some of the sub-contract works. R subsequently issued a letter appointing P as "introducer"; and the terms of engagement between them were expressed in an 'introducer agreement' by virtue of which P was to assist R in securing the project as a sub-contractor from CRBC.

As per the agreement, R submitted a quotation to P at RM31.09 million (1st Quotation) which was revised by P [to RM35.36 million] for onward submission to CRBC to bid for the sub-contract works (2nd Quotation). Under the agreement, P would be paid the differential sum between the two quotations i.e. RM4.27 million; and the validity of the introducer agreement 'shall be dependent on the award of the project to R by CRBC". However, CRBC rejected the 2nd Quotation. R protested and wrote to P to complain that his representation of having the necessary connection with CRBC was false and that CRBC had since informed R to deny the alleged relationship. Accordingly, R terminated the introducer agreement. Subsequently, through direct communication between R and CRBC, R was awarded the whole of the construction works of the project for structural and

[i] [2015] 5 MLJ 619, [2015] 8 CLJ 212, FC

[ii] [2020] 2 CLJ 727, FC

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

architectural works at RM58.6 million. Notably, this was a new scope of works.

P filed a claim against R for the differential sum on the basis that he had fulfilled his obligations pursuant to the introducer agreement. The HC as well as the Court of Appeal had dismissed P's claim on the ground that the introducer agreement was an illegal contract under s.24(e) of the Act which provides, *inter alia*, that an agreement of which the object or consideration is forbidden by a law or is of such a nature that, if permitted, it would defeat any law or is regarded by the court as immoral or opposed to public policy is unlawful and void.

On final appeal, the apex court dismissed the appeal by majority 2 to 1. The majority pointed out that the 2nd Quotation was submitted and rejected by CRBC and therefore, P failed to fulfil his obligation under the introducer agreement. The sub-contract eventually awarded by CRBC to R for the sum of RM58.6 million was through direct communication between both parties to the exclusion of P and was for different scope of works. The letter of award to R was not issued pursuant to P's efforts under the agreement. P was not entitled to be paid under the agreement.

On the basis of such factual finding against P, the majority (as well as the dissenting minority who had ruled in favour of P on the facts) however felt unnecessary to answer the Question of Law. It was reserved for another occasion where such question must necessarily be determined. In this regard, the minority had observed that there was no express provision in the introducer agreement on the use/sale of influence or "influence peddling" and the agreement was thus not a contract for influence peddling against public policy under s.24(e) of the Act. On that score, *Wong Yee Boon* was distinguishable from *Merong Mahawangsa* which concerned a sale of influence on the government authority to obtain a government contract. This was against public policy in Malaysia because such contract inevitably engendered corruption which was injurious to the public conscience. Whilst in *Wong Yee Boon*, although the introducer agreement bore close nexus with a Government funded project, that was not sufficient to strike it down as being illegal contrary to s.24(e) of the Act. There was therefore no basis to rely on the principle of law on public policy as established in *Merong Mahawangsa*[i] to hold the introducer agreement as illegal. Hence the minority declined to answer the Question of Law posed which stand was agreed by the majority as well.

****

[i] Basically, the principle in *Merong Mahawangsa* is confined to a contract for the sale of influence peddling of a public authority as against the established head of public policy in Malaysia.

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

CONTRACT FORMED BY CONDUCT OF PARTIES

A legally binding contract may not necessarily be in written form but can be by conduct of parties which constitutes acceptance. In *Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors*[i], the plaintiffs (P) had entered into contracts with the defendant (D) to buy gold from and/or sell gold to D. In resisting the claim, D contended that the customer purchase orders (CPO) were merely offers to sell gold to D; and that such CPO contained a clause that the CPO would not be binding on D until it was accepted in writing by D. There was no evidence by P of the acceptance by D hence no binding contract between parties.

The Court of Appeal rejected the contention. It is trite law that apart from writings, conduct of parties may amount to acceptance[ii]. On the facts of the instant case, there were payments into D's bank account and some by partly giving gold at an agreed value and using them for D's benefit. This was consistent with D having accepted the offers made by P. Thus, by D's own conduct, D was *estopped* from denying that there was a valid and binding contract. Having accepted payment for the gold transactions or accepted gold sold to D but failed to carry out its obligation under the contract, the appellate court ruled that D must refund the monies paid or return the gold or the value of the gold to P.

****

SEVERANCE OF RESTRAINT OF TRADE CLAUSE IN UK

Covenants to restrain an ex-employee from her professional activities were the crux of the UK Supreme Court case of *Tillman v Egon Zehnder Ltd*[iii]. T was the consultant and eventually became the joint global head of the company's financial services practice area. Shortly after she left the company, she informed the company of her intention to start work as an employee of a competitor business. The company applied for an interim injunction to restrain her,

[i] [2020] 4 CLJ 449

[ii] Reliance was placed on *Eckhardt marine GMBH v Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 3 CLJ 864, CA.

[iii] [2020] 1 All ER 477

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

relying upon a "non-competition covenant" in her employment agreement in which she covenanted, among others, not to '*directly or indirectly engage or be concerned or interested in any business carried on in competition*' with the company for a period of six months following the end of her employment. The High Court granted the injunction (UKHC) but the UK Court of Appeal (UKCOA) reversed the decision and held that the effect of the word '*interested*' in the non-competition covenant would be to prohibit T from holding even a minority shareholding in any competing business and as such, the covenant was in unreasonable restraint of trade. The appellate court had refused to sever the word from the remainder of the clause so as to save the remainder of the prohibition.

On appeal, the UK Supreme Court agreed with the UKCOA on the interpretation of the word '*interested*' in the non-competition covenant. The word '*interested*' covered a shareholding, large or small. The restraint on shareholding was part of the restraint on T's ability to work in the immediate aftermath of her employment and fell within the doctrine of restraint of trade. It was in unreasonable restraint of trade.

However, the apex court departed from the UKCOA in ruling that the words '*or interested*' were capable of being removed from the non-competition covenant without the need to add or modify the wording of the remainder (the so-called 'blue pencil' test). Removal of the prohibition against T being 'interested' would not generate any major change in the overall effect of the restraints. Thus, the words were severed and removed; the remaining part to restrain T from competing with the company, ie. from being '*directly or indirectly engage or be concerned in any business carried on in competition*' with the company, was enforceable. The injunction granted by the UKHC was accordingly restored.

It must however be noted that the law in UK on restraint of trade is different from Malaysia. A covenant on restraint of trade is void at common law (UK) unless it is reasonable. In Malaysia, s.28 of the Contracts Act 1950 provides that an agreement in restraint of trade is void unless it falls within one of the three exceptions (sale of goodwill, partners' agreement prior to dissolution of partnership and partners' agreement during partnership). Thus, other than cases falling within the exceptions, all covenants in restraint of trade are void even if the covenants in question are reasonable. The test of reasonableness is irrelevant to our law[i].

****

[i] See *Vision cast Sdn Bhd & Anor v Dynacast (Melaka) Sdn Bhd & Ors* [2015] 8 CLJ 884, CA.

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

JUDGMENT SUPERSEDED BY SETTLEMENT AGREEMENT

It is pertinent to note that judgments and orders may have been superseded or extinguished by settlement agreements entered between parties as a result of which such judgments or orders can no longer be executed or enforced. That was the effect of the Court of Appeal decision in *Pacific Sanctuary Holdings Sdn Bhd v Masaland Construction Sdn Bhd*[i].

In the instant case, a default judgment was entered against D. P then presented a winding-up petition against D. Parties entered into a settlement agreement in which P agreed not to enforce the judgment and to withdraw the winding-up proceedings in consideration of D agreeing to pay P certain sum by way of cash payment and contra of properties. D claimed it had carried out its part of the bargain under the settlement agreement but P disagreed. P issued notice to terminate the settlement agreement and applied for leave under O.46 r.2 of the Rules of Court 2012 to execute the judgment.

It was held that there was no longer any pending judgment and/or order of the court to be enforced as the judgment/order had been superseded or extinguished by the settlement agreement. The settlement agreement constituted a new and independent agreement for good consideration. Its effect was to supersede the original cause of action altogether and to put an end to the proceedings, which were spent and exhausted. Even if there was default under the settlement agreement, P's remedy was confined to taking a fresh action to sue on the settlement agreement and not by way of executing the judgment which had been rendered otiose by the settlement agreement.

****

1. EXPATRIATE CANNOT BE A PERMANENT EMPLOYEE

In *Aims Cyberjaya Sdn Bhd v Ahmad Zahri Mirza Abdul Hamid*[ii], the claimant had entered into the first three contracts of employment (six months, 1 year and 3 years respectively) with AIMS Data Centre 2 Sdn Bhd whilst the 4th one with AIMS Cyberjaya Sdn Bhd (the company). The first finding of the Court of Appeal (COA) was that the company and AIMS Data Centre 2 were two separate legal entities and the contracts could not be treated as one continuous contract. There was no evidence to show any fraud or unconscionable conduct of the company and thus, there was no ground to lift the corporate veil.

Prior to the expiry of the 4th contract on 30.9.2013, the company had offered the claimant the 5th contract which was not agreeable to him. He was then offered the

[i] [2020] 4 CLJ 490

[ii] [2020] 1 ILR 273, CA

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

three-month contract for the period from 1.10.2013 to 31.12.2013. He accepted it on 20.9.2013. On 1.10.2013, he informed the company that he was not accepting the 5th contract by which time, the 4th contract had already expired by effluxion of time. It was during the duration of the three-month contract, on 18.10.2013, that the company had issued a letter of 'early release' giving the claimant 2 months' notice of the expiry of the three-month contract. The COA held that the contract was not a fixed term contract but a fixed term contract of three months and the early termination was effected in accordance with clause 8 thereof.

Further, the claimant was a citizen of Singapore with the contract subject to compliance of any legal requirements necessary for the claimant to be able to provide services in Malaysia. This would include the legal requirement to obtain a work permit to work in Malaysia. An expatriate requiring such a work permit could not be a permanent employee.

2. EMPLOYEE EXERCISING HER PERSONAL RIGHTS AGAINST SUBORDINATE

The wrong perception by the company on the nature of an alleged scuffle between the General Manager (the claimant) and her subordinate (Chong, the Senior Logistics Manager) caused the company to lose the constructive dismissal claim brought by the claimant under s.20(1) of the Industrial Relations Act 1967 in *Kirba Daisy John Das v City-Link Express (M) Sdn Bhd & Anor*[i]. The claimant and Chong were charged by the company with conducting themselves improperly, unruly and disrespectfully in the discharge of their duties thus showing a bad example of managerial leadership to their subordinates (the 1st Charge). Both were found guilty and demoted. The Court of Appeal (COA) disagreed with such factual finding of the Industrial Court and High Court because from the evidence, it was the claimant who had been assaulted by Chong who was bent on getting a logbook away from the claimant, who had the right to have sight of its contents, as it was connected with alleged improper sale to third parties of pellets belonging to the company. The claimant was only discharging her obligations in protecting the company's properties from improperly pilfered, *albeit* by its own employee. The fact that the claimant was the victim of an assault by a subordinate negated scuffle and thus, she ought not to be found guilty of the 1st Charge.

The third charge against the claimant was for issuing a legal letter through her lawyer to Chong on an internal e-mail on a matter under investigation by the company and thus, causing unnecessary fear to Chong and in total disregard to the company's investigation process (the 3rd Charge). The COA pointed out that Chong had indisputably called the claimant a 'trouble instigator and actress'. The Claimant had taken umbrage at this and regarded such remarks as defamatory. It would be reasonable for a person circumstanced as the

[i] [2020] 2 ILR 209, CA

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

claimant to take action against Chong in defamation. Further, the company had failed to take action on the complaint lodged by the claimant on this matter. The claimant was thus clearly exercising her private rights to vindicate a perceived wrong against her which the company, to her mind, was not able to provide. Taking action in her personal capacity without naming the company as a party, this was a valid exercise of the claimant's private right against Chong. The 3rd Charge against the claimant had no proverbial legs to stand on.

There was no reason for the company to demote the Claimant. She was justified in treating herself as having been constructively dismissed by the company.

3. HOTEL OPERATOR AS AGENT OF THE REAL EMPLOYER OF HOTEL WORKERS

The former employees in Sheraton Langkawi Beach Resort (which had since been closed) had sued the owner of the hotel (Mashyur Mutiara) in the Labour Court for outstanding wages. In *Mashyur Mutiara Sdn Bhd v Abdul Samat Ishak & Ors and Anor Appeal*[i], Mashyur Mutiara had contended that they had been wrongly sued as they were not the workers' employer. It was argued that the management of the hotel including the hiring of the workers was carried out by a company called Sheraton Overseas Management Corporation (SOMC) which had executed employment contracts with them. The High Court ruled that it was not necessary for an employer to personally execute the contract of service. The phrase '*... agent, manager or factor of such first mentioned person...*' in s.2 of the Employment Act 1955

[i] [2020] 2 ILR 224

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

clearly envisaged and provided for an indirect appointment. An entity remained the employer even if it did not execute the contract of service as long as the party executing the contract with the worker was its duly appointed agent, manager or factor appointed. It was evident from the management contract that SOMC was appointed by Mashyur Mutiara to manage the hotel and to act as its agent with full authority in the hiring of the employees. The principal-agent relationship was further encapsulated in the letters of offer, confirmation and termination. Thus, when SOMC executed the contracts of service, it did so as the agent and manager of Mashyur Mutiara which was the real employer of the workers.

4. SERIES OF ACTIONS AMOUNTING TO CONSTRUCTIVE DISMISSAL

In the constructive dismissal case in *Joo Chooi Me v Sampro Distribution Sdn Bhd*[i], the claimant had applied for and was granted long leave by the Managing Director (MD). However, she was subsequently queried on it as both she and the MD, being senior management staff, were to be on long leave concurrently. She was asked to elect, with the MD, who was to go on leave, during that period, but she proceeded with her leave. The Industrial Court ruled for her on this point, that its actions of asking her to elect had been unreasonable. The claimant and the MD had been performing different functions and tasks and the company had failed to prove that if both of them had gone on leave at the same time, it would jeopardize or affect the smooth running of the company. Its action of attempting to cancel her leave, which had already been proved, had been unreasonable and was done to frustrate her. She was also entitled to clear her balance annual leave.

On the action of the company Chairman (COW4) going around asking her subordinates whether they had been able to do without her whilst she was still their superior, this had undermined her position as the Sales and Marketing Director. Further, COW4 had raised his voice at her without proof of her wrongdoing in relation to the missing stocks. COW4 had vented out his frustrations without any real basis.

The company's actions of subjecting her vehicle to a physical check whenever she exited its premises was uncalled for and oppressive. She ought not to have been subjected to demeaning treatment like a thief. Further, its actions of refusing to pay its suppliers and repair the products for customers within a reasonable time had seriously damaged her reputation and goodwill built with them. Such actions had clearly undermined the relationship of trust and confidence between employer and employee[ii]. This was compounded by the company's attempt to carry out salary cut. On the whole, the company had by its

[i] [2019] 4 ILR 471

[ii] On breach of implied term of trust and confidence between employer an employee, see *Woods V WM Car Services Ltd* [1981] ICR 666

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

actions evinced an intention not to be bound by the claimant's contract of employment. She succeeded in her constructive dismissal claim.

However, the court reduced the backwages awarded by 35% for post-dismissal earnings, although she claimed that she had not found gainful employment. The court held that the term "post-dismissal earnings" was not limited to remuneration from employment but included any income earned by a person whether from running his own business or working in informal sectors, be it part time or full time basis after he was dismissed. The court regarded her role as Consultant in a company as generating some income to her hence the reduction ordered.

5. LOCUM IS NOT A WORKMAN

The claimant in *K Sakthiaseelan Kumaraveloo v Poliklinik Dan Surgeri Semarak (Aker Solution In-House Clinic)*[i] was a locum doctor[ii] with the work arrangement as working from Monday to Friday from 9am to 5pm with daily wages RM600.00. There was no contract of service. Neither was there any contribution to EPF or deduction to tax. If he decided to take leave, he would not be entitled to any remuneration. He was not subject to annual appraisal and did not receive increment or bonus nor was he subject to the retirement age provision. Drawing guidance from the High Court decision in *Joedy Kanniah v Poliklinik & Hospital Veterina Sdn Bhd & Ors*[iii], the Industrial decided that the claimant was not within the definition of a workman under the Indistrial Relations Act 1967 (IRA). Thus, he was not subject to s.20 of the IRA for his claim of wrongful dismissal to be adjudicated.

6. NEGATIVE COMMENTS IN FACEBOOK

For posting negative comments about superiors and colleagues (albeit without names) on her personal Facebook (FB) account with unsavoury words and in

[i] [2019] 4 ILR 634

[ii] The term locum doctor is a commonly used term for a doctor who does the job of another doctor temporarily or someone who fills a post when it is vacant.

[iii] [1997] 5 CLJ 237

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

disrespectful tone including calling her superior 'bitch', the claimant was held to have been guilty of being disrespectful and insubordinate in the case of *Maxis Broadband Sdn Bhd*[i]. For complaining to the external vendor and portraying the company in a negative light, she had conducted herself unprofessionally and in a manner that was incompatible with the proper discharge of her duties to the company and hence in breach of the company's policy to safeguard its reputation. For sending out a trail of e-mails that showed a pattern of the claimant being disrespectful, obstructive and insubordinate to her immediate superior, she was found to have acted in a manner that was incompatible with the proper discharge of her duties to the company and to have been disrespectful towards her team leader. All such actions were serious misconduct which warranted her dismissal.

7. SACKED FOR MALINGERING – WENT ON HOLIDAY WHIST ON MC

Malingering[ii] was the flavour of the Industrial Court case, *Dalia Ash'ari v Malaysia Airports (Niaga) Sdn Bhd*[iii]. The claimant, a Senior Executive in the employ of the company for 14 ½ years, had applied for annual leave from 13.12.2017 to 20.12.2017 which had not been approved. On her way to work on 13.12.2017, she had allegedly suffered myalgia and numbness on her upper limb. Upon consultation at a clinic and a private hospital, she was given medical leave until 15.12.2017. After that, her leave was approved by her superior for 18.12.2017 to 20.12.2017, as 16.12.2017 and 17.12.2017 were Saturday and Sunday. The company subsequently discovered that whilst on medical leave, she had gone on holiday to Thailand on 15.12.2017. A show cause letter was issued to her. A domestic inquiry was conducted and she was suspended for 14 days without pay but upon review by the disciplinary appeal committee (DAC), she was found not guilty of the charge levelled against her. 10 months later, the DAC decision was reviewed by Senior management who found her abuse of medical leave sufficiently serious to warrant dismissal. Upon her complaint under s.20(3) of the Industrial Relations Act, the Industrial Court ruled for the company.

It had been clear that she had abused the medical leave given to her when she had seen it fit to travel to Thailand for a holiday when she should have been resting at home. The clear conclusion to be drawn was that she had been malingering. It was not up to her to decide what she could or could not do depending on the gravity of her illness. She had clearly betrayed the trust and confidence reposed in her by the company. It had not mattered that the company's guidelines had been silent on the abuse of medical leave. The court found it hard to believe that it was a mere coincidence that

[i] [2020] 1 ILR 408

[ii] It means pretending or exaggerating illness or physical disablement or mental derangement in order to escape work or duty.

[iii] [2020] 1 ILR 472

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

the claimant had fallen sick on the morning of her planned travel to Thailand. The *modus operandi* to obtain the medical certificate when she had found out that her lave had not been approved and then rescheduling her travel dates to Thailand had raised the presumption that she had been malingering which she had failed to rebut. She had also exhibited her defiance and rebelliousness by posting videos of her holiday during that period on her Instagram account. The company therefore was justified to terminate her services on account of serious misconduct. The court also held that it was not bound by the proceedings of the DAC.

8. WEIGHT REDUCTION FOR MAS STEWARDESS

In 2015, our national airline, Malaysia Airlines System (MAS) had introduced a weight management program to all its crew with the view to maintain its image as a premium airline and to ensure the safety of passengers while in flights. Those who did not meet the weight range would have to be subject to a weight management process which involved grounding and to reduce their weight to achieve the optimal weight. The claimant in *Ina Meliesa Hassim v Malaysia Airlines Berhad*[i] was a senior airline stewardess with the position of flight supervisor who had been in excess of her body mass index (BMI). She was subjected to the weight management program, grounded from flying to enable her to focus on achieving her optimum weight. Despite opportunities given, ample time granted and assistance provided, she failed to achieve. Seven months later, her employment was terminated on the ground that she had continuously failed to achieve the weight range in accordance with the company's Grooming and Uniform Guidelines Manual. The Industrial Court upheld the termination. The rationale for the implementation of the program was justified. It was within MAS's discretion to determine its own policy in relation to weight management independent from other international airlines such as British Airways, Lufthansa, KLM or Qantas and the claimant had not objected to its introduction. The program was also not discriminatory as it had applied to all crew and MAS had accorded everyone every possible opportunity to achieve their optimal weight. It was not tainted with *mala fide*. MAS was held to be right when it did not take into consideration the fact that the claimant had a mere less than 1 kg in excess of her optimal weight in terminating her employment.

[i] [2020] 1 ILR 602

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

9. DO UNTO OTHERS AS YOU WOULD HAVE THEM DONE UNTO YOU

It is important for a company/employer to comply with the provisions of its own employee handbook/manual which were relied upon and cited in order to dismiss an employee; and it is unreasonable to have the handbook binding on the employee but the same handbook/manual had no application and was not binding on the company. The company cannot be allowed to depart from following the proper procedure on dismissal stipulated in the handbook. In *Tan Cheng Chuan v UHY Tax Advisory Sdn Bhd*[i], the company had failed to comply with the provision of its Employee Handbook (the EH) on the recording and placing of any verbal or written warnings in the employee/claimant's file. The e-mail (the EM) given also did not amount to a written warning as it was never recorded in the employee's file. Thus, the employee was held not to have been given any proper warning in line with the provisions in the EH. Indeed, the evidence showed that as at the date of the EM, the company had intention to terminate him without prior discussion; and he had already been found guilty of misconduct by his immediate superior. He was not given time for improvement; and the company had no intention of accepting any explanation from him. No investigation or domestic inquiry had been conducted by the company in blatant disregard to the provisions of the EH. The EH had stipulated a number of alternative measures for disciplinary action including warnings, suspension, deferring or withholding increments, reducing salary, downgrading etc., which it had clearly failed to consider. The claimant's dismissal was held to have been arbitrary and without just cause or excuse.

10. OUTSOURCING IN RIGHTSIZING EXERCISE

A total of 18 security guards (the claimants) employed by Central Sugars Refinery Sdn Bhd (the company) were retrenched lawfully as decided in *Syamaizar Azmi v Central Sugars Refinery Sdn Bhd*[ii]. The company had in an effort to reduce its operational costs reduced the headcount of its Security Section to four and outsourced the remainder workforce in that Section to an external company (DFSB) which had led to the claimants' positions becoming redundant. An interview had been arranged for the claimants with DFSB but none of

[i] [2020] 2 ILR 138

[ii] [2020] 2 ILR 373

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

them turned up. The Industrial Court held, among others, that although the company had not applied the 'Last In First Out' (LIFO) principle in selecting employees to be retained, its selection had been based on its 'Performance Management System' (PMS) and disciplinary records, where the four security guards retained had been the top performers. The LIFO rule was not mandatory as it was not a statutory provision. Further, there was no legal obligation on the part of the employer to consult or give advance warning to the employee on the possibility of retrenchment. On the contention that the company had engaged foreigners to replace them, the fact was that DFSB had already been servicing the company's Security Section whilst the claimants were in the employment of the company, and the foreigners were employed by DFSB as security guards in the company. The decision of the company to outsource a large part of its Security Section had culminated in it achieving a considerable amount of savings on a monthly basis and had ben a genuine exercise of its managerial prerogative to run its business operations as it had deemed fit. It was just and proper for the company to retrench the claimants.

****

DOUBLE RENT CLAIM– MUST THERE BE WILFUL OR CONTUMACIOUS HOLDING OVER BY TENANT ?

Under s.28(4)(a) of the Civil Law Act (CLA), a tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of rent until possession is given up by him, whether notice to that effect has been given or not. In *Rohasassets Sdn Bhd v Weatherford (M) Sdn Bhd & Anor*[i], the Federal Court resolved the diversity of opinions by its predecessor in the cases of *Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd*[ii] (*Panicka*), *Wee Tiang Yap v Chan Chan Brothers*[iii] (*Wee Tiang Yap*) and *Soong Ah Chow & Anor v Lai Kok Cheng*[iv] (*Soong Ah Chow*) on the Question whether wilful and contumacious conduct on the part of the tenant holding over was required to be established by the landlord before he could exercise his option to charge double rent under the said s.28(4)(a).

The tenancies of the premises in *Rohasassets* expired in 2009 (11th and 12th floor) and 2011 (14th floor). Before their expiry, the landlord (appellant, A) and the tenant (respondent, R) began negotiations for renewal which went on even after the expiry of the tenancies and dragged on for more than 2 years during which A expressly reserved its right to charge double rent and consistently reminded R both before and after the expiry of the tenancies to make

[i] [2020] 1 CLJ 638
[ii] [1982] 1 LNS 69, FC
[iii] [1984] 1 CLJ (Rep) 433, FC
[iv] [1984] 1 CLJ 152, FC

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

payment but R did not do so. The negotiations for new tenancies failed. By letter dated 19.8.2011, A terminated the tenancies and gave notices to quit to R and deliver vacant possession of the premises by 1.10.2011. R took an additional month to do so and only delivered vacant possession on 31.10.2011. In total, R held over 30 months on 11th floor, 31 months on 12th floor and 9 months for 14th floor. A claimed for double rent premised on s.28(4)(a) of the CLA and section 8.42 and 8.43 of the tenancy agreements. Both the High Court and Court of Appeal decided that there must be wilful and contumacious holding over on the part of the tenant in order to entitle the landlord to claim double rental. On that score, R was ordered to pay double rent only for the period commencing from 1.10.2011 up to 31.10.2011, the date of actual delivery of vacant possession.

On final appeal, the Federal Court answered the Question in the negative, that is, in relation a claim for double rent under s.28(4)(a) of the CLA, there is no requirement on the landlord to show contumacious conduct on the part of the tenant holding over to render the tenant liable to pay the said double rent. It was pointed out that the words 'holding over' in s.28(4)(a) were not defined by the CLA and there was also no requirement under the said provision for the holding over to be 'wilful'. Holding over simply meant an act of continuing to be in occupation of the premises after the expiry of the tenancy and what mattered was the reason for the holding over. The words 'until possession is given up by him' in the said provision contemplated a situation where the tenant refused to deliver up vacant possession without any just cause or valid reason after the expiry of the tenancy. *Panicka* was therefore no longer good law.

To entitle the landlord to charge double rent, there must be a failure or refusal by the tenant to give up possession after being told to do so by the landlord. The court is to determine whether the option to charge double rent had been exercised properly and lawfully by the landlord. The court is not concerned with contumacious conduct on the part of the tenant holding over. Even if the tenant is not guilty of contumacious conduct, the tenant is still liable to pay double rent if the landlord had decided to charge double rent and did not consent to such holding over, express or implied by conduct and had asked the former tenant to vacate the premises.

On the facts, it was held that R's holding over was with the tacit approval of A. A did not make its intention clear to R that it did not wish to renew the tenancies and wanted R to give up possession after the expiry of the tenancies. In fact, by agreeing to negotiate for renewal of the tenancies, A had evinced an intention to renew the tenancies subject to finalisation of the terms. Nor did A make it clear to R that it would not allow R to hold over without paying double rent while negotiations for renewal were ongoing. Throughout negotiations, A accepted tenders of rent from R without any complaint and did not issue any notice to quit, not until after the failure of the negotiations some 2 years after the expiry. A

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

by conduct had waived its right to charge double rent. Therefore, R were tenants at will and not tenants at sufferance and only became trespassers from the date of expiry of the notices to quit up until the date R gave upon the premises. R were in lawful possession of the premises for the period between the date of expiry of the tenancies and the date of expiry of the notices to quit. Thus, it was correct to order double rent for the period commencing from the date of expiry of the notices to quit up until the date of delivery of vacant possession.

Be that as it may, and with utmost respect, we are perplexed on the view of the apex court that regarded the fact that A had reserved its right to charge double rent and had consistently reminded R to pay double rent during the period of negotiations for renewal of the tenancies as neither here nor there as A had continued to accept tenders of rental by R and did not at any time ask R to vacate the premises.

[i] [2020] 3 CLJ 571

****

TORT

HOTEL LIABLE FOR GIVING ACCESS TO ROOM OF ITS GUESTS TO ANOTHER PARTY

A hotel in Ipoh was found liable in negligence for granting access to the room occupied by its guests to another party in *Kinta Riverfront Hotel & Suites Sdn Bhd v Chang Yok Kee & Anor*[i]. P1 and P2 filed a suit against the hotel (H) and another party, VCW for a scuffling incident between VCW and P1 and P2 that had occurred on the wee hours at the hotel. VCW had gained the access card to the room occupied by P1 and P2 from the reception staff of H who was under the mistaken belief that VCW and R1 were husband and wife and who had also voluntarily informed VCW the number and location of the room that R1 was occupying. Upon entering the said room, VCW became angry upon seeing R1 and R2 together on the same bed. A scuffle broke out amongst R1, R2 and VCW which had caused abrasion and injuries to them.

The High Court, on appeal, held that the action of P1 and P2 against H was premised on the tort of negligence and not on breach of their privacy. Applying a Singapore High Court decision[ii] for the principle that innkeeper was liable for the negligent act or lackadaisical attitude of hotel staff vis-à-vis the room key, H owed a duty of care towards

[ii] John C Fleming & Anor v Sealion Hotels Ltd [1987] 2 MLJ 440, HC (Singapore)

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

P1 and P2 to ensure their safety as the hotel's paying guests. H had breached such duty. Even if there was deception or undue influence on the part of VCW to obtain the access card from H's staff, there was no evidence that its staff had taken all reasonable measures to not provide the access key to VCW without permission of P1 and P2.

H's appeal was thus dismissed and the award of exemplary damages in the sum of RM150,000 and aggravated damages in the sum of RM25,000 by the Sessions Court against H was affirmed.

****

WEIGHT MANAGEMENT WENT AWRY

Companies that provide slimming treatments are advised to take heed of the caution given by the Court of Appeal in *Thene Arulmani Chelvi Arumugam v London Weight Management Sdn Bhd*[i]. The plaintiff (P) in the case signed up a package of slimming treatments (package) with the defendant (D) which was a company specializing in 'slimming services'. After four sessions, P's health deteriorated. She then stopped treatment under the package upon medical advice. D refused to refund which prompted P to file a suit in negligence against D.

It was held by the Court of Appeal that:-

(a) D owed a duty of care to P. There was proximity of relationship between them for the court to consider it fair, just and reasonable that the law imposed a duty of care.

[i] [2020] 5 CLJ 260, CA

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

(b) Part of such duty was to ensure that its customers were suitable, able or even safe to undertake any of its treatments. D's own slimming consultation cards confirmed the inquiry that D had conducted before a customer signed up for the course.
(c) Further, the treatments undertaken by D involved ingestion of supplements or other concoctions. Such an intrusive treatment must carry a corresponding duty of care to ensure that whatever was provided was in fact safe and suitable for consumption.
(d) D must put into place a standard operating procedure where some proper tests were conducted to ensure that the customer was fit and able to undertake the package; and all customers were monitored throughout the duration of the treatment. D must have a response kit in the event of any adverse reaction to the treatments undertaken. D must also ensure that its staff were competent, suitably and adequately trained.
(e) D was also under a duty to warn or alert its customers of any adverse effects that its treatments may untowardly bring. D was further under a duty to take all necessary actions to react and redress the harm when it was alerted of the same by a customer.

The appellate court allowed P's appeal and entered judgment in favour of P.

****

HOT WORKS AS DANGEROUS THING ESCAPING TO NEIGHBOURING LAND

In *PEX International Pte Ltd v Lim Seng Chye and another*[i], a fire had occurred at the building owned by P (No.15) while construction involving hot works were being carried out in an adjoining property (No.17) which was owned and occupied by PEX. PEX had engaged Formcraft as the contractor to carry out the construction works. On the fateful day, sparks from the hot works at No.17 fell into flammable mattresses and other items at the backyard of No.15 and resulted in the fire. Strong winds present at that time had caused the fire to spread.

P commenced a suit against PEX and Formcraft based on the tort of negligence, the tort of private nuisance and the rule in *Rylands v Fletcher*. The trial judge found PEX not liable in negligence as PEX had delegated the performance of the works to Formcraft as an independent contractor and it was not negligent in the selection of Formcraft.

However, PEX was found liable in private nuisance which required foreseeability of harm and unreasonable use of land to be proven. PEX could have reasonably foreseen that the work it had instructed Formcraft to do was likely to result in a nuisance to P. There was unreasonable use of land because the hot works were executed in a manner that was reasonably unsafe. Against such findings, the Singapore Court of Appeal (COA Spore)

[i] [2020] 1 SLR 373, CA Spore

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.

remarked that foreseeability of the risk of harm was not generally relevant to establish liability in private nuisance[i]. The relevant control mechanism was the principle that the use of land (that interfered with the plaintiff's use and enjoyment of his neighboring land) had to be reasonable. Foreseeability of the type of harm, however, was relevant in determining whether the type of loss was too remote. By such decision, the law in Singapore in this regard appears to be different from that in England[ii].

Applied to the facts, there was unreasonable use of land because the works were done at the perimeter between No.15 and No.17 in the presence of strong winds in close proximity to the flammable mattresses stored at the backyard of No.15 and significantly, without any proper supervision of the workers. P's claim was also not too remote because the type of harm i.e. damage due to fire was reasonably foreseeable by PEX since PEX authorized Formcraft to conduct the works which ordinarily would involve hot works. Thus, the trial Judge was right to hold PEX liable in nuisance albeit on different grounds.

On liability under the rule in *Rylands v Fletcher*, foreseeability of the risk of harm was not relevant to establish liability. There was non-natural use of the land (the hot works which produced sparks or molten globules). There was an escape of a dangerous object (sparks) onto P's property. The loss was not too remote as the type of harm was foreseeable. The trial Judge's decision that PEX was liable in relation to the rule in *Rylands v Fletcher* was thus affirmed.

****

THANK YOU for your time in reading this issue.

For past issues, please visit our website at www.thw.com.my

[i] See also *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264, HL

[ii] *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, HL, *Northumbrian Water Limited v Sir Robert McAlpine Limited* [2014] EWCA Civ 685, CA UK.

IMPORTANT
Readers are strongly advised not to rely or act solely on the basis of the material contained herein which is meant for general information only and which is not intended as legal advice. Individual circumstances do vary, so specific advice must be sought before undertaking any transactions, taking any action or making any decision. Any liability that may arise from any reliance on or use of any part of the contents in this publication is expressly disclaimed.

© 2024 Tay & Helen Wong. All rights reserved.