

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.