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INTELLECTUAL PROPERTY

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Trade Descriptions Act 2011

IN THIS ARTICLE, SHARON CHIEN COMPARES AND HIGHLIGHTS THE CHANGES IN THE TRADE DESCRIPTIONS ACT 2011 WHICH REPLACED THE TRADE DESCRIPTIONS ACT 1972.

The Trade Descriptions Act 2011 ("TDA 2011") governs the quasi-criminal nature of prosecution that rights holders can rely on to curb counterfeiters. This mechanism works hand in hand with the Ministry of Domestic Trade, Cooperatives and Consumerism ("MDTCC") which will then use its statutory powers to enforce the rights of the trade mark owners.

The TDA 2011 which came into effect on 1 November 2011 was enacted to replace the Trade Description Act 1972 ("TDA 1972").

In this article we will discuss the main differences between the TDA 2011 and the TDA 1972 and further highlight the effects on trade mark owners, consumers and the public at large.

Under the TDA 1972, a rights holder may rely on the relevant provisions to lodge a complaint with the MDTCC asserting that its mark has been infringed and/or there has been passing off involving the mark.

(i) Where the infringing mark is identical with the registered owners' trade marks, the owners may pursue an action against the suspected infringer or counterfeiter by lodging a complaint with the MDTCC asserting that its mark has been infringed and/or there has been a passing off involving the mark. The MDTCC may organise and conduct raids against the suspected infringer or counterfeiter. Once the raid is concluded, the MDTCC may prosecute the suspected infringer or counterfeiter on the advice of the Attorney General's Chambers.

(ii) Where the infringing mark is not identical with the registered or unregistered owners' or common law owners' trade marks, the registered or unregistered trade marks owners or common law owners may apply for a Trade Descriptions Order ("TDO") under the TDA 1972 to declare the infringing mark a false trade description. The TDO empowers the MDTCC to organise and conduct the raids against the suspected infringer or counterfeiter. Once the raid is concluded, the MDTCC may prosecute the suspected infringer or counterfeiter on the advice of the Attorney General's Chambers.

One of the significant features of the TDA 2011 is that only the owners of registered trade marks[1] can apply for a TDO to declare that the infringing mark is a false trade description. This is in contrast with the TDA 1972 where unregistered trade mark owners or common law owners were eligible to apply for a TDO, asserting that their marks have been infringed and/or passed off.

Section 9(1) provides that where any person

being a registered owner of a registered trade mark claims that his rights in respect of such trade mark are being infringed by any other mark or get-up used by any other person which is not identical with his registered trade mark but can be passed off as his registered trade mark, he may apply to the High Court for a TDO to declare that the infringing mark is a false trade description[2].

Section 8(1) defines a trade description to include an indication, whether direct or indirect, and by any means given, in respect of any goods or parts of goods relating to any rights in respect of trade marks registered under the Trade Marks Act 1976.

Where the infringing mark is identical to a registered trade mark, the registered trade mark owner can rely on section 8 of the TDA 2011 to lodge a complaint with the MDTCC asserting that its mark has been infringed and/or there has been a passing off involving the mark. There will not be a need to apply for a TDO and the MDTCC can be immediately approached to file a complaint.

Another noteworthy feature is that the life span of a TDO is now one year from the date on which it is made, unless renewed by the High Court on such terms and for such further period as the High Court may decide. This provision is in contrast to the TDA 1972 where the validity of a TDO was for a term of five years.

In addition to section 9(1) and 9(5) of the TDA 2011, it is now a requirement under section 9(2) to specifically identify the infringing trade description in the application for a TDO.

Other features brought about by the TDA 2011 include, but are not limited to:

- False or misleading statement in relation to contest, games, etc:
  It is now a punishable offence under section 20 to make false or misleading statement in relation to contest and games.

- Defence of personal or domestic use:
  The defence of personal or domestic use under section 23 is now available to the person charged to prove that the commission of the offence was for the purpose of personal or domestic use. This defence is not available to a body corporate.

- Tipping-off:
  It is a punishable offence under section 44 to disclose information to others which is likely to prejudice an investigation or proposed investigation.

- Evidence of *agent provocateur*:
  Evidence of an *agent provocateur*[3] is now admissible under section 53.

- Reward for information:
  The court may under section 66 direct the payment of any part of the fine (not exceeding one half of such fine) to any person who gave the information leading to the conviction.

- Possession for supply:
  A person having in his possession three or more of the same goods of similar description and bearing the same trade description is deemed under section 12 to have in possession the goods for supply.

- False or misleading statement in advertisement:
  No person shall under section 18 make any false or misleading statement in any advertisement in relation to any goods or services. The definition of advertisement has now been extended to include every form of advertising through electronic means.

With the TDA 2011 having come into force, all unregistered trade marks owners should take immediate steps to register their trade marks in Malaysia if they wish to pursue an action under the TDA for the purpose of safeguarding and defending their rights in the trade marks.

It appears from a reading of the TDA 2011 that the government is encouraging not only trade mark owners but also the public at large to participate in ensuring the ultimate protection of intellectual property is improved. It would appear that the TDA 2011 has been carefully crafted by the Malaysian Government to secure better protection of consumers' interests and to further curb the occurrences of false trade descriptions and misleading statements, conduct and practices in relation to goods or service.

SD

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[1] Trade marks registered under the Trade Marks Act 1976 of Malaysia.
[2] A false trade description in this context refers to a false trade description for the purpose of section 8 of the TDA 2011.
[3] *Agent Provocateur* can be defined as a person employed by the police or other law enforcement body to act undercover and entice or provoke another person to commit an illegal act.

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CASE NOTE

Norman Disney & Young v Affifi Hj Hassan[1]

IN THIS ARTICLE, DEBBIE WOO PUI HAAN EXAMINES THE RECENT DECISION OF THE HIGH COURT IN NORMAN DISNEY & YOUNG V AFFIFI HJ HASSAN IN RELATION TO THE ILLEGALITY OF TRANSACTIONS INTENDING TO CIRCUMVENT STATUTORY PROVISIONS.

Facts

The plaintiff, an Australian firm of consulting engineers ("Consulting Firm"), and the defendant, a registered engineer who is a Malaysian citizen ("Registered Engineer"), were the registered shareholders of Norman Disney & Young Sdn Bhd ("NDYSB"), a company incorporated in Malaysia back in 1987.

The Registered Engineer was brought in as one of the local partners to hold the majority shares in the course of restructuring NDYSB and this was for the purpose of enhancing "the company's ability to secure specific contracts". The shares of NDYSB proposed to be distributed to the local partners were to be held on behalf of Australian investors with a very small percentage to be held by the local partners.

The restructuring was intended to achieve the following as its end result:

(a) NDYSB would be locally established with Bumiputra status;

(b) the Bumiputra partners would have 75% of total shareholding in NDYSB;

(c) the Bumiputra partners would control the decision making in NDYSB;

(d) there would be two Bumiputra directors who would collectively hold 75% of NDYSB's shares and one Malaysian Chinese director who would represent the Malaysian Chinese staff; and

(e) the Malaysian Chinese director was to have 25% of NDYSB's shares.

Premised on that understanding, the parties entered into a myriad of agreements on 28 September 1991 and pursuant to those agreements, 65,000 NDYSB shares were sold by a director of NDYSB, Liew Yan Sin, to the Registered Engineer for a total purchase price of RM811,200. Upon the completion of the sale and purchase, the purchase price of those shares constituted a debt owing by the Registered Engineer and was secured by a charge over the shares. In addition, call option agreements were executed pursuant to which the Registered Engineer granted the Consulting Firm the option to purchase the 65,000 shares exercisable upon the occurrence of certain events as stipulated in the agreements.

Subsequently, disputes arose between the parties and the Registered Engineer presented a winding-up petition against NDYSB on 1 April 2009. This triggered the call events under the call option agreements and the Consulting Firm exercised its call rights. The Registered Engineer failed to comply with the call option requirements, which led to the Consulting Firm's claim against the Registered Engineer for, inter alia:

(i) a declaration that it was the beneficial owner of the 65,000 shares;

(ii) specific performance of the call option agreements; and

(iii) an order restraining the Registered Engineer from dealing with the shares.

The Registered Engineer applied to strike out the Consulting Engineer's action.

Decision

The main issue considered by the High Court was whether the agreements entered into between the parties were intended to circumvent the law, in particular sections 7A(3) and 10(4) of the Registration of Engineers Act 1967 ("REA 1967") and hence deemed void under section 24(a) and (b) of the Contracts Act 1950, which read as follows:

"24. What considerations and objects are lawful, and what not.

The consideration or object of an agreement is lawful, unless –

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law

(c) ...

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

By virtue of section 7A(3) of the REA 1967, approval is required for a company to practise as consulting engineers in Malaysia and such approval can only be granted to a company whose shares are held by professional engineers and where the board of directors comprises professional engineers. Section 10(4) of the REA 1967, on the other hand, stipulates that only a Malaysian citizen or permanent resident of Malaysia qualifies for registration as professional engineers.

Lee Swee Seng JC in his judgment allowing the Registered Engineer's application held the following:

"To allow the plaintiff to pursue their claims would be to allow them to defeat the intention of Parliament that for the practice of consulting

engineers the shares in the body corporate so formed for this purpose must be held by professional engineers who must be a citizen or a permanent resident. The end result would be that foreigners would be indirectly practising as consulting engineers through the back door way. Until changes are made to the law with respect to engineers in the light of globalization and the opening up of our market to foreigners, it remains a prohibition."

"The attitude of the court has been that anything that smacks or smells of illegality or any set of facts that seems to support such a suggestion will surely be seriously scrutinized by it. No court would knowingly be a party to the enforcement of an unlawful agreement."

The court also held that the agreements relating to the participation in the shares of NDYSB were intended by the parties to circumvent the provisions of the REA 1967 and thus the contracts were void and unenforceable under section 24 of the Contracts Act 1950.

Further, Lee Swee Seng JC in his judgment cited the case of **Kondapuram Raghuram v Soo Peng @ Yew Soo Peng**[2] where a similar issue was addressed in the context of an "Ali-Baba" arrangement vis-à-vis the application of section 24(e) of the Contracts Act 1950 and in particular referred to the following paragraph from the judgment in that case:

"Hence, so long as the scheme concerned has the effect of defeating statutes or laws and policies of Malaysia, the scheme and any agreements thereunder would be illegal and unenforceable. It is trite that no court will lend its aid to a man who found his cause of action upon an illegal act (intended or otherwise). Such a cause of action cannot be maintained and no claim or recovery pursuant thereto would be allowed. This ground alone will justify the petition be struck out by the court in limine."

Conclusion

The High Court's decision in **Norman Disney & Young** makes it clear that sham arrangements or any form of agreement that in substance is intended to circumvent the law will not be enforced by the courts. In addition, where the true intention was to create an "Ali Baba" type of company to deceive public administration and where control of the company is ultimately still vested in the hands of foreigners, such arrangement would be construed as illegal and unenforceable on the basis that it is against public policy in Malaysia.

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[1] [2011] 1 CLJ 210
[2] [2006] 7 MLJ 510

DISPUTE RESOLUTION

Guidelines on *Ibra'* for Sale Based Financing and on Late Payment Charges

IN THIS ARTICLE, DATIN JEYANTHINI KANNAPERAN AND IZAHAIRANI IZANI OUTLINE THE GUIDELINES ON *IBRA'* FOR SALE BASED FINANCING AND THE GUIDELINES ON LATE PAYMENT CHARGES.

Introduction

The new Guidelines on *Ibra'* (Rebate) for Sale Based Financing and Late Payment Charges for Islamic Banking Institutions issued by Bank Negara Malaysia ("the Guidelines") are applicable to all Islamic banks licensed under the Islamic Banking Act, banks licensed under the Banking and Financial Institutions Act 1989 ("BAFIA") and development financial institutions prescribed under the Development Financial Institutions Act 2002 ("DFIA") permitted to carry on Islamic banking business.

Concept of *Ibra'*

Ibra' represents the waiver accorded by a person to claim his right which lies as an obligation (*zimmah*) of another person which is due to him[1].

From a financial perspective, *Ibra'* can be considered as a rebate given by one party to another in various economic transactions. *Ibra'* may for example be granted by a bank to a customer who has settled his or her debt before the end of the settlement period provided in the contract entered into between the parties[2].

Bank Negara Malaysia ("BNM") has noted that most Islamic financial institutions do not, in their respective finance facilities documentation, include a clause on *Ibra'* due to the concern that this may lead to uncertainty *(gharar)*

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in the selling price[3] and that the absence of a clause on *Ibra'* may cause a dispute between the customer and a bank vis-a-vis the customer's right to *Ibra'* upon early settlement of an outstanding debt.

Following a discussion on this matter by the Shariah Advisory Council ("SAC") of BNM the Guidelines have been issued to set out the incorporation, application and implementation of *Ibra'* in the documentation for sale based financing.

Application of the Guidelines on *Ibra'* for Sale Based Financing

A. 1 November 2011

The Guidelines, in general, took effect from 1 November 2011, but the requirements set out below and appearing in paragraph 6 of the Guidelines took effect immediately on issue.

Banks are required to grant *Ibra'* to all customers who have ongoing financing contracts with the banks entered into prior to 1 November 2011 and to all customers who enter into such financing contracts after 1 November 2011, who settle their financing before the end of the financing tenure, for example:

(i) those who make an early settlement or early redemption;

(ii) where settlement of the original financing contract is due to a restructuring;

(iii) even in cases of settlement by customers who were in default; and

(iv) where settlement by customers is in the event of termination/cancellation before the maturity date.

The *Ibra'* shall be the difference between the amount of profit calculated based on the ceiling/contracted profit rate ("CPR") and the amount of profit based on the effective profit rate ("EPR") and must be granted if the EPR is lower than the CPR.

B. 1 July 2012

The requirements set out below and which appear in paragraphs 7–90 of the Guidelines shall be fully implemented from 1 July 2012.

Paragraph 7 states, amongst others, that:

- the banks must, for facilities granted **after** 1 July 2012, incorporate an "*Ibra'* clause" in all loan documentation. The banks must, at a minimum, specify when *Ibra'* shall be granted and the formula for it along with the relevant conditions and procedures on the granting of *Ibra'*, which must be communicated to the customer individually via the product disclosure sheet (this can be found in BNM'S Guidelines on Product Transparency and Disclosure); and

- for facilities granted **before** 1 July 2012, a bank must inform customers vide notices, the applicability of *Ibra'*, the formula for the relevant conditions and procedures as well as provide and state the *Ibra'* and the formula in all recovery documents/notices/cause papers (for example, redemption statements, letters of demand, statement of claim) which must also state the bank's commitment to provide *Ibra'*.

Calculation of *Ibra'* (paragraph 8 of the Guidelines)

The amount of *Ibra'* that may be granted by banks is the amount of unaccrued profit at the point of settlement before the maturity date.

Early Settlement Charges and *Ibra'*

Banks are not entitled to claim a penalty charge for early settlement unless the charges represent the cost incurred by banks arising from such early settlement which may include:

(a) costs that have not been recovered because a financing contract has a structure with discount elements at the initial period of financing; and

(b) initial costs that have not been recovered (for example, for zero moving costs products).

Such charges **cannot** include:

- loss of profit that would have been received if the financing continues until end of the specified time period or expected tenure; or

- marketing and other costs associated with obtaining new customers.

Late Payment Charges

Should there be any late payment charges where settlement is reached before the maturity date, such charges shall be calculated separately from the *Ibra'* calculation.

Termination of Financing Due to Non-Delivery or Non-Possession of Underlying Asset

Banks are encouraged to give due consideration in handling cases where the customer ends up without possession of the underlying asset, for example arising from abandoned projects or fraud. The provisions of the Guidelines specifically provide:

- that where there is a portion of the principal amount to be disbursed, banks are not allowed to claim the undisbursed principal amount and upon settlement by customer, banks should grant *Ibra'* on the undisbursed amount;

- that where a portion of profit has already accrued and become payable under the financing contract, banks are allowed to claim the accrued profit portion up to the date of the first sign of inability to deliver the asset; and

- banks ought to perform their own due diligence as a counterparty in contracts involving assets under consideration.

Disclosure at the Point of Entering a Contract (paragraph 9 of the Guidelines)
Banks are required to provide an illustration showing the application of *Ibra'* with disclosure on additional items that include the amounts paid for each installment, apportionment of principal and profit in each installment, outstanding principal and outstanding selling price after each installment and so on.

Application of the Guidelines on Late Payment Charges
The effective date of these Guidelines is 1 January 2012.

Part I: Late Payment Charges
The Guidelines for late payment *ta'widh* (compensation based on actual loss incurred due to default) and *gharamah* (penalty charged on defaulters over and above *ta'widh*) shall be implemented based on the following principles:

Principle 1: Combined late payment
Banks may impose a combined late payment charge comprising *ta'widh* and *gharamah* (penalty) up to a prescribed limit which:

(i) shall be capped at the banks Average Financing Rate ("AFR") based on the product/type of customer and shall be based on AFR at the point of default computed on a monthly basis. This combined rate shall not:

- exceed the costs/interest on default borne by an equivalent customer under conventional finance; and
- be compounded on the overdue installments or outstanding principal amount.

(ii) subject to the above limits banks are accorded flexibility in structuring the components of the combined late payment charges; and

(iii) for purposes of initial adoption of the Guidelines, banks are required to submit an application to BNM for all changes to late payment charges and explain the justification for such charges.

Principle 2: Ta'widh
Banks are allowed to be compensated by way of *ta'widh* up to the actual amount of losses incurred subject to the overall combined limit. In determining the compensation rate, Banks are required to observe the following:

(i) actual loss to be compensated from date of payment until date of maturity shall not exceed 1% per annum on the overdue installments in the case of default of scheduled payments or on the outstanding balance subject to *Ibra'* if applicable in the case of default causing the entire facility to be recalled/brought to court prior to maturity;

(ii) the reference rate for actual loss shall be determined at the point of default computed on a monthly basis from the payment due date; and

(iii) *ta'widh* earned shall be included in the computation of profit distributable to the banks' depositors/investment income holders.

Principle 3: Gharamah
Gharamah is a deterrent for defaulters against delaying repayment of their obligations. As the same is not recognized as a source of income, all *gharamah* is to be channeled to charitable organizations with specific directions on *gharamah* accounts and distribution of *gharamah*.

Operational Requirements
(i) banks are expected to ensure that late payment charges are imposed only on negligent defaulters. Clear policies and procedures must be implemented to ensure that defaulters with genuine financial difficulties are given due consideration which should include viable options in assisting the defaulter to appeal/seek waiver of late payment charges;

(ii) the computation of late payment charges shall be on a daily rest basis;

(iii) the accumulated combined late payment charges shall not exceed 100% of the outstanding principal amount; and

(iv) banks must ensure that customers are duly informed of any revised fees at least 21 days before the effective date.

Part II: Post Judgment Debts
This part of the Guidelines seeks to provide guidance to banks on late payment charges on judgment debts. Banks are required to adopt the following policies in respect to late payment charges on a judgment debt.

Late Payment Charge
The court may impose a late payment charge at the rate provided by the rules of Court. The imposition of such a charge is based on a combination of the *ta'widh* and *gharamah* mechanism.

Ta'widh
(i) Banks can be compensated for their actual loss (excluding the Court Order for costs) based on *ta'widh* with the *ta'widh* rate being the prevailing Islamic Money Market rate on judgment amount.

(ii) If the amount of *ta'widh* equals or exceeds the total amount of late payment charges, then the total amount of late payment charges may be taken by the banks as compensation.

(iii) If the amount of *ta'widh* is less than the total amount of late payment charges, the difference will be treated as *gharamah*.

Gharamah
Gharamah is imposed as a preventive measure against late payment by the judgment debtor. *Gharamah* is the difference between the late payment charge and *ta'widh* which is the balance if *ta'widh* is less than the late payment charge. The requirement for *gharamah* to be channeled to charitable organizations and reports/disclosures on the same applies.

Operational Requirements
The late payment charge shall apply to the basis judgment sum awarded from the date of the judgment is made until the judgment is fully settled.

In this respect:

(i) the basis judgment sum refers to the outstanding balance (subject to *Ibra'* if applicable) and does not include the late payment charges before judgment and other costs;

(ii) the accumulated late payment shall not exceed the outstanding principal of the judgment sum awarded;

(iii) the late payment charge shall not be compounded on the basis judgment sum awarded;

(iv) the *ta'widh* rate shall be determined on the date of judgment and reviewed monthly from the date of judgment; and

(v) the late payment charge and *ta'widh* amounts shall be computed on a daily rest basis.

Conclusion
These Guidelines will have a significant impact on recovery action for sale based financing both in the availment and recovery thereof as banks are now required, through the loan documentation and/or through cause papers, to specify *Ibra'* (the formula along with the relevant conditions) and when it shall be granted. The challenge however comes in the drafting of loan documents and cause papers accurately and in a manner that enables customers to understand the calculation of the applicable *Ibra'*.

As far as the late payment charges are concerned, the new regime may require that banks and their lawyers reconsider what has previously been standard terminology in loan documentations and court papers. SD

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[1] Kuwait Ministry of Waqf and Islamic Affairs, *Al-Mawsu`ah al-Fiqhiyyah al-Kuwaitiyyah*, 1993, v. 1, p. 142
[2] Guidelines on Ibra' (Rebate) for Sale-Based Financing – BNM/RH/GL 008-13
[3] Shariah Resolutions in Islamic Finance, 2nd Edition, Bank Negara Malaysia

EMPLOYMENT LAW

Averting a possible scenario of conflict of interest?

IN THIS ARTICLE, WONG KIAN JUN LOOKS AT THE FIDUCIARY RELATIONSHIP BETWEEN AN EMPLOYER AND AN EMPLOYEE.

As an employer places confidence and trust in its employees, an employee in turn owes a fiduciary duty to his employer and, consequently, cannot act in any manner which would conflict with the interests of his employer. In his book, *Misconduct in Employment*, B.R. Ghaiye wrote that the relationship between an employer and an employee is of a fiduciary character and if the employee does an act which is inconsistent with the fiduciary relationship, then it will be an act of bad faith for which his services can be terminated.

In determining whether a conflict of interest had occurred, the Industrial Court will generally ascertain whether the employee had placed himself in a position where his interest conflicts with the interest of his employer.

A conflict of interest situation may have a detrimental effect on many different levels such as overpayments for services by the company wherein the service provider is associated with an employee in the company. There are instances where a conflict of interest may not result in financial loss to the company such as where spouses work in the same company. Even if there is no financial loss to the company, such relationships limit the company's ability to deploy manpower and also may result in the sharing of confidential information between the spouses which one spouse is not privy to.

There are many ways in which an employer can prevent a situation of conflict of interest from arising.

It is not uncommon for employment contracts to expressly state that employees are prohibited from engaging in activities which may lead to a situation of conflict of interest. Such clauses may further specify that employees are to dedicate their time and efforts in discharging their duties. For example, many employment contracts today have express clauses forbidding employees from engaging in alternative employment during their tenure of employment without the express approval of their employers.

In addition there may be terms and conditions of employment which specifically provides that the employee cannot have a spouse or immediate family member working in the same company and in the event this takes place one of the related parties would have to leave the company.

Furthermore, employers may implement standard operating procedures whereby employees are required to make declarations on a yearly basis that none of the company's suppliers are related to them in any way. Employees in the procurement division are typically subjected to such a requirement.

However, it should be noted that in the event the employer wishes to expressly prohibit certain conduct, it should ensure that the relevant provisions are comprehensively worded so that the employee concerned may not rely on technicalities to argue that he does not fall within the ambit of the relevant provision(s).

In addition to express clauses in an employment contract, an employee has an implied fiduciary obligation to act in good faith and with honesty under his employment contract. An employee cannot act in conflict with the interests of his employer, and any such breach is actionable despite the absence of any express prohibition.

In the case of **Cellular Communications Network (M) Sdn Bhd v Johari Tahar**[1], the court held:

> *"The implied term of contract relied upon by the company can hardly be gainsaid. In a passage at p. 446 of The Modern Law of Employment, G.H.I. Fridman put the matter as follows:*
>
> *The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully and if by his own act he prevents himself from doing so, the master may dismiss him. There are thus two aspects of the employee's duty under the contract of employment. He must provide a satisfactory performance of the work he has contracted to do; and he must act faithfully and in accordance with the interests of his employer.*
>
> *The court has little difficulty in holding that there is implied into the employment contract between the claimant and the company the terms of the nature set out above. Quite apart from express stipulations of conflicts of interests rules in an organisation there is the specific implied term that an employee shall not act in any manner which will put his interests in conflict with those of his employer."*

In *Harvey on Industrial Relations and Employment Law*, it states that:

> *"Equity regards the relationship of master and servant and depending upon a continuing bond of trust and confidence. The common law recognizes an obligation on the part of the servant to give honest and faithful service. The latter is now treated as an implied term of the contract. There is obviously some overlap between the equitable and legal concepts, but they do not correspond exactly."*

It is apparent from the above that even if an express provision is not present in an employment contract, an employer may still rely on the implied duties of an employee to ensure fiduciary obligations are adhered to.

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[1] [2001] 1 ILR 387

R E A L   E S T A T E

Private caveats under the National Land Code 1965

IN THIS ARTICLE, ANITA BALAKRISHNAN DISCUSSES THE CONSEQUENCES OF ENTERING A PRIVATE CAVEAT WRONGFULLY OR WITHOUT REASONABLE CAUSE.

A private caveat is a caveat entered on the document of title to land pursuant to section 322 of the National Land Code 1965 ("NLC"). It comes into effect when a memorial of the private caveat is entered or endorsed on the document of title to land. A private caveat prevents a registered proprietor from dealing with the land or any interest therein so long as it continues in force, that is, it prohibits the registration, endorsement or entry on the register document of title of the caveated land of any transfer, certificate of sale, lease or tenancy, charge or lien, easement or lien holder's caveat.

Not every person or body has a right to enter a private caveat; only a person or body having a caveatable interest in land is entitled to do so. A caveat is interim protection for a person or body who has an entitlement to register dealings under the NLC (a transfer, charge or lease) over land but is not yet in a position to do so. Only persons or bodies who may effect a dealings with land or interest in land under the NLC are entitled to enter a caveat.

Section 323(1) of the NLC sets out the categories of persons or bodies who are entitled to enter a private caveat. They are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficiary entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be beneficially entitled under any trust affecting any alienated land or undivided share in land.

The following are examples of persons or bodies who do not have caveatable interest:

- In **Anafartalar Caddessi Sdn Bhd v Southern Investment Bank Berhad**[1], the Court of Appeal held that a shareholder of a company had no right to caveat a land owned by the company as the shareholder has no equitable interest in the land.

- In **Luggage Distributors (M) Sdn Bhd v Tan Hor Teng**[2], Gopal Sri Ram JCA held that tenancies exempt from registration are not registrable and thus do not qualify as caveatable interests.

- In **Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd**[3], the Court of Appeal held that the fact that there was payment of earnest deposit and that it should be refundable did not provide to the caveator a caveatable interest in the land, that is, a mere pecuniary interest in land does not entitle a person to enter a caveat.

- In **EM Buxton and Anor v Packaging Specialist Sdn Bhd**[4], the caveator, the purchaser of the land who had defaulted and whose deposit had been forfeited by the vendor, claimed that although it was an unsecured debt, it had arisen out of a land transaction and, hence, the debt was caveatable. Siti Norma Yaakob J noted that since the caveator was seeking a refund of its deposit and not specific performance, the caveator had clearly shown that it was no longer interested in purchasing the property. Hence the caveator had no interest in the land capable of being registered and the caveator only has a personal claim against the proprietors.

Consequences of wrongfully entering a caveat of the land

It is provided in section 329 of the NLC that any person or body who wrongfully or without reasonable cause secures the entry of, or fails to withdraw, any caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

In **Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor**[5], Abdul Malik Ishak J held that there are two limbs in section 329(1) of the NLC that a plaintiff has to satisfy:

(a) that the private caveat entered by the defendants was entered wrongfully or without reasonable cause; and

(b) that the plaintiff had suffered damages or losses as a result of the lodgement of the private caveat.

The learned judge went on further to state that the term "wrongfully or without reasonable cause" is not defined in the NLC. Section 329(1) of the NLC creates a right of action where there is a malicious or a negligent or incorrect entry of a private caveat or a failure to withdraw a private caveat. The requirements of "wrongfully and without reasonable cause" ought to be read disjunctively so that a plaintiff is entitled to succeed if he can show that the defendant's private caveat had been lodged wrongfully. There was no necessity for the plaintiff to show that the private caveat was lodged without reasonable cause.

Selvam JC in **Tan Soo Leng David v Wee, Saktu & Kumar Pte Ltd and Anor**[6] concluded that the word "wrongfully" ought to be construed to mean "without legal right".

Who will be entitled to bring an action

In **Quill Construction**, it was held that normally it is the registered proprietor of the land who may institute an action under section 329(1) of the NLC. However, any person or body taking any interest from the registered proprietor of a land and who has suffered loss by the entry of, or refusal to withdraw, the private caveat is also entitled to initiate an action for wrongful entry of a private caveat.

Actual damage or loss suffered

In **Mawar Biru Sdn Bhd v Lim Kai Chew**[7], James Foong JC held that in order to be entitled to an award for damages actual loss must be proved, that is, there must be real damages as opposed to what might have been the damages.

Conclusion

Not every person is entitled to enter a private caveat over land. If a person who is not entitled to enter a caveat does so, the person aggrieved by the existence of the private caveat will be entitled to bring an action against the caveator for wrongful entry of the private caveat and if the person aggrieved is able to prove that he has suffered any damage or loss as a result of such private caveat, then the caveator will be liable to

pay compensation for the actual damage or loss suffered.

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[1] [2003] 1 MLJ 561
[2] [1995] 1 MLJ 719
[3] [2007] 7 MLJ 3
[4] [1987] 1 MLJ 342
[5] [2003] 6 MLJ 279
[6] [1993] SLR 569
[7] [1992] 1 MLJ 336

CASE NOTE

Galaxy Energy Technologies Sdn Bhd v Timbalan Pemungut Duti Setem, Malaysia & Anor[1]

IN THIS ARTICLE, CYNTHIA LIAN ANALYSES THE RECENT COURT OF APPEAL DECISION IN **GALAXY ENERGY TECHNOLOGIES SDN BHD V TIMBALAN PEMUNGUT DUTI SETEM, MALAYSIA & ANOR** IN RELATION TO THE PRINCIPLE THAT STAMP DUTY IS CHARGEABLE ON INSTRUMENTS AND NOT TRANSACTIONS.

Facts

On 17 January 2007, Galaxy Energy Sdn Bhd ("the Company") entered into a sale and purchase agreement ("SPA") with Tennessee Builders Products Sdn Bhd ("Vendor") to purchase a piece of land for RM2,280,000. Pursuant to the SPA, the Company paid earnest money and a further sum as a deposit to the Vendor. The balance of the purchase price was to be paid by the Company within a period of 90 days from the unconditional date, as defined under the SPA.

Subsequently, the memorandum of transfer, Form 14A ("MOT"), was executed on 18 July 2007. The Collector of Stamp Duties ("Collector"), acting under section 36(1) of the Stamp Act 1949 ("SA"), assessed the duty chargeable on the MOT at RM78,600 which was duly paid by the Appellant.

However, the Company was unsuccessful in obtaining the financing to pay the balance of the purchase price as the Company's applications to three different financial institutions were rejected. As a result, the SPA was terminated and the earnest money and deposit were forfeited. The MOT and original document of title were all returned to the Vendor.

The Company then applied to the Collector for a refund of the stamp duty paid on the instrument of transfer pursuant to section 57(f)(iii) and/or (iv) of the SA. The Collector rejected the Company's application for refund on the ground that the inability to obtain financing to pay for the balance of the purchase price was not a ground within the meaning of section 57(f)(iii) of the SA for a refund of stamp duty.

Aggrieved, the Company filed an application for a judicial review under O 53 r 3 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of the Collector and for an order of *mandamus* to direct the Collector to refund the stamp duty paid on the MOT.

The High Court dismissed the application for judicial review and held that the inability to pay the balance purchase price which resulted in the termination of the SPA was due to an inability to comply with a term of the contract. Therefore, this was not an inability within the meaning of section 57(f)(iii) of the SA.

Decision

On further appeal to the Court of Appeal, the Company's appeal was allowed.

The crux of the issue in this appeal concerns the construction of section 57 of the SA which reads as follows:

"57. Allowance for spoiled stamps

Subject to any rules which may be made under this Act and to the production of such evidence by statutory declaration or otherwise as the Collector may require, allowance shall be made by the Collector for stamps spoiled in the following cases

(f) the stamp used for any of the following instruments

> *(iii) ...*
>
> *(iv) an instrument executed by any party thereto, which by reason of the inability or refusal of any person to act under the same, or for want of registration within the time required by law, fails of the intended purpose or becomes void;" [emphasis added]*

Having scrutinized the language of the SA, in particular the phrase "by reason of the inability or refusal of any person to act under the same" in section 57(f)(iii) of the SA, the Court held that it is a question of fact whether a person comes within the meaning of the word "inability" in section 57(f)(iii) and is to be determined in the light of the particular case. On the facts of this case, the inability by the Company to complete the sale of the land due to its proven

inability to obtain financing is an "inability" within the meaning of section 57(f)(iii). The inability to complete the sale in this instance was not self-induced.

Further, "any person" in section 57(f)(iii) is wide enough to include the party to the instrument, that is the Company, and it was not the intention of the legislature to interpret the word "any person" as "any other person".

The MOT was stamped under item 32(a) of the First Schedule to the SA with the heading "Conveyance, Assignment, Transfer Or Absolute Bill of Sale". In this regard, "conveyance on sale" is defined in the SA to include "every instrument whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction".

The MOT was the relevant "conveyance on sale" in this case. As the purpose of the MOT was to transfer or vest the property in the Company, due to the Company's inability to pay the balance purchase price which resulted in the termination of the SPA, there was clearly no "conveyance on sale" within the meaning of the SA.

The Court of Appeal held that the case falls squarely within section 57(f)(iv) of the SA which empowers the Collector to give allowance in respect of spoiled stamps. As such, the Company was entitled to a full refund of the stamp duty paid on the MOT.

Conclusion

This is the first reported case on the provision for allowance of spoiled stamps under section 57 of the SA and reiterates an important principle of stamp duty that stamp duty is chargeable on instruments and not transactions. As the MOT was not capable of transferring the property to the purchaser, there was therefore no conveyance on sale and no instrument chargeable to stamp duty.

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[1] [2011] 5 CLJ 829

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