

Legal Bulletin

A summary of developments in the law

At a glance

Amendments to subsidiary legislation pursuant to the commencement of Companies (Amendment) Act 2005	4
Highlights of Singapore Budget 2006	5
Parliament passes Casino Control Bill 2006	8
Parliament passes Residential Property (Amendment) Bill 2006: Policy changes affecting foreign ownership of property	10
Tax exemptions and concessions to promote Islamic financial services	11
Public consultation on proposed amendments to Electricity Act	13
Public consultation on proposed amendments to Gas Act	14
Public consultation on proposed amendments to Consumer Protection (Fair Trading) Act: Protection of buyers of timeshares, club memberships and alternative investments	15
English Court of Appeal upholds subordination agreement entered into by group of companies under fair commercial terms	19
Singapore Court of Appeal upholds High Court decision in ThumbDrive patent case	22
Singapore Court of Appeal holds in favour of paramount mortgagee in tussle with subsequent mortgagee over terms of discharge	25
Allen & Gledhill is Singapore Law Firm of the Year 2006	30

[Click here for Table of Contents](#)

In this issue

Articles

Amendments to subsidiary legislation pursuant to the commencement of Companies (Amendment) Act 2005	4
Highlights of Singapore Budget 2006	5
Parliament passes Casino Control Bill 2006	8
Parliament passes Residential Property (Amendment) Bill 2006: Policy changes affecting foreign ownership of property	10
Tax exemptions and concessions to promote Islamic financial services	11
Public consultation on proposed amendments to Electricity Act	13
Public consultation on proposed amendments to Gas Act	14
Public consultation on proposed amendments to Consumer Protection (Fair Trading) Act: Protection of buyers of timeshares, club memberships and alternative investments	15

Cases

Corporate & financial services

English Court of Appeal opines on enforceability of obligation to negotiate in good faith	17
---	----

Insolvency

English Court of Appeal upholds subordination agreement entered into by group of companies under fair commercial terms	19
--	----

Intellectual property & technology

Singapore Court of Appeal upholds High Court decision in ThumbDrive patent case	22
---	----

Real estate

Singapore Court of Appeal holds in favour of paramount mortgagee in tussle with subsequent mortgagee over terms of discharge	25
--	----

English High Court declines to set aside sale by mortgagee for improper purpose	27
---	----

Shipping

Singapore High Court expounds on piracy and violent theft coverage in marine hull insurance	28
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News

Allen & Gledhill is Singapore Law Firm of the Year 2006	30
Aabar Petroleum Investments Company PJSC to acquire P.T. Austindo Nusantara Jaya's stake in Pearl Energy Limited	30
Venture Corporation Limited acquires shares in DMX Technologies Group Limited	30
Proposed Scheme of Arrangement to acquire shares held by Pacific Century Regional Developments Limited's minority shareholders	31
Standard Chartered Bank provides first Islamic financing facility in Singapore	31

Articles

Amendments to subsidiary legislation pursuant to the commencement of Companies (Amendment) Act 2005

The following Regulations have been issued under the Companies Act to amend the subsidiary legislation issued under the Companies Act (the “**Amendment Regulations**”) pursuant to the commencement of the Companies (Amendment) Act 2005.

- Companies (Amendment) Regulations 2006
- Companies (Filing of Documents) (Amendment) Regulations 2006
- Companies Act (Amendment of Second Schedule) Notification 2006
- Companies Act (Amendment of Eighth Schedule) Notification 2006

These Amendment Regulations came into force on 30 January 2006, the same date as the date of commencement of the Companies (Amendment) Act 2005.

The Companies (Amendment) Act 2005 amended the Companies Act to introduce the following key changes:

- abolishing the concepts of “par value” and “authorised capital”;
- introducing an alternative capital reduction process which does not require court sanction;
- liberalising the financial assistance restrictions to allow financial assistance to be provided in additional circumstances, e.g. where less than 10 per cent. of the company’s paid-up capital and reserves is involved, or where it is approved by a unanimous resolution of shareholders;
- allowing share-buyback to be funded out of profits as well as capital so long as the company is solvent;
- allowing repurchased shares to be held as treasury shares;
- introducing a more effective and efficient statutory form of merger and amalgamation process.

The Amendment Regulations were issued to facilitate the implementation of some of the above changes. Below is a summary of the amendments made by each of the Amendment Regulations.

- **Companies (Amendment) Regulations 2006.** To introduce the publicity requirements required for the new court-free capital reduction process under section 78B(1) (for private company) and section 78C(1) (for public company).
- **Companies (Filing of Documents) (Amendment) Regulations 2006.** To insert new Parts IXA and IXB to introduce prescribed forms for the new court-free capital reduction and statutory merger and amalgamation processes.

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- **Companies Act (Amendment of Second Schedule) Notification 2006.**
To introduce new fees payable to the Registrar of Companies under the Second Schedule to the Companies Act.
- **Companies Act (Amendment of Eighth Schedule) Notification 2006.**
To amend the Eighth Schedule to the Companies Act that sets out the content of the annual return of a company having a share capital to take into account the changes made by the Companies (Amendment) Act 2005.

On 26 January 2006, the Accounting and Corporate Regulatory Authority also issued Practice Direction No 2 of 2006 which highlights the amendments introduced by the Amendment Regulations. To view the full text of Practice Direction No 2 of 2006, please [click here](#).

[Back to Contents Page](#)

Highlights of Singapore Budget 2006

In his Budget Statement for Financial Year 2006 delivered on 17 February 2006, Prime Minister and Minister for Finance Lee Hsien Loong announced a range of tax and other initiatives to support the ongoing restructuring and upgrading of the economy, including measures to build up the depth and breadth of the capital markets and to further promote Islamic finance in Singapore.

To view the Budget Statement 2006, please [click here](#).

The following are highlights of some of the proposed changes.

Developing a full-service global financial centre

Promote wealth management, capital market and treasury activities

To further support growth in the asset and wealth management industries, the following changes will be introduced:

- the Designated Unit Trust (“**DUT**”) scheme will be enhanced to allow other types of funds such as Restricted Authorised Schemes to qualify for the DUT status. Specified income derived on or after 17 February 2006 by such unit trusts that are granted DUT status will not form part of their statutory income;
- qualifying domestic trusts and their underlying holding companies will be exempt from tax on their locally-sourced investment income derived on or after 17 February 2006 as well as foreign-sourced income received on or after 17 February 2006, to the extent that it mirrors the tax exemption enjoyed by individuals. Beneficiaries will also enjoy tax exemption on trust distributions made from such income;
- with effect from 17 February 2006, the scope of the Approved Trustee Company scheme and the tax exemption scheme for foreign trusts will be expanded to include a wider range of settlors and beneficiaries of the trusts;
- a new tax incentive scheme will be introduced which exempts from tax resident funds with foreign investors. Approval will be granted under this incentive scheme during the period from 17 February 2006 to 17 February 2011.

Promote capital and treasury markets

To encourage the development of capital market and treasury activities, the following tax changes will be made:

- with effect from 17 February 2006, tax exemption will be granted on foreign-sourced interest and trust distributions received by REITs listed on the Singapore Exchange Securities Trading Limited (“**S-REITs**”). S-REITs and their special purpose companies (“**SPCs**”) set up to hold overseas non-residential properties will be allowed to recover the goods and services tax (“**GST**”) incurred on the setting up of SPCs and the acquisition and holding of overseas non-residential properties by SPCs. This change is effective for GST incurred during the period from 17 February 2006 to 17 February 2010;
- the Qualifying Debt Securities (“**QDS**”) scheme will be expanded to encompass discount debt securities with tenure of more than one year, which are issued during the period from 17 February 2006 to 31 December 2008;
- with effect from 17 February 2006, the scope of activities qualifying for the Finance and Treasury Centre incentive will be expanded to include trading and arranging of derivative products, subject to counter-party restrictions;
- a five per cent. concessionary tax rate on clearing income for qualifying clearing members of a Singapore Over-The-Counter (“**OTC**”) derivatives clearing facility will be introduced for five years beginning from 17 February 2006.

Promote Islamic financing activities

- The overall policy approach is to align the tax treatment of Islamic contracts with the treatment of conventional financing contracts that they are economically equivalent to. To give the industry maximum flexibility for innovation whilst preventing any unintended tax consequences, tax rules will be prescribed for qualifying financial products based on the *Murabaha* concept, *Mudarabah* concept, *Ijara Wa Igtina* concept and *Sukuk* concept.

For further information about the incentives introduced to develop Singapore into a full-service global financial centre, please [click here](#).

Support captive insurance industry

- To support the growth of the captive insurance industry, an income tax exemption for approved captive insurance companies will be granted for a period of 10 years.

Promote maritime and logistics industries

To support the maritime and logistics industries, four changes will be introduced:

- to encourage the development of ship financing activities in Singapore, a Maritime Finance Incentive will be introduced to grant tax exemption for qualifying income of ship investment vehicles and a 10 per cent. concessionary tax rate for qualifying income of ship investment managers;

- to entrench shipping companies in Singapore, the Approved International Shipping incentive will be enhanced by allowing companies to renew their incentives for a third period of 10 years, lengthening the maximum period of incentive from 20 years to 30 years;
- to lower the compliance cost for traders enjoying the 10 per cent. concessionary tax rate under the Global Trader Programme, there will be removed the need for companies to show that the derivative trades are incidental to the physical trades before such income can be treated as qualifying income; and
- automatic GST suspension for goods removed from Zero-GST warehouses by all those who qualify under the Major Exporter Scheme and Approved Third Party Logistics Company Scheme will be allowed.

For further information about the changes to promote the maritime and logistics industries, please [click here](#).

Build up new services

- To encourage creative talents, the existing tax concessions that exempt 90 per cent. of the royalties earned by creative individuals will be extended to industrial design, interactive and digital media.

Reduce the regulatory burden on local enterprises

- The record-keeping period in 17 statutes, including the Companies Act and the Income Tax Act, will be reduced. For further information, please [click here](#).

Maintain a competitive tax environment

- To encourage companies to remit their foreign income, tax exemption will be granted on foreign income that is disqualified from the foreign-sourced income tax exemption (“**FSIE**”) regime, if they are remitted under specific scenarios or circumstances. The Inland Revenue Authority of Singapore (the “**IRAS**”) will release further details;
- To facilitate share-based compensation schemes, deductions will be granted on employee stock options granted through treasury shares. This will take effect from Year of Assessment 2007;
- To encourage more MNCs to locate their holding functions in Singapore, with effect from 17 February 2006, there will be exempt from tax any gains by approved holding companies on the disposal of shares in subsidiaries, if they own at least 50 per cent. of the shares for a period of not less than 18 months. The Economic Development Board will release further details;
- The administrative conditions for businesses to claim Industrial Building Allowances will be rationalised. For details of these changes, to be implemented for buildings purchased on or after 1 January 2006, please [click here](#).
- Tax incentives will be awarded to partnerships on a scheme-by-scheme basis. Broader-based implementation will be considered after further study.

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- General insurers will be allowed GST claims in two circumstances effective from 1 January 2007 onwards:
 - insurers will be able to claim GST based on the tax fraction of the cash indemnities paid to non-GST registered policyholders under contracts that are subject to GST;
 - insurers will be allowed to claim GST on expenses incurred on their policyholders' passenger cars, for example, repairs.

Asset tax

- The property tax surcharge will be removed with effect from 1 July 2006.

Promote manufacturing sector

The supply of tools used in the manufacture of goods for export will be zero-rated for GST purposes. This change will take effect from 1 April 2006. The IRAS will release more details.

[Back to Contents Page](#)

Parliament passes Casino Control Bill 2006

On 14 February 2006, the Casino Control Bill 2006 (the "**Bill**") was passed in Parliament. The Bill was introduced in Parliament on 16 January 2006, following a public consultation in October / November 2005.

As a matter of background, the Government announced in April 2005 that it would allow the development of two integrated resorts with casinos in Singapore. The Bill seeks to put in place the legislative and regulatory framework that will provide an environment in which the integrated resorts can succeed and thrive, while keeping the social and law and order problems under control.

The Bill has three broad objectives. First, the Bill will provide for the setting up of the casino regulator with the necessary powers to enforce the regulatory regime. Secondly, the Bill will set out a regulatory regime for the casino operator and related business parties. Thirdly, the Bill will provide for a number of social safeguards to protect vulnerable persons from casino gaming.

In his speech delivered on 13 February 2006 at the Second Reading of the Bill in Parliament (the "**Second Reading Speech**"), the Deputy Prime Minister and Minister for Home Affairs, Mr Wong Kan Seng (the "**DPM**"), went through the key provisions of the Bill and explained the rationale behind some of the provisions in the Bill.

Highlights of the DPM's Second Reading Speech on 13 February 2006

In order to provide greater certainty and support to investors of the integrated resorts, the Bill provides that:

- casino tax rates will remain unchanged for 15 years;
- the two casino operators will enjoy an exclusivity period of 10 years, during which, no new casinos will be allowed;

- the lease of the land on which the integrated resorts will be sited will be for 60 years and they be allowed to operate a casino for 30 years, subject to the suitability of the casino operators to run them.

Further, the DPM pointed out that the Casino Regulatory Authority (the “**CRA**”), which will be established pursuant to the Bill, shall have powers to investigate and probe into the casino operator’s background, accounts and business links and that such comprehensive investigations are also being conducted of the bidders for the integrated resorts licence. Such checks will ensure that only suitable persons are given the licence to operate casinos in Singapore. The CRA will also be empowered to deal with offences typically committed in casinos. For instance, cheating, forgery, tampering with gaming equipment or attempting to exploit the casino chips as an alternative currency are regarded as attempts to undermine the integrity of the casinos’ operations, which will lead to fines or imprisonment or both. The CRA will also be the approving authority for various aspects of casino operations. It will oversee the casinos’ system of internal controls and accounting procedures.

Since many crimes in casinos are committed by persons who collude with casino employees, it will be a requirement under the Bill for casino operators and their key employees to be licensed by the CRA. The licensee must remain suitable throughout the validity period of the license. Where there are material changes to the licensee’s situation that could affect his suitability, the licensee will be required to report these changes promptly to the CRA.

Apart from the casino operators and their employees, shareholders and business associates are also considered to be possible avenues through which criminals can infiltrate casino operations. As such, shareholders taking a 5 per cent., 12 per cent. or 20 per cent. stake in the casino operator will be required to seek approval from the Minister for Home Affairs. Further, the casino operator’s relationship with other business partners will also be closely monitored. The casino operator will be required to seek approval for contracts of significant monetary value or that provide critical services to the casino, such as security and surveillance.

There will also be a requirement for the casino operator to adopt and implement a robust anti-money laundering programme that will include know-your-customer due-diligence, mandatory reporting for transactions above S\$10,000, record keeping for transactions above S\$5,000, mandatory reporting of suspicious transactions, and anti-money laundering training for employees.

After much debate and deliberation on whether to remove, lower or raise the entry levy, or even to incorporate more entry criteria, it was decided that there will be no change to the entry levy. The entry levy for a citizen or permanent resident of Singapore will be S\$100 for every consecutive period of 24 hours, or S\$2,000 for a valid annual membership of the casino.

To read the DPM’s Second Reading Speech, please [click here](#).

DPM’s replies to queries from Members of Parliament on 14 February 2006

There were a number of queries and comments from various Members of Parliament during the two-day debate on the Bill. For example, a comment was made that the Bill did not provide details on operational issues such as anti-money laundering measures and advertisement policies. The DPM responded that such details should be set out in the relevant subsidiary legislation, or specified as licensing conditions, or issued in directives from the CRA.

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To read more about the queries and comments raised by the Members of Parliament and the DPM's response thereto, please [click here](#).

To view the Bill, please [click here](#).

An article discussing the Casino Control Bill 2006 when it was first introduced in Parliament was featured in a previous issue of the Allen & Gledhill Legal Bulletin (January 2006). To view the article entitled "*Casino Control Bill 2006 introduced for first reading*", please [click here](#).

[Back to Contents Page](#)

Parliament passes Residential Property (Amendment) Bill 2006: Policy changes affecting foreign ownership of property

The Residential Property (Amendment) Bill 2006 (the "**Bill**") was read a second time and passed in Parliament on 14 February 2006. The Bill has not been gazetted and has not come into force.

Principally, the Bill amends the Residential Property Act to implement some of the measures announced in a ministerial statement by the Minister for National Development on 19 July 2005. Among other things, it was announced that foreigners would be permitted to purchase apartments in non-condominium developments of less than six levels without the need to obtain prior approval.

In order to implement this change, section 4 of the Residential Property Act will be amended to allow any foreign person to purchase or acquire any of the following non-restricted residential property:

- any flat (which is not a landed dwelling-house) that is comprised in a building permitted to be used for residential purposes;
- any unit in a condominium development;
- any unit in an executive condominium.

Other changes to the Residential Property Act include the following:

- **Enhanced penalty.** A higher penalty will be imposed under section 23 for the offence where a citizen or approved purchaser purchases residential property as a nominee for a foreign person, or where a foreign person appoints a citizen or approved person as his nominee to acquire or purchase residential property. The new penalty will be a fine of up to S\$50,000 (currently S\$5,000) or imprisonment for a term of up to three years or both;
- **Confiscation orders.** A new section 23A will be introduced empowering a court to make a confiscation order in respect of benefits derived by any person convicted of any offence under section 23. The benefits derived are defined as the value of the estate or interest in residential property held in contravention of section 23 or, if the property is disposed of before conviction, the proceeds of such disposition;
- **Controller of Residential Property to administer Residential Property Act.** The approval for residential development on land deemed non-

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These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert of 13 February 2006. If you would like to be on our KnowledgeShare Alert mailing list, please e-mail us at publications@allenandgedhill.com

residential will be administered by the Controller of Residential Property (currently administered by the Controller of Housing);

- **Licensed trust company may purchase residential property.** A foreign company (which is also a trust company licensed under the Trust Companies Act 2005) will be permitted to purchase and hold any residential property in trust for beneficiaries who are citizens of Singapore or approved purchasers.

An article discussing the changes proposed by the Residential Property (Amendment) Bill 2006 when it was first introduced in Parliament was featured in a previous issue of the Allen & Gledhill Legal Bulletin (January 2006). To view the article entitled "*Residential Property (Amendment) Bill 2006: Policy changes affecting foreign ownership of property*", please [click here](#).

[Back to Contents Page](#)

Tax exemptions and concessions to promote Islamic financial services

In a move to promote Islamic financial services in Singapore, legislative changes have been made to promote the growth of Islamic financial services.

In the 2005 Budget Statement, it was announced that, in order to make the Singapore tax system more conducive to Islamic financial products, payouts from Islamic bonds would be accorded the same concessionary tax treatment that is granted to interest arising from conventional financing.

Since then, the concessionary tax treatment afforded to conventional bonds under the Qualifying Debt Securities ("**QDS**") Scheme has been extended to payouts from Islamic debt securities. Given that the nature and structure of Islamic financial products tend to attract more tax than their conventional counterparts, the tax concessions are aimed at leveling the playing field for Islamic transactions.

The remission of stamp duty for qualifying Islamic financing arrangements was also announced in the 2005 Budget Statement.

To implement the income tax changes, the following were recently amended, with the amendments taking effect from 1 January 2005:

- Income Tax Act (the "**ITA**");
- Income Tax (Concessionary Rate of Tax or Exemption for Income Derived from Debt Securities) Regulations; and
- Income Tax (Qualifying Debt Securities) Regulations (the "**QDS Regulations**").

Meaning of "Islamic debt securities"

The term "Islamic debt securities" is defined in the ITA to mean debt securities and trust certificates:

- which are endorsed by any *Shari'ah* council or body, or by any committee formed for the purpose of providing guidance on compliance with *Shari'ah* law; and
- the amounts payable from such securities and trust certificates are periodic and supported by a regular stream of receipts from underlying assets.

Meaning of “qualifying debt securities”

The definition of “qualifying debt securities” in the ITA has been expanded to encompass Islamic debt securities which are arranged according to the QDS Regulations by any financial institution in Singapore or any financial sector incentive (bond market) company, and issued during the period from 1 January 2005 to 31 December 2008.

However, unless otherwise approved by the Minister for Finance, the definition of “qualifying debt securities” excludes any Islamic debt securities issued on or after 1 January 2005 and which, during its primary launch, are issued to less than four persons, and 50 per cent. or more of the issue of Islamic debt securities is beneficially held or funded, directly or indirectly, by related parties of the issuer of those Islamic debt securities.

Tax exemption for non-residents

Subject to certain conditions, there shall be exempt from tax any amount payable from any Islamic debt securities which are qualifying debt securities and issued during the period from 1 January 2005 to 31 December 2008 to any person:

- who is not resident in Singapore and who does not have any permanent establishment in Singapore; and
- who is not resident in Singapore and who carries on any operation in Singapore through a permanent establishment in Singapore where the funds used by that person to acquire the qualifying debt securities are not obtained from the operation.

The tax exemption for non-residents is only available if the conditions stipulated in the QDS Regulations are satisfied.

Tax exemption for individuals

Individuals will enjoy a tax exemption on any amount payable from Islamic debt securities on or after 1 January 2005, except where such amount is derived by the individual through a partnership in Singapore or from the carrying on of a trade, business or profession.

Tax concession for companies

Subject to certain conditions, income tax is payable at the rate of 10 per cent. on any amount payable to any company from any Islamic debt securities which are qualifying debt securities and issued during the period from 1 January 2005 to 31 December 2008.

Waiver of withholding tax

The provisions on withholding tax in the ITA do not apply to any amount payable from any Islamic debt securities which are qualifying debt securities, and issued during the period from 1 January 2005 to 31 December 2008.

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The waiver from withholding tax is only available if the conditions stipulated in the QDS Regulations are satisfied.

[Back to Contents Page](#)

Public consultation on proposed amendments to Electricity Act

On 20 January 2006, the Energy Market Authority (the “**EMA**”) issued a public consultation paper requesting feedback on proposed amendments to the Electricity Act (the “**Act**”). The proposed amendments are intended to strengthen the regulatory oversight of the electricity market.

Amendments are proposed in areas relating to the following:

- **Licensing regime.** It is proposed that SP Power Grid Ltd be licensed to allow for more adequate control over the grid infrastructure. Currently, SP Power Assets Ltd holds the assets and business of power grid and SP Power Grid Ltd manages its business as its agent.
- **Security safeguards.** It is proposed that the EMA be given oversight and powers of approval over the ownership of SP Power Assets Ltd and SP Power Grid Ltd, which owns and manages the electricity grid, respectively. Further, the EMA’s approval will be required before SP Power Assets Ltd or SP Power Grid Ltd can appoint a chief executive officer, director or the chairman of its board of directors.
- **Power to obtain information.** Essentially, the proposed amendments will give the EMA greater powers to obtain and use information.
- **Improvement to penalty structure.** For an effective penalty against continuous licence-related infringements, e.g. consistently operating without holding a valid licence or consistently infringing licence conditions, for which the current one-off financial penalties might not be sufficient, it is proposed that the penalty regime for offences and contraventions under the Act be enhanced.
- **Ambit of market rules.** The Act currently provides that the market rules may include authorising and governing the imposition of financial penalties on market participants. It is proposed that the Act be amended to include provisions authorising and governing the imposition of financial penalties on the market company (Energy Market Company) and the market support services licensee (SP Services) as they do not come within the definition of market participants.
- **Revised appeal process.** The proposed amendments here relate to the responsibility of the appellant in an appeal to the Minister for Trade and Industry (the “**Minister**”) against the decision or direction of the EMA and the time limit for appeal to the Minister. It is also proposed that the Act be amended such that the Minister would have the flexibility, on the merits of each case, to refer appeals of a technical nature (requiring specialised knowledge or experience) to an Appeal Panel (appointed by the Minister) for resolution.
- **Terms for generation companies to supply electricity.** It is proposed that the Act be amended so that a transmission licensee or its agent may perform any work on any premises for the purpose of developing the transmission system or effecting a connection to any person,

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notwithstanding any existing or future contracts signed between any parties.

The consultation closed on 3 February 2006.

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

[Back to Contents Page](#)

Public consultation on proposed amendments to Gas Act

On 13 February 2006, the Energy Market Authority (the “**EMA**”) issued a public consultation paper requesting feedback on proposed amendments to the Gas Act (the “**Act**”) which is currently being reviewed by the Attorney-General’s Chambers.

The proposed amendments to the Act will allow new gas importers and retailers to have open competitive access to the gas pipeline infrastructure. There will also be greater clarity of the regulatory regime of the gas industry for potential investors.

The key amendments to the Act are set out below.

Licensing regime

It is proposed that shippers and operators of the Gas Onshore Receiving Facilities (“**ORF**”) be licensed to ensure their compliance with stipulated licensing conditions. Performance bonds will be required of ORF operators with little assets or paid-up capital in Singapore. Further, the definition of “shipper” in the Act will be amended to refer to a party that contracts with, as well as pays the gas transporter for transportation of the gas through the gas pipeline or gas pipeline gas network.

Measures to ensure open access to gas network

It is proposed that compliance with the Gas Network Code (the “**Code**”) be made mandatory through a licence condition. The Code is comprised of a set of terms and conditions for transportation of gas through the gas network.

It will be illegal to have any terms in existing and new transportation agreements for onshore or offshore pipelines that are inconsistent with the Code or that prevent third party access. Further, contractual provisions which exclude the application of the Act or its regulations will be illegal and unenforceable.

The EMA will be empowered to issue an order to prevent the non-compliant party from flowing gas under such illegal terms or, impose a financial penalty. For offshore pipelines where no agreement is reached between parties, the EMA will be empowered to impose a gas allocation arrangement on users to enable third party access.

Strengthening regulatory powers and safeguarding security of gas transportation system in a multiple shipper environment

It is proposed that the EMA be given oversight and powers of approval over the following:

- the ownership of the gas grid, the gas transporter and any licensee engaging in the management of the transportation business; and
- the disposal / acquisition of the gas grid. A potential ownership transfer that is assessed to be detrimental to national security may either be rejected by the EMA, or reversed by the Minister for Trade and Industry (the “Minister”).

The gas transporter and any licensee engaging in the management of the gas transportation business must obtain the approval of the EMA before appointing a chief executive officer, director, or the chairman of its board of directors.

The EMA’s powers to obtain information will be enhanced and it will be empowered to issue codes of practice (for example, Metering Code and Gas Supply Code) and other standards of performance under the proposed amendments to the Act. Further, it is proposed that shippers be permitted to pass through to gas consumers the charges and penalties for non-compliance with gas security requirements under the Code, which are currently borne by only the shippers.

Other general amendments

Other more general proposed amendments to the Act relate to the following:

- clarity on process of appeal to the Minister and stipulating a time limit for appeal to the Minister against the EMA’s decision;
- requirement for compliance with the decision or direction of the EMA pending the determination of an appeal;
- penalising the contravention of the Minister’s direction relating to the transfer of properties between gas companies substantially owned by the Government in the transitional provisions of the Act;
- additional precautions for protection of underground pipelines; and
- production of town gas a to be a licensable gas activity under the Act.

The consultation closed on 26 February 2006.

To view the full text of the consultation paper and the draft amendments to the Act, please [click here](#).

[Back to Contents Page](#)

Public consultation on proposed amendments to Consumer Protection (Fair Trading) Act: Protection of buyers of timeshares, club memberships and alternative investments

A working group formed to consider legislation to amend the Consumer Protection (Fair Trading) Act (the “Act”) has announced on May 2005 that it is opening its proposed revisions to the Act to public views and feedback. Public comment, which the working group will gather by 28 February 2006, may be incorporated into a private Bill and tabled to Parliament.

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The working group, formed in May 2005, was tasked with addressing the protection of buyers of timeshares, club memberships and alternative investments. It has held meetings with the Monetary Authority of Singapore and the Ministry of Trade and Industry. Based on these discussions, it has proposed several revisions which are reflected in a draft Consumer Protection (Fair Trading) (Amendment) Bill (the “**draft Bill**”) which is attached to the working group’s concept paper on amendments to the Act.

The concept paper reviewed the current regulatory framework of Singapore and the regulatory frameworks of other jurisdictions such as Australia, the European Union, Malaysia, and the United States of America. It discussed examples of problems that have arisen in Singapore in the sale and governance of “consumer interests”, the collective name assigned to consumer transactions that would typically include elements of both consumption and investment. Consumer interests include club memberships, timeshares, and real estate outside Singapore. In its review, the working group noted that while the Act prohibits unfair practices, such as making false claims or misleading consumers through the omission of information, it addresses only disclosure, rather than governance, and does not impose affirmative disclosure rules. It also does not cover transactions outside Singapore.

Based on this review, the working group concluded that the regulatory framework for sale and governance of consumer interests in Singapore has fallen short of that in other regional and international jurisdictions. It recommends a framework of disclosure that enables Singapore consumers to make an informed choice, and is sufficiently robust to accommodate future developments in product development, marketing and technology, such as solicitations through the Internet. Finally, it concludes that the best approach is to amend the Act, to expand its scope to regulate governance as well as the sale of consumer interests.

The draft Bill proposes two substantive amendments:

- to regulate the governance of time shares and clubs (both those owned by members and those owned by proprietors); and
- to expand the scope of protection to purchasers of real estate situated outside Singapore.

The draft Bill also proposes a Code of Practice for Governance of Time Shares and Clubs.

For a copy of the concept paper prepared by the working group, please [click here](#).

For a copy of the draft Bill, please [click here](#).

An article discussing the development of the Consumer Protection (Fair Trading) Act when it came into force on 1 March 2004 was featured in a previous issue of the Allen & Gledhill Legal Bulletin (January 2004). To view the article entitled “*Consumer Protection (Fair Trading) Act 2003 and subsidiary legislation in force on 1 March 2004*”, please [click here](#).

[Back to Contents Page](#)

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Cases

Corporate & financial services

English Court of Appeal opines on enforceability of obligation to negotiate in good faith

Petromec Inc & Ors v Petroleo Brasileiro SA Petrobras & Ors
[2005] EWCA Civ 891

The English Court of Appeal recently stated that an express obligation to negotiate in good faith may be enforceable.

The court made the statement in the context of a dispute surrounding the sinking of the oil platform Petrobras 36 (the “**vessel**”) which, at the time of its sinking, was the subject of several lengthy binding agreements for its charter, purchase and upgrade by the parties to this case.

Petroleo Brasileiro SA (“**Petrobras**”) had the use of the vessel under a sub-charter agreement with an associated company, Braspetro Oil Services Company (“**Brasoil**”). Brasoil in turn chartered the vessel from Petro-Deep Inc. (“**Petro-Deep**”), one of the plaintiffs. The vessel was owned by Societa Armamento Navi Appoggio S.p.A. (“**SANA**”). A purchase arrangement among the parties intended for the vessel to be eventually sold to Brasoil.

The terms of the charter charged Petro-Deep with the obligation of upgrading the vessel. For this purpose, Petro-Deep entered into an upgrade agreement with an associated company, Petromec Inc. (“**Petromec**”) and SANA. As agreed among the parties, the sub-charter and charter hires would fund two streams of expenditure: the instalments of price payable to SANA under the purchase agreement, and the costs for upgrade payable by Petro-Deep and Petromec.

Subsequently, it became apparent that different and more expensive upgrades would be required to equip the vessel for use in Roncador, a new oilfield (the “**Roncador upgrade**”). Since the necessity for the Roncador upgrade became clear only after the other contracts were in an advanced state of preparation, the parties agreed to update the contractual position in a Supervision Agreement, which was back-dated to 20 June 1997, the same date that the sub-charter, charter, and purchase agreements were entered. A clause in the Supervision Agreement provided that Brasoil agreed to negotiate in good faith with Petromec the reasonable extra costs entailed by the Roncador upgrade.

After the vessel was lost, insurance proceeds were recovered and applied to the purchase of the vessel in accordance with the parties’ agreements. However, claims arose with respect to the distribution of the excess of the insurance proceeds among the parties.

The court upheld the claim of Brasoil as intended owner of the vessel to the excess of the insurance proceeds. On a total loss before the price of the vessel was fully paid from charter hire and before title to the vessel passed to Brasoil, the intention was that the insurance proceeds should stand in lieu of payments from charter hire, the price should be treated as paid, and Brasoil should, despite the vessel’s loss, be given a bill of sale transferring to it any interest in the vessel and should receive the benefit of the insurance proceeds.

On the issue of Brasoil’s obligation to pay reasonable extra costs in connection with the Roncador upgrade under the Supervision Agreement, the court affirmed the finding of the High Court below that the agreement’s wording was inappropriate to enable Petromec to claim profit not permitted by the Supervision Agreement.

To the extent that the enforceability of an express obligation to negotiate in good faith was put into question, and in deference to the arguments presented by the parties, the court went into a discussion on the topic albeit stating that it was not essential to the disposition of the appeal.

The court identified the traditional objections to enforcing an obligation to negotiate in good faith, being as follows:

- that the obligation is an agreement to agree and thus too uncertain to enforce;
- that it is difficult, if not impossible, to say whether the end of negotiations was brought about in good or bad faith; and
- that it would be difficult to ascertain loss, since it would be hard to determine whether good faith negotiations have produced an agreement and what the terms of that agreement are.

The court dismissed the first objection, viewing the obligation as not a mere agreement to agree but part of the Supervision Agreement, which was itself legally enforceable. Reasonable extra costs pertaining to the Roncador upgrade would be “comparatively easy to ascertain”, and if agreement was not reached, the court would step in to determine what the reasonable cost of that upgrade should be. The same applied to the third objection, in relation to losses that arose from a failure to negotiate in good faith, which should also be ascertainable with comparative ease. The court was of the view that it was not uncommon for the courts to have to assess, by way of calculating damages, whether a claim against a third party was good or not and for how much it might have been settled. Any exercise in relation to the upgrade would raise similar but not insurmountable problems.

With regard to the second objection, the court stated that the difficulty of ascertaining whether negotiations ended in bad faith should not be an excuse to withhold relevant assistance to the parties by declaring a blanket unenforceability of the obligation. The defendants’ main authority in support of this objection was *Walford v Miles* [1992] 2 AC 128, which held that it was impossible to imply an obligation to negotiate in good faith since it was unworkable in practice and inherently inconsistent with the position of a party negotiating “subject to contract”.

Walford involved a dispute surrounding negotiations for the sale of a business, in the course of which a “lock-out agreement” was arranged to keep the defendant prospective vendor from negotiating with parties other than the plaintiff prospective purchaser. The plaintiff asserted that the “lock-out agreement” carried an implied term that, while the defendant wanted to sell the business, it would negotiate in good faith with the plaintiff.

The court stated that the main distinction between *Walford* and the instant case was that in *Walford*, there was no express agreement to negotiate in good faith; neither was there a concluded agreement since everything was “subject to contract”. In contrast, the Supervision Agreement was not a bare agreement to negotiate. It was an express obligation which was part of a complex agreement drafted by a City of London law firm, and it would be a strong measure to declare unenforceable a clause into which the parties had deliberately and expressly entered. To decide that such a clause had no legal content would be for the law to deliberately defeat the reasonable expectations of honest men.

[Back to Contents Page](#)

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Insolvency

English Court of Appeal upholds subordination agreement entered into by group of companies under fair commercial terms

In re SSSL Realisations (2002) Ltd (in liquidation) and another company
[2006] EWCA Civ 7

The English Court of Appeal has held that it is commercially important to uphold the subordination provisions in a contract entered into by a group of companies with their creditors while solvent, especially if the group has had the benefit for which it entered into the contract.

Where the borrowers of a loan consist of companies organised under a group, the lending document normally contains subordination provisions which provide that if one member of the group becomes insolvent, all companies under the group are prohibited from proving for their inter-company debts in the liquidation of the insolvent company until the lender is paid in full.

The subordination provisions in issue were found in a deed of indemnity entered into between AIG Europe (UK) Limited (“**AIG**”) and Save Group Plc (“**Group**”) and its subsidiaries, including, SSSL Realisations (2002) Limited (formerly known as Save Service Stations Limited and, hereafter, “**Stations**”).

The Save group traded primarily as retailers of petrol. Group bought petrol from suppliers and sold it on to Stations which sold it to retail customers. Group was also in charge of bank borrowing for the whole Save group, and lent on to subsidiaries such funds as were necessary for their trading purposes. There were, therefore, substantial inter-company debts, on the part of Stations to Group for money borrowed and lent on to Stations, and for petrol products bought by Group and sold on to Stations.

The Save group was liable to pay duty to the UK Customs & Excise department for the supply of petrol. To defer the Save group’s liability to pay the duty, AIG provided bonds on behalf of Group and its subsidiaries to the Customs & Excise to secure payment of the duty. As a condition of providing the bonds, AIG entered into a deed of indemnity with Group and its subsidiaries where Group and its subsidiaries, including Stations, had agreed to indemnify AIG in respect of the liabilities to Customs & Excise which AIG had undertaken in providing the bonds (the “**Deed**”). The Deed contained subordinate provisions, namely clauses 8.2 and 8.3, which are reproduced below. Under the Deed, AIG was the “**Surety**” and Group and its subsidiaries, including Stations were the “**Indemnitors**”.

“8.2 Postponement of Indemnitors’ Rights

Until all amounts which may be or become payable by the Indemnitors to the Surety under this deed have been irrevocably paid in full no Indemnitor shall after a claim has been made by the Surety hereunder or by virtue of any payment made by it under this deed:

- (a) be subrogated to any rights, security, cash cover or other monies received on account of that Indemnitor’s liability hereunder,
- (b) claim rank prove or vote as a creditor of any Indemnitor or its estate in competition with the Surety; or

- (c) receive, claim or have the benefit of any payment distribution or security from or on account of any Indemnitor or exercise any right of set-off as against any Indemnitor.

8.3 Declaration of Trust

Each Indemnitor shall hold in trust for and forthwith pay or transfer to the Surety:

- (a) any payment distribution benefit or security received by it contrary to clause 8.2 and
- (b) following any claim upon or payment by the Surety under or in respect of a Bond any payment or repayment received by it from the Commissioners or any other person in respect of the Charges or in respect of any overpayment or over-declaration of Value Added Tax.”

Group and its subsidiaries were wound up subsequently. The business and assets of the entire Save group were realised and the largest proportion of which was owned by Stations. Group's main asset was the inter-company debt owed to it by Stations. Under the Deed, AIG was a creditor in respect of Stations, Group and its other subsidiaries. AIG contended that pursuant to the subordination provisions under the Deed, the indebtedness of Stations to Group and to other members of the Save group was subordinated to the debt that Stations owed to AIG. If AIG's contention was accepted, the assets available for distribution in the liquidation of Stations would be applied towards the payment of AIG and other creditors whose proof of debts in the liquidation exceeded in aggregate the assets owned by Stations. As a result, Stations' inter-company debt would remain unpaid. Thus, the liquidators of Group and Stations brought the present action to ascertain the effect of the subordination provisions under the Deed on the distribution of Stations' assets.

The trial judge held, *inter alia*, that on the true construction of clause 8.2 of the Deed, Group was not entitled to prove for its inter-company debt due from Stations in the liquidation of Stations as long as the debt to AIG under the Deed remained unpaid.

Group appealed against the trial judge's decision and raised, *inter alia*, the following issues:

- whether the Deed was capable of being disclaimed by Group's liquidators on the ground that it formed part of an "unprofitable contract" within the meaning of section 178 of the UK Insolvency Act 1986;
- whether Group was entitled to prove for its inter-company debt due from Stations in Stations' liquidation;
- if Group were entitled to prove for its debt in Stations' liquidation, whether it would receive any dividend on its proof.

Disclaiming the Deed pursuant to section 178 of the UK Insolvency Act 1986

Section 178 of the UK Insolvency Act 1986 provides that a liquidator may disclaim any "onerous property" of a company and "onerous property" of a company includes any "unprofitable contract" of the company. Similarly, section 332 of the Singapore Companies Act empowers the liquidator to disclaim any unprofitable contract of a company with the leave of the court or the committee of inspection.

The Court of Appeal referred to the following five principles in determining whether the Deed should be disclaimed as an “unprofitable contract”:

- a contract is unprofitable if it imposes on the company continuing financial obligations which may be regarded as detrimental to the creditors, which presumably means that the contract confers no sufficient reciprocal benefit;
- before a contract may be unprofitable for the purposes of the section, it must give rise to prospective liabilities;
- contracts which will delay the winding-up of the company’s affairs because they are to be performed over a substantial period of time and will involve expenditure that may not be recovered are unprofitable;
- a contract is not unprofitable merely because it is financially disadvantageous, the nature and cause of the disadvantage must be considered;
- a contract is not unprofitable merely because the company could have made, or could make, a better bargain.

After considering earlier authorities, the Court of Appeal concluded that the critical feature of the test in determining whether a contract is an “unprofitable contract” is whether the contract can be satisfactorily carried out by a liquidator whose interest is to realise the company’s property and to pay a dividend to creditors at the earliest possible time.

The Court of Appeal found that the Deed was not an “unprofitable contract” because clause 8.2 of the Deed which had the effect of prohibiting Group from proving in the liquidation of Stations did not impede the liquidators of Group in discharging their functions in Group’s liquidation. The court commented that although the Deed was detrimental to the creditors of Group, it did not have the characteristics of an “unprofitable contract”, namely, it did not impose on Group continuing financial obligations nor did it give rise to prospective liabilities. Further, it also did not require performance over a substantial period of time or involve expenditure.

Whether Group was entitled to prove for its inter-company debt in Stations’ liquidation

Liquidators of Group had also asked for the direction of the court if AIG could, in situations where it had incentive to do so, waive its right to enforce the restrictions in clause 8.2 of the Deed so that Group was entitled to prove in Stations’ liquidation.

The Court of Appeal held that the purpose of clause 8.2 of the Deed was to prevent one group company (say, company A) from competing with AIG in the liquidation of another (say, company B). It protected AIG from competition in respect of inter-company claims, whether it had arisen out of the relationship of principal debtor and co-sureties. The court further held that clause 8.2 was not enforceable by AIG only. Instead, it had created a multilateral obligation enforceable by AIG and each member of the Save group which were subject to the Deed until AIG had been paid in full. So, if company B seeks to prove in the liquidation of A, it can be restrained by AIG and by company C.

Hence, the court held that the restrictions in clause 8.2 of the Deed could not be waived by AIG unilaterally. The obligation could only be waived by the

mutual agreement of AIG and the liquidators of Group and its subsidiaries which were subject to the Deed.

The court was of the view that it is commercially important that, if group companies entered into subordination agreements of this nature with their creditors while solvent, they and the creditors should be held to the bargain when the event for which the agreement was intended to provide (i.e. insolvency) occurs.

If Group were entitled to prove for its debt in Stations' liquidation, whether it would receive any dividend on its proof

The third issue had become irrelevant after the Court of Appeal held that Group was not entitled to prove in Stations' liquidation. However, the Court of Appeal had carried on with a full discussion of this issue and laid down useful principles in relation to the distribution of assets of an insolvent company.

In this regard, the court had applied the rule set out in *Cherry v Boulton* in determining the amount that Group would receive in Stations' liquidation. The rule in *Cherry v Boulton* is applied in equity to the distribution of a fund. The rule requires that a person cannot share in a fund in relation to which he is also a debtor without first contributing to the whole by paying his debt.

The rule in *Cherry v Boulton* must yield to the principle of mutual set-off. Therefore, in cases where there is no set-off between a claim by the fund in liquidation against the creditor and the debt provable by the creditor in the liquidation, the rule applies. These cases include cases where mutual set-off is prevented by the rule against double proof.

In this case, Stations had a right of indemnity against Group because Stations was one of the guarantors of Group's obligation to AIG under the Deed. Accordingly, the court held that if Group were to prove in Stations' liquidation, it would be required under the rule in *Cherry v Boulton* to first contribute the full amount of Stations' claims of indemnity to the fund distributable in Stations' liquidation.

[Back to Contents Page](#)

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Intellectual property & technology

Singapore Court of Appeal upholds High Court decision in ThumbDrive patent case

FE Global Electronics Pte Ltd & Ors v Trek Technology (Singapore) Pte Ltd [2005] SGCA 55

In *FE Global Electronics Pte Ltd & Ors v Trek Technology (Singapore) Pte Ltd*, the Singapore Court of Appeal had to consider issues surrounding the validity of a patent relating to the invention of a data storage device known as the "ThumbDrive" (the "**ThumbDrive**").

As a matter of background, the respondent, Trek Technology (Singapore) Pte Ltd ("**Trek**") had filed two actions in the High Court against the four parties, who were the appellants in this appeal (the "**appellants**"). Trek's action was for infringement of its patent (the "**patent**" or "**Trek's patent**") relating to the invention of the ThumbDrive. One of the appellants had also commenced an action against Trek for threatened patent infringement. All three actions were consolidated and heard together before Lai Kew Chai J.

Before the hearing of the consolidated actions, Trek amended its patent to clarify the definition of its invention. Lai J held for the respondent and ruled that the appellants had infringed Trek's patent, and were therefore liable in damages.

A previous issue of the Allen & Gledhill Legal Bulletin (May 2005) featured an article on the High Court decision of this case. To read the article entitled "*Singapore High Court decides in favour of patent owner relating to ThumbDrive*", please [click here](#).

The appellants appealed to the Court of Appeal against the decision of Lai J. The issues were whether the ThumbDrive was within the ambit of the patent, whether the amendments proposed by Trek to the patent were properly allowed during the trial, and whether Trek's patent was invalid for lack of novelty and inventiveness.

Whether the ThumbDrive was within the ambit of the patent

The appellants asserted that the ThumbDrive was not protected by the patent. The Court of Appeal considered the original claims under Trek's patent and held that the ThumbDrive was protected by the patent. In reaching its conclusion, the Court of Appeal adopted a purposive interpretation of the words in Trek's patent. Such an approach balances the rights of the patentee and those of third parties. According to the court, "*the language of a patent is deemed to have been addressed by the inventor not to a panel of equity draftsmen but to the man skilled in the art*".

Whether the amendments proposed by Trek to the patent were properly allowed during the trial

Section 83 of the Patents Act allows for a patent to be amended during infringement proceedings subject to, *inter alia*, the two following limitations:

- no amendment if it results in the specification disclosing any additional matter; or
- no amendment if it extends the protection conferred by the patent.

The appellants contended that the amendments to the patent added subject matter. The task of the court is threefold in determining whether there is any disclosure of additional matter:

- ascertain through the eyes of the skilled addressee what is disclosed, both explicitly or implicitly in the application;
- to do the same in respect of the patent as granted; and
- compare the two disclosures and decide whether any subject matter relevant to the invention has been added whether by deletion or addition. The comparison is strict in the sense that subject matter will be added unless such matter is clearly and unambiguously disclosed in the application either explicitly or implicitly.

On the facts, the Court of Appeal held that none of the amendments sought disclosed any additional matter or extended the protection conferred by the patent. The amendments were required to place the invention in its proper perspective.

The appellants also questioned whether the High Court was correct in exercising its discretion to allow the patent to be amended by Trek. In this

regard, the Court of Appeal agreed with Lai J's decision to allow the amendment as there would have been little scope for abuse when patent applications for patents are filed. In the court's view, a more lenient approach towards amendments should be called for. The modern context in which patents are registered must be taken into account when considering whether amendments should be allowed. The present practice in Singapore is that skilled examiners examine and scrutinise patent applications and if there is a negative patent examination report, it is in the patent file at the Intellectual Property Office of Singapore and is open for public inspection.

Apart from the above, there were also other complaints by the appellants that the amendments were not clear and that there was undue delay on the part of Trek in applying for an amendment of a patent. In this regard, the Court of Appeal did not agree with any of the appellants' complaints and held that Lai J's decision to allow the amendments could not be faulted.

Whether Trek's patent was invalid for lack of novelty and inventiveness

Section 14 of the Patents Act provides that an invention shall be taken to be new if it does not form part of the state of the art. The state of the art comprises all matter which has, at any time before the priority date of that invention, been made available to the public, whether in Singapore or elsewhere. Disparate pieces of prior art cannot be combined unless a document directs the reader to do so. On the facts, the Court of Appeal held that the appellants' allegation of lack of novelty failed.

Next, the court had to consider the issue of inventiveness. Section 15 of the Patents Act provides that an invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art. The Court of Appeal thought that Trek had an inventive concept for a new type of data storage device that was quite different from and more convenient to use than conventional data storage devices. Although all the elements required for this invention were available to those skilled in the art, no one thought of combining all these elements together before Trek applied for the patent. It was thus not obvious to proceed from a two-piece cable-connected prior art to the neat cableless solution presented by the ThumbDrive. Further, simplicity has never been a bar to inventiveness and *ex post facto* analysis can often be unfair to inventors.

In considering the inventiveness of a new product, the commercial success of a new product might also be taken into account. The Court of Appeal noted as a fact that the ThumbDrive was warmly welcomed when it was launched and its subsequent commercial success spoke volumes.

For the reasons stated, the Court of Appeal ruled that the appellants' assertion that the ThumbDrive lacked inventiveness had no foundation.

In the circumstances, the appellants' appeal was dismissed with costs.

Allen & Gledhill represented the successful respondent in one of the two appeals which were heard together in the Court of Appeal.

[Back to Contents Page](#)

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Real estate

Singapore Court of Appeal holds in favour of paramount mortgagee in tussle with subsequent mortgagee over terms of discharge

United Overseas Bank Ltd v Bank of China
[2006] 1 SLR 57; [2005] SGCA 46

The Singapore Court of Appeal in *United Overseas Bank Ltd v Bank of China* was faced with the issues of estoppel by representation and subrogation in a tussle between a paramount mortgagee of a development (the “**Development**”) and a subsequent mortgagee of one of the houses (the “**Property**”) in the development which was sold by the developer to a couple. The question was whether, as between the two mortgagees, which mortgagee should, following the default of the purchasers, be entitled to have possession of the Property. The subsequent mortgagee appealed against the decision of judge in the High Court, who had ruled in favour of the paramount mortgagee.

In the action below, the plaintiff was the Bank of China (“**BOC**”). BOC was the successor-in-title of the Kwangtung Provincial Bank (“**KPB**”), which was the paramount mortgagee of the Development. Hereinafter, reference to “**BOC**” shall include KPB. The first defendant to the action was Yong Tze Enterprise (Pte) Ltd (“**YTE**”), the developer and the mortgagor of the development land to KPB. Three detached houses were to be built on the land. The mortgage was executed by YTE as security for the facilities granted by KPB.

YTE sold one of the houses to Mr and Mrs Ong (the “**Ongs**”). Mr Ong was a director of YTE and was in charge of YTE’s affairs. The Ongs financed the purchase of the Property in part by a loan from OCBC Finance Ltd (“**OCBC**”). OCBC lodged a caveat as mortgagee against the Property.

Following the grant of additional banking facilities by KPB to YTE, YTE executed a further mortgage (the “**second mortgage**”) over the Development in favour of KPB. With the consent of OCBC, the second mortgage was registered with priority over the caveat lodged earlier by OCBC.

Eventually, the Ongs refinanced their purchase of the Property with the United Overseas Bank Limited (“**UOB**”). UOB paid off OCBC. The UOB loan was secured by a legal mortgage of the Property.

Subsequently, YTE defaulted in its repayment obligations to BOC. The Ongs also defaulted on their loan and voluntarily surrendered possession of the Property to UOB. BOC instituted the present originating summons against YTE claiming for possession of the Property as well as the outstanding amount due under the paramount mortgage. UOB applied to be added as the second defendant to the proceedings.

The nub of the problem in the proceedings centred on two letters. The first letter (the “**1996 letter**”) was written by the solicitors for KPB to the solicitors for YTE in response to YTE’s request for partial release of the paramount mortgage over the Property. In the 1996 letter, KPB undertook to give a discharge on the Property upon receipt of 85 per cent. of the sale price.

The second letter (the “**1999 letter**”) was KPB’s letter to YTE issued following a review of the loan granted to YTE whereby KPB decided to vary the terms for a partial discharge of the paramount mortgage set out in the

1996 letter. In the 1999 letter, KPB undertook to give a partial discharge of any unit sold only after the receipt of full 100 per cent. of the sale prices. In the letter, KPB expressly referred to the sale of the Property to the Ongs and suggested that KPB reviewed the sale of the Property. The court noted that the loan by UOB to the Ongs was made well after the 1999 letter had been written by BOC.

UOB resisted BOC's application for possession of the Property on two main grounds. First, that the defence of promissory estoppel by representation applied. UOB alleged that the representation was set out in the 1996 letter which stated that KPB would allow a discharge of the Property from the paramount mortgage upon payment of 85 per cent. of the purchase price by the Ongs into the account maintained by YTE with KPB (the "**85% payment representation**"). UOB argued that the 1999 letter could not apply to it because that letter was never brought to its attention. Second, UOB argued that the principle of subrogation applied, i.e. upon UOB paying off the amount which the Ongs owed OCBC, UOB would have stepped into the shoes of OCBC and thereby be entitled to enjoy the benefits under the 1996 letter.

Estoppel

It is settled law that for a person to successfully raise the defence of estoppel by representation, three elements must be satisfied, namely, representation, reliance and detriment.

Therefore, the first question considered by the court was whether KPB did make a representation to UOB. It was clear that the 1996 letter was addressed not to UOB but to the developer, YTE. However, it did not mean that for a person to be able to rely upon a representation, the representation must be made directly by the representor to the representee. *Prima facie*, if YTE, the Ongs and their financier could prove reliance, they would be entitled to hold KPB to what it had stated in the 1996 letter.

On the facts of the case, the court found that no representation had been made to UOB. The terms set out in the 1996 letter had been varied by the 1999 letter and that was not disputed. The 1999 letter was addressed to YTE for the attention of, among others, Mr Ong. YTE was specifically asked to review the sale of the Property to the Ongs, and to bring it in line with the terms of the 1999 letter. Thus, when the Ongs sought refinancing of, and the redemption of, the OCBC loan, they were well aware that the terms of the 1996 letter had been varied. However, it appeared that the Ongs did not draw the change to the attention of UOB or its solicitors.

In any event, the court was of the view that it was not reasonable on the part of UOB to assume that the representation in the 1996 letter was still operative when the Ongs refinanced their loan with UOB in 2000. A simple inquiry on the part of UOB with the paramount mortgagee would have elicited the correct answer. The court was also of the view that it was not reasonable for UOB to rely on it. UOB's letter of offer clearly evinced the need for obtaining an undertaking from KPB. The law would be imposing an impossible burden on KPB if it were to require KPB to notify all parties who could be affected by the change. KPB would not have known that the Ongs were thinking of refinancing. Neither would KPB know who the new financier of the Ongs would be. The court held that in a situation, and as a general rule, the new financier should always reconfirm with the alleged representor that the representation made earlier was still valid.

In the result, the court held that BOC had not, at the time UOB granted a loan to refinance the Ongs' purchase of the Property, made a representation to UOB that BOC would give a partial discharge from the paramount

mortgage in respect of the Property upon payment of 85 per cent. of the purchase price into the account of YTE with BOC. Moreover, even if it were correct to hold that a representation was made by KPB, it was, in the circumstances, wholly unreasonable for UOB to have relied on it without obtaining confirmation from KPB. Accordingly, the defence of estoppel by representation failed.

Subrogation

Subrogation is based on an implied understanding on the part of the new lender that he is to have a certain security for the money he has advanced to pay off the old lender. In the light of the court's views that UOB should have sought confirmation from KPB before assuming that the representation in the 1996 letter was still operative, the court held that there was no basis for UOB to assert that there was an implied understanding as to partial release on 85 per cent. payment.

Further, an essential prerequisite for the application of the equitable doctrine of subrogation is the presence of unjust enrichment. In the present case, subrogation was sought to be applied not against the borrower (i.e. the Ongs) but a third party, the paramount mortgagee. In the circumstances of the case, the court was of the view that the denial of subrogation to UOB would not give rise to unjust enrichment on the part of BOC.

Be that as it may, the court went on to consider the arguments of UOB on subrogation. UOB argued that as OCBC was entitled, pursuant to the 1996 letter, to call on KPB to release the Property from the paramount mortgage on receipt of 85 per cent. of the purchase price, upon UOB refinancing the loan which the Ongs owed to OCBC, UOB stepped into the shoes of OCBC and became entitled to require BOC to honour its obligation to OCBC to give a partial discharge on the same terms.

The court held that, implicit in this contention, was the assumption that OCBC was entitled to call upon BOC to give a partial discharge upon receiving 85 per cent. of the proceeds of sale. On the facts of the case, the court held that it would have been a reasonable inference to draw in all the circumstances that OCBC was made aware of the variation and had gone along rather than objected. In the result, even if UOB were to have stepped into the shoes of OCBC, it could not have acquired more rights than what OCBC had before the loan owed by the Ongs was discharged by UOB.

[Back to Contents Page](#)

English High Court declines to set aside sale by mortgagee for improper purpose

Meretz Investments NV & Anor v ACP Ltd & Ors [2006] EWHC 74 (Ch)

It is settled law that a mortgagee, exercising his remedies under the mortgage, owes equitable duties to the mortgagor and to subsequent encumbrancers.

In *Meretz Investments NV & Anor v ACP Ltd & Ors*, the mortgagor submitted to the English High Court that a power of sale would only be properly exercised where the mortgagee had "purity of purpose", that is to say, where the mortgagee's only motive was to recover, in whole or in part, the debt secured by the mortgage. Even if the mortgagee's purpose was to protect his security, rather than to recover the secured debt, that was an illegitimate

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purpose. The mortgagor further submitted that if the mortgagee had mixed purposes, the requisite purity of purpose was not achieved, and the exercise of the power of sale was improper. On the other hand, the mortgagee submitted that as long as one of the mortgagee's purposes was to recover the debt secured by the mortgage or to protect his security, it did not matter that he had other purposes as well.

The mortgagor's argument was rejected by the court as none of the authorities to which the court was referred gave unequivocal support to the argument that the mortgagee must have "purity of purpose". On the contrary, the court found that there were authorities which were inconsistent with it.

For example, in *Nash v Eads* (1880) 25 Sol J 95, it was held that although there were some limits to the powers of the mortgagee, he was not bound to abstain from selling because he was not in urgent want of his money, or because he had a spite against the mortgagor. In *Farrar v Farrars Ltd* (1888) 40 Ch D 395, it was held that the fact that the mortgagee would acquire benefits consequent upon the sale did not necessarily involve a breach of the mortgagee's duty of good faith.

The court also referred to *Fisher & Lightwood on Mortgages* where it was stated that "it seems that a mortgagee who genuinely seeks payment of sums due will not be defeated merely because he has an additional improper motive".

On a practical note, the court observed that a dissection of a mortgagee's motives was likely to be difficult in practice. Moreover, unlike statutory powers conferred for the public benefit, or trustees' powers conferred for the benefit of beneficiaries, a mortgagee's powers are conferred upon him for his own benefit. In such circumstances, "purity of purpose" may be difficult to achieve.

In the circumstances, the court held that where, however, a mortgagee has mixed motives (or purposes) one of which is a genuine purpose of recovering, in whole or in part, the amount secured by the mortgage, then his exercise of the power of sale will not be invalidated on that ground. In addition, the court held that it is legitimate for a mortgagee to exercise his powers for the purpose of protecting his security.

[Back to Contents Page](#)

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Shipping

Singapore High Court expounds on piracy and violent theft coverage in marine hull insurance

Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd
[2006] 1 SLR 69; [2005] SGHC 185

The Singapore High Court in *Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd* had the occasion to deliberate on the general principles of piracy and violent theft by persons from outside the vessel ("violent theft") as grounds for recovery under a marine insurance policy.

The plaintiff, Bayswater Carriers Pte Ltd ("**Bayswater**") was the registered owner of a Singapore registered tug, the *BW Wisdom*, and the named assured to a marine hull policy for the same boat. The defendant, QBE Insurance (International) Pte Ltd ("**QBE**") was the underwriter of the policy. The *BW Wisdom* was lost to a hijacking while moored within the port limits of

Batu Ampar, Batam. Bayswater filed a claim under the policy which QBE resisted, arguing that neither piracy nor violent theft, two marine perils covered by the policy, took place.

The court made a finding of piracy. The court held that a piratical act under the policy had the following elements: force or threat of force, a purpose of personal gain, and the occurrence of such act within territorial waters or on the high seas.

Elaborating on the third element, the court rejected QBE's argument that the act must be committed on the high seas to be considered as piracy. It noted that the word "piracy" has not acquired a technical meaning in the context of a marine policy. Thus, a marine policy like any commercial contract must be construed as to give effect to the parties' intention as expressed in the written contract, and its terms must be understood in their plain, ordinary and popular sense. A definition of piracy that limits the insured peril to robbery on board a vessel on the high seas is justifiable only if it arises from a proper construction of the marine policy.

Moreover, QBE could not contend that the insured peril "piracy" is confined to piracy in the high seas because that meaning would be inapplicable to the maritime adventure covered by the policy in the instant case. The trading pattern of *BW Wisdom* was mainly between Singapore and Batam Island and these trading limits were reflected as an express warranty in the policy. Thus, the word "piracy" should be construed in the context of the policy. The court noted that this is an important consideration for shipowners and marine underwriters doing business in this region where piracy is a real and serious menace to shipping in the Straits of Malacca and Singapore.

The court further stated that the distinction that customary international law places between "high seas" and "territorial waters" is a matter of jurisdiction. It adopted the reasoning in *Cameron v HM Advocate* [1971] JC 50 that the difference relates simply to the basis by which a state assumes jurisdiction to prosecute the crime of piracy: if it is committed within territorial waters, there is automatic jurisdiction; if it takes place on the high seas, the state assumes jurisdiction if qualifying conditions are satisfied. Moreover, the United Nations Convention on the Law of the Sea ("**UNCLOS**") extended the definition of high seas to pertain to waters not included in the Exclusive Economic Zone, the waters of an archipelagic state (such as Indonesia), and the territorial waters (internal waters and territorial sea) of a state. It would be difficult to interpret piracy as an insured peril if its scope is limited to the high seas under the extended definition in UNCLOS.

The court also held that even if the loss was not due to piracy as the attack was not committed "at sea" (the tug was at port), the plaintiff's claim would still be upheld under the alternative peril of violent theft. Both are marine perils and they overlap. The marine policy in this case covered risk of violence or threats of violence from outsiders against those on board, to steal and seize property which they own or which is under their control. These circumstances were attendant in this case, when the intruders threatened the master and crew with *parangs*, forcibly took possession of the tug, and appropriated it for their own use. Therefore, alternatively and on the same facts, there was violent theft by persons outside the tug.

[Back to Contents Page](#)

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News

Allen & Gledhill is Singapore Law Firm of the Year 2006

Allen & Gledhill has been named Singapore Law Firm of the Year 2006 by the *International Financial Law Review (IFLR)*. This is the seventh consecutive year that the Firm has won the Singapore Law Firm of the Year Award. The awards recognise legal innovation in all areas of corporate finance and will be presented at the *IFLR Asian Awards 2006* ceremony at The Ritz-Carlton, Hong Kong, on 15 March 2006.

[Back to Contents Page](#)

Aabar Petroleum Investments Company PJSC to acquire P.T. Austindo Nusantara Jaya's stake in Pearl Energy Limited

Aabar Petroleum Investments Company PJSC ("**Aabar**") has entered into an option agreement with P.T. Austindo Nusantara Jaya ("**PT ANJ**") and ANJ Energy Pte Ltd ("**ANJE**"), a wholly-owned subsidiary of PT ANJ, with respect to PT ANJ's effective interest of 214,200,016 ordinary shares in Pearl Energy Limited ("**Pearl Energy**"), representing approximately 48.29 per cent. of the issued share capital of Pearl Energy. Under the terms of the option agreement, PT ANJ granted Aabar a call option to purchase PT ANJ's effective interest in 48.29 per cent. of the share capital in Pearl Energy and Aabar granted PT ANJ a put option to sell its effective interest in 48.29 per cent. in Pearl Energy to Aabar.

Advising PT ANJ are Allen & Gledhill Partner Lim Mei and Senior Associate Koh Shang Yun and advising Pearl Energy are Allen & Gledhill Partner Andrew M. Lim and Senior Associate Goh Peng Fong.

[Back to Contents Page](#)

Venture Corporation Limited acquires shares in DMX Technologies Group Limited

Venture Corporation Limited ("**Venture**") has entered into a conditional subscription agreement pursuant to which it agreed to subscribe for 83 million new ordinary shares in the capital of DMX Technologies Group Limited ("**DMX**") for an aggregate subscription price of approximately S\$70.63 million. Venture has also entered into a conditional option agreement with Fast Worth Management Limited ("**FWML**") pursuant to which Venture has the option to require FWML to sell to it, and FWML has the option to require it to purchase from FWML 12 million ordinary shares in the capital of DMX for an aggregate cash consideration of approximately S\$10.42 million.

Advising Venture are Allen & Gledhill Partner Andrew M. Lim, Senior Associate Jolyn Ho and Associate Zahedah Abdul Rashid.

[Back to Contents Page](#)

Proposed Scheme of Arrangement to acquire shares held by Pacific Century Regional Developments Limited's minority shareholders

Newbridge Century Ltd ("**Newbridge Century**"), TPG Century Ltd ("**TPG Century**") and Pacific Century Regional Developments Limited ("**PCRD**") jointly announced on 26 January 2006 that they had entered into an implementation agreement to effect the acquisition by Newbridge Century and TPG Century, through a scheme of arrangement (the "**Scheme**"), of all the issued shares in PCRD held by the shareholders of the company, other than those held by Pacific Century International Limited ("**PCIL**"), Borsington Limited ("**Borsington**"), Anglang Investments Limited ("**Anglang**") and Pacific Century Group (Cayman Islands) Limited ("**PCG (Cayman Islands)**", and together with PCIL, Borsington and Anglang, the "**PCG Shareholders**"). The PCG Shareholders, who hold in aggregate approximately 75 per cent. of the issued shares of PCRD, will not dispose of its shares in, or acquire further shares in, PCRD as a result of the Scheme, and will abstain from voting on the Scheme. If PCRD shareholders (other than the PCG Shareholders) approve the Scheme, PCRD will be privatised and an application will be made to delist PCRD from the Official List of Singapore Exchange Securities Trading Limited.

Advising PCRD are Allen & Gledhill Partners Lucien Wong and Lim Mei and Senior Associate Hilary Low.

[Back to Contents Page](#)

Standard Chartered Bank provides first Islamic financing facility in Singapore

Standard Chartered Bank extended a US\$96 million Islamic financing (*Murabahah*) facility for Baitak Asian Real Estate Fund I (Labuan) Limited ("**Baitak AREF I**"), a US\$600 million Asia Real Estate fund launched by the Kuwait Finance House Group and Singapore's Pacific Star Group. This is the first Islamic financing transaction in Singapore following the Monetary Authority of Singapore's September 2005 announcement allowing banks in Singapore to offer *Murabahah* financing and complying with the guidelines thereunder (in previous structures, the lending entities were usually special purpose affiliates of the banks). Under the Baitak AREF fund structure, Kuwait Finance House acts as the fund manager and advisor on *Shari'ah* laws while Pacific Star provides investment management and asset management services. The *Murabahah* facility proceeds will fund the joint venture's first investment into a mix-use prime property development project in Kuala Lumpur.

Advising Standard Chartered Bank are Allen & Gledhill Partner Kok Chee Wai and Associate Suhaimi Zainul Abidin.

[Back to Contents Page](#)

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