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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 3/2024)

The Publications Committee is pleased to circulate the third edition in this case note series.

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Thank you.

Gregory Das
Chairperson
Publications Committee

Highlights from the Appellate Courts

Khairul Azizi bin Abdul Jalil v. Public Prosecutor (CA)
Criminal Procedure — Defence of Unsound Mind

Khairul Azizi bin Abdul Jalil v. Public Prosecutor (Criminal Appeal No.: A-05(M)-586-12/2022) was an appeal regarding the conviction of the Appellant under s. 302 of the Penal Code for the murder of an Indonesian female named Aidah ('**Aidah**'). The Appellant was also sentenced to death by the trial court.

The prosecution's case against the appellant was premised upon the Appellant's confession that he killed Aidah as well as circumstantial evidence, as follows:-

Confession

(i) The Appellant surrendered himself to the police station and confessed to killing Aidah by hacking her to death. The Appellant told police witnesses PW4 and PW11 that he had killed her as she maligned him to others.

Circumstantial Evidence

(ii) The Appellant's father ('**the father**') testified that Aidah was supposed to clean a homestay on 9.10.2017, and asked the Appellant to follow them to Kuala Kangsar for a business meeting. The Appellant however refused on the basis of feeling unwell. After leaving for Kuala Kangsar, the father called the Appellant and asked him to open the homestay gate and door for Aidah. Aidah later called the father to inform him that the Appellant requested RM5 to buy cigarettes. The father also confirmed that the murder weapon i.e. a parang belonged to him.

(iii) A psychiatrist in a government hospital ('**PW17**') testified that the Appellant had consulted her with his father on 21.6.2017. His father complained that the Appellant was having auditory hallucinations in the form of voices giving commands. The Appellant's urine was positive for amphetamine and methamphetamine and the hospital records showed that the Appellant had been consuming drugs since he was 17 years old. The Appellant was diagnosed with substance induced psychosis and put on medication. PW17 also testified that the Appellant was previously admitted when he ingested pesticides.

(iv) PW17 further testified that the Appellant was last seen at the government hospital on 20.9.2017, i.e. 20 days before the incident. The Appellant informed PW17 that he did not hear any voices when he was at home and was also able to ignore the commands when he did hear them.

(v) PW18, a forensic psychiatrist, had assessed the Appellant for a period of 3 months. PW18 testified that the Appellant's urine showed recent consumption of methamphetamine and he found no convincing evidence of mental illness or disorder in the Appellant across 30 interviews he conducted. PW18 concluded that the Appellant was not suffering from schizophrenia at the time of the offence, but was substance dependent on methamphetamine. PW18 further opined that the Appellant was neither intoxicated nor having a drug induced psychotic episode during the commission of the offence.

The Appellant's defence was that he heard an unnatural whispering calling him to take a parang and kill Aidah who was still cleaning the house. The voices then told him to go to the police station to avoid an Indonesian person who was coming there to hack him. To further support his defence of unsound mind, the Appellant relied on the expert medical evidence of DW3, a senior consultant pathologist who opined that the Appellant was suffering from schizophrenia.
The trial court preferred the expert opinion of PW17 on the mental condition of the Appellant at the time of the offence. The trial judge found that PW17's opinion was supported by medical reports that the Appellant was diagnosed with drug induced psychosis. The trial judge also accepted PW17's opinion that there was no impairment of the Appellant's cognitive faculties at the time of committing the offence.

The Appeal Issues

(A) PW17's Testimony

The defence contended that s. 105 of the Evidence Act 1950 provides a presumption that the accused person is sane. Hence, the prosecution was not in the position to call PW17 to adduce evidence to prove that the Appellant was of sound mind. PW17 being called had unfairly influenced the trial judge's mind, especially since he was allowed to give evidence before DW3.The Appellant argued that it was his exclusive right to call his doctors first to establish insanity.

The Court of Appeal accepted that it was for the defence to call witnesses in relation to the defence of insanity, and the prosecution had no obligation to adduce evidence on the mental condition of the accused person until it was raised by him. However, the Court of Appeal held that the calling of PW17 did not prejudice the Appellant given that the trial judge had considered and evaluated at length the conflicting medical evidence of the doctors for the defence and the prosecution.

(B) Whether Trial Judge Erred in Preferring PW17's Opinion over DW3's

The Appellant contended that the trial judge had minimised the significance of DW3's evidence without considering that PW17 was one of the psychiatrists who was in her team and assisted her in evaluating the Appellant's mental condition. Given that PW17 is DW3's

subordinate, PW17 was not in a position to produce a conflicting report upon DW3's retirement. The Court of Appeal rejected this submission. PW17 being a part of DW3's team does not preclude him from producing a conflicting report. The Court of Appeal further supported the trial judge's findings that DW3's opinion had serious shortcomings, and that PW17's evidence was far more objective and better reasoned, and that he could produce medical literature that supported his findings.

The Court of Appeal also agreed with the trial judge that PW17 interviewed the Appellant on 30 occasions whereas DW3 only did so 4 times.

The Court of Appeal also emphasized the difference between medical insanity and legal insanity. Even assuming that DW3's evidence is accepted that the Appellant was suffering from medical insanity, that alone was insufficient as legal insanity is the requirement for the defence of unsoundness of mind. The Court of Appeal agreed with the trial judge that the Appellant failed to establish legal insanity given his conscious behaviour which preceded, attended, or followed the crime – there was no loss of his cognitive faculties.

Decision

The Court of Appeal upheld the trial court's conviction of the Appellant. In light of the Abolition of Death Penalty Act, and due to the absence of evidence that the Appellant was "*a hardcore criminal incapable of reform or rehabilitation*", the sentence of death was commuted to a sentence of imprisonment of 35 years with 12 strokes of the cane.

Written by
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Swissray Asia Healthcare Co. Ltd. v. V Medical Services M Sdn. Bhd. (CA)
Company law – Winding up – Fortuna injunction

The primary issue for the Court of Appeal to determine in ***Swissray Asia Healthcare Co. Ltd. v. V Medical Services M Sdn. Bhd. (Civil Appeal No. W-02(NCC)(A)-1479-08/2022) ("Swissray")*** was the test to be applied by the Courts in deciding whether to grant a Fortuna Injunction to restrain the filing of a winding-up petition where the disputing parties had agreed to resolve any dispute through arbitration. Specifically, the Court of Appeal had to determine whether the applicant party was, in order to obtain a Fortunat Injunction, required to show:-

i. A bona fide dispute **("Higher Threshold Test")**; or
ii. To merely show that there exists a "prima facie dispute" **("Lower Threshold Test")** that the debt fell within the arbitration clause.

In ***Swissray***, the Appellant, a Taiwanese company, and the Respondent, a Malaysian Company, had entered into a Distributorship Agreement **("DA")** for a period of 3 years effective from 1 April 2016. The DA contained an arbitration clause that stipulated that all disputes in connection with the DA shall be referred to arbitration in Switzerland and in accordance with the Swiss rules of International Arbitration.

Subsequently, the Respondent received 2 medical machines which were delivered to the University Malaya Medical Center **("UMMC")**. Due to alleged non-payment for the medical machines, the Appellant terminated the DA and demanded for payment of the purported debt. Ultimately the demands for payment were left unheeded, resulting in a statutory notice of demand, pursuant to Section 466 of the Companies Act 2016, being issued to the Respondent. This resulted in the Respondent filing an Originating Summons for the Fortuna Injunction on the basis that there existed a disputed debt where no award or final judgment was obtained. The High Court granted the Fortuna Injunction resulting in the appeal.

Before the Court of Appeal, the Respondent submitted that the proper test to be applied was the Lower Threshold Test, relying on the English Court of Appeal decision of *Salford Estates (No. 2) Ltd v Altomari Ltd [2014] EWCA Civ 1575*. Among others, the Respondent disputed the debt on the following grounds:

i. The 2 medical machines were not actually purchased by the Respondent but was only meant for demonstration and promotional purposes. The issuance of the purchase order was merely to assist the Appellant to deliver the machines to the end-user;
ii. That this agreement was based on an understanding between the parties that the terms of the DA would only become applicable if UMMC placed a confirmed order and the medical machines were registered under the Medical Device Act 2012; and
iii. The terms for the subject purchase, pursuant to the Purchase Order and the Appellant's conduct, had differed from the terms of the DA resulting in a variation and/or collateral contract between the parties for the two medical devices.

On the other hand, the Appellant submitted tha the transaction was a simple sale and purchase for the minimum number of required medical machines in accordance with the terms of the DA. It was the Appellant's position that the Respondent was bound by the plain terms of the DA and therefore there was no bona fide dispute of the debt. In respect of the test to be applied, the Appellant took the position that it is the **Higher Threshold Test.**

The Court of Appeal in determining the proper test to be used in deciding whether to grant a Fortuna Injunction, where there exists an arbitration clause governing the contract between the parties, began by first distilling the propositions surrounding the granting of a Fortuna Injunction, in the usual circumstances, as follows:

i. When a court exercises its discretion to issue an injunction to restrain the presentation of a winding up, it exercises its inherent jurisdiction;
ii. (Part of this inherent jurisdiction is to prevent abuse of the Court process; and
iii. When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds.

The Court of Appeal then delved into the following cases which had developed the law specifically in relation to disputed debts governed by the existence of an arbitration agreement between the contesting parties. The Court started by examining the English Court of Appeal decision of *Salford Estates (No 2) Ltd v Altomari Ltd (No 2)* which held that the test to be applied in respect of a disputed debt governed by an arbitration agreement ought to be lowered, and that the English Courts when faced with such a disputed debt ought to dismiss or stay the winding-up application, save in "wholly exceptional circumstances" which the judge found "difficult to envisage". This, in essence, was the **Lower Threshold Test**. The English Court of Appeal had reach this decision after finding that the court ought to refrain from conducting an inquiry of a summary judgment nature in circumstances when a dispute arises between parties who have contractually bound themselves to refer the dispute to arbitration.

Upon examining the same, the Court of Appeal drew a distinction here by highlighting that *Salford Estates (No 2)*

involved an unadmitted debt. However, it was the Court of Appeal held the view that the same stance should not apply where the debt is unequivocally admitted.

The Court of Appeal then looked at the Singapore High Court decision in *BDG v BDH [2016] 5 SLR 977* which was predicated on Singapore's pro-arbitration policy. The Singapore High Court had applied the Lower Threshold Test as well, holding that a dispute existed whenever a claim by one side was disputed by the other. The Singapore High Court found that there was no need to go into the merits of the claim, and all that was needed to establish the Lower Threshold Test was that a dispute existed which fell within the scope of the arbitration clause.

However, the Court of Appeal also took note of the Singapore Court of Appeal decision in *AnAnGroup (Singapore) Pte Ltd v VTB Bank [2020] SGCA 33* which considered the standard of review in respect of a winding up petition and had included an additional factor, namely that the dispute being raised must not be an abuse of the court's process.

In light of the additional factor laid out in *AnAn Group*, the Court of Appeal surmised that it is the High Threshold Test which should be applicable in determining whether to grant a Fortuna Injunction. This was, the Court of Appeal opinion, as to hold otherwise would be to countenance a situation where frivolous disputes will be alleged in order to obtain a Fortuna Injunction, thus amounting to an abuse of Court process. This was in line with the Court of Appeal decision of *Megasteel Sdn Bhd v Perwaja Steel Sdn Bhd [2008] 4 CLJ 352* which held that a party can present a winding up petition on the strength of a debt asserted without first needing a judgment.

Therefore, it would not make sense for the applicant of a *fortuna* injunction to be successful by merely asserting that the debt is disputed without being able to withstand curial scrutiny of its bona fideness. The mere existence of an arbitration clause was not a mechanical switch which could be turned on to evade a legitimate claim for a debt and evade obligations under the terms of an agreement. Accordingly, to countenance the Lower Threshold Test would open the door to parties in breach of their contractual obligations subjecting the system to abuse by the mere assertion of a dispute, regardless of its substance, purely to defeat the legitimate presentation of the winding up petition.

Applying the above to the present case, the Court of Appeal noted that there were repeated acknowledgements of debts by the Respondent together with a settlement arranged reached between parties at a previous meeting which had resulted in the Respondent making part payment. Therefore, while acknowledging that the Court should not indulge in a minute examination of the merits of any dispute, the Court of Appeal recognised that the case herein did not require such examination given the unequivocal admissions. Accordingly, the Court of Appeal held that no *bona fide* dispute existed and set aside the Fortuna Injunction granted by the High Court.

Written by
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Ho Sue San @ David Ho Sue San v. Hovid Berhad & Another (CA)
Company law – Oppressive conduct under s. 346 of the Companies Act 2016

In ***Ho Sue San @ David Ho Sue San v. Hovid Berhad & Another (Civil Appeal No.: W-02(NCC)(A)-162-01/2023)***, the Court of Appeal had to consider the principles under the House of Lord decision in *Ebrahimi v Westbourne Galleries Ltd [1973] AC 360*, in the context of an oppression claim under section 346 of the Companies Act.

The Appellant (who was the Applicant in the High Court) sought an order to buy-out the shares of a majority shareholder in the subject company on the premise that the majority shareholder had conducted itself in a manner that unfairly discriminated against or otherwise prejudiced the Appellant. The Appellant argued that he had a legitimate expectation based on an equitable bargain between himself and the majority shareholder, that the composition of the subject company's board would not change despite the majority shareholder holding the majority of shares. In this regard, the Appellant held that the impugned conduct of requisitioning an EGM for the appointment of six more directors in the board of the subject company was a breach of this equitable bargain.

The Court of Appeal (by a majority of 2 to 1) affirmed the High Court decision in dismissing the Section 346 claim. The majority of the Court of Appeal, having canvassed the 3 principles set down in *Ebrahimi v Westbourne* (supra) for establishing a relationship of "quasi-partnership" in a company, held that the Appellant had failed to fulfil any of the *Ebrahimi* principles. Chiefly, it was found that the alleged "equitable bargain", was purely a commercial agreement between both parties. Any breach of this bargain, if it existed, was purely a contractual one that does not ground a claim under Section 346.

It is noteworthy that in the dissenting judgment, it was found that the Appellant had made out a case under Section 346. Briefly, the dissenting judge found that the learned Judicial Commissioner had misdirected himself in relation to the laws under Section 346 and the principles under *Ebrahimi v Westbourne* (supra). His Lordship explained that the jurisprudence under Section 346 does not discriminate whether the affairs of the company are commercial or not. The dissenting judgment further clarified that the case of *Ebrahimi v Westbourne* (supra) did not hold that equitable considerations can never be imported if the affairs of the company or the relationship between the shareholders are commercial in nature.

Written by
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Lee Kwee Foh Sdn. Bhd. v. Loke Kooi Chuan Properties Sdn. Bhd. & Another (CA)
Land law – Memorandum of transfer voidable or defeasible under s. 360 of National Land Code / Civil procedure – Judicial estoppel

The central issue in ***Lee Kwee Foh Sdn. Bhd. v. Loke Kooi Chuan Properties Sdn. Bhd. & Another (Civil Appeal No: A-01(NCVC)(W)-490-07/2022)*** was whether the Appellant/First Defendant, by way of a Counter Claim against the First Respondent/Plaintiff, was entitled to the restitution of 22 lots of lands on the ground that the memoranda of transfer were void or insufficient instruments and therefore the First Respondent's title to the 22 lots of land was voidable or defeasible pursuant to s. 360(2)(1) and/or (b) of the National Land Code 1965 **("NLC")**.

The dispute arose from a sale and purchase agreement dated 12/1/1977 **("SPA")** between the Appellant and the First Respondent wherein the Appellant sold 22 lots of land at the purchase price of RM934,513.44 to the First Respondent. The last and final tranche of the purchase price under the SPA was paid to the Appellant via a letter dated 29/4/1978 from the solicitors of the First Respondent.

In 2018, the First Respondent filed an action against the Appellant at the High Court seeking prayers that it be registered as the owner of two pieces of land in Perak **("the Main Action")**, and that a Consent Order dated 3/11/2010 in respect of the said two pieces of land in Perak be set aside. The Appellant filed its defence to the Main Action and obtained leave in 2020 to file a Counter Claim against the First Respondent. The First Respondent subsequently withdrew the Main Action when it was set down for trial. However, the Appellant continued with the Counter Claim which was subsequently dismissed by the High Court after a full trial in 2022. The Appellant filed an appeal against the decision of the High Court.

The Appellant submitted that the memoranda of transfer for the 22 lots of land under the SPA were not executed by its actual director or the liquidator (as it was pleaded by the First Respondent that the Appellant was in Members' Voluntary Liquidation **("MVL")** during the sale of the said lands) and therefore were void or insufficient instruments under the NLC. The First Respondent opposed the Appellant's contention and argued that on the one hand the Appellant pleaded it was never in MVL, but on the other hand, the Appellant pleaded that the SPA and the memoranda of transfer were null and void as they were not executed by the liquidator but by its directors including one Lee Nyan Chong (whom the Appellant averred to be a fraudster) as the Appellant was in MVL.

The First Respondent tendered evidence to show that in caveat proceedings initiated by the First Respondent against the Appellant in relation to the Main Action and in another proceedings in relation to the Consent Order, the Appellant had expressly and/or impliedly confirmed the existence and validity of the SPA and there were supporting affidavits affirmed by its director by the name of Lee Nyan Chong on behalf of himself and the Appellant.

The High Court had pursuant to section 73(1) of the Evidence Act 1950 conducted a signature comparison exercise and found that the signature of the said Lee Nyan Chong on the memoranda of transfer and in his sworn affidavits in all the different proceedings to be similar.

In dismissing the appeal with costs to the First Respondent and Second Respondent, the Court of Appeal held that the Appellant was estopped from taking the position that Lee Nyan Chong was not a director in this appeal. The Appellant could not take an inconsistent position in different proceedings. In the unanimous judgment, Collin Lawrence Sequerah JCA, referred to the case of *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) [2012] 1 MLJ 761* wherein the Court of Appeal cited Sir Nicholas Browne-Wilkinson VC in *Express Newspapers pic v. News (UK) Ltd & others [1990] 3 All ER376* as follows:

> *"There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt once stance, cannot thereafter be permitted to go back and adopt an inconsistent stance".*

The Court of Appeal thus held that the Appellant was barred from contending that the SPA was not valid because it was tainted by fraud and its directors had no authority to execute the same due to it being in MVL. Further although memoranda of transfer were not executed by the liquidator, there was no evidence adduced to show that the said transactions were not with the consent of the liquidator.

The Court of Appeal also proceeded to find that the Appellant could have initiated its claim as early as 1981 but it had only filed the Counter Claim in 2020 when the First Respondent initiated the Main Action. As such, limitation would apply to bar the Counter Claim. It would be most inequitable for the Appellant, having received the benefit of the purchase price way back in the 1970's, to be allowed to now invalidate the SPA and the instruments of transfer, notwithstanding the Appellant's position that they stand willing to refund the purchase price.

Written by
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Kerajaan Malaysia & Another v. Nurul Rabihah Binti Abdul Rahman (CA)
Medical law –Medical negligence – Appellant intervention on the quantum of damages awarded

The key issue in the appeal of ***Kerajaan Malaysia & Ors v Nurul Rabihah binti Abdul Rahman (Civil Appeal No.: A-01(NCVC)(W)-84-02/2023)*** was whether the quantum of damages awarded by the trial judge was fair and reasonable.

In this case, it was discovered that the Respondent had suffered an obstetric anal sphincter injury after giving birth at the Taiping Hospital ("**the Hospital**"). A surgery was performed to repair the tear and the Respondent was put on antibiotics for two weeks and was prescribed a laxative syrup to prevent wound breakdown. Two weeks later, the Respondent was referred to the Hospital by Columbia Asia Hospital due to a wound breakdown. A decision was made that it was not advisable to attend to the anal sphincter injury repair within two weeks from the first operation. The Respondent underwent an examination under anaesthesia to check the extent of the tear and it was decided that a defunctioning sigmoid colostomy was to be performed. The Respondent went for a follow-up appointment at Sultanah Bahiyah Hospital, Alor Setar and was told to delay the injury repair and continue with conservative management plus the management of the stoma bags.

Four months later, at Pusat Perubatan Universiti Malaya (PPUM), it was discovered there was a 90-degree loss of the internal sphincter where the functional loss was more predominant than the anatomical loss. The Respondent was offered to undergo a graciloplasty or sacral neuromodulation **("the SN procedure")**. The device for the SN procedure would cost around RM65,000.00 minus the injury. Eight months later, the PPUM plastic surgery team performed graciloplasty on the Respondent because of the failed overlapping repair due to severe external anal sphincter injuries and associated nerve injury.

The Respondent claimed that the procedure did not improve the Respondent's condition and further claimed that the Appellants' negligence in her management had caused the injury and the other complications suffered. The parties recorded a consent judgment in which the Appellants admitted liability and damages were assessed by the High Court. The parties appealed on the quantum of damages awarded to the Respondent as follows.

A. <u>The Appellants' appeal</u>

<u>(a) General damages</u>

The High Court awarded RM1,000,000.00 as general damages for pain and suffering and loss of amenities to life by taking into account the following factors:

i. The Respondent had to undergo a sphincter repair within 24 hours of sustaining the injury and the injury had not completely healed since then;
ii. Despite being a normal injury during childbirth, weaknesses in the management of the Respondent led to further complications;
iii. The Respondent has to use stoma bags and she had difficulties and embarrassment from using them;
iv. The Respondent suffered depression in the form of sadness, pessimism, loss of pleasure, self-dislike, crying, loss of energy, concentration difficulty and fatigue;
v. The Respondent is a Quality Engineer and had to be assigned to light duties for six months due to her condition;
vi. The Respondent could not care for her daughter when she was hospitalised; and
vii. The Respondent's sexual relationship with her husband was disrupted.

Referring to the case of *Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors [2019] 12 MLJ 741* ("**the Nur Syarafina case**") cited by the Appellants which awarded RM80,000.00 as general damages, the Court of Appeal observed that it was materially different to the present appeal in that there was evidence to show that the Respondent had suffered from depression and had undergone psychotherapy sessions. Notwithstanding the above, the Court of Appeal viewed that the amount of damages awarded was extremely high that it was not a compensation for the injuries suffered by the Respondent but was a reward to the Respondent and a punishment to the Appellants. As such, the Court of Appeal viewed that a global sum of RM300,000.00 as general damages is fair and reasonable.

<u>(b) Costs for future medical treatment</u>

The High Court awarded **RM100,000.00** for the SN procedure, including the testing of a pacemaker. The Court of Appeal remarked that such determination must be made by relying on the reasonable, responsible, respectable and logical opinions of experts as they were the most knowledgeable in their respective fields and were best equipped to assess the Respondent's future needs. The High Court placed more weight to the Respondent's expert than the Appellants' since the Respondent's had the advantage of directly seeing and examining the Respondent and viewed that the former's evidence to be more convincing and probable than the latter's. As such, the Court of Appeal upheld the award for costs of future treatment at **RM100,000.00**.

<u>(c) Aggravated damages</u>

The High Court awarded **RM300,000.00** as aggravated damages which reflected the severity of the emotional distress caused by the Appellants' conduct. The Court of Appeal remarked that it is a well-established principle that aggravated damages are granted to compensate the plaintiffs for the injury

to their feelings, such as distress or outrage, which is intensified by the reprehensible nature of the defendant's conduct during the negligent acts or its subsequent handling by the defendant. The Court of Appeal observed that the surgeon who made the sphincter repair within 24 hours of the injury being reported, neither had the experience in handling a complicated third-degree perineal tear nor had the appropriate credentials to perform the surgery. The documentation of the surgery was also poor and inadequate. The Respondent had to also seek treatment at Columbia Asia Hospital as she was not immediately referred to the Hospital when the Medical Officer at the Klinik Kesihatan found her wounds dirty on the 5th day of postpartum. The Court of Appeal compared the award of aggravated damages in the ***Nur Syarafina*** case of RM200,000.00 and viewed that **RM300,000.00** was justifiable, fair and reasonable considering the overall facts and circumstances of the case.

(d) Costs for counsel's appearance and cost for advocacy

The High Court awarded **RM7,500.00** as costs for the appearance of the Respondent's counsel at the High Court and **RM50,000.00** for costs of advocacy. The Appellants submitted that the sum for the counsel's appearance was too excessive since the counsel had attended only three days of physical court proceedings and as such, the Court of Appeal viewed that **RM3,000.00** was fair and reasonable. As for the costs of advocacy, the Court of Appeal remarked that such award lies within the discretion of the trial judge and viewed that the award was fair and reasonable considering the complexity of the case, skill, specialised knowledge, responsibility, time and labour required of the Respondent's counsel and affirmed the award of **RM50,000.00**.

B. Respondent's cross-appeal

(a) Costs for future damages

As part of the Respondent's cross-appeal, the Respondent submits that the award of **RM6,000.00** for her operation for the reversal of her stoma is low. The High Court allowed the claim because this operation could be carried out at government hospitals and, as such, the Court of Appeal viewed the award of **RM6,000.00** was fair and reasonable. As for the costs of stoma bags pending the implantation of the pacemaker which the High Court awarded **RM3,600.00**, the Respondent submitted that it was too low as the Respondent has been using the stoma bags since the first surgery was performed. The High Court only awarded the costs of stoma bags pending the implantation of the pacemaker. If the Respondent wished to claim for past costs incurred, the Respondent ought to have particularised in the pleadings and proven such during trial. As such, the Court of Appeal affirmed the award of **RM3,600.00**.

(b) Special damages

The High Court awarded **RM4,000.00** for the Respondent's travelling expenses from her house to the respective hospitals. The Court of Appeal found that the Respondent had failed to prove her claim for RM8,852.84 but the Appellants were able to concede to the sum of RM4,000.00 for expenses reasonably incurred by the Respondent. As such, the Court of Appeal affirmed the award of **RM4,000.00**.

Written by
Sandhya Saravanan
Member, Publications Committee

Dr Vijaendreh a/l Subramaniam & Anor v Government of Malaysia & Anor
Medical law – Poisons Act 1952 and Sale of Drugs Act 1952 – Statutory right of medical practitioners to dispense Group B poisons under Poisons Act 1952

In ***Dr Vijaendreh a/l Subramaniam & Anor v Government of Malaysia & Anor (Civil Appeal no. W-01(A)-228-04/2022),*** the Court of Appeal had to determine whether medical practitioners have the right under the Poisons Act 1952 to dispense a medicine known as Ivermectin (listed as a Group B poison under the Act) to their patients.

The Appellants, both registered medical practitioners and members of the Malaysian Association for the Advancement of Functional and Interdisciplinary Medicine (MAAFIM), filed an Originating Summons **("OS")** in the High Court seeking various declaratory orders to essentially uphold the said right.

The dispute began when Ivermectin medicines from the 2nd Appellant's clinic were confiscated by officers from the Selangor Health Department. The 2nd Appellant was investigated by the Department for potential offences in relation to the dispensation of Ivermectin over the counter.

In essence, the Appellants sought to determine the following issues in the OS:

i. whether a registered medical practitioner is entitled to dispense Ivermectin medicines to his or her patient under the Poisons Act 1952 and the Poison Regulations 1952; and
ii. whether a registered medical practitioner is entitled to dispense Ivermectin medicines to his or her patient for the purpose of the medical treatment of the patient under the Poisons Act 1952 and the Poison Regulations 1952.

[("Two Issues")]

The OS was dismissed by the High Court. The Appellants then appealed to the Court of Appeal.

The Appellant submitted that pursuant to s. 19(1)(a) of the Poisons Act 1952, a registered medical practitioner is allowed to sell, supply and administer Group B poisons, including Ivermectin, to his or her patient for the purposes of medical treatment, and such sale and supply shall be done under the immediate supervision of the said medical practitioner.

The Respondents submitted that:

i. the Poisons Act 1952 and the Sale of Drugs Act 1952 as well as their respective subsidiary legislations formed the regulatory framework for the sale and use of drugs and poisons. The requirements found within these pieces of legislation are applicable to the sale and supply of drugs and poisons. It would be contrary to the regulatory framework for the Appellants to rely on only selected provisions in the Poisons Act 1952;
ii. the dispensation of Ivermectin is subject to the requirements under the Sale of Drugs Act 1952 and its subsidiary legislation, the Control of Drugs and Cosmetic Regulations 1984 ("1984 Regulations"); and
iii. pursuant to the 1984 Regulations, drugs and poisons is first to be a registered product and is to be supplied and administered by a licensed person. No product with Ivermectin as an active ingredient has been registered with the Drug Control Authority under the 1984 Regulations.

The crux of the issue was the interpretation of the provisions in the Poisons Act 1952 and the Sale of Drugs Act 1952. The Court of Appeal referred to the principles of statutory interpretation set out in *Tey Por Yee & Anor v Protasco Bhd and Other Appeals [2021] 1 MLJ 76*. Given that the Poisons Act 1952 and the Sale of Drugs Act 1952 were enacted almost simultaneously, these pieces of legislation must be construed harmoniously, and any interpretation that would have the effect of modifying or repealing the terms of another statute must be avoided. Collin Lawrence Sequerah JCA quoted from Tey Por Yee and held that, the interpretation ought to ensure that "the Parliament does not give with one hand only to have taken away with the other".

The Court of Appeal found that the legislative purpose of the Poisons Act 1952 is to deal with the importation, possession, manufacture, compounding, storage, transport, sale and use of poisons whereas the Sale of Drugs Act 1952 on the other hand relates to the aspect of sale.

Ss. 18, 19 and 21 of the Poisons Act 1952 were specifically enacted to vest an autonomous right to medical practitioners to dispense and administer a drug based on their professional judgment. Therefore, the subsidiary legislation under the Sale of Drugs Act 1952 shall not be construed in a manner that removes a right vested to medical practitioners under the Poisons Act 1952.

The Court of Appeal allowed the appeal and answered the Two Issues in the affirmative. In conclusion, medical practitioners have the right to dispense Ivermectin to their patients in accordance with s. 19 of the Poisons Act 1952 and the Poisons Regulations 1952. Ivermectin may be dispensed by medical practitioners to their patients for the purposes of medical treatment.

Writen by
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Tay Keong Kok & Ors v. Eastmont Sdn. Bhd. (CA)
Company law – Fradulent trading

In **Tay Keong Kok & Ors v. Eastmont Sdn. Bhd. (Civil Appeal Nos.: B-02(NCC)(W)-1705-09/2021 and B-02(IM)(NCC)-666-04/2022)**, Tay Keong Kok and others were the Appellants, while Eastmont Sdn Bhd was the Respondent in 2 appeals heard together by the Court of Appeal on liability and damages respectively. This note focuses on the issue of liability where the Court of Appeal discussed pertinent issues relating principally to fraudulent trading under section 540 of the Companies Act 2016. This decision provides clarity on the scope of section 540, bearing in mind the purpose and intent of the section in allowing the corporate veil to be pierced in fitting circumstances.

Brief Facts
By way of a letter of award, the Respondent was appointed by Mega Planner Jaya Sdn Bhd **("Mega Planner")** to carry out sub structure works for a project. The Respondent took the position that it had completed the works, but the letter of award was mutually terminated, where Mega Planner owed the Respondent sums for the works.

Upon service of the writ by the Respondent against Mega Planner to recover said sums, the Respondent discovered that Mega Planner had just been wound up vide a petition filed by Dakota Engineering Sdn Bhd **("Dakota Engineering")**. The basis of the petition was a judgment in default obtained by Dakota Engineering against Mega Planner. Thereafter, upon getting leave of the winding up court, the Respondent also obtained a judgment in default against Mega Planner for the sum of RM 10,050,819.57 based on the final statement of account dated 28th October 2014. Significantly, after securing the judgment in default, the Respondent discovered that Mega Planner and Dakota Engineering were related concerns and had common directors and/or shareholders and/or ultimate controllers.

The Respondent contended that the Appellants were the ultimate controllers of both companies at the material time who had carried on the business of Mega Planner with the intention of defrauding the Respondent by winding up Mega Planner through Dakota Engineering to avoid payment of debts to the Respondent. It was also alleged that the Appellants had conspired to injure the Respondent by orchestrating the winding up of Mega Planner.

The High Court allowed the Respondent's claim for fraudulent trading and conspiracy to injure.
Findings of the Court of Appeal
The Court of Appeal agreed with the High Court's assessment. The Court of Appeal made the following key findings on fraudulent trading:

1. While section 540 can only be engaged "in the course of the winding up of a company or in any proceedings against a company", it is not necessary for a suit for fraudulent trading to be brought in the winding up court or the court where there are proceedings against the company itself. On the contrary, it is acceptable for a fresh suit to be commenced, as in the present case, following the earlier Court of Appeal decision of *Chin Chee Keong v Toling Corporation (M) Sdn Bhd [2016] 4 MLRA 180*. That case adopted a practical reading of the statute where the court makes a finding against the company before it makes the necessary consequential orders;
2. Section 540 is satisfied if the discovery of fraudulent trading is made in the process of winding up (after the granting of the winding up order) or subsequent to the proceeding against the company, provided that there was such a proceeding in the first place which led to the discovery. These limbs were satisfied in the present instance;
3. The Respondent had satisfied the 3 substantive elements to establish fraudulent trading, namely:

    a. The business of Mega Planner was carried out with intent to defraud creditors of the company:
        i. The phrase "carrying on of the business" in section 540 is not limited to matters carried out by the company in the ordinary course of its commercial existence. It can encompass the presentation of a winding up petition against Mega Planner by Dakota Engineering, where both companies shared ultimate controllers. There is no basis in law or in principle to exclude such scheme from the scope of section 540;
        ii. Fraudulent trading is not only actionable when a company incurs debts despite knowing there is no repayment. It is actionable also when the

company takes steps to deprive creditors of an economic advantage or inflict upon them some economic loss. In the present case, this is demonstrated vide the orchestration of the judgment in default and winding up petition which were uncontested by Mega Planner; and

iii. Intention to defraud is a question of fact to be inferred from the surrounding circumstances and subsequent conduct of the perpetrators but fraud must mean actual fraud and involve dishonesty of some sort;

b. The Appellants participated in the carrying on of the business in that manner:

i. It needs to be shown that a person had participated, concurred or taken positive steps in the carrying on of the business in a fraudulent manner but it is not necessary to show that he had assumed a controlling or managerial position over the company's business; and

ii. In any event, in the present case, there was ample evidence from the trial to show that the Appellants either controlled both Mega Planner and Dakota Engineering, or otherwise participated in the fraud by allowing themselves to be named as directors and shareholders; and

c. The Appellants participated knowingly in the conduct of the business with the intent to defraud. They either knew or turned a blind eye to the orchestration of the winding up. In this regard, the law only required a lower proof of fraudulent conduct on a balance of probabilities.

The Court of Appeal did not disturb the High Court's findings on the assessment of damages.

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Keysight Technologies Malaysia Sdn. Bhd. v. Ketua Pengarah Hasil Dalam Negeri Malaysia (CA)
Revenue law – Sale of a capital asset – Capital or income – Dominant purpose of transaction – Badges of trade interest

The central issue before the Court of Appeal in ***Keysight Technologies Malaysia Sdn. Bhd. v Ketua Pengarah Hasil Dalam Negeri (Civil Appeal No: W-01(A)272-05/2021)*** was whether the Appellant's gains of RM 821,615,000 from the sale of 'IP Rights' to another entity was a form of income, and was thus taxable under the Income Tax Act 1967 **("ITA 1967")**.

In 2008, the Appellant **("Keysight")** converted its operations from a full-fledged manufacturer of various devices, including microwave devices, test accessories, amplifiers and transceivers, to a contract manufacturer for Agilent Technologies International S.a.r.l **("ATIS")**. As a result of the conversion, Keysight sold its own technical know-how in manufacturing and marketing activities **(the "IP Rights")** that it had developed during its many years as a full-fledged manufacturer to ATIS for RM821,615,000 through an Intellectual Property Transfer Agreement. Thereafter, ATIS granted Keysight a licence to use the IP Rights for the sole and exclusive purpose of contract manufacturing for ATIS. In filing its tax returns for the year of assessment 2008 **("YA 2008")**, Keysight reported the monies received from the sale of the IP Rights as a gain which was capital in nature, and therefore not taxable.

Following an audit on Keysight that commenced in 2013, the Respondent in 2017 alleged that the monies received from Keysight's sale of the IP Rights to ATIS was income in nature and therefore was taxable, and that Keysight was negligent for failing to report this income. These findings by the Respondent resulted in the issuance of a Notice of Additional Assessment for YA 2008 which imposed additional tax and a 45% penalty on Keysight to the total of RM 311,057,602.46.

Keysight was unsuccessful in its appeal against the Notice of Additional Assessment to the Special Commissioners of Income Tax **("SCIT")** and its subsequent appeal to the High Court. In brief, both SCIT and the High Court held that Keysight's receipt from the sale of the IP Rights was income in nature as there was no "outright sale" of the IP Rights by Keysight to ATIS, as only beneficial rights to the IP Rights were transferred to ATIS.

In its decision, the Court of Appeal held that the appropriate test to determine whether Keysight's gains from the sale of the IP Rights were taxable was the 'badges of trade test', as first applied in the High Court's decision of *NYF Realty v Comptroller of Inland Revenue [1874] 1 MLJ 182*, where it was held that the following factors were relevant in distinguishing between taxable and non-taxable selling profits: the subject matter of the transaction, the period of ownership, the frequency of transactions, the alteration of property to render it more saleable, the methods employed in disposing of the property, and the circumstances responsible for the sale.

Applying the badges of trade test, the Court of Appeal found that the receipt from the sale was not income in nature, for purposes of the ITA 1967, as Keysight was "not in the business of selling intellectual property rights, but of manufacturing testing devices for electronic appliances" and that Keysight's sale of the IP Rights "*was not the dominant purpose of the transaction*" with ATIS. Rather, the Court of Appeal was of the view that the IP Rights were a capital asset that Keysight had used in manufacturing products for sale when it had acted as an exclusive manufacturer, and therefore held that the disposal of the IP Rights was a disposal of a capital asset and the receipt of monies from the sale of that capital asset was not income in nature, and therefore was not taxable.

In doing so, the Court of Appeal rejected the Respondent's contention, as well as the findings of SCIT and the High Court, that the badges of trade test did not apply to the disposal of IP Rights, and only applied to cases involving the acquisition of land. The Court of Appeal's decision in this regard was in accordance with a string of case law put forward by the Appellant where the badges of trade test was applied in various different contexts (*see paragraph [47] of the judgment*), such as the sale of commodities (e.g. timber in *Sekong Rubber Co Ltd v Director-General of Inland Revenue [1980] 2 MLJ 198*) and the disposal of shares (e.g. *DGIR v Hypergrowth Sdn Bhd [2008] 1 MLJ 417*).

In coming to its finding, the Court of Appeal was persuaded by various factors (*see paragraphs [61] to [73] of the judgment*), including, among others, the fact that Keysight had held and developed the IP Rights for a long period of time prior to its sale; that the sale was a one-off transaction, thus not displaying a frequency of transaction; the circumstances of the sale, namely that the sale was in furtherance of a corporate restructuring exercise, as opposed to a profit-making exercise; and that the IP Rights were sold on an as-is-basis and were not altered to render them more saleable.

It is pertinent to note that while the Court of Appeal found no persuasive legal authority to support the "outright sale" test that was utilised by SCIT and the High Court (*see paragraphs [100] and [101]*), the Court of Appeal in any event found that SCIT and the High Court erred in determining that there hadn't been an outright sale of the IP Rights by Keysight to ATIS (*see paragraphs [74] to [151] of the judgment*). In any event, and as stated by the Court of Appeal at paragraph [152] of its judgment, the Court of Appeal's affirmative finding was that the proper test to be utilised was the badges of trade test discussed above.

Lastly, the Court of Appeal held that the Respondent's allegations of negligence on the part of Keysight in order to justify its lifting of the time bar under section 91(1) ITA 1967, which provides that the Respondent may only issue an assessment within 5 years of the specific year of assessment, were unfounded. In summary, the Court of Appeal found that the Respondent's allegations of negligence were "based entirely upon their disagreement with [Keysight's] tax treatment of the said sum as a capital gain in its tax returns", a tax treatment which was found to be based on professional advice that Keysight had obtained at the material time. The Court of Appeal was persuaded that Keysight "had not willy nilly classified the sum received as capital without the benefit of the relevant advice from specialists in the field" and ultimately held that the Court could "not see how therefore [Keysight] can be said to be negligent for making a return on a tax position by relying upon professional advice".

Accordingly, the Court of Appeal held that SCIT and the High Court had erred and misdirected themselves in ruling against Keysight. As a result, the Court of Appeal ordered that any sums paid by Keysight to the Respondent by way of tax imposed after the 5-year time bar be refunded to Keysight.

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Odang v. Public Prosecutor and Public Prosecutor v. Odang
Criminal law – Self defence – Defence of sudden flight

The Court of Appeal in ***Odang v. Public Prosecutor and Public Prosecutor v. Odang (Criminal Appeal Nos.: Q-05(SH)-477-11/2021 and Q-05(SH)-487-12/2021)*** addressed the principles of self-defence and sudden fight under the Penal Code.

The decision was made in two appeals. One appeal was filed by the accused against his conviction and sentence for culpable homicide. The other appeal was filed by the Prosecution against the High Court's decision not to find the accused guilty of murder.

The accused was charged for the murder of one Rianto **("the deceased")** in the district of Mukah, Sarawak. The Prosecution's case was premised principally on the eye witness account of one Puddin Sampara **("PW11")**. PW11 was with the accused at the time of the incident. PW11's evidence was that he and the accused met the deceased on an estate road in Mukah. The deceased offered to sell drugs to the accused for RM1,000.00. The accused rejected the offer. The deceased then asked the accused to lend him RM1,000.00. This request was rejected by the accused. The deceased then drew a knife that was unsheathe. In response, the accused drew his own knife and stabbed the deceased once in the lower back. PW11 proceeded to testify that the deceased fled the scene and the accused pursued the deceased along the estate road. PW11 then left the scene and returned home.

The deceased's body was found the subsequent morning. A pathologist who conducted an autopsy on the deceased found three stab wounds on the deceased's body which comprised of two wounds in the chest and a single wound in the back.

In his defence, the accused did not deny stabbing the deceased. The accused's evidence was that a scuffle arose after he rejected the deceased's request to lend him RM1,000.00 as the deceased attempted to search the accused for money. After the deceased had drawn a knife, the accused's case was that he drew out his own knife and stabbed the deceased once in the chest and once in the back. The accused then chased the deceased who had fled and stabbed him a further time. The accused stated that third stab was inflicted to, as the Court of Appeal termed, "*…make sure that he was helpless and could not retaliate*" and also "*…because he thought the deceased would fight back*".

The accused relied on the defence of self-defence under s. 96 of the Penal Code, which would result in his acquittal if proven. In the alternative, the accused relied on the exceptions to s. 300 of the Penal Code that would result in his conviction for the lesser offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code.

The High Court rejected the plea of self-defence on the grounds that the accused chased the deceased and stabbed him a further time. However, the learned Judicial Commissioner upheld the fourth exception to s. 300 of the Penal Code, namely the sudden fight defence. This resulted in the High Court's decision to acquit the accused of murder, but convict him of the lesser offence of culpable homicide not amounting to murder. The accused was sentenced to 13 years' imprisonment by the trial judge.

In the ensuing appeals, the Court of Appeal upheld the High Court's finding that the accused inflicted a fatal chest injury on the deceased after he chased the latter along the estate road. This finding was made principally from a comparison of the accused's cautioned statement and the pathologist's report. In his cautioned statement, the accused stated, amongst others, that he swung his knife at the deceased when PW11 warned him that the deceased had drawn his knife. It was noted that the accused was not certain of which part of the deceased's body was injured when he swung his knife. The Court of Appeal found that "*The pathologist said the two fatal wounds, i.e. in the back and the chest were deep and serious wounds. Thus, the fatal chest wound is the result of a deliberate and forceful stab. It is not the result of the accused swinging his knife at the deceased and hitting him...Moreover, the accused himself was not sure which part of the body of the deceased was injured when he swung his knife*".

The Court of Appeal proceeded to affirm the High Court's rejection of the self-defence defence. This was because "*After having stabbed the deceased in the back with a lethal weapon, he chased him over a distance of 400 metres and stabbed him again. The second attack on the deceased infringes section 96(4) of the Penal Code as it was not necessary for the defence of the accused. It also takes the right of the accused to defend himself outside the ambit of section 100 of the Penal Code as there could not be any reasonable apprehension on the part of the accused that he could be killed or grievously injured. The wounded deceased was fleeing the scene at that time*".

The Court of Appeal then reversed the High Court's decision to uphold the defence of sudden fight. It was first noted that there were three preconditions to the defence, namely; "*Absence of premeditation*", "*Sudden fight in the heat of passion upon sudden quarrel*" and

the accused "*Must not take undue advantage or act in a cruel or unusual manner*".

It was ruled that the preconditions for the sudden fight defence did not apply as "*the accused himself said that he chased the deceased to ensure that he does not retaliate…Since, the accused chased the deceased for a long distance to finish him off, it cannot be said that his act was not premeditated. Further, the accused cannot claim he did not take advantage or did not act in a cruel manner towards the deceased. The initial stab wound inflicted by the accused on the deceased's back was deep, as confirmed by the pathologist. Despite this, the accused relentless pursued and stabbed the deceased again…*"

In the result, the Court of Appeal dismissed the accused's appeal, but allowed the Prosecution's appeal and convicted the accused of the charge of murder. As the accused was a first time offender and "*that it was the deceased who initiated the fateful meeting to do a drug transaction*", the Court of Appeal imposed a sentence of 30 years' imprisonment and 12 strokes of the cane.

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