



Legal Bulletin

A summary of developments in the law

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The contents of the Legal Bulletin are intended to provide general information. Although we endeavour to ensure that the information contained herein is accurate, we do not warrant its accuracy or completeness or accept any liability for any loss or damage arising from any reliance thereon. The information in this Legal Bulletin should not be treated as a substitute for specific legal advice concerning particular situations. If you would like to discuss the implications of these legal developments on your business or obtain advice, please do not hesitate to approach your usual contact at Allen & Gledhill or the editors of the Legal Bulletin, **Margaret Chew (+65 6890 7500 or margaret.chew@allenandgledhill.com)** and **Elizabeth Wong (+65 6890 7559 or elizabeth.wong@allenandgledhill.com)**.

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Articles

MAS releases policy consultation paper on proposed amendments to SFA and FAA

The Monetary Authority of Singapore (the “MAS”) is conducting a policy consultation on proposed amendments to the Securities and Futures Act (the “SFA”) and the Financial Advisers Act (the “FAA”) between now and 16 January 2007.

The current consultation is the second of a series of policy consultations conducted by the MAS with regard to amendments to be made to the SFA and the FAA. The first policy consultation was carried out in September 2006 and the MAS will release at least one further consultation paper in the coming months.

Key issues that are highlighted for discussion in the current consultation are as follows:

Licensing: New licensing exemptions

- Exempt securities proprietary traders from licensing requirements under the SFA.
- Exempt research houses based overseas that are not related corporations of a financial adviser (“FA”) in Singapore from licensing requirements under the FAA where their research reports are distributed through FAs in Singapore provided that the conditions proposed by the MAS are satisfied.

Licensing: New registration regime for representative offices under SFA

- Allow foreign entities that are keen on exploring the viability of setting up a regulated entity in Singapore to set up a representative office under the SFA.

Business conduct: Appointment of directors

- Holders of capital market services (“CMS”) and FA licences that operate in Singapore as branches of foreign companies will not require the MAS’ approval for the appointment of directors who:
 - (a) do not have responsibility for the operations of the Singapore branch, and
 - (b) are not resident in Singapore.
- The MAS’ approval will be required for changes in directors’ appointment from a non-executive director to an executive director of holders of CMS and FA licences.

Market conduct: Expansion of employer’s liability

- Companies will be liable for market misconduct committed by their employees whilst trading on their behalf unless “reasonable steps” (e.g. appropriate internal controls) have been taken to prevent the market misconduct.

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(Offers of investments: New safe harbour, resale restriction loosened)

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Market conduct: Disgorgement of gains by persons benefiting from contravening trades

- Persons who have benefited from contravening trades conducted on their behalf may be ordered by the court to disgorge such gains to affected investors.

Market conduct: Disqualification order from acting as officer of company

- A person who is convicted of market misconduct offences or found liable for a civil penalty may be subject to an order disqualifying him from acting as an officer (includes a director) of a company.

Offers of investments: New safe harbour

- New prospectus exemption for offers of securities made to persons who satisfy the proposed “knowledge test”, namely individuals who have sufficient knowledge and skill to invest in securities but do not satisfy the requisite value in assets to qualify as accredited investors.

Offers of investments: Resale restriction loosened

- Lift the resale restriction for securities acquired under the accredited or institutional investors exemption when the issuer lists additional securities of the same class on an approved securities exchange and a prospectus is issued in connection with the offer and listing.

Offers of investments: Fine-tuning substantial shareholdings notification requirement

- Migrate substantial shareholdings notification requirement under the Companies Act to the SFA.
- Remove the requirement for substantial shareholders to notify the SGX of their substantial shareholdings and replace it with a requirement for a listed company to notify investors of such substantial shareholdings.
- Extend the substantial shareholdings notification requirement to substantial shareholders of foreign companies with a primary listing on the SGX.
- Extend the civil penalty regime to breaches of the substantial shareholdings notification requirement.

Offers of investments: New recognition regime for foreign business trusts

- New recognition regime to exempt foreign business trusts (“BTs”) offering units to retail investors from the Business Trusts Act (the “BTA”) registration requirement subject to the foreign BTs being constituted in a jurisdiction whose laws and practices afford protection to Singapore investors equivalent to that provided under the BTA.

Offers of investments: Continuing listing requirement for debenture issuers

- Remove the audit requirement for half-year financial statements for debentures issuers.

If you would like to consider how this would impact your business or would like our assistance in providing feedback to the MAS, please contact:

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These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert of 7 December 2006. If you would like to be on our KnowledgeShare Alert mailing list, please e-mail us at publications@allenandgledhill.com

Offers of investments: New notification regime for restricted schemes

- Remove the authorisation or recognition requirement for restricted schemes (namely, collective investment schemes offered to accredited investors) and replace it with a requirement to lodge a notification with the MAS.
- Remove the requirement for an information memorandum to accompany an offer of units in a restricted scheme.

For the full text of the current consultation, please click on the following document titles:

[Policy Consultation on Amendments to the SFA and the FAA \(December 2006\)](#)

- [Chapter 1: Markets and Clearing Houses](#)
- [Chapter 2: Licensing and Business Conduct Rules](#)
- [Chapter 3: Fidelity Funds of Securities and Futures Exchanges](#)
- [Chapter 4: Market Conduct](#)
- [Chapter 5: Offers of Investments](#)
- [Chapter 6: Amendments to Miscellaneous Provisions in the SFA and the FAA](#)

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Joint consultation by MAS and IE on transfer of regulatory oversight of commodity futures from IE to MAS

On 29 November 2006, the Monetary Authority of Singapore (the “**MAS**”) and International Enterprise Singapore (“**IE**”) jointly released a consultation paper entitled “Transfer of Regulatory Oversight of Commodity Futures from IE to MAS” (the “**Consultation Paper**”).

Commodity futures are currently regulated under the Commodity Trading Act (the “**CTA**”) by IE. The Consultation Paper proposes that the MAS takes over the regulatory oversight of commodity futures. Commodity futures will be regulated as a type of “futures contract” for the purpose of the Securities and Futures Act (the “**SFA**”) and the Financial Advisers Act (the “**FAA**”). When that happens, a person broking in or advising on commodity futures would be subject to the licensing regime under the SFA or the FAA.

The transfer is aimed to take place in the fourth quarter of 2007. Detailed timing with regards to its implementation will be confirmed later.

The MAS and IE are seeking views on the following issues in the Consultation Paper:

- Commodity futures to be prescribed as a type of “futures contract” for the purpose of the SFA and the FAA

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- Regulatory oversight of over-the-counter commodity derivatives and spot commodity contracts to remain with IE under the CTA
- Definition of “commodity”
- Timeline for transfer of regulatory oversight
- Proposed transitional measures for Commodity Futures Markets and Clearing Facilities
- Proposed arrangements to transfer regulatory oversight of entities and representatives broking in commodity futures

Comments on the Consultation Paper must be submitted to the MAS by 15 January 2007.

Please [click here](#) to read the full text of the Consultation Paper.

Please [click here](#) to read the MAS press release dated 29 November 2006 in relation to the above development.

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MAS releases fourth consultation paper on Basel II implementation

On 24 November 2006, the Monetary Authority of Singapore (the “**MAS**”) released the fourth consultation paper on the implementation of Basel II (Basel Committee on Banking Supervision’s report on “International Convergence of Capital Measurement and Capital Standards: A Revised Framework”).

The consultation paper is the fourth of several phases of consultation conducted by the MAS on the proposed standards and requirements for Basel II implementation. This fourth consultation paper sets out the proposed disclosure requirements applicable to a Reporting Bank. The purpose of the requirements is to ensure that minimum public disclosures are made available to market participants to assist in forming an opinion on the risk profile and capital adequacy of a Reporting Bank.

The MAS is inviting comments from Singapore-incorporated banks and other interested parties on the proposals set out in the consultation paper. Comments must be submitted to the MAS by 29 December 2006.

To view the full text of the consultation paper, please [click here](#).

The three earlier phases of consultation on Basel II implementation in Singapore were featured in previous issues of the Allen & Gledhill Legal Bulletin. Please click on the titles of the following documents to view these related articles:

Phase 1

- [MAS consults on proposals for the implementation of Basel II in Singapore](#)

- [MAS issues response to feedback received on “Proposals for the implementation of Basel II in Singapore – Phase 1](#)

Phase 2

- [MAS conducts public consultation on proposals for the implementation of Basel II in Singapore – Phase 2](#)
- [MAS issues response to feedback received on proposals for the implementation of Basel II in Singapore – Phase 2](#)

Phase 3

- [MAS consults on proposals for the implementation of Basel II in Singapore – Phase 3](#)

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IRAS releases consultation paper on proposed list of other borrowing costs to be allowed for income tax purposes

On 22 November 2006, the Inland Revenue Authority of Singapore (the “**IRAS**”) issued a consultation paper entitled “Consultation Paper on proposed list of other borrowing costs to be allowed for income tax purposes” (the “**Consultation Paper**”).

The IRAS is reviewing the rules on the tax deduction of borrowing costs (other than interest expense) incurred in respect of borrowings where the funds are used to acquire taxable income. In particular, the IRAS is evaluating whether the tax treatment of such other borrowing costs should have the same tax treatment as interest expense. For the purposes of the consultation, borrowings include loans, overdrafts and other forms of debt securities such as bonds and notes.

Current tax treatment of borrowing costs other than interest expense

Section 14(1) of the Income Tax Act, which deals with deductions of expenses, provides for the deduction of all outgoings and expenses that are wholly and exclusively incurred in the production of income. Section 15(1)(c), on the other hand, provides that “any sum employed or intended to be employed as capital” does not qualify for deduction. Therefore, a taxpayer is only allowed a tax deduction of expenses incurred to earn taxable income where the expenses are not capital in nature.

Applying the provisions of section 14(1) and 15(1)(c), the Consultation Paper envisages two scenarios regarding the deduction of the borrowing costs:

- If the borrowing is revenue in nature, both the interest expense and other borrowing costs (e.g. legal expenses, broker’s commission, loan procurement fees etc) incurred in respect of the borrowing are tax deductible;
- If the borrowing is capital in nature, all borrowing costs are not deductible in the first instance.

However, section 14(1)(a) provides for an exception to the second scenario. Section 14(1)(a) provides that “any sum payable by way of interest upon any money borrowed by that person where the Comptroller is satisfied that the interest was payable on capital employed in acquiring the income” will be deductible.

As section 14(1)(a) applies only to interest expense, it follows that, where a borrowing is taken to acquire a capital asset which is employed to earn taxable income, only the interest expense is deductible against the income generated from the capital asset acquired using the borrowed funds, but not the other borrowing costs.

Proposed list of other tax deductible borrowing costs incurred on borrowings that are capital in nature but are employed in acquiring income

It is acknowledged in the Consultation Paper that, increasingly, the costs of borrowing incurred by business enterprises on their borrowings are no longer confined to interest expense. Aside from interest expense, there are other borrowing costs. In the IRAS' view, these other borrowing costs are similar in nature to interest expense and, therefore, should be accorded the same tax treatment as interest expense.

The proposed list of such other borrowing costs to be allowed a tax deduction is as follows:

- Procurement, upfront, commitment, prepayment fees;
- Break costs;
- Guarantee fees;
- Bank option fees (to keep interest expenses on such loans at fixed levels);
- Upfront premium paid on a swap to cap floating rate of interest on such loans; and
- Discount on notes/bonds.

The consultation closes on 22 December 2006.

Please [click here](#) to view the full text of the Consultation Paper.

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Changes in the days and hours of business in various Intellectual Property Registries

With effect from 15 December 2006, there will be a change in the excluded days and hours of business in the various registries of the Intellectual Property Office of Singapore (the “**IPOS**”), namely Registry of Trade Marks, Registry of Designs, Registry of Patents and Registry of Plant Varieties.

Following the change, all Saturdays will be excluded days for any business under the Trade Marks Act, Patents Act, Registered Designs Act and Plant Varieties Protection Act, which means that where the time for doing the business expires on a Saturday and where the business was not done by

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These recent developments were highlighted in the Allen & Gledhill Intellectual Property & Technology Review of 12 December 2006. If you would like to be on our Intellectual Property & Technology Review mailing list, please e-mail us at publications@allenandgledhill.com

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that Saturday, it is acceptable to complete this business on the following Monday. The changes are brought about by the following Practice Directions:

- [Practice Direction Relating to Trade Marks](#)
- [Practice Direction Relating to Patents](#)
- [Practice Direction Relating to Designs](#)
- [Practice Direction Relating to Plant Varieties Protection](#)

For further information, please click on the title of the respective Practice Direction.

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Changes to classification of goods and services for purpose of trade mark registration

With effect from 1 January 2007, there will be changes to the classification of certain categories of goods and services under the Third Schedule to the Trade Marks Rules:

- Class 21 in Part I: Household or kitchen utensils and containers will include those made of precious metal or coated therewith
- Class 42 in Part II: Legal services will be removed
- Class 45 in Part II: Addition of legal services

The changes are brought about by the Trade Marks (Amendment) Rules 2006 and are intended to align the provisions of the Trade Marks Rules with the corresponding changes in the Nice Classification.

The Ninth Edition of the Nice Classification in relation to the international classification of goods and services for the purposes of the registration of trade marks will replace the Eighth Edition of the Nice Classification with effect from 1 January 2007. The change will not affect applications filed before 1 January 2007. For existing applications filed prior to 1 January 2007, there will be no reclassification of goods and services even after the Ninth Edition of the Nice Classification has come into force.

For further information on the above, please [click here](#) to visit the IPOS website.

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Allen & Gledhill Legal Bulletin year in review: 2006

In this last issue for the year 2006, the Allen & Gledhill Legal Bulletin provides an overview of the key developments in 2006. These developments are listed according to the following categories and links are provided to the issue of the Allen & Gledhill Legal Bulletin in which the development is reported:

- Banking
- Casino control
- Competition
- Corporate
- Employment
- Energy
- Insurance
- Intellectual property and technology
- Life sciences
- Limited partnerships
- Real estate
- Regulatory
- Securities and futures
- Singapore Exchange
- Tax
- Trust companies
- General

Key legal and regulatory developments in 2006

Banking	
Tax exemptions and concessions to promote Islamic financial services	February 2006
Banking regulations amended to allow Singapore banks to offer Murabaha investment products	June 2006
Parliament introduces Banking (Amendment) Bill 2006: Strengthening prudential safeguards and greater operational flexibility for banks	November 2006
Casino control	
Parliament passes Casino Control Bill 2006	February 2006
Competition	
Competition Act: Prohibition against anti-competitive agreements and abuse of dominance operative with effect from 1 January 2006	January 2006
Competition (Appeals) Regulations 2006 operative from 1 March 2006	March 2006
Competition law: Block exemption for liner shipping agreements	July 2006
Competition Commission of Singapore consults on proposed merger regime	October 2006
Corporate	
Companies (Amendment) Act 2005 comes into force on 30 January 2006	January 2006
Amendments to subsidiary legislation pursuant to the commencement of Companies (Amendment) Act 2005	February 2006
Addendum to ACRA Practice Direction No 4 of 2005: ACRA's policy in granting exemption under section 202 of Companies Act	March 2006
ACRA Practice Direction No 4 of 2006: Interpretation of sections 201(1A), (3) and (3A) of the Companies Act in relation to consolidated accounts	May 2006
MOF accepts CCDG's recommendations to maintain status quo relating to the mandatory quarterly reporting for listed companies	September 2006

Employment	
CPF salary ceiling lowered from S\$5,000 to S\$4,500 effective 1 January 2006	January 2006
Workplace Safety and Health Act 2005 comes into force on 1 March 2006: New legislative framework for occupational safety and health	March 2006
MOM announces details of Personalised Employment Pass (“PEP”) which will be introduced from 1 January 2007	August 2006
MOM conducts public consultation on draft workplace safety and health regulations	October 2006
MOM conducts public consultation on draft Employment of Foreign Manpower Act	November 2006
Energy	
Public consultation on proposed amendments to Gas Act: Measures to ensure open access to gas network	February 2006
Electricity (Amendment) Act 2006 takes effect on 1 May 2006: Strengthening regulatory oversight of the electricity market	April 2006
Insurance	
MAS issues response to feedback received from consultation paper on review of framework for nomination of beneficiaries	May 2006
MAS releases response to feedback received on recommendations to enhance Policy Owners’ Protection Fund Scheme	August 2006
MAS releases consultation paper “Review of Regulatory Requirements for Sub-funds of Investment-Linked Life Insurance Policies”	September 2006
MAS proposes regulatory framework for mortgage insurance business	October 2006
MAS issues consultation paper on proposed modifications to regulatory requirements for trade credit and political risk insurance business	November 2006
Intellectual property and technology	
IPOS proposes changes to timelines of certain processes of PCT (Singapore) national phase entry applications	April 2006
The Singapore Treaty on the Law of Trademarks	May 2006
IPOS consults on exemptions to prohibition against circumvention of technological access control measures	June 2006

IPOS conducts public consultation on patents laws in Singapore	July 2006
Updates on amendments to Patents Rules	July 2006
Parliament introduces Trade Marks (Amendment) Bill 2006: Giving effect to certain articles of the Singapore Treaty on the Law of Trademarks	November 2006
Changes in the days and hours of business in the various Intellectual Property Registries	December 2006
Changes to classification of goods and services for purpose of trade mark registration	December 2006
Life sciences	
Bioethics Advisory Committee issues consultation paper on the use of personal information in biomedical research	June 2006
Limited partnerships	
Ministry of Finance consults on Limited Partnerships Bill 2006	August 2006
Real estate	
Residential Property (Amendment) Act 2006 comes into force on 31 March 2006: Policy changes affecting foreign ownership of property	March 2006
Regulatory	
MAS public consultation on draft Deposit Insurance Agency Rules	January 2006
MAS issues four revised risk management guidelines	March 2006
MAS issues response to feedback received on consultation on draft Deposit Insurance Agency Rules	March 2006
MAS issues response to feedback received on "Proposals for the implementation of Basel II in Singapore – Phase 1"	March 2006
MAS conducts public consultation on proposals for the implementation of Basel II in Singapore – Phase 2	March 2006
MAS proposes to fine-tune existing minimum liquidity risk supervision framework for banks	May 2006
Payment Systems (Oversight) Act 2006 and related Regulations operative from 23 June 2006	June 2006
MAS issues response to feedback received on consultation paper on recognition of bilateral netting for capital adequacy purposes	June 2006

MAS consults on proposals for the implementation of Basel II in Singapore – Phase 3	June 2006
MAS second consultation paper on draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism	August 2006
MAS issues response to feedback received on proposals for the implementation of Basel II in Singapore – Phase 2	September 2006
MAS issues consultation on Draft Guidelines to Draft Notices on Prevention of Money Laundering and Countering the Financing of Terrorism	September 2006
MAS releases Draft MAS Notice 639: Exposures to Single Counterparty Groups and Draft MAS Notice 640: Minimum Asset Maintenance Requirements for Foreign Banks for consultation	September 2006
Joint consultation by MAS and IE on transfer of regulatory oversight of commodity futures from IE to MAS	December 2006
MAS releases fourth consultation paper on Basel II implementation	December 2006
Securities and futures	
Securities and Futures (Market Conduct) (Exemptions) Regulations 2006: Revised rules for stabilising action	March 2006
SFA Regulations provide for new prospectus requirements exemption for offers of asset-backed securities and structured notes issued pursuant to synthetic securitisation transactions	April 2006
MAS consultation on proposed amendments to the Code on Collective Investment Schemes	May 2006
SIC issues consultation paper on amendments to the Singapore Code on Take-overs and Mergers	June 2006
MAS issues response to SIBA Equity Derivatives and Structured Products Taskforce Findings	July 2006
Securities and Futures Regulations amended to effect changes to margin requirements applicable to CMS licence holder which conducts securities financing or offers contracts for differences	August 2006
New Futures Trading Rules and revised SGX-DC Clearing Rules effective from 22 September 2006	September 2006
MAS conducts public consultation on proposed amendments to the SFA and FAA	September 2006
MAS releases policy consultation paper on proposed amendments to SFA and FAA	December 2006

Singapore Exchange	
SGX issues consultation paper on proposed amendments to SGX-DT Rules to allow inter-exchange cross margining	March 2006
SGX releases consultation paper to provide for admission of banking clearing members	April 2006
SGX issues consultation paper on proposed changes to the SGX-DT Derivatives Trading Rules	April 2006
SGX-DC releases consultation paper on proposed amendments to SGX-DC Clearing Rules	May 2006
Amendments to SGX-ST Listing Manual to enhance corporate governance standards	June 2006
SGX releases new rules for the listing of Global Depository Receipts	June 2006
SGX issues consultation paper for Phase Two of proposed changes to the SGX-DT Trading Rules	June 2006
New rules for listing of hedge funds effective 29 June 2006	July 2006
SGX proposes to amend SGX-ST Business Rules to empower the SGX-ST to impose restrictions on trading of Global Depository Receipts	October 2006
Tax	
Stamp Duties (Amendment No. 2) Act 2005 in force from 1 January 2006: Relief under section 15 for transfer of mortgages	January 2006
Goods and Service Tax (Amendment) Act 2005 in force from 1 January 2006: Minister for Finance prescribes new international services	January 2006
Highlights of Singapore Budget 2006	February 2006
Tax changes to the Singapore-India Double Tax Agreement arising from the Singapore-India Comprehensive Economic Cooperation Agreement (including developments announced on 17 February in the Singapore Budget Statement 2006)	May 2006
MOF conducts public consultation on draft Goods and Services Tax (Amendment) Bill 2006	September 2006
Parliament introduces Income Tax (Amendment) Bill 2006: Implementation of income tax changes announced in 2006 Budget Statement	November 2006
IRAS releases consultation paper on proposed list of other borrowing costs to be allowed for income tax purposes	December 2006

Trust companies	
Trust Companies Act 2005 operative from 1 February 2006	January 2006
General	
Public consultation on proposed amendments to the Consumer Protection (Fair Trading) Act: Protection of buyers of timeshares, club memberships and alternative investments	February 2006
MAS and Ministry of Law consult on proposed changes to unsecured credit rules and similar rules for moneylenders	August 2006
DPM Jayakumar announces plan to develop an integrated arbitration complex in Singapore	October 2006
Parliament introduces Statutes (Miscellaneous Amendments) Bill 2006: Proposed changes to period for retention of records	November 2006

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Cases

Corporate & financial services

English High Court upholds standard clauses in Syndicate Information Memorandum that limit liability of arranging bank

IFE Funds SA v Goldman Sachs International
[2006] EWHC 2887

The recent English High Court's decision in *IFE Funds SA v Goldman Sachs International* offers comfort to arranging banks in syndicated credit facilities as it confirms the validity of the standard clauses in Syndicate Information Memorandum (the "SIM") which limit the liability of the arranging banks. The court was also unwilling to find that an arranging bank's standard practice of issuing the SIM and procuring accountants' reports for the participants of a syndication for the purpose of enabling the latter to consider whether to take part in the syndication gives rise to any implied representation by the arranging bank that it has no knowledge that the information in the SIM or the accountants' reports is or might be materially incorrect. The implied representation that is given by the arranging bank in supplying the SIM is that it is acting in good faith and is not knowingly putting forward information likely to mislead. The arranging bank can be said to be giving a continuing representation, so that if, after the issue of the SIM but before a recipient acts on it, the arranging bank has actual knowledge that the information which it has supplied in good faith is misleading, it will be under a duty to disclose the error.

In the present matter, IFE Funds SA (“**IFE**”) bought from the defendant (“**G**”) bonds and warrants issued by Autodis SA (“**Autodis**”) for €20 million. The transaction was part of the provision of syndicated credit facilities to Autodis. The purpose of the credit was to enable Autodis to take over Finelist Group PLC (“**Finelist**”). The provision of the syndicated credit facilities contributed by IFE was arranged by G.

Following an expression of interest by IFE to contribute to the syndicated credit facilities, G sent a SIM for the facilities to IFE. The SIM referred to two reports dated December 1999 and February 2000 (the “**1999 and 2000 Reports**”) prepared by the accountants, Arthur Andersen (“**AA**”), which carried out a review of Finelist’s financial affairs. These two reports had also been provided to IFE.

The SIM contained a large number of disclaimers of responsibility and one of them (the “**Disclaimer**”) read as follows:

“The Arranger [G] has not independently verified the information set out in this Memorandum. Accordingly, no representation, warranty or undertaking, express or implied, is made and no responsibility is accepted by [G] ... as to or in relation to the accuracy or completeness or otherwise of this Memorandum or as to the reasonableness of any assumption contained therein or any other information made available in connection with the Facilities (whether in writing or orally) to any interested party (or its advisors)... Neither the arranger nor any of its respective directors ... shall be liable for any direct, indirect or consequential loss or damage suffered by any person as a result of relying on any statement contained in this Memorandum or any such other information.” (emphasis added)

The invitations to IFE to participate in the syndication went out before the offer to acquire Finelist became unconditional. As the acquisition timetable was very short, it was not anticipated that AA would have time to carry out a post-acquisition review of Finelist before the completion of the syndication. A few other reports (the “**subsequent Reports**”) were prepared by AA after the 1999 and 2000 Reports but the subsequent reports were not sent to IFE and IFE had no knowledge of their existence at the time of the completion of the syndication. G had received the subsequent Reports and it was G’s intention to have AA sending these reports to the potential participants of the syndication, including IFE, although IFE did not receive them. The subsequent Reports stated that AA could not complete the post-acquisition review of Finelist due to lack of timely access to management and difficulty in obtaining relevant information.

However, after the completion of the syndication, AA discovered that Finelist’s financial position was not as had been shown in its audited accounts, and that the group had deceived its auditors by transferring money between different members of the group so as to present a false picture of the group’s financial position. Finelist was subsequently put into receivership.

IFE commenced the present proceedings claiming damages for its loss on the transaction against G on the following grounds:

- Negligent misstatement or breach of a duty of care to inform, and/or
- Misrepresentation pursuant to the UK Misrepresentation Act 1967.

The thrust of IFE’s complaint was that it was induced to enter into the transaction by information provided by G, which presented a picture that was in fact misleading and which was not corrected or qualified after G had cause to doubt its reliability as a result of receiving the subsequent Reports.

Negligent misstatement

IFE argued that by issuing the SIM and procuring that the reports prepared by AA to be sent to IFE for the purpose of enabling IFE to consider whether to take part in the syndication, G impliedly represented that it knew nothing which showed that the information in the SIM or in the reports was or might be materially incorrect, and that this representation continued until completion of the syndication.

The court held that in determining what, if any, implied representation had been made by G, it had to consider what sort of implied representations a reasonable person would have inferred from G's words and conduct in their context.

It was the court's view that the SIM should not be treated like a document issued to members of the public unversed in financial matters and unlikely to have professional advice. The court found that the SIM should be read in the context of a document issued to financially sophisticated entities operating in a specialist market. Hence, the SIM had to be read as a whole in order to see what a reasonable participant would understand was the scope of the responsibility undertaken by the arranger in relation to its contents.

In construing the SIM, the court had also taken into account the common industry practice in relation to syndication of credit facilities. The court noted that common features of such syndication are that the parties introducing the equity into the venture (the sponsors) retain a bank (the arranger, in this case, G) which arranges and sometimes underwrites the facilities. The arranger prepares a SIM; the debtor accepts responsibility for the accuracy of the information contained in the SIM at that date; and the arranger disclaims any legal responsibility for its accuracy.

Against this background, the court found on the evidence that G had not made any implied representation to the effect that it knew nothing which showed that the information in the SIM or in the reports was or might be materially incorrect. The court was of the view that an implied representation of the scope contended for by IFE would potentially require G to carry out an evaluation in order to decide what information it was required to disclose, inconsistent with the express language of the SIM as it contained a clause which stated that:

"The Arranger expressly does not undertake to review the financial condition, status or affairs of ...Finelist... at any time or to advise any potential or actual participant in the Facilities of any information coming to the attention of the Arranger".

The court however commented that the implied representation that was made by G in the present case was that in supplying the SIM, it was acting in good faith, that is, not knowingly putting forward information likely to mislead; or that this was a continuing representation, so that if, after the issue of the SIM but before a recipient acted on it, G became aware that the information which it had supplied in good faith was misleading, it would be under a duty to disclose this (at all events unless it honestly believed that the error was a matter of no importance). There was, however, a difference between actual knowledge that the information previously supplied was misleading and acquisition of information which merely gave rise to a possibility that the information previously supplied was misleading. In the latter case, G would not be under a duty to a prospective participant to investigate the matter further, or to advise the participant, in view of the terms of the SIM.

Breach of duty of care to inform

Alternatively, IFE contended that a relationship existed between itself and G, such that G owed it a duty to take reasonable care to inform it if, before completion of the syndication, G became aware of any facts and matters which showed that the statement about Finelist's performance made in the SIM or the facts stated in the 1999 and 2000 Reports were or might be incorrect in any material way.

The court rejected IFE's argument and held that G did not owe such duty to IFE. The court commented that G was not acting as an adviser to IFE or purporting to carry out any professional service for IFE, as the terms of the SIM made plain. It was acting for the sponsors and not on behalf of the recipients of the SIM.

In general, a party involved in negotiations towards a commercial venture owes no positive duty of disclosure towards another prospective party. Although a duty of disclosure may be undertaken, the court found that in the present matter, no such duty was undertaken by G expressly or impliedly.

Issues under the UK Misrepresentation Act 1967

Section 3 of the UK Misrepresentation Act 1967 prevents a person from excluding or restricting liability for misrepresentation, or any remedy available for misrepresentation, by a contractual term unless it satisfies the requirement of reasonableness. Section 3 of the Singapore Misrepresentation Act is in *pari materia* with its UK equivalent. Section 2 of the UK Unfair Contract Terms Act 1977 provides that a person cannot exclude or restrict liability for negligence by a contractual term or notice unless it satisfies the requirement of reasonableness. Section 2 of the Singapore Unfair Contract Terms Act provides for the same restriction.

IFE argued that in substance the terms of the SIM purported to exclude or restrict G's liability for misrepresentation or negligence.

So the issue here was whether the SIM were properly to be understood as excluding a liability for misrepresentation or as going to the question whether the alleged representation was made at all. This issue was one of the substance and not the form of the SIM.

In the present matter, the information supplied by G to IFE was obtained by G from other sources. The court was of the view that the statements made by G in the SIM regarding its non-verification of the accuracy or completeness of that information, and its non-acceptance of any responsibility for reviewing the information, went to the scope of the representations being made and could not properly be characterised for the purposes of, either the UK Misrepresentation Act or Unfair Contract Terms Act, as attempts to exclude liability for misrepresentation.

The court also commented that the Disclaimer which stated that G should not be liable for any loss or damage suffered by any person as a result of relying on any statement in the SIM was not in any event relevant to the issue of what representations were made. It was the court's view that the Disclaimer was not to be characterised in substance as a notice excluding or restricting a liability for negligence, but more fundamentally as going to the issue of whether there was a relationship between the parties (amounting to or equivalent to that of professional adviser and advisee) such as to make it just and reasonable to impose the alleged duty of care.

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Based on the above grounds and some other arguments that G raised in the course of its defence (which are not covered in the current case summary), the English High Court dismissed IFE's claim.

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Dispute resolution

Arbitration

Singapore Court of Appeal decides that Singapore High Court does not have jurisdiction under International Arbitration Act to grant an injunction in aid of foreign arbitration

Swift-Fortune Ltd v Magnifica Marine S.A.
[2006] SGCA 42

This case is an appeal against a decision of the Singapore High Court which set aside a Mareva injunction restraining Magnifica Marine SA ("**Magnifica**"), a Panamanian company, from disposing of its assets in Singapore pending arbitration proceedings in London. The dispute arose in connection with the sale of a vessel by Magnifica to Swift-Fortune Ltd ("**Swift-Fortune**"), a Liberian company, whereby Swift-Fortune claimed substantial losses up to US\$2.5 million arising from delay in delivery of the vessel.

Significance of the case

The case addresses important issues relating to the power of a Singapore court to grant Mareva interlocutory relief to assist international arbitrations taking place outside Singapore. It is also especially interesting in the wake of the two recent and contrasting decisions of the High Court on the issue.

In *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 ("**Front Carriers**"), Belinda Ang J upheld the power of the court to grant a free-standing Mareva injunction in aid of foreign arbitration. (Allen & Gledhill successfully acted for the respondents in this case. The decision in *Front Carriers* is on appeal.) In *Swift-Fortune Ltd v Magnifica Marine SA* [2006] SGHC 36 (from which Swift-Fortune made this appeal), Judith Prakash J ruled that the court has no power to issue such an injunction.

Speaking for the court, Chan Sek Keong CJ noted that, except for one critical difference in fact, i.e. the existence of a substantive claim recognisable by a Singapore court (in the *Front Carriers* case but not the present case), the material facts in the present case and in *Front Carriers* were substantially the same. In both cases, the defendant had assets but had no place of business in Singapore. In both cases, the parties had agreed to refer the contractual dispute to arbitration outside Singapore and in accordance with English law. The court remarked that two cases on the same legal issues reaching the courts within a short span of time may be indicative of the potentially high incidence of similar future cases. Moreover, that two experienced commercial judges have expressed different views on the applicability of the relevant statutory provisions relating to Mareva injunctions also indicates the need for clarity, certainty and predictability in such an important area of Singapore commercial law.

Relevant statutory provisions

The court's powers at issue are those provided under section 12(7), read with section 12(1), of the International Arbitration Act (the "IAA") and also under section 4(10) of the Civil Law Act (the "CLA").

Section 12(1) of the IAA lists the powers of an arbitral tribunal, which include the power to make interim injunctions. Section 12(7) of the IAA provides that with respect to these powers, the High Court has the same power in relation to arbitration as it does in relation to an action or matter in court.

Section 4(10) of the CLA is, the court noted, the source of the court's power to grant interlocutory injunctions in respect of court proceedings.

International arbitrations covered by section 12(7) of the IAA

Swift-Fortune argued that section 12(7) applies to all international arbitrations whether conducted in or outside Singapore. The argument invokes a reading of section 12(7) in conjunction with section 5(2) of the IAA which provides a broad scope of what arbitration would be treated as international, with no qualification as regards the seat of arbitration or the law applicable to the arbitration. Magnifica contended otherwise, that section 12(7) should not be interpreted literally but purposively, to give effect to the purpose of the IAA which is to promote international arbitration in Singapore.

After considerable deliberation, the court agreed with the decision of Prakash J that section 12(7) of the IAA is not intended to apply to foreign arbitrations but only international arbitrations which have Singapore as the seat of arbitration. For this reason, section 12(7) does not give the court the power to grant interim measures, including Mareva injunctions, to assist foreign arbitrations.

In coming to this conclusion, the arguments examined by the court included:

- **Legislative history:** The IAA is intended to encourage and assist the proper functioning of international arbitrations in Singapore, and not elsewhere.
- **Placement:** Section 12(7) is placed in section 12 which deals only with the powers of arbitral tribunals conducting arbitrations in Singapore. The court agreed with the view of Prakash J that in the absence of clearer words, it is unlikely that Parliament intended section 12(7) to apply to foreign arbitrations, when at the same time it has not conferred on the court the power to grant Mareva injunctions in aid of foreign court proceedings.
- **Extraterritoriality:** Section 12(7) is not expressed to apply extraterritorially.
- **Overreaching:** To allow the plain but broad meaning that Swift-Fortune proposed could lead to interference with the rights of parties and intrusion into powers of foreign arbitral tribunals. This could not have been the intention of Parliament in enacting section 12(7).

Power under Section 4(10) of the CLA

The court took the view that section 12(7) does not provide an independent source of statutory power for the court to grant the orders and reliefs set out in section 12(1) of the IAA. Rather, it draws from section 4(10) of the CLA which gives courts the power to grant interlocutory relief, including Mareva

injunctions, in aid of foreign court proceedings. If the court has such power with respect to foreign court proceedings, then it has similar power with respect to arbitral proceedings under the IAA.

With regard to section 4(10) of the CLA, the Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 applied the principle in *Siskina v Distos Compania Naviera SA* [1979] AC 210 that a Singapore court could not assume jurisdiction over a foreign defendant simply because he had assets within the territorial jurisdiction that could be the subject of an injunction order. In order for a Mareva injunction to apply against such a defendant, the plaintiff has to possess an accrued cause of action against the defendant that is justiciable in a Singapore court.

The court was of the view that the decision of Ang J in *Front Carriers* had the effect of amplifying or extending the scope of section 4(10) to apply to foreign arbitrations where the plaintiff had a cause of action that is justiciable in Singapore and the court had personal jurisdiction over the defendant, such as by reason of the defendant having assets in Singapore. The existence of personal jurisdiction over the defendant in itself does not give the court the power to grant a Mareva injunction in aid of a foreign arbitration. The court took pains to make clear that it was not deciding on the issue as to whether the court could grant an injunction in circumstances where that is justiciable in Singapore, as that was the subject of the separate appeal in *Front Carriers*.

Differentiating *Front Carriers*

The court observed that the finding in *Front Carriers* that there was a justiciable cause of action in a Singapore court distinguishes it from the present case where Swift-Fortune did not have such a justiciable right over Magnifica when it obtained the *ex parte* Mareva injunction. For this reason, the court was of the view that the decisions in the present case, that in *Front Carriers*, and in Prakash J's judgment are not in conflict with each other in their interpretations of section 4(10) of the CLA.

Accordingly, the appeal of Swift-Fortune against the decision of Prakash J was dismissed.

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Singapore High Court rules on enforcement of English judgment in Singapore

Westacre Investments Inc v The State-Owned Company Yugoimport SDPR
(also known as *Jugoimport-SDPR*)
[2006] SGHC 210

This is an interesting case arising from the registration in Singapore of an English judgment obtained by Westacre Investments Inc ("**Westacre**"), a Panamanian company, against Yugoimport SDPR ("**Yugoimport**"), a state-owned company in the former Yugoslavia, now Serbia.

The judgment was issued in relation to an arbitration award issued by the International Chamber of Commerce in Geneva, Switzerland on 28 February 1994. Westacre, the judgment creditor, sought enforcement of the award before the High Court of England. The court entered judgment on 13 March 1998 but execution was stayed pending appeal. Eventually, through

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enforcement proceedings between 1999 and 2004, Westacre recovered a part of the judgment debt in England.

However, Westacre did nothing towards the enforcement of the judgment in Singapore until 5 October 2004 when it applied for and obtained an order to have the judgment registered under section 3 of the Reciprocal Enforcement of Commonwealth Judgments Act (“**RECJA**”).

Yugoimport applied to set aside the registration on grounds that the application to register the English judgment was time-barred. Also, even if the judgment was not time-barred, it was not just and convenient that it be registered in Singapore.

Limitation

Yugoimport’s first argument was that as the judgment debt cannot be sued on again after six years under English law (invoking section 24(1) of the Limitation Act 1980), then by analogy, it cannot be registered abroad as a foreign judgment. The court dismissed the argument as having no basis in Singapore law. The applicable limitation statute is Singapore’s Limitation Act which does not set a time limit on applications to register foreign judgments.

“Just and convenient”

The judgment was registered well after the usual 12-month period for registration provided under section 3(1) of the RECJA. The provision allows older judgments to be registered if “it is just and convenient that the judgment should be enforced in Singapore.”

In arriving at what would be just and convenient, the court considered but rejected the position taken by the Privy Council and the Supreme Court of the Australian Capital Territory whereby it had been held it would be considered just and convenient to allow registration as long as the debtor could not demonstrate any prejudice due to the delay. The approach in these cases was that leave should generally be granted despite the delay. The Singapore court held that the onus was on the applicant to give good reasons for the delay and that this was an additional factor to be considered together with the issue of prejudice to the debtor. Upon considering further common law authorities, the court endorsed the following principles:

- Generally, leave to execute will not be given after a lapse of six years from the date of judgment,
- The onus is on the judgment creditor to justify an extension of time, and
- In deciding whether to extend time, the court will consider the reasons for the delay and the prejudice an extension of time may have on the judgment debtor.

The court took note of section 3(2)(e) of the RECJA which provides that a judgment shall not be registered if the judgment debtor satisfies the registering court that an appeal is pending, or that he is entitled and intends to appeal, against the judgment. This would be a valid reason for a delay. In Westacre’s case, it could only commence registration proceedings in Singapore at the earliest on 20 October 1999, when the House of Lords refused Yugoimport leave to appeal. However, the application was filed much later on 5 October 2004, or almost five years after leave to appeal was refused.

The court was not persuaded by the explanations given by Westacre for the delay.

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Furthermore, the court found that registration in Singapore will have the effect of clear prejudice to Yugoimport. Whereas English law requires leave of court for the issue of a writ of execution on judgments where six years or more have elapsed since the date of judgment, the RECJA does not carry a similar requirement. Under section 3(3)(a) of the RECJA, the judgment once registered will have the same force and effect as if it had been obtained upon the date of registration. As such, the registered judgment would have the same force and effect as a judgment of the registering court. The RECJA does not give the court the power to impose restrictions on the enforcement of a duly registered judgment.

Based on the foregoing, the court found that it will not be just or convenient to allow the registration of the judgment despite delay, and ordered that such registration be set aside.

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Insolvency

Singapore High Court examines “who is an associate” in unfair preference claim against ex-employee of insolvent company

Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory [2006] SGHC 191

Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory is a recent Singapore High Court decision which dealt with the issue of unfair preference relating to payments made by an insolvent company to its employee.

The plaintiff was a company in liquidation and this was a claim brought by its liquidator against the defendant, who had been its employee, to recover payments that had been made to the defendant by the plaintiff. The payments were made to repay certain debts owed to the defendant by the plaintiff. Winding up proceedings were commenced against the plaintiff almost two years after the payments were made. It was alleged that these payments constituted an unfair preference and hence were recoverable by the liquidator. The defendant was an employee of the plaintiff at the time of the payments. However, the defendant was no longer employed by the plaintiff at the time when the plaintiff was wound up by the court. On the basis of the facts set out, the court had to consider two issues:

- Whether the payments were unfair preferences within the meaning of section 329(1) of the Companies Act read with sections 99 to 100 of the Bankruptcy Act; and
- Whether the defendant was an “associate” of the plaintiff at the time of the payments.

Was the defendant an “associate”?

The court felt that it was important to first tackle the issue of whether the defendant was an associate of the plaintiff before looking into the other issue of whether the payments were unfair preferences. The court’s rationale was that, should the defendant be an associate (otherwise than by reason only of his being an employee of the plaintiff), then the defendant would be a person connected with the plaintiff with the consequence that:

- A rebuttable presumption would arise that the payments were influenced by the desire to prefer him (section 99(5) of the Bankruptcy Act); and
- The relevant period for invalidating the transaction as an unfair preference would be extended from six months to two years prior to the commencement of insolvency proceedings (section 100(1)(b) of the Bankruptcy Act).

The court pointed out that although the defendant was an employee of the plaintiff at the relevant time of the payments, sections 99(5) and 100(1)(b) of the Bankruptcy Act do not apply to a person who is an associate of the insolvent party by reason only of his position as an employee. As such, the relevant question was whether the defendant was an associate of the plaintiff otherwise than by reason of his employment. Section 101 of the Bankruptcy Act provides that any question whether a person is an associate of another person *shall* be determined in accordance with the provisions of that section.

The provisions of the Bankruptcy Act are made relevant by virtue of section 329(1) of the Companies Act which provides that if a transaction may be avoided under the Bankruptcy Act had it been by or against an individual in the event of his bankruptcy, it shall be voidable if done by or against a company in its liquidation.

In the context of companies, it was also necessary to examine the Companies (Application of Bankruptcy Act Provisions) Regulations (the “**CABAR**”). Regulation 2 provides that an “associate” means an associate of a person or company as determined in accordance with section 101 of the Bankruptcy Act as modified by regulation 5 of CABAR. Further, regulation 2 provides that a “person connected with a company” means a person who is a director or shadow director of the company, or who is an associate of such a director or shadow director, or who is an associate of the company. Regulation 4 then provides that any reference to an associate of a person or an individual who has been adjudged bankrupt (except any such reference within section 101 itself of the Bankruptcy Act) shall be read as a reference to a person connected with the company that has been, among others, wound up. Regulation 5 is not relevant for present purposes.

As such, the provisions of section 101 of the Bankruptcy Act are to be applied with some modifications in the corporate context. In particular, if it could be shown that the defendant was an associate of either of the directors of the plaintiff, then he would be a person connected with the company.

In the present action, the plaintiff relied on several grounds to persuade the court to hold that the defendant should be considered an associate of, or a person connected with, the company otherwise than by virtue of his position as an employee. One of the grounds submitted was that the provision excepting an employee from being an associate in the relevant sense for the purposes of section 99(5) and section 100(1)(b) of the Bankruptcy Act should be read as only applicable to the extent that the transaction being challenged related to the payment of such of the employee’s debts as had been incurred *qua* employee. The plaintiff further submitted that, should the court hold otherwise, there would be a dissonance between these provisions and section 328 of the Companies Act which recognises certain priorities for employee claims. The court disagreed and held that the provisions relate to quite different things. Section 328 of the Companies Act deals with priority among creditors seeking to be paid out of the insolvent estate and has nothing to do with an unfair preference which may be set aside. If the employee is not an associate of the company or is an associate solely by virtue of being an employee and is paid a sum within six months of the onset of insolvency and that has the effect of preferring him over other creditors,

then it can be attacked as an unfair preference. If the payment is made more than six months before the onset of insolvency and he is not otherwise an associate, it cannot be impugned on this ground. That is a different matter from the issue of priority under section 328 of the Companies Act.

The other ground which the plaintiff relied on was that the defendant was a relative of one of the directors (the “**director**”) of the plaintiff at all material times, and that on this basis he should be treated as a person connected with the plaintiff. The plaintiff relied on section 101(2) read with section 101(7) and section 101(8) of the Bankruptcy Act. The relevant wording of the sections is set out below:

Section 101 (2) : “A person is an associate of an individual if that person is ... a spouse of a relative of the individual...”

Section 101(7) : “For the purpose of this section, a person is a relative of an individual if he is that individual’s...niece...”

Section 101(8) : “References in this section to a spouse shall include a former spouse.”

In other words, a person will be an associate of another person, *inter alia*, if he is that person’s relative or relative’s spouse. On the facts, the defendant had been married to the director’s niece for some years. As such, the court held that by virtue of section 101(2) of the Bankruptcy Act, the defendant was an associate of the director of the plaintiff and by virtue of the provisions of the CABAR as outlined above, he was a person connected with the plaintiff. This would extend the period within which transactions entered into by the plaintiff with the defendant may be invalidated, to two years from the onset of insolvency. There is also a rebuttable presumption that the payments were influenced by the desire to prefer the defendant.

Were the payments unfair preferences?

Before the court could hold that the payments were unfair preferences, it must be satisfied that at the time of the payments the plaintiff was influenced by the desire to improve the defendant’s position in the event of its own insolvent liquidation.

The court felt that the following propositions may be advanced when considering whether a transaction may be successfully challenged as an unfair preference:

- A person is taken to intend the natural consequences of his action. As such, something more has to be shown.
- The payment must have been influenced by the desire to improve the creditor’s position in the event of an insolvent liquidation.
- The analysis is to be undertaken by reference to the time of the impugned transaction.
- If, as in the present case, the challenged transaction involves an associate and there is a rebuttable presumption that the company entered into that transaction under the influence of the relevant desire, the court will examine all the facts, and determine whether on a balance of probabilities the presumption had been rebutted.

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Further, any inferences drawn must be from the perspective of the facts known at the time of the transaction. As such, the court took into account the fact that, at the time of the payments, no one expected that the company would inevitably be wound up imminently. This would point away from the probability that those making the payments were doing so with the relevant desire to prefer the defendant.

On the facts, looking at the totality of the facts and circumstances, the court held that the presumption had been adequately rebutted and the plaintiff had failed to discharge the burden of showing that the payments constituted an unfair preference.

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Shipping

Singapore High Court rules on meaning of “goods carried in a ship” under High Court (Admiralty) Jurisdiction Act

The “Mezen”
[2006] SGHC 35

The Mezen is an interesting case because it presented an opportunity for the Singapore courts to consider the meaning of “goods carried in a ship” under section 3(1)(g) of the High Court (Admiralty) Jurisdiction Act (the “**Act**”). Section 3(1) of the Act provides a list of the claims over which the High Court’s admiralty jurisdiction may be invoked, including “any claim for loss of, or damage to, goods carried in a ship” under section 3(1)(g).

The plaintiffs brought a claim against the defendants for damages arising from the defendants’ alleged wrongful detention of or interference with the plaintiffs’ seismic equipment, which were on board the defendants’ vessel, *The Mezen* (the “**vessel**”). The plaintiffs arrested the vessel in order to secure their claim. The defendants in turn applied to, among others, set aside the arrest of the vessel on the basis of several grounds. One of the grounds was that the plaintiffs had wrongly invoked the admiralty jurisdiction of the High Court because their claim against the defendants did not fall within section 3(1)(g) of the Act.

Scope of section 3(1)(g) of the Act

The plaintiffs urged the court to give a broad and liberal construction to section 3(1)(g). It was not disputed that the words “claim for” in the subsection meant “arising out of” and were wide enough to cover both tortious and contractual claims. The words would cover the loss of right to goods and would not be restricted to physical destruction of goods. In the instant case, the plaintiffs’ claim would fall under this limb as the plaintiffs had been deprived of their right to the equipment arising out of the defendants’ wrongful detention of or interference with the same.

The bone of contention was in the meaning of the words “goods carried in a ship” in section 3(1)(g) of the Act. The plaintiffs argued that the ordinary and natural meaning of “goods” was “all chattels of which possession is possible notwithstanding that they are not easily moveable” and “goods carried in a ship” meant “whatever conveyed in a ship” or “the load carried in a ship”. According to the plaintiffs, the equipment on board the vessel was a chattel capable of being off loaded (that is, capable of being moved) and it also formed the load of the vessel. As such, the equipment would be covered by

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the words “goods carried in a ship” and the admiralty jurisdiction of the High Court was correctly invoked.

The defendants’ argument was that “goods carried in a ship” was confined to “goods carried as cargo on board a ship”. The High Court agreed with the defendants’ interpretation of the words. The court’s view was that if these words could include any chattel as long as the chattel was movable and formed the load of a vessel, then surely any baggage on board a vessel would fall within the definition of these words. There would then be no need for section 2 of the Act to define and extend the word “goods” to include baggage. The court further held that “goods carried in a ship” referred to goods carried as cargo on board a ship, in other words, things or items carried on board a vessel for the purpose of being conveyed or transported from one place to another.

In the present case, the equipment was something the vessel was fitted out with in order to enable the vessel to carry out a specific type of work, geophysical survey works. The vessel was not carrying the equipment as cargo for the purpose of conveying or transporting the equipment from one venue to another. As such, the equipment was not “goods carried in a ship” as contemplated by section 3(1)(g) of the Act.

The High Court held that the admiralty jurisdiction of the court was wrongly invoked and, for this reason, the arrest of the vessel had to be set aside.

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General

Contract

English Court of Appeal: Third party must be sufficiently identified in contract under Contracts (Rights of Third Parties) Act

Themis Avraamides & Anor v Mark Colwill & Anor
[2006] EWCA Civ 1533

The English Court of Appeal in *Themis Avraamides & Anor v Mark Colwill & Anor* has held that a third party to a contract may only enforce the terms of the contract under the UK Contracts (Rights of Third Parties) Act 1999 if it was sufficiently identified within the meaning of section 1(3) of that Act.

Mr Avraamides and his wife (the “**Respondents**”) brought an action against two individuals, Mark Colwill and Stephen Martin (the “**Appellants**”), seeking to hold them personally liable for failures in the refurbishment of two bathrooms. The Respondents’ contract for refurbishment of the bathrooms was with a company Bathroom Trading Company (Putney) Limited (“**BTC Ltd**”) and the refurbishment work that was carried out for the Respondents was the responsibility of BTC Ltd.

The Appellants were the partners of BTC. BTC purchased the assets and the goodwill of the business from BTC Ltd on 1 April 2003. The Respondents’ claim was based on a provision of a transfer agreement between the shareholders of BTC Ltd and the Appellants (the “**Transfer Agreement**”). The relevant provision of the Transfer Agreement read as follows:

*“The purchasers (sic) undertakes to complete outstanding customer orders taking into account any deposits paid by customers as at 31 March 2003, and to pay in the normal course of time any **liabilities properly incurred** by the company as at 31 March 2003...”* (Emphasis added)

It was argued that the “liabilities properly incurred” by BTC Ltd as at 31 March 2003 meant liabilities to customers. The Respondents claimed that since their refurbishment work had not been completed by BTC Ltd as at 31 March 2003, BTC Ltd had an obligation to complete the refurbishment work and to pay the liabilities properly incurred to the Respondents as customers of BTC Ltd.

The Respondents alleged that pursuant to, *inter alia*, the above provision of the Transfer Agreement, the Appellants, as partners of BTC, had agreed to assume the liabilities properly incurred by BTC Ltd to the Respondents, who were customers of BTC Ltd, as at 31 March 2003.

Although the Respondents were third parties to the Transfer Agreement, they submitted that they were entitled to enforce the Transfer Agreement under section 1 of the UK Contracts (Rights of Third Parties) Act 1999 (the “**UK Act**”).

Section 1(1) to (3) of the UK Act relied on by the Respondents read as follows:

*“(1) Subject to the provisions of this Act, a person who is not a party to a contract (a “**third party**”) may in his own right enforce a term of the contract if –*

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

*(3) The third party must be **expressly** identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.”*

Section 2(1) to (3) of the Singapore Contracts (Rights of Third Parties) Act are in *pari materia* with the above English provisions.

The Respondents’ argument was that the Transfer Agreement “purported to confer a benefit” on them under section 1(1)(b) of the UK Act and the Respondents were “expressly identified” in the Transfer Agreement as the third party who may “benefit” from the Transfer Agreement. It was suggested that “customers of BTC Ltd” was a class of persons identified in the Transfer Agreement to “benefit” from the Transfer Agreement. Thus, the Respondents being members of the “customers of BTC Ltd” were entitled to enforce the Transfer Agreement pursuant to section 1 of the UK Act.

The English Court of Appeal rejected the Respondents’ argument. The court held that the phrase in the relevant provision of the Transfer Agreement, “any liabilities properly incurred”, was not limited to liabilities to customers and therefore that phrase did not identify any third party or class of third parties for the purposes of the UK Act. The court was of the view that section 1(3) of

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the UK Act, by the use of the word “express”, does not allow a process of construction or implication.

The Respondents’ claim was dismissed accordingly.

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General

Evidence

UK House of Lords rules open communication about repayment of acknowledged liability does not fall within the without prejudice rule and will be admissible in court

Bradford & Bingley plc v Rashid (FC)
[2006] UKHL 37

The chief question before the UK House of Lords in *Bradford & Bingley plc v Rashid (FC)* was whether two letters containing an acknowledgement of a debt for the purposes of section 29(5) of the UK Limitation Act 1980 (the “Act”) were inadmissible on the ground that the letter formed part of a negotiation with a view to the creditor giving the debtor time to pay or accepting a lesser amount.

There was also the question as to whether the letters contained acknowledgements within the meaning of the Act. A debtor’s written acknowledgment of his debt starts time running afresh under the Act. Section 29(5) of the Act corresponds to section 26(2) of the Singapore Limitation Act.

This is the first occasion upon which the House of Lords has had to consider the interrelationship between the without prejudice rule and the operation of section 29(5) of the Act.

On the facts of the case, the appellant was a mortgagee under a legal mortgage of a property created by the respondent to secure repayment of a sum advanced towards the purchase of the property. Payments due under the mortgage speedily fell into arrears and the property was sold by the appellant leaving a shortfall owing by the respondent to the appellant. Eventually, the appellant issued proceedings claiming the shortfall plus interest. The sole defence advanced was that of limitation. But for any acknowledgment of the debt within the terms of section 29(5) of the Act, time would have expired before the issue of these proceedings.

Before proceedings were commenced, the parties were in communication and two letters from the respondent to the appellant made reference to an “outstanding balance” and an “outstanding amount”.

Acknowledgement

The House of Lords held that a debtor can only be held to have acknowledged the claim if he has in effect admitted his legal liability to pay that which the plaintiff seeks to recover. But his acknowledgment need not identify the amount of the debt. His acknowledgment will be sufficient if the amount for which he accepts legal liability can be ascertained by extrinsic evidence.

In the first letter, it was stated that the respondent was not in a position to pay “the outstanding balance, owed to you.” Lord Hope of Craighead held that the plain meaning of those words was that the respondent was admitting that he owed the appellant a sum of money which for the time being he was unable to pay. There could not be a clearer way of acknowledging that the respondent was under a legal liability to pay the outstanding balance. It was not disputed that the amount of the balance was capable of being determined by extrinsic evidence. The wording of the second letter was slightly different. It referred to “the outstanding amount”. This indicated that there was an amount representing the respondent’s present state of indebtedness which was readily ascertainable. Lord Hope of Craighead held that this letter too was an acknowledgment within the meaning of section 29(5)(a) of the Act.

In the judgment of Lord Brown of Eaton-Under-Heywood, the purpose of the first letter was to obtain time to pay, and the purpose of the second was to persuade the appellant to accept a lesser sum in final settlement of an amount which was admitted to be outstanding. The only explanation that could be given for writing to the appellant in these terms was that the respondent appreciated that there was a claim which could still be enforced against him. In his Lordship’s view, the letters provided a good example of an acknowledgment in writing of the kind that the Act contemplates.

Admissibility

The more difficult issue was whether these acknowledgments were protected by the without prejudice rule.

The question was whether the letters were written in an attempt to compromise actual or pending litigation and, if so, whether it could be inferred from their terms and their whole context that they contained an offer in settlement for which the party who made the offer could claim privilege which prevented the acknowledgments from being relied upon for the purposes of the Act. The guiding principle is that parties should be encouraged so far as possible to resolve their dispute without resort to litigation, and that they should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedings. The mere fact that the communications in question constituted acknowledgments does not mean that they necessarily fell outside the protection of the without prejudice rule.

In the present case, neither of the two letters contained the words “without prejudice”, so the issue was whether it was clear from the surrounding circumstances that the parties were seeking to compromise the action.

The House of Lords was of the view that while the first letter contained a clear admission that there was a balance of debt that was still outstanding and also contained a request for time to pay, there was no suggestion in the letter that the amount of the debt itself was open to compromise. The only issue that was being opened up for compromise was how that debt was to be paid off. The second letter contained both an admission and an offer to compromise. The admission was that there was an amount which was still outstanding. The offer was to pay a much reduced sum in full and final settlement of it. However, the second letter did not contest the outstanding amount. On the contrary, it was based on what the respondent could offer to pay, not on what he believed to be due.

In the House of Lord’s view, there was nothing in both letters that entitled the respondent to the without prejudice privilege. The without prejudice rule has no application to apparently open communications, such as those between the appellant and respondent, designed only to discuss the repayment of an

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admitted liability rather than to negotiate and compromise a disputed liability. If the without prejudice rule were to apply not merely to attempts to resolve a dispute over the existence or extent of a liability but also to discussions as to how an admitted liability was to be paid, that would be a very substantial enlargement of its scope.

In conclusion, it was observed that while some acknowledgments will indeed attract without prejudice protection, these will be cases where the extent of the liability is genuinely in dispute and the parties are attempting to settle that difference.

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News

Initial public offering of CapitaRetail China Trust

Retail Crown (BVI) Limited (“**Retail Crown**”), an indirect wholly-owned subsidiary of CapitaLand Limited (“**CapitaLand**”) has made an offering of 222.1 million units in CapitaRetail China Trust (“**CRCT**”) raising approximately S\$251 million. The offering consisted of a placement to institutional and other investors outside Singapore, a placement to institutional and other investors in Singapore and an offering to the public in Singapore. CRCT is a Singapore-based real estate investment trust established with the objective of investing on a long-term basis in a diversified portfolio of income-producing real estate used primarily for retail purposes and located primarily in China, Hong Kong and Macau. Currently, it has a portfolio of seven retail malls located in various cities of China. CRCT is the first pure-play China REIT and the first China shopping mall trust to be listed in Singapore.

Adviser to the offering, Retail Crown, CapitaLand and CapitaRetail China Trust Management Limited (the manager of CRCT) are Allen & Gledhill Partners Jerry Koh, Foong Yuen Ping and Chua Bor Jern and Associates Long Pee Hua and Derrick Khoo.

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Biosensors International Group Ltd issues US\$30 million of convertible bonds

Biosensors International Group Ltd (“**Biosensors**”) has issued US\$30 million of convertible and unsubordinated notes with a three-year maturity period in two tranches. The additional funds will be used to finance its new research and development programs and to accelerate its existing clinical trials.

Advising Biosensors are Allen & Gledhill Partner Lim Mei and Senior Associate Koh Shang Yun.

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Allen & Gledhill organises zoo trip for children this Christmas

As part of its Christmas Charity Programme 2006, Allen & Gledhill organised a half day excursion on 26 November 2006 to the Singapore Zoo for the children from The Children's Aid Society, which operates the Melrose Home for children who require residential care. The children had a fun and educational trip learning about the animals and their habitats as they explored the various animal exhibits and enjoyed the animal shows which included *Wonders of the Wild*, *Elephants at Work and Play* and *Animal Friends Show*. The children also had the opportunity to feed the elephants and pet some of the animals at the Children's World Animal Land.

To make the trip more exciting, the children were given a worksheet to complete as a team along the way and the winning team was given a prize. The excursion ended with lunch and the children were each given a surprise Christmas gift from the Firm.



During lunch, the Firm also presented prizes to six winners of the Christmas Card Art Competition 2006 organised for the children from the home. The children, aged between four and 12 were given a month to submit their artwork to convey what they like most about Christmas. The Firm's Inter-Departmental Committee shortlisted six pieces and members of the Firm were invited to vote for two of them to be used as Allen & Gledhill's Electronic Christmas Card design for 2006, which you would already have seen.



The following are the other winning pieces. Which two would you have chosen?



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