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The newsletter is also available on our website.

The contents of this publication are of a general nature and not intended as legal advice. For any specific legal advice, please contact the partners.

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Announcement:

Firm Establishes New Specialised Practice Areas

The firm has established two new dedicated practice areas to meet the requirements of clients. These are:-

1. Technology, Multimedia and Telecommunications Law Department

We are proud to announce the establishment of our Technology, Multimedia and Telecommunications (“TMT”) Law department to enhance and streamline our provision of a diverse range of legal services tailored to companies and individuals alike in the TMT industries. These include mergers and acquisitions, commercial contracts, hardware, software and services procurement, privacy and data protection, regulatory issues and dispute resolution.



The department is headed by Ivan Ho Yue Chan, who has acted for technology companies in relation to licensing agreements, supply contracts and system integration agreements as well as other companies in relation to technological matters. Ivan has also acted for the Association of Merchant Banks Malaysia in advising on the "Guidelines On Electronic Prospectuses and Internet Securities Application" and providing input to the Securities Commission in relation thereto.

Deputy head of the department, Tan Gian Chung, is often called upon to advise and act for the regulator on a broad range of matters pertaining to multimedia and communications laws, including litigation. Gian Chung has also spoken at conferences locally and abroad on trending TMT-related topics such as cloud computing and the impact of personal data legislation on human resources. He also advises businesses on data protection matters to ensure compliance with the Personal Data Protection Act 2010 and has advised both local and foreign banks on cyber security issues related to cross-border fraudulent transfer of funds.



Announcement:

2. Competition & Anti-Trust Law Department

We are proud to announce the establishment of our Competition & Anti-Trust Law Department to enhance and streamline our provision of a diverse range of legal services in connection with the Competition Act 2010.

The administration and enforcement of the Act has been vested in the hands of the Malaysian Competition Commission (MyCC). Whilst the MyCC's initial focus was on education and advocacy, the MyCC's focus is now firmly on implementation and enforcement of the Act. Examples of steps taken by MyCC to implement/enforce the Act are as follows:

- (a) Enforcement action against Cameron Highlands Floriculturist Association (Dec 2012)
- (b) Rejection of Application for Individual Exemption by Nestle Sdn Bhd (Feb 2013)
- (c) Enforcement action against Pan-Malaysia Lorry Owners Association (PMLOA) (Oct 2013)
- (d) Grant of Block Exemption in favour of Liner Shipping Services (Dec 2013)
- (e) Enforcement action against Ice Manufacturers (Feb 2014)
- (f) Enforcement action against MAS and AirAsia (April 2014)

The broad range of services provided by the department include:

- advice on all matters relating to competition law, including advice on compliance with the Competition Act 2010 and guidelines issued there under.
- representation and advocacy before the MyCC and appeals to the Competition Appeals Tribunal.
- appearance in court.



The department is headed by Steven Thiru, who appears regularly in all levels of the courts and handles a variety of litigation matters that are related to regulatory laws and their enforcement. Steven has also appeared before statutory appellate boards, and has argued judicial review actions against decisions of these boards.

Deputy Head of the department T. Sudhar regularly advises on matters relating to competition law and has advised both local and foreign businesses on matters relating to the Competition Act 2010. Sudhar also regularly speaks at conferences and seminars on current and topical issues relating to competition law.



Announcement:

Firm's Partners' Elections to Key Positions



The Firm congratulates Steven Thiru on his re-election as Vice-President of the Malaysian Bar and wishes him a successful tenure in office.



Elections of the Malaysian Institute of Arbitrators (MIArb)



The firm congratulates Mr. Lam Ko Luen, Mr. Sudharsanan Thillainathan and Ms. Victoria Loi on being elected President, Vice-President and Council Member, respectively at their recent elections on 26th June, 2014. Ko Luen and Victoria serves for the term (2013/2015), whereas Sudharsanan will be serving for the 2014/2016 term.

KLBC AGM and Elections



The firm congratulates Goh Siu Lin on being re-elected to the Kuala Lumpur Bar Committee (2014/2015).

Elections of the Association of Women Lawyers



Our Goh Siu Lin was re-elected Vice President for the term (2014/2015) at the recent Annual General Meeting of the Association of Women Lawyers.

ARTICLES

How To Report Sexual Harassment: Breaking The Wall of Silence

By Janice Anne, Partner



The presentation was premised on understanding the “Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace” and the recourse available to victims of sexual harassment. The Code has been in existence for about 15 years (1999) and only in 2012, the Employment Act 1955 was amended to incorporate elements of the Code. The amendments to the Employment Act 1955 sets out steps to be taken by a victim and the legal recourse available in the event an employer refuses to investigate any complaint.

What is interesting about this ever sensitive yet real element of work life is the definition of sexual harassment and practical difficulties in determining whether the unwarranted attention or action was in fact harassment of a sexual nature.

In balancing the interest of a victim of sexual harassment and the alleged perpetrator, the Courts have, in the recent times, been required to draw a distinction between an actual act of sexual harassment and circumstances when a victim may have just been “overly sensitive” about particular remarks made in just in the course of everyday conversation. Human Resource practitioners and academicians have even come up with a list of circumstances where “sexual harassment” would not be deemed as harassment but most likely welcomed.

An analysis of recent cases was also discussed during the presentation and what captured the audiences attention was the fact that the Courts, in determining if the harassment was really sexual in nature and how deeply a victim was affected by the same, are sanitizing the conduct of the victim post event.

If a victim behaves in a normal manner i.e. not distraught or upset, the chances are he/she was not sexually harassed and the incident could be consensual. This angle of consideration cannot be conclusive due to the subjective nature of individuals, however, does assist in weeding out the cases where victims are in fact crying wolf.

The recourses available to victim of sexual harassment was also discussed in light of circumstances where a victim may consider herself constructively dismissed in the event the employer does not take an action when a complaint of sexual harassment is made. The amendments to the Employment Act 1955 provide a structured process where complaints can be made to the Director General if an employer refuses to investigate into a complaint of sexual harassment and the punishment that will be meted out to an employer.

The In-House Counsel Congress was attended by about over 200 In-House Counsels and the presentation was well received by those who attended.

CASE UPDATES

The following lawyers contributed to the preparation of various case updates in this issue: Yoong Sin Min, Hoh Kiat Ching, Chan Kok Keong, Tharmy Ramalingam, Tan Gian Chung, Ng Kim Poh, Gregory Das.

Banking

The Pacific Bank Berhad v. Kerajaan Negeri Sarawak Civil Appeal No. Q-01-8-2011(Q)

The Federal Court had on 23.4.2014 delivered its decision in *The Pacific Bank Berhad v. Kerajaan Negeri Sarawak Civil Appeal No. Q-01-8-2011(Q)* where the issue concerned whether a claim on a bank guarantee by the beneficiary may be made after the deadline or expiry date specified by the bank. The question of law which was considered by the Federal Court was:

"Whether a term in a letter of guarantee which limits or restricts the time for making a claim thereunder is void?"

The Sarawak Government (the Respondent) had granted a timber licence to a Company. As the Respondent required a bank guarantee as security for payment of royalties in respect of the licensed area, Pacific Bank at the request of the Company issued a Bank Guarantee (BG) in favour of the Respondent. In return, the Bank obtained a Letter of Indemnity from the Company's contractor. Both the BG and Indemnity were dated the same date and both expired also on the same date, ie., a year later on 24.4.1998.

The BG specifies when a claim must be made on it, as follows:

"All claims, if any in respect of this guarantee shall be made during the guarantee period failing which we shall be deemed to have been discharged and released from all and any liability under this Guarantee." ("the Said Clause").

No claim was made on the BG by the guarantee period and the Bank notified the Respondent that its BG had expired and was cancelled. However, 6 months after such expiry, the Respondent made a claim under the BG. By that time, the Letter of Indemnity given to the Bank had also already expired.

The Bank rejected the Respondent's claim which led to the Respondent filing a suit in the Kuching High Court against the Bank.

The High Court and the Court of Appeal were not with the Bank. They held that the Said Clause breached s. 29 of the Contracts Act and was therefore void. Judgment was entered against the Bank and the appeal against such Judgment was dismissed by the majority of the Court of Appeal Judges on 24.6.2010.

S.29 of the Contracts Act states:

"Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The Courts followed earlier Court of Appeal decisions which had held that clauses like the Said Clause effectively restricted a party's right to sue for the claimed sum, i.e., the party should be given the full benefit of the relevant limitation period in which to sue.

The Bank (having by now been taken over by Malayan Banking Berhad) appealed to the Federal Court. In the light of other similar Court of Appeal decisions, there was much concern amongst banks, as there was now a great uncertainty as to how long a bank's contingent liability under its guarantee would subsist and how long could a bank hold security given for the issuance of the bank guarantee. This in turn would affect the cost and practicability of giving/obtaining a bank guarantee.

On 23.4.2014, the Federal Court delivered its decision, answered the above question of law in the negative and allowed the Bank's appeal. In gist, after going through various authorities, the Federal Court held:-

- a) The liability of the guarantor under a guarantee depends on the language of the instrument. If the language of the guarantee prescribes a time limit for a demand to be made before a cause of action can arise, so be it. The plain and ordinary meaning must be given.
- b) There is a need to distinguish between an agreement prescribing the time limit in which to make a demand (and if the guarantor does not pay, a cause of action ie., a right to sue, arises), and an agreement which limits the time period for suing on the failure to pay. Section 29 of the Contracts Act only invalidates the latter as such an agreement would limit the enforcement of the right.

The Federal Court recognised that parties are at liberty to contract as to how a right can arise and drew a comparison with a contractual term for a demand to be made on a guarantor before a right to sue on the guarantee can accrue. The Said Clause was thus found to be valid. Various preceding Court of Appeal decisions which had ruled to the contrary were distinguished.

Our Ms Yoong Sin Min had assisted the Bank and East Malaysian counsel in the preparation of submissions for the Federal Court hearing in Kuching. She was assisted by Ms Cheah Faan Jin.

Shencourt Sdn Bhd & Anor v Aseambankers Malaysia Berhad & 3 Ors [2011] MLJU 552)

As was reported in our earlier issue No. 1/2014, on 27.9.2013, the Court of Appeal had reversed the High Court decision made on 6.5.2009 (the High Court judgment was reported under *Shencourt Sdn Bhd & Anor v Aseambankers Malaysia Berhad & 3 Ors [2011] MLJU 552*). The High Court decision had caused ripples of consternation amongst commercial and investment banks in Malaysia.

In allowing the appeal by the Agent bank and the lenders of a syndicated loan, the Court of Appeal had found, inter alia, that the doctrine of good faith (raised by the Borrower, who had claimed there was a breach thereof and had sued the banks) is a new doctrine still in a state of flux in other legal jurisdictions and had no application in a banker-borrower relationship, especially as such relationship would be governed by fairly detailed agreements.

The Borrower had applied for leave to appeal to the Federal Court and the main question of law proposed by the Borrower in its leave application concerned whether, in Malaysia, the Courts ought to recognise the existence of a duty of good faith in the performance of contractual obligations.

The Federal Court has on January 29, 2014 unanimously dismissed such leave application, as findings of fact by the Court of Appeal would in any event result in the Borrower failing in any appeal to the Federal Court, even if leave to appeal on the aforesaid question of law were to be allowed. Our Ms Yoong Sin Min and Ms Kong Chia Yee represented the banks.

Public Investment Bank Berhad v Yap Chee Hean [Court of Appeal Civil Appeal No. W-02(NCC)(W)-2134-09/2013]

In the High Court where this action originated, a customer of the investment bank sued the bank for breach of contract, breach of duty of care and breach of trust arising from unauthorised transactions carried out by the remisier on his share trading account with the bank.

Before the High Court, Yap argued amongst others that the remisier was the bank's agent even in respect of the unauthorised transactions by reason of the terms of the Standard Remisier's Contract and that his failure to notify the bank of any discrepancy or issue with the share trading account did not give rise to estoppel to preclude him from commencing legal action when he was not aware of there being anything wrong in the first place.

Yap's contention that he was not aware of there being anything amiss was premised on the fact that he had changed his correspondence address for all share trading statements to the remisier's residential address so that the remisier would receive all these statements and then report to him on the status of his trades and account. Yap's explanation for agreeing to this arrangement was that he was not conversant in English and was not highly educated and when the remisier offered this service to him, he accepted it as he trusted the remisier implicitly since the remisier was the bank's representative.

After a full trial, the High Court allowed Yap's claim against the bank on the basis of breach of contract as the Court took the view that the remisier was the bank's agent even in respect of the unauthorised transactions and further held that the defence of estoppel did not arise to preclude Yap from now complaining of the unauthorised transactions when Yap was not even aware in the first place of there being anything wrong with the share trading account. The High Court judgment is reported in the law journals under [2014] 8 MLJ 494 and [2014] 2 CLJ 1036.

On appeal by the bank, the Court of Appeal reversed the trial judge's judgment and held that the terms of the Standard Remisier's Contract and the Share Trading Contract between the bank and Yap did not support the trial judge's finding that the remisier was the bank's agent in respect of the unauthorised transactions. Instead, the Court of Appeal was of the view that the said terms clearly showed that the remisier was Yap's agent in respect of the unauthorised transactions.

The Court of Appeal also held that the defence of estoppel did apply against Yap notwithstanding the fact that he had no knowledge of there being anything amiss with the share trading account as he had agreed in the first place under the terms of the Share Trading Contract with the bank that he was duty bound to notify the bank of any discrepancy and it was his own foolhardiness that had resulted in him being ignorant of the unauthorised transactions.

The Court of Appeal therefore allowed the bank's appeal and recently handed down its written grounds of decision.

Our Mr Chan Kok Keong and Mr Samuel Tan appeared for the bank before the High Court and the Court of Appeal.

Hong Leong Bank Bhd v M Muthiah @ Nagappan & Anor and another appeal [2014] 1 MLJ 1

In the case of *Hong Leong Bank Bhd v M Muthiah @ Nagappan & Anor and another appeal [2014] 1 MLJ 1*, the Federal Court decided that a notice of demand on a guarantor need not specify the precise outstanding amount due to the creditor, and that the liability of a guarantor in a continuing guarantee is not limited to the principal sum.

The Federal Court had to consider a common guarantee clause, found in a guarantee given by three guarantors to the respondent Bank in respect of a loan, and determine the extent of a guarantors' liability thereunder. The clause concerned is as follows:

“... jointly and severally guarantee payment on demand upon us of all monies and liabilities ... together with interest on all such debts and liabilities to the date of payment

Provided that the total sum recoverable from us hereunder is limited to the sum of [RM5,665,000.00] owing or incurred to the Bank as aforesaid at the date of demand for the same is made by the Bank or discontinuance by any means of this guarantee by any of us”

This dispute revolved around whether the guarantors' liability was limited to the principal sum of RM5,665,000.00 or that it included interest thereon. This in turn gave rise to the further dispute that the letter of demand issued to the guarantors, which was for a far higher sum than the principal amount, as interest was included, was invalid for being imprecise.

The Federal Court in allowing the Bank's appeal, held that it was not mandatory for the notice of demand to state the exact amount due and payable to the creditor. The purpose of the demand was only to give notice to the debtor that the creditor is demanding repayment of the sum borrowed.

The Court also held that this proviso in the clause in question had to be read together with the other clauses in each guarantee and not in isolation. The other clauses in the guarantee to be read together were:-

- a) the clause which provided that the guarantors shall for the purpose of the debt be deemed to be principal debtors;
- b) the clause which stipulated that the guarantee is a continuing guarantee.

The Federal Court thus held that the liability of the guarantor was not limited to RM5,665,000.00 but also included accruing interest.

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768

In the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768*, the Federal Court affirmed the doctrine of deferred indefeasibility in Malaysia and emphasised that the Proviso to Section 340(3) of the National Land Code, 1965 (NLC) is applicable only to a subsequent bona fide purchaser for valuable consideration.

Saribu bte Badai (“the Deceased”) was a registered coproprietor of 1/3 share in two lots of lands (“the said Lots”). After her death, the 1st to 4th Respondents applied for and obtained an order under the Small Estates Distribution Ordinance 1955 to distribute the Deceased's 1/3 share in the said Lots to the 1st to 4th Respondents. Thereafter, by two memoranda of transfers, the 1st to 4th Respondents transferred their total 1/3 share in the said Lots to the 5th and 6th Respondents for valuable consideration.

The Appellants were the nephew and nieces of the Deceased. They alleged that the 1st to 4th Respondents acquired title to the said Lots by fraud in that they had falsely stated they were the children/beneficiaries of the Deceased and that the 5th and 6th Respondents had therefore not acquired an indefeasible title to the Said Lots. The 1st to 4th Respondents did not defend the Appellants' claims and judgment was entered against them. In this regard, the Appellants' allegations of fraud were considered proven as against the 1st to 4th Respondents. The Appellants also sought to set aside the 5th and 6th Respondent's title to the Said Lots.

Both the High Court and Court of Appeal found that since the 5th and 6th Respondents did not have any notice of, nor were they involved in, the 1st to 4th Respondents' fraud, their titles were protected by the Proviso to Section 340(3) of the NLC.

The Proviso to Section 340(3), NLC states:-

“Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2)-

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

The Federal Court reversed such findings of the lower courts. The Federal Court held that in order for the Proviso to Section 340(3) of the NLC to apply, the purchaser must be: a) be a subsequent purchaser, and not an immediate purchaser; and b) the subsequent purchaser must be bona fide and had given valuable consideration. The Federal Court did not consider the 1st to 4th Respondents as the first or immediate purchasers and therefore found that the 5th and 6th Respondents were the immediate purchasers and not subsequent purchasers. It was thus held that the Proviso to Section 340(3) of the NLC was not applicable to them, despite their being bona fide purchasers for valuable consideration. The 5th and 6th Respondents' titles to the said Lots were ordered to be set aside.

The following statement by the Federal Court, rendered as a guide to the trial courts, is useful:

“Whenever a registered title or interest is sought to be set aside under s 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the bona fides of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s 340(2) would not affect the title or interest of a bona fide subsequent purchaser.

The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a bona fide subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.”

Affin Bank Bhd v Damai Freight (M) Sdn Bhd [Federal Court Civil Appeal No. 02(F)-5-02/2013 (B)]

A written absolute assignment of rights has been, and still is, a popular and important security document in lending transactions involving land without an individual issue document of title. Very often a bank would obtain an absolute assignment of rights to the land from the borrower/assignor and when the document of title is subsequently issued, the lender/assignee would have a right to require the assignor to create a legal charge over the land, and to enforce the legal charge in the event of a default under the loan in question.

By the nature of an absolute assignment, the lender would acquire all the rights of the assignor to the land, including the assignor's rights under the agreement he had entered into for the purchase of the land. Notice of such assignment is then given to (or in some cases, the consent obtained of) the developer or party in whose name the master title over the lands (including the assignor's land) is registered. This is to ensure that when the individual title to the land is eventually issued, it will be delivered to the lender, as absolute assignee of the rights to the land.

If there is a default under the loan, the lender would realise such security in the following manner:

- a) if the individual title to the land is not issued yet, the lender may effect a sale, as absolute assignee, of its rights to the land without having to first obtain a court order. This arises from the concept that the lender, as absolute assignee and owner of the rights to the land, may sell such rights on its own. Such sale would effectively be by way of a further assignment of all the rights acquired by the lender, to the successful purchaser.
- b) if the individual title to the land is already issued, the lender has the right to insist on a land charge being created by the assignor over the title, in favour of the lender. The lender would then enforce the land charge pursuant to the terms of the National Land Code, 1965, ie., via a court-conducted auction sale.

However, very often, the issue document of title may subsequently be issued without the knowledge of the lender and is held, for instance, by the developer who had sold the land to the assignor. The lender often only realizes this only when it is ready to enforce its rights to the land by way of a sale and further assignment of the lender's rights to the land, consequent on a default under the loan.

Thus, the issue arises as to whether the security over the subject land may be realized without the need to create a legal charge when there is a default under the loan in question and when the document of title for the security land has already been issued.

On April 2014, our Ms. Yoong Sin Min and Mr. Lau Kee Sern had appeared for Affin Bank Berhad in the Federal Court on an appeal involving the following question of law:-

“Whether a lender having an absolute assignment of rights to land may realize his security under the terms of the assignment, where document of title to the land was issued subsequently, without the need to resort to the remedies provided under the National Land Code, 1965.” (“the Issue”)

It is to be noted that the aforesaid leave question is an extension of the following issue which had been answered in the affirmative by the Federal Court some ten years ago in the case of *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513:-

“Whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.”

In *Bupinder Singh*, the Federal Court considered the issue of a private treaty sale (without a court order for sale) of assigned land when there was no individual title issued. The Federal Court held that the assignee bank was fully entitled to sell such assigned property without the need for a court order for sale. In *Bupinder Singh*'s case, however, no document of title to the land was issued, unlike in the present case.

Our Mr. Porres Royan and Ms. Yoong Sin Min were the counsel who had represented the appellant bank in *Bupinder Singh*, which is one of the landmark decisions for the banking and finance industry).

In the present appeal, the borrower / assignor maintained that once the individual title to land was issued, the Bank could not sell its rights to the land by way of a further assignment but was obliged to procure a legal charge over the title and effect a sale pursuant to the National Land Code. This would necessarily delay the realization of the security and increase the costs involved, as well as result in further interest accruing on the loan.

The borrower / assignor succeeded before the High Court.

The lender bank engaged Messrs Shook Lin & Bok for the appeal to the Court of Appeal. The bank's appeal was allowed on 8.2.2012, which led to the further appeal by the assignor to the Federal Court, to consider the Issue.

The Federal Court heard extensive submissions in relation to the Issue and has reserved its decision on the same on April 2, 2014, to a date to be fixed. The Federal Court's decision would be a highly-anticipated one, as it will, determine the manner in which lenders will realize such security and how expeditiously or costly such manner of realization will be. An update will certainly be rendered once the decision is delivered.

Jaafar bin Mohd Khalid v. Hong Leong Bank Bhd [2013] 5 MLJ 800

In *Jaafar bin Mohd Khalid v. Hong Leong Bank Bhd* [2013] 5 MLJ 800, the firm's Partner, Mr. Tan Gian Chung, successfully defended the respondent bank against a writ action by the appellant in the High Court for negligence and malicious prosecution and also the appellant's subsequent appeal to the Court of Appeal.

In 2004, the respondent bank commenced a civil suit against the appellant as one of the guarantors in respect of a hire-purchase loan given by the respondent bank to a company. The appellant was a shareholder in the company. In April 2004, the respondent bank obtained a judgment in default of appearance against the appellant.

As the appellant failed to satisfy the default judgment, the respondent bank commenced bankruptcy proceedings against the appellant in October 2007. In December 2009, the respondent bank obtained receiving and adjudication orders against the appellant.

Upon learning that he had been adjudged a bankrupt, the appellant went to the respondent bank to complain that he had never signed any guarantee agreement involving the hire-purchase loan in question.

In October 2010, on the application of the respondent bank, the adjudication order was annulled and the receiving order against the appellant was rescinded.

However, the appellant never applied to set aside the default judgment obtained by the respondent bank against him.

The Court of Appeal agreed with the learned High Court judge that the appellant's claim for negligence was time barred as it was not filed within six years from the date of the alleged act of negligence.

The appellant alleged that the act of negligence occurred when the respondent bank in processing the hire-purchase documentation failed to ensure that there was no fraud and that the signature in the guarantee agreement dated 7 May 1997 was indeed that of the appellant.

The Court of Appeal held that if at all there was any negligent act on the part of the respondent bank in failing to ensure the possibility of fraud happening in the processing of the hire-purchase loan was minimised, or in failing to detect any irregularity or fraudulent act in the hire-purchase approving process, that negligent act could only have occurred around 7 May 1997. So the six year period began from 7 May 1997 and the appellant was clearly time barred as he filed the writ action only on 26 May 2011, that is to say, some 14 years later.

The appellant relied on s 29(a) of the Limitation Act to support his contention that the period of limitation did not begin to run until the appellant discovered the alleged fraud in March 2010. The appellant's said contention was rejected by the Court of Appeal because the appellant's claim was not based on fraud.

The appellant's appeal was also dismissed because the appellant failed to show that the respondent bank owed him a duty of care since the appellant was not a customer of the respondent bank and did not have any account with the respondent bank. In other words, it was the appellant's pleaded case that he is a stranger to the respondent bank and had nothing to do with the guarantee agreement or hire purchase agreement. Since the appellant adopted such a position, the Court of Appeal was of the view that clearly there was no commercial relationship or some kind of proximity between the appellant and the respondent bank. Hence, the appellant could not in the same breath claim that the respondent bank owed him a duty of care.

According to the Court of Appeal, the appellant's claim for malicious prosecution by reason of the bankruptcy proceedings commenced against him by the respondent bank was correctly dismissed by the High Court. This was so because there was in existence a valid default judgment, as the appellant had not applied to set aside the same. And as long as there was a valid judgment on which the bankruptcy proceedings were based, the respondent bank had a valid basis for commencing the bankruptcy proceedings against the appellant.

Corporate

Tan Chee Hoe v. Code Focus Sdn. Bhd. (Federal Court Civil Appeal No. 02(F)-32-06/2013(W))

Federal Court considers the validity of a share sale agreement where the contracting parties have agreed to waive the statutory requirement under section 132C(1) of the Companies Act 1965 for shareholders' approval in a general meeting.

On 4 March 2014, the Federal Court, in the case of *Tan Chee Hoe v. Code Focus Sdn. Bhd.* (Federal Court Civil Appeal No. 02(F)-32-06/2013(W)), was invited to answer various questions affecting the validity of a share sale agreement involving the disposal of the total issued and paid-up shares of Choo Hoe Sdn. Bhd. ("the Company"), which represented the Company's substantial property.

In this case, the Appellant ("the Vendor") agreed to sell the shares of the Company to the Respondent ("the Purchaser"), for the sum of RM16million and the Purchaser proceeded to pay the deposit of RM1.6million to the Vendor pursuant to the terms of the Share Sale Agreement ("SPA"). At the time of execution of the SPA, both the Vendor and the Purchaser agreed to, *inter alia*, waive the requirement under section 132C(1) of the Companies Act 1965 of obtaining the Company's shareholders' approval for the transaction under the SPA.

As the Purchaser had failed to pay the balance purchase price, the Vendor forfeited the deposit paid. The Purchaser filed a suit in the High Court disputing the forfeiture of the deposit and further claimed that it was the Vendor who had breached the terms of the SPA and thus, the Vendor was obliged to pay agreed liquidated damages to the Purchaser.

The High Court held in favour of the Vendor that the forfeiture of the deposit by the Vendor was valid and dismissed the Purchaser's claim. The Court of Appeal however unanimously reversed the decision of the High Court and held that the mandatory statutory requirement under section 132C(1) of the Companies Act 1965 could not be waived by agreement of the parties, thus rendering the SPA voidable at the option of the Purchaser.

The Vendor appealed to the Federal Court and on the issue of the requirements under section 132C(1) of the Companies Act 1965, the Federal Court decided as follows:-

- (1) if the directors decide to make a disposal of a substantial portion of the company's undertaking or property, a disclosure of the proposed transaction must be made to the shareholders before the transaction or disposal is carried into effect, to enable the shareholders to make an informed decision on the transaction in a general meeting;
- (2) a transaction or disposal entered into in contravention of section 132C(1) of the Companies Act 1965 is invalid and void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention;
- (3) the statutory requirement under section 132C(1) of the Companies Act 1965 is mandatory notwithstanding anything in the company's memorandum or articles of association; and
- (4) if a third party had actual notice of the non-compliance of section 132C(1) of the Companies Act 1965, then the transaction or agreement is void and invalid (not voidable) as against the whole world as well as the third party. Such void agreement cannot be enforceable by law.

Applying the above principles and considering that the Purchaser was fully aware of the non-compliance of section 132C(1) of the Companies Act 1965, the Federal Court held that the SPA was void and thus, neither party could make any claim under the SPA except to restore any advantage received under section 66 of the Contracts Act 1950. The Vendor was thus bound to restore the deposit paid to the Purchaser. However, the Federal Court further held that it was unconscionable for the Purchaser to be allowed to claim interest to be paid from the date the deposit was paid and instead, awarded interest on the deposit to be calculated from the date of the action was first filed by the Purchaser at the High Court.

There is therefore a limit to the contracting parties' freedom in deciding the terms of an agreement. Where the contract which the party seeks to enforce is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect, more so where both parties to the contract had consciously and willingly agreed to the contravention of the law.

Intellectual Property

F&N Diaries (Malaysia) Sdn. Bhd v Tropicana Products, Inc & Other Cases

This case concerns 4 appeals by the appellants against the High Court's decision which allowed the respondent's claims for infringement of the respondent's registered industrial design for a bottle and for revocation of the registered industrial design of one of the appellants ("FNL") for a bottle. The appeals were heard together. The respondent alleged that the appellants (other than FNL) had infringed its bottle design. The appellants claimed that the respondent's design was not new or novel at its priority date.

The Court of Appeal allowed the appellants appeal. The Court held, among others, that the question to be asked for the purpose of interpreting the term 'dictated solely by function' is whether the features of shape and configuration were designed to fulfil functional means; and it is no answer to claim that other articles bearing other features of shape and configuration also serve the same function. Although the Court found that the respondent's design has an element of eye appeal but it was not an industrial design as the features of shape or configuration of the design are dictated solely by the function which the article to which the design is applied has to perform.

Further, the appellants contended that the respondent's bottle design was not new as an earlier industrial design differing from it only in immaterial details was published or disclosed to the public in Malaysia. The Court held that in order to determine this issue, it is necessary to examine the representation or drawing of the design as appeared in the certificate of registration. While an actual article embodying the design may also be looked at to assist the process of comparison, the Court must ensure that the article is an accurate embodiment of the design.

The respondent's applications for leave to appeal to the Federal Court were dismissed on 23.04.2014.

YTL Corporation Berhad v JacMoli Designs & Jewellers Sdn Bhd.

The respondent filed an action against the appellant for trade mark infringement and passing-off in respect of old and outdated articles relating to the respondent which were kept by the appellant's in the archives of the appellant's websites. These articles related to the respondent when the respondent was a tenant at the Appellant's Starhill Gallery Shopping Centre.

The High Court held that the leaving of the said articles which mentioned the respondent's registered trade mark "JacMoli & Device" ("the JacMoli mark") amounted to trade mark infringement and the tort of passing-off. The Court of Appeal had on 07.05.2014 overturned the decision of the High Court.

At the time of writing the Court of Appeal has yet to provide its grounds of decision. However, based on the parties' submissions, it would appear that :-

- (a) in overturning the decision of the High Court on the issue of infringement, the Court of Appeal was of the view the learned trial judge had erred when she failed to consider that :-
 - the Appellant's use of the JacMoli mark is not in relation to the goods in respect of which the JacMoli mark is registered
 - the Appellant's use of the JacMoli mark does not constitute use in the course of trade
 - the Appellant's use of the JacMoli mark is not likely to be taken as being used as a trade mark or in a trade mark sense
- (b) in overturning the decision of the High Court on the issue of passing-off, the Court of Appeal was of the view the learned trial judge had erred when she failed to consider that :-
 - there was no misrepresentation by the appellant which gave rise to passing-off because, among others, the articles do not contain any false representation
 - the respondent has not established any goodwill in its business by reference to the JacMoli mark
 - there is no damage or likelihood thereof to the respondent

Further, the Court of Appeal allowed the appellant's counterclaim for the following :-

- (a) that the respondent's action is mala fide and / or is an abuse of process of Court for having been filed for a collateral purpose;
- (b) Registration of the JacMoli mark is liable to be expunged for non-use; and
- (c) the respondent is guilty of passing-off and / or causing a false association by changing its name to one containing the words "Star Gallery", albeit for a short period of time.

The Court of Appeal also awarded exemplary / aggravated damages to the appellant.

Companies

Perisai Wira Sdn Bhd v Harum Minat Sdn Bhd & Ors [2014] 5 CLJ 88 (High Court, Kuala Lumpur)

The plaintiff in this case sought specific performance of a resolution passed by the board of directors of the first defendant. Pursuant to the resolution, the board of directors resolved to sell the first defendant (together with its assets) to the plaintiff upon certain specified conditions.

There was no written sale and purchase agreement, although the plaintiff alleged that a director of the first defendant had issued a letter of undertaking to, inter alia, sell the first defendant's land for RM10 million. The land was to be alienated by the Selangor State Government to the first defendant although no title thereto had been issued at the material time, as the first defendant had not made the necessary payment of premium for the land. The plaintiff testified that all the necessary payments, including payment of the premium and the quit rent in respect of the land, had been made. The first defendant on the other hand testified that the parties had not agreed on the price of the said land.

The plaintiff submitted that the offer and acceptance to buy and sell the first defendant could be deduced from the oral arrangements between the parties and the payments made on behalf of the first defendant were corroborating evidence.

The Court dismissed the plaintiff's claim, on the following grounds:

- (1) The resolution was merely an authorisation to the directors of the first defendant to sell the first defendant company subject to certain express terms and conditions. The elements of an offer, acceptance and consideration were not present in the resolution. Further, the resolution itself stated that the price of the sale had yet to be determined and agreed between the parties, and hence the resolution was not capable of amounting to any agreement between the parties.
- (2) It was different if the plaintiff's pleaded case was that there was an agreement between the parties to buy and sell the company and that such an agreement was to be found partly in several material facts such as the resolution, the undertaking and the payments. That was not actually pleaded and it was not the function of the court to guess or improve on any parties' plea or case. The plea was quite clear in that the resolution houses the agreement which was sought to be specially enforced. However, the resolution did not contain an intention to create legal relationship in the terms sought to be enforced.
- (3) It could not be readily concluded what was the subject matter of the sale and whether there was any concluded agreement between the parties, be it for the sale of the company together with its assets or the said land alone. While the pleaded case stated about the company, the oral and documentary evidence was about the sale of the land.

- (4) The remedy of specific performance was a discretionary remedy guided by certain basic principles; one of which required the plaintiff to plead that it was ready, able and willing to complete the relevant agreement. There was no evidence of this readiness and willingness on the part of the plaintiff. The plaintiff had not suggested or explained as to why damages were not otherwise an adequate remedy and why the agreement must be specifically enforced. Given that the court did not find any valid and enforceable agreement, this remedy was not available.
- (5) The plaintiff had not pleaded for an order of damages in lieu of specific performance. Given that the claim was fraught with not just lack of fundamental pleas, but inconsistencies and more, it would require this court to exercise moral justice on the facts of this case. That was not the function of the court. Since the plaintiff itself was uncertain as to what the agreement between the parties was, the court was not able to make any order, let alone a pronouncement that the agreement was not valid or enforceable. An order for the return of any benefits received under Section 66 of the Contracts Act 1950 required the court to first make that finding before proceeding to order that relief. The court was impeded and constrained in making such an order on the present facts and circumstances.

Constitutional rights

Nik Nazmi Bin Nik Ahmad v. Public Prosecutor [2014]4 CLJ 944

The Court of Appeal in *Nik Nazmi Bin Nik Ahmad v. Public Prosecutor* (B-09-303-11/2013) delivered a pioneering decision on the constitutional right of freedom of assembly in Malaysia.

The Appellant had been charged for an offence under section 9(1) of the Peaceful Assembly Act 2012 (“the PAA”), which is punishable under section 9(5) of the said Act. The Appellant was alleged to have violated section 9(1) of the PAA by failing to provide a ten (10) day notice of an assembly which he had organized at a stadium in Petaling Jaya in the wake of the 2013 General Elections. The Appellant applied to the High Court for orders to declare sections 9(1) and 9(5) of the PAA as unconstitutional and, further, that the charge against him be set aside and that he be acquitted and discharged accordingly. The High Court dismissed the application and upheld the constitutionality of sections 9(1) and 9(5) of the PAA.

The Appellant appealed against the High Court decision and argued, amongst others, that sections 9(1) and 9(5) of the PAA were unconstitutional as it represented an excessive and an unreasonable restriction to the right of freedom of assembly as guaranteed under Article 10 of the Federal Constitution.

Section 9(1) of the PAA requires an organizer of an assembly to provide a ten (10) day notice of the said assembly, whilst section 9(5) of the PAA prescribes a penal sanction of a RM10,000.00 fine for the breach of section 9(1).

The Court of Appeal unanimously allowed the appeal and set aside the charge against the Appellant and acquitted and discharged him of the same. In view of the constitutional importance of the appeal, each of the three presiding judges prepared separate written grounds of their respective decisions.

Justice Mohamad Ariff Bin Yusoff held section 9(1) of the PAA to be constitutionally valid as the ten (10) day notice requirement represented a reasonable restriction to the right of free assembly. Justice Ariff proceeded to find section 9(5) of the PAA to be unconstitutional as it created a “conceptual difficulty” in purporting to criminalise an act which was *prima facie* lawful under the PAA. In this regard, his Lordship held that the PAA does not stipulate that an assembly held without the provision of the required notice was unlawful (i.e. a strict reading of section 9(1) provides that a public assembly remains valid despite the non-provision of a ten (10) day notice). Therefore, Justice Ariff held that the dichotomy between sections 9(1) and 9(5) of the PAA rendered section 9(5) unconstitutional and ordered the said provision to be struck down.

Justice Hamid Sultan Abu Backer did not find section 9(1) of the PAA to be unconstitutional on the premise that the ten (10) day notice requirement was not excessive as it does not prohibit the convening of peaceful assemblies. However, his Lordship held section 9(5) to be unconstitutional as its penal provisions were inconsistent with Article 10(2) of the Federal Constitution as it operated to criminalise assemblies that are peaceful in nature (such as the assembly organized by the Appellant).

Justice Mah Weng Kwai went further than either of his Lordship’s two judicial brethren by declaring as unconstitutional and striking down both sections 9(1) and 9(5) of the PAA. Justice Mah held that the aforesaid provisions represented an unreasonable encroachment on one’s Article 10 right to free assembly and, further, were a disproportionate legislative response to the purported security concerns in question. In this respect, his Lordship held that the Public Prosecutor had failed to demonstrate that the ten (10) day notice requirement was necessary to maintain public order when an assembly is held. Justice Mah further held that sections 9(1) and 9(5) of the PAA were unconstitutional as it rendered as illusory the right to hold urgent and spontaneous assemblies in Malaysia.

SEMINARS & CONFERENCES

ALFA Conference in Beijing



Our Mr. Ivan Ho and Mr. Lau Kee Sern attended the 2014 ALFA International Conference held at The Ritz-Carlton, Beijing, China.

ALFA International, founded in 1980, was the first and continues to be one of the largest and strongest legal networks. It comprises 145 independent, very respectable and exceptional law firms throughout the world. Shook Lin & Bok is the only member firm of ALFA International in Malaysia.

The seminar was hosted by Grandall Law Firm, a leading Chinese law firm established in 1998 providing business-focused legal advice to China's and the world's largest companies. At present, it has more than 100 partners and more than 600 PRC-licensed attorneys throughout China.

Our Mr. Ivan Ho was one of the speakers on the Panel discussion on "Doing Business in Asia".



Will Fung, a former associate of Shook Lin & Bok, is now a foreign counsel working in Grandall Law Firm (Beijing)

SEMINARS & CONFERENCES

Winding-Up of Companies & Corporate Insolvency Laws of Malaysia - 20 March 2014

On 20th March, 2014, our Mr. Lau Kee Sern and Mr. Tan Gian Chung jointly conducted a one day workshop on "Winding-Up of Companies & Corporate Insolvency Laws of Malaysia" at the Swiss Garden Hotel, Kuala Lumpur organised by Crimsonlogic Malaysia Sdn Bhd.



This hands-on workshop provided participants with the fundamentals of the Winding-Up process and exposure to the laws and different modes of Winding-Up. The subject-matter included the pitfalls, challenges and practicalities of the winding-up and insolvency process and the effects of liquidation on the powers of receivers and managers.

“Impact of IFSA on the Islamic Banking Industry in Malaysia” – 28 May 2014



On 28.5.2014, our Head of Islamic Financial Services Practice Group, Jal Othman was invited to speak at a seminar on the “Impact of IFSA on the Islamic Banking Industry in Malaysia” organized by Red Money, Kuala Lumpur. He spoke on the issues and challenges surrounding the Islamic Financial Services Act 2013 and touched on areas such as corporate governance, business conduct, Shariah compliance and the regulator’s reach in standards, guidelines, discretions and more. This seminar is one of the series of the Islamic Finance Briefings.

“Women & the Law” – 6 March 2014

On 6th March, 2014, our Ms Goh Siu Lin spoke on the topics of "Sex & Gender" and "Violence against Women" at the Women & the Law seminar which was organised by the Kuala Lumpur Bar Committee in conjunction with International Women's Day.



SEMINARS & CONFERENCES

IPBA Conference in Vancouver, BC, Canada



On 10th May, 2014, our Deputy Head of the firm's International & Domestic Arbitration department, Mr. Lam Ko Luen presented a paper on "Arbitration of Intellectual Property Disputes" at the IPBA 24th Annual Meeting and Conference 2014 in Vancouver, BC, Canada attended by legal practitioners from around the globe.

The conference was organised by the Inter-Pacific Bar Association ("IPBA"), an international association of business and commercial lawyers from the Asia-Pacific region.

"In-House Congress Kuala Lumpur 2014"

Partners Janice Leo and David Mathew spoke at the recent 2014 In-House Congress. Janice spoke on "Sexual Harassment at the Workplace" while David spoke on the areas of "Breach of Confidence, Restraint of Trade and the Personal Data Protection Act 2010".



The In-House Congress brings together leading in-house lawyers, compliance professionals and senior business executives from both the private and public sectors in Malaysia. Delegates participated in specific practice area workshops featuring

prominent business leaders and private practice lawyers, hosted by leading law firms. Shook Lin & Bok was one of the host law firms.

"3rd Annual Employment & Labour Law Conference 2014"

On 15th May, 2014, our Ms. Janice Anne Leo and Mr. Tan Gian Chung presented papers on "Trends in the Outsourcing of Services" and "Personal Data Legislation - Its Impact On Employees" respectively at the 3rd Annual Employment And Labour Law Conference 2014 in JW Marriot Hotel, Kuala Lumpur.

The conference attendees included the President and several Chairmen of the Industrial Court, employment and labour law practitioners, in-house counsel and their colleagues from the human resource department, former members of the judiciary and academicians.



It was organised by the Malaysian Society for Labour and Social Security Law and Malaysian Current Law Journal. This conference is jointly organized by the Malaysian Society for Labour and Social Security Law and the Malaysian Current Law Journal and aims to provide employment and human resource professionals with the tools, resources, innovations and solutions needed to enhance human capital strategies.

SOCIAL & SPORTS

Relaxing at a Wine Social - 17 May 2014



It was an afternoon of fun for SLB's associates who were exposed to the "sensory examination and evaluation of wine". The attendees were educated on the range of perceived flavours, aromas and general characteristics of the different varieties of wine and grapes from which they are made. Those present were indeed privileged to taste the iconic "Purple Angel" wine that was served to President Obama by the Chilean President, on the former's visit to Chile.

SOCIAL & SPORTS

The Malaysia/Singapore Bench & Bar Games : A Firm Perspective

by Edward Kuruville

The Annual Malaysia/Singapore Bench and Bar Games 2014 between the Malaysian Bench and Bar, and the Singaporean Bench and Bar, were held in Kuala Lumpur from the 1st to 3rd of May 2014. At the end of the 3-day event, the Malaysian contingent emerged victorious, with an overall score of 12-3, winning the Badminton, Bowling, Cricket, Golf, Hockey, Netball, Premier Soccer, Squash, Table Tennis, Tennis, Veteran Soccer and Volleyball events respectively.

Shook Lin & Bok's presence was in the form of Senior Associate Jason Gopal, who was instrumental in the Malaysian Badminton Team's 3-2 win against the Singaporean lawyers. Jason, who won his match this year by straight sets, proudly conveyed, *"I have never not won any of my matches I've played in, and this is my 5th time representing the Malaysian contingent."* When Jason was asked how he first got involved in the Games, he attributed it to a mixture of chance and destiny, *"When I was a Pupil, I played for the Selangor Bar in the Inter-State Bar Games because I did not know who to approach from the KL Bar. It just so happened that my first match was against the KL Bar, and my opponent was the Malaysian Bar Badminton Team Captain, who recognised my talents. Upon finding out I was part of the KL Bar, he accused me of committing an act of betrayal! He told me the only way to redeem myself was to offer my services to the Malaysian contingent against Singapore. That's how I initially got involved."*



Not known to many however, is the silent contribution of Partner Steven Thiru to the Malaysian Badminton Team's success over the years. When Jason was asked what is the Team's secret to success, he delivered an unexpected answer, *"To be honest with you, I believe a big reason for the Team's success over the years is Mr. Steven."* When pressed further what he meant by it, Jason said, *"The Malaysian Badminton Team considers Mr. Steven our mascot, our good luck charm if you will. As far as I can recall, Mr. Steven has never failed to attend every match we've played in, even when the Games are held in Singapore. His tireless support has been instrumental in our success. In fact, whenever he is there, we win our matches against Singapore! He is very much part of the Team."* Jason added that Mr. Steven even participates in the preparation for the Games, and joins them in their traditional post-match banana-leaf session. He cheekily added that if Mr. Steven runs for President of the Bar Council in the coming year, the Team is hoping for an allocation to buy new jerseys. Mr. Steven could not be reached for comment.



As for how long Jason sees himself hoisting the Malaysian flag at the Games, Jason addresses the issue with much humility, *"As long as they need me, I'm always willing to offer my services. It's truly an honour to represent the Malaysian Bar, and it is my hope to someday captain the Team."* One thing is certain, whether it be Jason's shuttling skills, or Mr. Steven's endless commitment and unwavering support, Shook Lin & Bok is proud to have representatives from the firm contributing to the continued success of The Malaysia/Singapore Bench & Bar Games.

INTERVIEWS



Interview with our Head Librarian Clive Pereira

by Gregory Das

Shook Lin & Bok's Head Librarian, Mr. Clive Pereira, is a man of many talents. His admirable ability to locate the most archaic of English cases from the forgotten corners of the firm's library is matched only by his tenacious entrepreneurial skills in repeatedly recording a series of high profits from his sale of Murruku in the office..

However, the firm's library and the seasonal sale of Murruku are not the only passions of Mr. Clive. He has another (less appealing) passion. Liverpool Football Club. "Commiserations Clive, on Liverpool's failure to win the league." I began the interview, in an admittedly cheeky manner, which was probably caused by my condition as an ardent Manchester United fan.

"The last few games of the league were a real disappointment for us. But I suppose a consolation is that Man. United didn't even qualify for the Europa Cup! That was a disastrous season for United!"

I tried not to hold that remark against him throughout the remainder of the interview. Here's how it went.

Q: How long have you been a Liverpool fan?

A: Since 1977. Keegan's era. Kevin Keegan, John Toshack and Jimmy Case. I actually started following them after their FA Cup loss. I watched my first Liverpool match whilst I was on a 'retreat' when I was in Form 5. Usually at the end of the school year, we would have a 'retreat', which would be organized by one of the Brothers. The Liverpool game I watched was the FA Cup Final of 1977 where we played Manchester United. But we lost, 2 – 1.

Q: So you must have been a Liverpool fan when you joined the firm.

A: Yes I was. But I've always had this feeling that Liverpool haven't been winning any league titles because I joined this firm! 1990 was the last time they won the league. I joined Shook Lin & Bok in 1991!

Q: Haha. Have you ever thought of working elsewhere in the best interests of the Liverpool team?

A: Haha no no.

Q: So you joined the firm over 20 years ago?

A: Yes I joined on the 1st of October 1991.

Q: What were you working as before you joined Shook Lin & Bok?

A: I was actually teaching English. My friend was running an institute in Pudu. I was working in Taiping and I knew this guy who was at an institution Kuala Lumpur. In Taiping I was working in a real estate agency and doing some part-time jobs. But Taiping, being a small town, you can't earn very much. So this guy offered me a job to help him manage the institute and at the same time to teach English.

INTERVIEWS

Q: What made you choose to join Shook Lin & Bok?

A: Actually it was my ambition to become a lawyer. My brother's friend, who was Mr. Jacob's, our translator's, neighbour, got news that there was an opening in Shook Lin & Bok. My brother was informed of this and my brother asked me to try it out. The teaching job that I was in required me to go in early in the morning and I even had to teach evening classes.

So the whole day was spent at the institute. So I was getting a bit fed up with having to go in so early and come back so late in the night. So my elder brother suggested that I get a good 9 to 5 job and to also pursue a legal career. So I came for the interview in Shook Lin & Bok in July or August and I was supposed to report for duty on the 1st of September. The letter came to me but I was still not sure whether to leave the teaching job I was in. This was partly because when I came for the interview, Mrs. Lee, who was the office manager at the time, made me type out some legal documents. My typing wasn't very good at the time. So I thought you needed to be a typist whilst at the firm and so I wasn't very keen on joining at the time. So when the 1st of September came, I didn't show up for the job. I carried on with the teaching job.

Then, at the end of September, I wasn't feeling very well and I didn't go for work and was at home. I received a call from Mrs. Lee in my house. Apparently she had been trying to reach me at home for the past month! "Clive, where are you? Why haven't you come in for work?" Mrs. Lee said to me on the phone. I responded by saying that I wasn't very sure whether I'd like the job or not. "No, no, no. Mr. Das says you must come in to at least try the job first." Mrs. Lee replied.

So I had to give a 24-hour notice at the other job. I joined the firm on the 1st of October 1991.

Q: *Have you any regrets in joining the firm?*

A: No, not at all. After joining the firm, I realized that I developed a greater interest in pursuing a legal career.

Q: *What do you like the most about your work at the firm?*

A: I like the people who are around me. When I joined, the Partners in particular were very friendly. At the time I joined it was Dato' Param who was the Managing Partner. And I really enjoyed the atmosphere in the firm. I felt like there was this family kind of relationship. I felt at home. It's a fantastic place to be in.

Q: *Now, it cannot be disputed that Shook Lin & Bok has one of the best law libraries a law firm in Malaysia can offer. What would you say is the secret behind the quality of our library?*

A: I don't know what the quality of the library was before I joined. But when I joined, Dato' Das was the boss of the library. I think he did a fantastic job upgrading the library and keeping it up to date with the latest books and the latest reports. At that time everything was done manually and we didn't have the online research portals we have today. Dato was making sure that everything was there for the lawyers to do their research.

Also, comparing the library that we have now with the one we had in the old building in MPL, the size of the present library is much bigger than the one we had before. The size of the library in the MPL office was only a quarter of the size of the present library.

Those days, other law firms and lawyers would call the firm to ask for copies of cases in some of the Indian law reports. But we would always have to get permission from the bosses to see if we could assist these law firms for conflict reasons.

Q: *Why would you say a well-stocked library is important for a law firm?*

A: The law is developing every year. You have to have all the resources you need. Having good lawyers in a firm would serve no purpose if they do not have the resources they need to do the job. We have almost every law report there is, from the English and Australian reports to the Indian, Pakistani and Sri Lankan law reports.

INTERVIEWS

- Q: Would you say a well-resourced library is crucial to the professional development of a lawyer?*
- A: Definitely. The tools of a lawyer are the books. A lawyer will not develop if we do not equip them with the books. We have to equip them with the best books to produce the best out of them. We need to update them with the latest and the best reports. That is entirely the decision of Dato' Das, he decides which books to bring in to the library and he gets only the best.
- Q: Now, many in the office say that you have a very good knowledge of the resources and the law reports in the library. How did you develop this impressive knowledge of the resources we have in the library?*
- A: It's just practice over the years. I was a librarian in school and so I had this experience before starting at the firm. But I think I got better when I started first year law studies. This made it easier for me as I understood better what I was doing. But you need to have a good memory and my memory is tested from time to time. In particular, Mr. Porres [Royan] would call me up and ask me about the books that we have on a particular area of law and what edition there is in stock. So I would have to give an answer off hand. So that prompted me to know these details and information so that I was prepared.
- Q: You mentioned that you had enrolled yourself into law school. Please do tell us a little bit about that.*
- A: Well I enrolled myself onto the law course at ATC. I completed the first year. However, I wasn't able to complete the course. I put up with a lot of unforeseen circumstances and I think I lost my focus. However, at the same time, knowing that I was in a big firm like Shook Lin & Bok, it was like balancing it. I thought that if I don't become a lawyer, I would still be in a good place. So I wouldn't put down my inability to complete the course as a failure. It's a disappointment, but not a failure.
- Q: It's certainly not a failure judging from your extensive knowledge in legal research.*
- A: Thanks, I do feel very privileged when many of the chambering students come up to me to ask for help with their research. I don't take this as a burden or anything. I help them out of my own free will.
- Q: How do you think the firm has changed over the years?*
- A: It has improved in many ways. This is probably because of the technology. I think it is doing very well. We have the cream of lawyers in the firm. We only take the best.
- Q: We established earlier that you joined the firm 23 years ago, so you must have seen some of the current Partners join the firm as chambering students. Do you have any funny stories to tell us about some of these Partners. Please be as candid as possible.*
- A: Haha. Many of the Partners we have in the firm chambered here as well. Like Mr. Steven Thiru, Mr. Lau Kee Sern and Mr. Lam Ko Luen. I suppose one funny aspect about some of these Partners was that they would, from the early days, be fearful about one boss in particular who would come down to the library, Dato' Das. For instance, when there's some work to be done for Dato' Das, these Partners would be with me in the library from the start of the work right up to it's completion. This applies to some of the lawyers who have since left the firm as well. I would say that I had a very good relationship with these lawyers and I've become good friends with them.
- Q: Clive, we know you're quite the family man. How many children do you have?*
- A: I have two. The eldest one is Manuel Chrisvin Pereira who is 8 years old and my second son is Mishon Levin Pereira who is 6 years old.

INTERVIEWS

Q: Neither of them are Liverpool fans right?

A: No neither of them are. I'm sure you'd be happy to hear that.

Q: Yes, I'm quite sure they too would be a whole lot happier in the long run by their choice of team.

A: Haha. Anyways, my wife is Caroline Prema. We both have the initials 'CP'.

Q: Right. Was that why you chose to settle down with her?

A: Haha no no. She was the nurse that was attending to my brother in Ipoh and that was how I met her. She was a dialysis nurse. Now she is a housewife. After coming to KL, I asked that she looked after the kids. So she resigned from her job in Ipoh and she came over here. I managed to buy a house in Pingiran USJ in 2009.

Q: How do you spend your free time with your family?

A: On Saturdays I usually take them out. I usually take them to the bookshops and they like to look at the magazines. there I sometimes buy my kids some children books and comics. Also, occasionally, I would take my family to the library on the weekends.

Q: Are your children constantly fed Murruku at home?

A: Haha no. Mine is only a seasonal sale of Murruku. My wife only cooks it in particular seasons.

Q: Where did your wife learn to cook Murruku?

A: Her mother is an excellent cook. I think she picked the skills up from her mother, who used to stay at our place sometimes. The sale of the Murruku is almost like a family business, my kids and I would sometimes help with the packaging. Although, my wife would occasionally do it all by herself. Therefore I give her all the profits from the sale of the Murukku. She really puts a lot of effort into this.

Q: That's very good to hear Clive, you're a true gentlemen. Now, as a librarian, I must assume that you have a passion for books. Are you an avid reader?

A: I usually read cases. But we also have some old books in the library on the very old criminal cases. Sometimes I read those books. Also, I often read some football magazines which I get from Mr. Romesh [Abraham].

Q: What would you say is your favourite book?

A: Well I would say it's the Bible, but I haven't quite finished it yet. But there was this one book that really touched me when I was in Form 6. It's called Keluarga Gerilya by Pramoedya Ananta Toer, an Indonesian author. That book really brings you into the situation when the Dutch occupied Indonesia. That's one book that I would read again and again.

Q: What are your other hobbies?

A: I watch a lot of sport programs. At home, its either sports or Tamil programs that I watch.

Q: What is your favourite movie?

A: My favourite Tamil movie is Kumki, it's a movie about this guy and his elephant. My favourite English movie that I can't forget is Titanic. That was a movie that really moved me.

Q: I never quite saw you as a romantic, Clive. Thank you very much for your time. Goodday.

A: Thanks. Goodday.

INTERVIEWS



Long Service Award - Mr. Lee Youn Sang

by Edward Kuruvilla

On 31.12.2013, the Firm honoured Mr. Lee Youn Sang with the 'Long Service Award'; an award given to employees who have served the firm for 50 years. I was accorded the privilege of interviewing the man himself. When I first approached Mr. Lee with the idea of conducting an interview with him, he was very reluctant, saying "I've been here for 50 years, what else is there to write about?" After much persuasion I managed to convince Mr. Lee to sit down with me and share his half-a-century-worth of experiences at Shook Lin & Bok. Once Mr. Lee loosened up, it was clear that he was quite the character, read below for some historical insights into the Firm.

Lee Youn Sang = LYS

Q: When did you first find out that you will be a recipient of the 'Long Service Award'?

LYS: Actually, the process is automatic. When people attain 50 years of service with the firm, they receive the award. There was one recipient before me, and if I am not mistaken, there will be someone receiving it right after me as well. That's how I knew.

Q: How do you feel after receiving the award?

LYS: Nothing! I am happy about the extra RM5,000.00 that I have received though.

Q: If you have been 50 years in service, I take it that you first joined the firm in 1964?

LYS: No, it was a year earlier actually. I joined in 1963.

Q: Wow! That was the year The Beatles released their first album 'Please Please Me'!

LYS: That one I don't know.
[Mr. Lee proceeded to tell me he doesn't care much for The Beatles or their music...]

Q: Do tell us a bit about how you ended up at Shook Lin & Bok. What was it that made you apply here over 50 years ago?

LYS: I was initially learning typewriting, book-keeping and shorthand in Shaw Commercial, Kuala Lumpur. It was there that I was introduced by a fellow employee's relative to Lorraine Esme Osman, who was at that time, a Partner of Shook Lin & Bok. Mr. Osman took a liking towards me and offered me employment, and I accepted.

INTERVIEWS

Q: What was the firm like back in the day? Offer us a glimpse of Shook Lin & Bok in 1963.

LYS: Back then the firm was much smaller. There were only a few lawyers, around 6 or 7. Definitely less than 10. Now the firm has 80 or 90 lawyers! We had manual typewriters instead of computers.

Q: I notice you still have your trusted typewriter next to you on your desk!

LYS: This typewriter is actually mine. So I was forced to carry mine to work! It's extremely heavy.

Q: Forgive me but I have to ask you Mr. Lee, which do you prefer to do your work on - a computer or your typewriter?

LYS: Of course the computer! There's no need to bang on the computer like I used to do on the typewriter. Look at my fingers! Bang, bang, bang until crooked already. My knuckles are all worn out now.

[At this point I asked Mr. Lee if he ever considered using less force when typing on a typewriter, to which he responded "You must bang it really hard to type!". He proceeded to ask me if I had ever used one before. After answering in the negative, I thought it best to move along with the interview.]

Q: Briefly tell us what sort of work you do?

LYS: Conveyancing, completion of loan documents. Basically, all things conveyancing.

Q: In your opinion has the work changed over the years?

LYS: I don't think so. The work is quite routine. Nothing much has changed. Clerical work doesn't change much in my opinion. Essentially, it depends on the authority. Whatever is given to me, I will strive to carry it out.

Q: Let's move away from the office-talk for a while. How do you spend your free time? Hobbies? What would be the ideal day be like for you?

LYS: Relaxing with family members at home. I don't have any particular hobbies. I don't even watch TV that seriously! During the long holidays, the whole family takes a trip somewhere.

Q: Since you mentioned your family, could you give us a brief background?

LYS: I have a wife and 3 grown up children. 2 boys and 1 girl. You know, my first boy was given a grant by Shook Lin & Bok to study abroad.

Q: Oh really? Please tell me more, if you will.

LYS: After secondary school, he was given a British Council Chevening Scholarship to pursue his degree abroad. The scholarship covered tuition fees but I still had to bear his day-to-day expenses. That's when I approached the then Managing Partner Dato' Param Kumaraswamy to see if the firm could offer any assistance to my son. Much to my surprise, the firm awarded my son a RM50,000.00 grant! It really helped us a lot, and my family was very grateful for it. My son went on to obtain a Degree in PPE (Philosophy, Politics and Economics) from Exeter College, Oxford. Not too long after, he pursued his Masters Degree in Environmental Management & Policy in Sweden. My son is now a Managing Consultant on his own.

Q: That's such a lovely story Mr. Lee. What about your other children?

LYS: My daughter is a Professional Diagnostics Manager with Roche Diagnostics (M) Sdn. Bhd. Wait, let me show you her card...

[The proud father took out his daughter's name card from his wallet and briefly told me the nature of her work.]

Q: And your youngest child Mr. Lee?

LYS: My youngest child is a doctor who is now based in Singapore. He too obtained a scholarship (ASEAN). Although he lives in another country, we make it a point to meet as often as we can. I think that is important.

INTERVIEWS

Q: You beam with such pride and happiness when you speak of your children Mr. Lee!

LYS: I'm very happy that they have all become successful people. I did not have the chance to do my degree, so I'm very proud that they all had the chance. All my children have a lot of ambition.

Q: If I could steer the interview back to the firm for a moment Mr. Lee. I'm just curious, do you have anyone in the firm you are particularly close to?

LYS: No. We seldom go for lunch together or meet outside of work. A lot of us just care for the work. We seldom go out and "hee-ha-hee-ha"! *[Animated hand gestures follow.]*

Q: 50 years is a very long time to be at one firm Mr. Lee. I might get into trouble for asking this, but haven't you ever considered leaving?

LYS: *[Laughs]* I never once considered leaving! I think Shook Lin & Bok pays better than a lot of other firms. If I had opted to go to a smaller firm, I would constantly have had to worry about their financial status. It wouldn't have been secure. Plus, the firm gave my son a grant to study. If I were to have gone somewhere else to work, the Partners would have said I'm ungrateful! *[Laughs]*

Q: Would it be right to say that Shook Lin & Bok offers some sort of security then?

LYS: Security la. Unless you do something wrong, then they will sack you! *[Laughs]*

Q: Do you have any advice to the future members of the Shook Lin & Bok family?

LYS: *[Laughs]* I am not qualified to give any advice!

Q: Now that you have reached the 50-year milestone, how long do you see yourself going on for?

LYS: It depends on the nature of the work. What is given to us; if we know, we do. If we don't know, we tell the lawyer in charge, and he/she will tell us how to solve the problem. If I don't know how to do something, I tell them outright. So it's really up to them. To answer your question, I will carry on for as long as I can.

Q: In your 50 years here, who are your most memorable bosses?

LYS: Those have passed away or the present bosses?

[I break out in laughter, believing Mr. Lee was showcasing his wit. I then find out it was an honest question. Mr. Lee eventually saw the humour in his question, and joined in with laughter.]

Q: Anyone at all Mr. Lee...

LYS: Lorraine Esme Osman, Tan Teow Bok, Cheong Kee Fong. Both Lorrain and Tan have passed away. As far as the present bosses are concerned, I enjoy working with Ng King Hoe.

Q: Thank you for the interview Mr. Lee. It has been an absolute pleasure. All the best to you.

LYS: Thank God it's over. I don't like interviews because the more you quote, the more it will backfire. Silence is golden.

Once the interview had ended I felt obliged to tell Mr. Lee that the interview was such an eye-opener to me; that it was a perfect mix of information and wisdom, to which he responded with much humility, "No la, I still don't understand why anyone would want to publish something like this." Although Mr. Lee had a point when he said "silence is golden", it's hard to imagine it applying to him. I believe his perspective is more than worth its weight in gold.

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