

RECENT LEGAL DEVELOPMENTS IN BRUNEI DARUSSALAM

This report highlights some of the more important legal developments in Brunei Darussalam covering the period between January 1991 to December 1992. The topics covered in this report include Emergency Orders and case law.

EMERGENCY ORDERS¹

1. *Emergency (Fatal Accidents and Personal Injuries) Order, 1991 – Gazetted on 31 January 1991*

THIS Order came into force on 1 February 1991. It serves to consolidate the various applicable Acts of Brunei, as well as some of the pre-1951 United Kingdom legislation,² in the area of personal injury and fatal accident claims. It also repeals The Law Reform (Contributory Negligence) Act and The Law Reform (Personal Injuries) Act of Brunei³ and provides that the following United Kingdom Acts, *viz*, Fatal Accidents Act 1846, Fatal Accidents Act 1864, Fatal Accidents (Damages) Act 1908, Law Reform (Miscellaneous • Provisions) Act 1934, and The Law Reform (Married Women and Tortfeasors) Act 1935, shall cease to apply.⁴

¹ Pursuant to s 83 of the Constitution of Brunei Darussalam, His Majesty The Sultan and the Yang Di-Pertuan of Brunei Darussalam proclaimed a state of emergency in the State of Brunei Darussalam. A Proclamation under s 83 of the Constitution is in force for no more than two years, without prejudice, however, to the right of His Majesty The Sultan and the Yang Di-Pertuan to issue another such Proclamation at or before the end of the two-year period. The latest Proclamation was made on 5 August 1992 and gazetted on the same date. In a state of emergency, any emergency order, or any other subordinate instrument expressed to be made by virtue of any power expressed to be conferred by any emergency order, shall have the force of law, in accordance with s 83(3) of the Constitution.

² The Application of Laws Act (Cap 2) which came into force on 25 April 1951 provides for the reception into Brunei of the English principles of common law, the doctrines of equity, together with statutes of general application, as administered or in force in England at the date of commencement of the Act.

³ S 22, Emergency (Fatal Accidents and Personal Injuries) Order, 1991.

⁴ S 23.

This Order applies only to any action commenced after the date of commencement of the Order.⁵ Under the Order, the right of a person's claim shall not survive for the benefit of his estate in respect of a claim for bereavement, any exemplary damages, and any damages for loss of income in respect of any period after that person's death.⁶ Damages for bereavement is fixed at \$10,000. Damages for loss of expectation of life is abolished.⁷

The Order also makes possible the award of provisional damages by the court in cases where it is proved or admitted that there is a chance of further deterioration of the physical or mental condition of the claimant and empowers the High Court to make rules to bring this into effect.⁸

Lastly, the Order also covers aspects of the law relating to contributory negligence, joint liability, contribution and common employment in relation not only to personal injury and fatal accident claims but also to other tort and simple contract claims.

2. *Emergency (Limitation) Order, 1991 – Gazetted on 19 September 1991*

This Order came into force on 1 September 1991. It repeals the outmoded Limitation Act (Cap 14) which was itself modelled on the Indian Limitation Act. The Order prescribes that the ordinary time limit for bringing an action founded on tort is now six years.⁹

The Order also prescribes an ordinary time limit of six years in actions founded on simple contract.¹⁰ This obviates the need under the old Act to determine whether a contract was oral or in writing.

In an action for damages involving personal injury due to negligence, nuisance or breach of duty (whether under contract or under a written law), the period applicable is three years.¹¹ Where the person injured dies before the expiration of the aforesaid three-year period, the period applicable is three years from the date of death or the date of the personal representative's

⁵ S 2.

⁶ S 11(3).

⁷ S 12.

⁸ S 21.

⁹ S 6, *Emergency (Limitation) Order, 1991*. The period of limitation for defamation actions is three years, s 6(2). Under the old Act, three years was the prescribed time limit for personal injury claims as well as trespass and conversion. The difficulty inherent under the old Act was that it was often not easy to ascertain the limitation period for other types of tort claims as they could be classified as claims in malfeasance, misfeasance or nonfeasance which would have the effect of reducing the limitation period to only two years. Happily, no such classification under the Order is now necessary.

¹⁰ S 9.

¹¹ S 15.

knowledge (in an estate claim),¹² or the date of knowledge of the person for whose benefit the action is brought (in a dependency claim).¹³

In an action for negligence, other than one to which damages for personal injury is made,¹⁴ a special time limit is applicable which is either six years from the date on which the cause of action accrued,¹⁵ or three years from the earliest date on which the plaintiff or any person in whom the cause of action was vested first had both the knowledge required to bring an action for damages in respect of the relevant damage, and a right to bring such an action.¹⁶ There is, however, an overriding time limit of fifteen years from the date of the act or omission which is alleged to constitute negligence and for which damage is attributable.¹⁷

No period of limitation is prescribed for an action by a beneficiary under a trust, where the trustee is guilty of fraud or fraudulent breach of trust, or where trust property is converted to his own use.¹⁸ In other actions for breach of trust, the period of limitation is six years.¹⁹ A beneficiary whose claim is time-barred may not derive any benefit from a judgment or order obtained by any other beneficiary.²⁰

Important changes are also made to this area of the law by the inclusion in this Order of provisions for the extension or exclusion of ordinary time limits. Thus the normal period of limitation is extended in cases where the claimant is under a disability,²¹ or where the claimant is a subsequent owner in a case of latent damage.²² In addition, the court has a discretionary power to allow an action which is otherwise time-barred by reason of section 15 (personal injuries) or section 16 (fatal accidents) of this Order to proceed, where it would be equitable to do so having regard to the relative prejudice to both the plaintiff and the defendant.²³ The court shall not displace section 16 of the Order except where the reason why the person injured could no longer maintain an action was because of the time limit in section 15.²⁴

¹² S 15(5).

¹³ S 16(2).

¹⁴ S 19(1).

¹⁵ S 16(4a).

¹⁶ S 19(4b).

¹⁷ S 20.

¹⁸ S 27(1).

¹⁹ S 27(3).

²⁰ S 27(4).

²¹ S 32.

²² S 34.

²³ S40.

²⁴ S 40(2). If, *eg*, the person injured could at his death no longer maintain an action under the Emergency (Fatal Accidents and Personal Injuries) Order because of the time limit in Art 16 in the First Schedule to the Merchant Shipping Act (Cap 145), the court has no power to direct that s 16(1) shall not apply. Note however that this subsection appears to be

The limitation period is “postponed” in cases founded on fraud by the defendant or the deliberate concealment by the defendant of “any fact relevant to the plaintiff’s right of action or for relief from the consequence of mistake.” The period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.²⁵ In the case of libel or slander, action may be brought, with the leave of the court, outside the three year period where the facts of the cause of action did not become known to the plaintiff provided that it is brought within one year of the date of knowledge of all the facts relevant to that cause of action.²⁶

Under section 47 of the Order, it is provided that any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced, in the case of a new claim made in or by way of third party proceedings,²⁷ on the date on which those proceedings were commenced; and in the case of any other new claim, on the same date as the original action.²⁸ Section 47(3) then provides that except as provided by section 40 of this Order or by rules of court, neither the High Court nor any Intermediate or subordinate court shall allow a new claim within section 47 (1b), other than an original set-off or counterclaim to be made in the course of any action, after the expiry of any time limit under this Order which would affect a new action to enforce that claim.²⁹

3. *Emergency (Intermediate Courts) Order, 1991 — Gazetted on 24 August 1991*

This Order came into effect on 1 July 1991. The long title of this Order is “An Order to establish Intermediate Courts and to provide for the constitu-

inconsistent with s 16(1) which states: “Where any such action by the injured person would have been barred by the time limit in s 15 of this Order, no account shall be taken of the possibility of that time limit being overridden under s 40 of this Order.”

²⁵ S 38(1).

²⁶ S 39.

²⁷ S 47(1 a).

²⁸ S 47(1b). A new claim under this section means any claim by way of set-off or counterclaim, and any claim involving either the addition or substitution of a new cause of action, or the addition or substitution of a new party: s 47(2).

²⁹ For the purposes of this sub-section, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or, as the case may be, by way of counterclaim by a party who has not previously made any claim in the action. The purport of this sub-section is rather obscure. Since a new action under s 47(1b) is deemed to have been commenced on the same date as the original action, a new action within the meaning of subsection (1b) which is time-barred would necessarily mean that the original action would have been time-barred as well when it was instituted. Conversely, if the original action was not time-barred, a new action within the meaning of sub-section (1b) would likewise not be time-barred. In either case, subsection 3 would appear to be superfluous.

tion, jurisdiction and powers thereof and the administration of justice therein.”

Under section 13 of the Order, the Intermediate Courts shall have (concurrently with the High Court) all the jurisdiction, powers, duties and authority as are vested, conferred and imposed on the High Court in the exercise of its original criminal jurisdiction. However, the Intermediate Courts shall not have jurisdiction in respect of any offence punishable with death or with imprisonment for life; or to impose a period of imprisonment longer than 20 years in respect of any offence.³⁰

Section 14 of the Order provides that the Intermediate Courts shall have, in the exercise of their civil jurisdiction, original jurisdiction in every action where the amount claimed or the value of the subject-matter in dispute exceeds \$15,000 but does not exceed \$60,000 or such higher sum as the Chief Justice may prescribe by Order in the Gazette. Subsection 3 of the same section provides however that the Intermediate Courts shall have no jurisdiction in certain civil actions, notably actions for the recovery of immovable property or where there is a dispute as to a title registered under the Land Code; and actions wherein the legitimacy of any person, the guardianship or custody of a minor, or the validity or dissolution of any marriage is in question.

The Intermediate Courts have jurisdiction to grant probate or letters of administration in respect of estates³¹ and to try actions in respect of the administration of estates³² where the gross value of the estate does not exceed \$250,000.

The parties to a civil action in the Intermediate Court may agree in writing before the delivery of the judgment that such a judgment shall be final and conclusive between them. Subject as aforesaid, an appeal from an Intermediate Court in the exercise of its civil jurisdiction lies to the Court of Appeal as if it was an appeal from the High Court.³³ A criminal appeal, as well as a review of sentencing or a reference of a point of law where any person has been acquitted, similarly lies to the Court of Appeal.³⁴

Finally the rules and procedures of the High Court have been incorporated so that they shall now apply equally, with the necessary modifications, to the Intermediate Court.

³⁰ S 13(3), Emergency (Intermediate Courts) Order, 1991.

³¹ S 16.

³² S 17.

³³ S 26.

³⁴ S 27.

4. *Emergency (Dissolution of Marriage) Order, 1992 – Gazetted on 30 May 1992*

Section 2 of this Order provides that “the High Court shall notwithstanding the provisions of any other law, but subject to the provisions of this Order, have the same powers as those vested in the Family Division of the High Court in England on 1 January, 1992, in relation to the matters specified in section 3 of this Order.”

Section 3 sets out the pertinent jurisdiction of the High Court as envisaged in section 2 of the Order. The matters within the jurisdiction are:

- (a) Divorce and nullity of Marriage;
- (b) Judicial Separation;
- (c) Declarations and presumption of death;
- (d) Property and financial reliefs;
- (e) Custody of children;
- (f) All such other matters as are ancillary or supplementary to any jurisdiction conferred by this section of this Order.

This Order applies only to non Muslim monogamous marriages³⁵ and either party to the marriage must have a substantial connection with Brunei Darussalam or have been ordinary resident within Brunei Darussalam for at least 12 months immediately preceding the date of the petition.³⁶

Prior to the coming into force of this Order, divorce proceedings in the Brunei High Court were governed by the English Matrimonial Causes Act 1950. This new Order now makes it possible for the court to dissolve a marriage by mutual consent of the husband and wife after two years separation.

5. *Emergency (Tabung Amanah Pekerja) Order 1992 – Gazetted on 9 November 1992*

This Order provides for the establishment of a fund to be called the *Tabung Amanah Pekerja* or the Employee Trust Fund.³⁷ An “employee”

³⁵ S 4, *Emergency (Dissolution of Marriages) Order, 1992*.

³⁶ S5.

³⁷ S 6, *Emergency (Tabung Amanah Pekerja) Order, 1992*.

means any person being a citizen or permanent resident of Brunei Darussalam, who is employed under a contract of service or apprenticeship or other agreement to work for an employer.³⁸ A Board called *Lembaga Tabung Amanah Pekerja* shall be set up³⁹ which shall function as the trustee of the Fund.⁴⁰

Under this Order, an employer is required to pay to the Fund monthly or at such other intervals as approved by the Board a sum representing his contribution in respect of each employee at the appropriate rate as prescribed by subsequent regulations.⁴¹ The employer shall in addition pay the contribution on behalf of and to the exclusion of the employee, the contribution payable by that employee.⁴² The employer is entitled to recover from the employee the amount of any contribution payable on behalf of the employee by means of deductions from the wages of the employee but not otherwise.⁴³

A member of the Fund may withdraw from the Fund in full when he has attained the age of 55 years; or is physically or mentally incapacitated from engaging in any further employment; or is about to emigrate.⁴⁴ The member may withdraw up to one-fourth of the amount standing to his credit at only one withdrawal upon attaining the age of 50 and he may at any time withdraw up to 45 per cent of the amount standing to his credit for the purposes of purchasing or building a house.⁴⁵

An employer who has established a welfare scheme which provides for the payment to his employees of pensions, gratuities or other pecuniaries or welfare benefits not less advantageous to the employees than the benefits which are provided for an employee by the Fund may obtain certification from the Board that the scheme may qualify as an Approved Fund.⁴⁶ Where an employee who is a member of an Approved Fund leaves his employment the employer must pay to the Board, to be placed to the credit of the employee in the Fund, the money (if any) payable to such employee under the Approved Fund on the termination of his employment.⁴⁷

This Order came into operation by notification in the gazette on 1 January 1993. The rate of contributions per month for both the employee and employer

³⁸ S 2.

³⁹ S 2(3).

⁴⁰ S 6(2).

⁴¹ S 7.

⁴² S 8.

⁴³ S 9.

⁴⁴ S 17.

⁴⁵ S 17(2).

⁴⁶ S 34.

⁴⁷ S 36.

are 5 per cent respectively.⁴⁸ For the purposes of the principal Order, an employee has been defined as any person in the public service or a member of the Royal Brunei Armed Forces or the Royal Brunei Police Force or a member of any Approved Fund.⁴⁹

CASES

1. *Lim Teng Huan (Suing as Administrator of the estate of Lint Lian Ching v Ang Swee Chuan*. (Privy Council Appeal No 16 of 1991 from the Court of Appeal of Brunei Darussalam; Judgment of the Lords of the Judicial Committee of the Privy Council delivered on 25 November 1991)

This case concerned a parcel of land which belonged beneficially in equal shares to the appellant, Lim Teng Huan, and the respondent, Ang Swee Chuan. In April 1984, the respondent at his own cost and expense constructed a house on the land at a cost of over \$1 million. On completion he went into occupation. On 15 March 1985, the appellant and respondent entered into an agreement the gist of which was that the appellant acknowledged that he had no claim whatsoever on the said house and that he would give up his share in the said land in exchange for (the respondent's) parcel of land which at the time of the agreement remained unspecified. The respondent counterclaimed for a declaration of ownership of the appellant's share in the land and an injunction. The trial judge held that the agreement of March 1985 was void for uncertainty and gave the appellant leave to withdraw his claim but dismissed the respondent's counterclaim on the ground that no proprietary estoppel had been established, apparently on the ground that the appellant had not been guilty of any unconscionable conduct to preclude him from relying on his strict legal right.

The Privy Council affirmed the Court of Appeal's decision in holding that the trial judge had erred in law, following the case of *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*⁵⁰ which established that in order to found a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did: it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make.

⁴⁸ *Tabung Amanah Pekerja* (Rates of Contributions) Regulation, 1992 – Gazetted on 16 January 1993.

⁴⁹ *Tabung Amanah Pekerja* (Definition of Employees) Order, 1992 – Gazetted on 16 January 1993.

⁵⁰ [1982] QB 133.

2. *Kwan Kwai Choi v AK Zaidi Bin Pg Metali (Civil Suit No 175 of 1990, Judgment delivered on 12 September 1992)*

The defendant, who was a policeman, arrested the plaintiff on 23 June 1990 pursuant to a warrant of arrest issued by the Magistrates' Court for failing to attend court as required under a Judgment Debtor Summons. The plaintiff was arrested on Saturday at 10.00 am and was brought to the police station whereupon she was held in detention from 10.30 am onwards. At 3.30 pm on the same afternoon the defendant received an order to bring the plaintiff to the Magistrates' Court but was unable to carry out the order as by then it was too late to make arrangements to bring the plaintiff before a magistrate. The plaintiff was therefore held in detention in the police station on Saturday, the whole of Sunday, and was not brought to court until Monday morning. The trial judge found that the defendant had not complied with section 47 of the Criminal Procedure Code in that he had failed to bring the arrested plaintiff before a magistrate without unnecessary delay but that the defendant was only responsible for the period of unlawful detention up to 4.00 pm on Saturday, 23 June 1990. After that, the matter was entirely in the hands of the defendant's superior officer. The issue the trial judge had to decide was whether, having found the defendant liable in fact for falsely imprisoning the plaintiff, the defendant was, nevertheless, not liable in law by reason of section 25(b) of the Succession and Regency Proclamation which states:

The Sultan can do no wrong, and effect shall be given to this principle in like manner as, immediately before the enactment of the Crown Proceedings Act 1947 in England, effect was there given to the maxim that the King can do no wrong: Provided that provision may be made by laws enacted under the Constitution for the bringing of proceedings against the Sultan (otherwise than in his private capacity), or against the Government or any officer, servant or agent thereof, in respect of wrongs committed in the course of carrying on the government of Brunei.

The trial judge held that there existed a right in the injured party to sue a public servant in his private capacity prior to the English Crown Proceedings Act. The same right would therefore exist in Brunei so that a private person may sue a government servant in his private capacity and that wrongs committed in the course of carrying on the government of Brunei is meant to refer only to those torts which the crown in England could not be held liable before the passing of the Crown Proceedings Act of 1947. Damages for wrongful imprisonment was accordingly awarded against the defendant.

3. *Lamat Bin Bunut v PP (Criminal Appeal No 3 of 1992, Court of Appeal Judgment delivered on 3 December 1992)*

The appellant was charged and convicted of possession of ammunition and explosives without lawful authority, and in a special area without lawful excuse contrary to section 28 of the Public Order Act (Cap 148). On appeal, the Court of Appeal quashed the trial judge's decision and acquitted the appellant. The material part of the charge was that the appellant did, on or about 12 December 1990 have possession of the ammunition and explosives at lot 592 kampung Bintudoh, Lamunin, Tutong. It was common ground that the appellant did have a tin box containing the ammunition and explosives in question hidden in the backyard of the house but that the wife of the appellant had removed the tin box without the knowledge of the appellant. The Court of Appeal's finding was that there was no evidence that the appellant had entrusted the ammunition and explosives to his wife or that she was otherwise his agent in possession. There was no clear evidence when the wife removed the tin box or when the appellant originally hid it. The Court ruled that when the wife removed the box, the appellant had lost both control and possession and that he was not able to regain possession, for when the offending articles resurfaced, the same came immediately into the possession of the police and that therefore there was no time for him to come into repossession.

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