

Legal Bulletin

A summary of developments in the law

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Allen & Gledhill LLP also publishes the monthly Financial Services Bulletin. To view the July 2009 issue, please [click here](#).

Articles

IRAS issues guide on income tax treatment of limited partnerships

The Inland Revenue Authority of Singapore (the “**IRAS**”) has issued a new e-Tax guide entitled “Income Tax Treatment of Limited Partnerships (LPs)” (the “**LP Circular**”) on 30 June 2009. The LP Circular provides details on the income tax treatment of limited partnerships.

Background

The Limited Partnerships Act 2008 came into force on 4 May 2009. Like a general partnership, but unlike a limited liability partnership (“**LLP**”), a limited partnership (“**LP**”) does not have a separate legal personality from its partners. An LP must have one or more general partners and one or more limited partners. A limited partner of an LP is only liable for the debts and liabilities of the LP to the extent of his agreed contribution to the LP, and does not participate in the management of the LP.

Tax treatment of LPs largely similar to tax treatment of LLPs

The Limited Partnerships Act 2008 made consequential amendments to the Income Tax Act through the introduction of a new section 36C in the Income Tax Act. The LP Circular highlights that the tax treatment of an LP is largely identical to the tax treatment of an LLP. Like an LLP, an LP is not recognised as a taxable entity. Tax transparency is accorded to the income of the LP or, in other words, the income of the LP accrues to the partners of the LP in their respective shares (as in a general partnership).

Reference materials

Please [click here](#) for the full text of the LP Circular, which is available from the IRAS website www.iras.gov.sg

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MOF proposes changes to Income Tax Act to implement internationally agreed standard for exchange of information

Between 29 June 2009 and 28 July 2009, the Ministry of Finance (the “**MOF**”) conducted a public consultation to seek public comments on the draft Income Tax (Amendment) (Exchange of Information) Bill (the “**Draft Bill**”).

Objectives of Draft Bill

The Organisation for Economic Co-operation and Development (“**OECD**”) had developed an international standard for the exchange of information for tax purposes (“**EOI Standard**”). The Draft Bill will make changes to the Income Tax Act to enable the implementation of the EOI Standard in Singapore.

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Acceding only to clear, specific, relevant information requests

In the press statement issued by the MOF on 29 June 2009 announcing the public consultation of the Draft Bill, the MOF stated that the Draft Bill provides for procedures to ensure that only information requests that are clear, specific, relevant, and consistent with the EOI Standard can be acceded to. In addition, the MOF stated that the EOI Standard allows the requested jurisdiction to reject requests that are frivolous or spurious in nature or “fishing expeditions” by the requesting jurisdiction.

Prescribed DTAs

The provisions of the Draft Bill will only apply to those double taxation agreements entered into by Singapore with other countries, that have been amended to incorporate the EOI Standard and which are specifically prescribed by the MOF for the purpose of exchange of information.

Reference materials

For further information, please click on the titles of the following documents relating to the above development:

- [MOF press statement dated 29 June 2009](#)
- [MOF consultation paper](#)
- [Draft Bill](#)

These resources are also available from the MOF website www.mof.gov.sg

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IDA and AGC seek views on proposed changes to electronic transactions legislation

On 30 June 2009, the Info-communications Development Authority of Singapore (the “**IDA**”) and the Attorney-General’s Chambers (the “**AGC**”) jointly released a report entitled “*Joint IDA-AGC Review of Electronic Transactions Act - Proposed Amendments 2009*” (the “**Report**”). The purpose of the Report is to gather public feedback on proposed changes to the existing electronic transactions legislation in Singapore. The principal legislation in Singapore governing electronic transactions is the Electronic Transactions Act (the “**ETA**”) and the Electronic Transactions (Certification Authority) Regulations (the “**Regulations**”).

The consultation period closes on 17 August 2009.

Draft legislation released

As part of the Report, the IDA and AGC also released drafts of the Electronic Transactions Bill 2009 (the “**draft Bill**”), the Electronic Transactions (Certification Authority) Regulations 2009 (the “**draft Regulations**”) and the Compliance Audit Checklist. The Report consolidates recommendations arising from the joint IDA-AGC public consultation on a review of the ETA which was conducted in three stages in 2004 and 2005.

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Proposed changes

The draft Bill seeks to align the law on electronic transactions with the UNCITRAL Convention on the Use of Electronic Communications in International Contracts and will repeal and re-enact the existing ETA. The draft Bill and draft Regulations also seek to review the scope of transactions excluded from the application of the ETA, make changes to facilitate e-Government and adopt a new accreditation framework for the regulation of certification authorities.

Exemption from liability for Internet service providers

As the issue concerning the exemption of liability for network service providers is still under consideration, a separate document on this issue will be published in due course.

Reference materials on the IDA website

To view the following documents which are available on the IDA website www.ida.gov.sg, please click on the relevant titles:

Current consultation materials

- [Joint IDA-AGC Review of Electronic Transactions Act: Proposed Amendments 2009 \(Report\)](#)

Past consultation materials

- [Joint IDA-AGC Review of Electronic Transactions Act: ETA Remaining Issues](#) (2005)
- [IDA-AGC Review of Electronic Transactions Act: Exclusions Under Section 4 of the ETA](#) (2004)
- [IDA-AGC Review of Electronic Transactions Act: Electronic Contracting Issues](#) (2004)

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Steering Committee for Reviewing Companies Act to conduct public consultation on draft Companies (Amendment) Bill in 2010

In a speech delivered on 18 July 2009 at the Asian Investment Conference & Exhibition 2009, Minister in Prime Minister's Office and Second Minister for Finance and Transport Mrs Lim Hwee Hua disclosed that the Steering Committee for Reviewing the Companies Act (the "**Steering Committee**") will be releasing a draft Companies (Amendment) Bill for public consultation by 2010.

Mrs Lim highlighted three issues regarding shareholder rights that the Steering Committee for Reviewing the Companies Act has studied and which will be discussed in the consultation papers. These areas are:

- Appointment of multiple proxies
- Investor rights for CPF Fund investors

- Minority shareholders protection

Appointment of multiple proxies

In normal circumstances, it is sufficient and fair for an individual shareholder who is also the registered member to have two proxies. Consistent with this, the Companies Act provides that a member is entitled to appoint a maximum of two proxies to attend and vote at a general meeting, unless otherwise provided in the articles of association of that company. Although a company may allow a greater number of proxies, it is not the prevalent practice in Singapore to do so. Where shares in a company are held through a nominee company or a custodian bank, it is the nominee company or custodian bank who is the registered member and who is entitled to attend and vote at a general meeting of the company. Hence, due to the limit to the number of proxies, fund managers and institutional investors who hold shares through a nominee company or custodian bank may not be able to attend shareholders' meetings. The Steering Committee will seek feedback on whether the Companies Act should be amended to allow a nominee company or custodian bank to appoint more than two proxies to attend the general meeting of a company.

Investor rights for CPF Fund investors

Where Central Provident Fund ("CPF") members purchase shares with their CPF funds through the CPF Investment Schemes, the shares are held in the names of the CPF Agent Banks. Not being the registered members, the CPF share investors do not have a right to attend the annual general meetings of the company and may only instruct the CPF Agent Bank in advance on how they wish to vote on resolutions. The Steering Committee will be seeking comments and feedback on how to enhance the investor rights for such investors, in particular, the possible legislative mechanisms that can be put in place to allow CPF share investors to enjoy their membership rights, such as attending general meetings. In this way, shareholders will be allowed a greater say in the overall well-being of the company.

Minority shareholders protection

The Steering Committee will be seeking views on how minority shareholders rights can be enhanced. Currently, the Companies Act allows minority shareholders to apply to court for relief against abuse of the majority's voting power. However, taking this route entails costly litigation which makes it unattractive to minority shareholders. An alternative route has been developed in jurisdictions such as Canada, New Zealand and the United States involving a minority buy-out right or appraisal right regime, whereby a minority shareholder who dissents from certain fundamental changes to the enterprise or certain alteration of shareholder rights, may require the company to buy out his shares at a fair value. The Steering Committee will be seeking feedback from focus groups as to whether the feasibility of such a regime in Singapore's context.

Other areas being studied by Steering Committee

On 17 February 2009, Minister for Finance Mr Tharman Shanmugaratnam highlighted another three specific areas that the Steering Committee is studying. They were:

- The codification of directors' duties
- Removing restrictions on financial assistance

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- Replacing the concept of the exempt private company with a “small company” definition

An article discussing the three areas highlighted by Mr Shanmugaratnam was featured in a previous issue of the Legal Bulletin (February 2009). Please [click here](#) to read the article entitled “*Steering Committee for reviewing Companies Act studying three areas for change*”.

Reference materials

Please [click here](#) for the full text of the speech delivered by Mrs Lim Hwee Hua on 18 July 2009, which is posted on the MOF website www.mof.gov.sg

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Parliament introduces Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes

The Goods and Services Tax (Amendment) Bill 2009 (the “**Bill**”) was introduced in Parliament on 20 July 2009.

The Goods and Services Tax Act (the “**Act**”) will be amended to implement changes announced in the Budget Statement 2009, as well as other tax changes. These include:

- Zero-rating treatment for all aircrafts used wholly for international travel as well as the sale and lease of qualifying aircraft parts. For this purpose, the Bill introduces the definition “qualifying aircraft parts” and enlarges the definition of “aircraft”;
- Providing for the temporary removal of goods, without payment of tax, from a warehouse outside the free trade zone for the purpose of an auction, an exhibition or other similar event involving the display of goods;
- Allowing a trust to be registered in its own name, while continuing to make the trustees liable for compliance with the Act;
- Extending to electronic vouchers the current practice of accounting for GST on physical vouchers at the point where the physical vouchers are redeemed for goods and services. The GST (General) Regulations will be amended to implement this change; and
- Requiring taxpayers to state precisely their grounds of objection when applying for a review or revision of a decision made by the Comptroller of GST. This will align the Act with requirements under the Income Tax Act and Property Tax Act.

Reference materials

Please [click here](#) for the full text of the Bill, which is posted on the Singapore Parliament website www.parliament.gov.sg

The changes to be made by the Bill were the subject a public consultation conducted by the Ministry of Finance in June 2009. An article discussing the public consultation was featured in a previous issue of the Legal Bulletin

(June 2009). To read the article entitled "*MOF conducts public consultation on draft Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes*", please [click here](#).

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MOM issues Third Tripartite Advisory and Workplace Checklist to mitigate spread of Influenza A (H1N1-2009)

The Ministry of Manpower (the "**MOM**") has issued the Third Tripartite Advisory on Workplace Measures to Tackle Influenza A (H1N1-2009) (the "**Third Tripartite Advisory**") and a Workplace Checklist to Mitigate the Spread of Influenza A (H1N1-2009) (the "**Workplace Checklist**").

Third Tripartite Advisory

On 16 July 2009, the MOM, the Singapore National Employers Federation (SNEF) and National Trades Union Congress (NTUC), in consultation with the Ministry of Health (the "**MOH**"), issued the Third Tripartite Advisory. The Third Tripartite Advisory supersedes the preceding advisories released on 30 April 2009 and 26 June 2009.

Guidelines raised in the Third Tripartite Advisory include:

- **Minimising workplace disruptions:** Employers are advised to start planning early to ensure that disruptions at the workplace are minimised. They should prepare to implement business continuity plans, which should include dealing with the possible scenario where there is significant absence from work.
- **Infection control measures:** Employers are strongly encouraged to
 - Consider the needs of employees who might be at higher risk of severe illness and complications due to Influenza A (H1N1-2009), and take appropriate steps to enable them to work, while minimising their risk of infection at the workplace.
 - Advise employees who are ill with flu-like symptoms to observe the period of leave indicated in the medical certificates issued by doctors.
 - Consider taking precautionary measures such as staggering working hours where practicable so that employees might avoid peak hour crowds in the public transportation system, and advising employees to avoid crowded areas and contact with anyone who appears unwell.
 - Urge employees on medical leave not to return to the workplace. This socially responsible measure would allow employees to recover fully, reduce the risk of infecting other colleagues, and minimise business disruptions at the workplace. Likewise, employees on medical leave should be socially responsible and rest at home. For employees who have used up their medical leave, employers are urged to exercise compassion and flexibility by granting extended paid medical leave.

- **Leave of absence:** The Third Tripartite Advisory states that in the mitigation phase, contact tracing and Home Quarantine Orders would generally not be necessary, unless there are public health reasons to do so on a case-by-case basis.

Workplace Checklist

The Workplace Checklist is issued by the MOM, in consultation with the MOH, Singapore Business Federation and SPRING Singapore. The Workplace Checklist was initially issued on 3 July 2009 and has been updated on 16 July 2009 following the issuance of the Third Tripartite Advisory.

The Workplace Checklist helps employers put in place the appropriate measures to mitigate the spread of Influenza A (H1N1-2009), and ensure business continuity to minimise the impact on business operations and employees. The checklist, which is meant to serve as a guide and is not exhaustive, encompasses business continuity measures, staff management policies, education of employees, and environmental cleanliness.

The Workplace Checklist refers to the following documents, the contents of which may be incorporated into existing business continuity plans of organisations:

- **MOH Guide on Infection Control: Measures for Workplaces (Non-healthcare):** Issued by the MOH, this booklet was last updated in May 2009 and provides guidelines on infection control measures and practices that can be implemented in the workplace to limit the spread of influenza, as well as other infectious diseases with similar transmission mechanism via close contact and large respiratory droplets.
- **A Flu Pandemic Business Continuity Guide for SMEs, SPRING Singapore:** Issued by SPRING Singapore (June 2009), this guide on business continuity planning helps small and medium-sized enterprises in Singapore deal with a flu pandemic.

Reference materials

Please [click here](#) to read the Third Tripartite Advisory.

Please [click here](#) to access the Workplace Checklist.

Both resources are available from the MOM website www.mom.gov.sg. Please [click here](#) to go to the relevant webpage.

Various advisories and guidelines are also available from the MOH website www.moh.gov.sg and www.flu.gov.sg

An article about MOM advisories for Influenza A (H1N1-2009) was featured in a previous issue of the Allen & Gledhill Legal Bulletin (June 2009). To read the article entitled “*MOM issues advisories for Influenza A (H1N1-2009)*”, please [click here](#).

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MAS responds to feedback on public consultation on proposed definitions of “carrying on insurance business” and “soliciting insurance business” for Insurance Act

From 11 May 2009 to 12 June 2009, the Monetary Authority of Singapore (the “MAS”) conducted a public consultation and invited views and comments on proposed definitions of “carrying on insurance business” and “soliciting insurance business” for the Insurance Act.

On 15 July 2009, the MAS issued its response to the feedback received on the proposed changes. Comments that are of wider interest, together with the MAS responses, are set out below:

- **Criteria for carrying on insurance business:** In response to a query whether the assumption of risk or undertaking of liability must be (a) in Singapore, or (b) arising out of activities undertaken in Singapore but assumed or undertaken outside Singapore, or (c) a combination of both, the MAS explained that the definition of “carrying on insurance business” does not depend on the location where the risk is assumed or liability is undertaken. This would only be relevant in making the distinction between Singapore and offshore risks, which is set out in the First Schedule to the Insurance Act.
- **Unregistered insurers:** Clarification was sought on the meaning of “unregistered insurer” and the extent of solicitation by or on behalf of an unregistered insurer that would be allowed. The MAS explained that an unregistered insurer is one that is deemed as carrying on insurance business, as determined by the proposed definition, but who has not been approved by the MAS to do so in Singapore. There will be no change to the current prohibition in section 6(1) of the Insurance Act against a person soliciting insurance business for an unregistered insurer. The proposed definition of “soliciting insurance business” only serves to clarify what is deemed as solicitation and the extent of solicitation allowed. Hence, solicitation for an unregistered insurer is not allowed, even if it is a one-off transaction or targeted at a specialised segment.
- **Employee benefits group policies:** In response to a query about the types of employee benefits group policies that would constitute the carrying on of insurance business, the MAS explained that arrangements which are administered and funded by an employer for the benefit of its employees would generally be carved out from the ambit of the Insurance Act. This would be the case regardless of the type of benefit provided, whether retirement (superannuation), disability or death, as long as it is a non-commercial arrangement that is not for profit. However, arrangements which involve the assumption of risk and provision of benefits by a third-party would not be excluded from the ambit of the Insurance Act.
- **Pre-paid services:** In relation to pre-paid services which are to be rendered in response to some future event, such as that provided by automobile associations, the MAS explained that pre-paid services which are incidental to the core business of the provider would be carved out from the ambit of the Insurance Act and would not be deemed to be carrying on insurance business.
- **Silent payment undertakings and payment guarantees:** With regard to silent payment undertakings or payment guarantees, which are arrangements whereby a bank would, in return for a fee, agree to

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assume the risk of non-payment by a purchaser to a seller in a sale and purchase transaction, the MAS responded that it does not require banks, which are already regulated under the Banking Act, to also be licensed as insurers. Hence, banks would be exempted from the need to be licensed as insurers.

- **Insurance forums, talks and seminars:** The MAS stated that the conduct of insurance forums, talks and seminars would not constitute solicitation of insurance business as long as there is no marketing of specific insurers or insurance products.

It is mentioned in the MAS Response that a separate public consultation will be conducted at a later date on the proposed definitions of “insurance agent”, “insurance broker” and “insurance intermediary”.

Please [click here](#) to read the Response, which is available on the MAS website www.mas.gov.sg

An article about the consultation paper was featured in a previous issue of the Allen & Gledhill Legal Bulletin (May 2009). To read the article entitled “MAS public consultation on proposed definitions of ‘carrying on insurance business’ and ‘soliciting insurance business’ in Insurance Act”, please [click here](#).

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IPOS invites feedback on proposed changes to Singapore’s patent system

On 3 July 2009, the Intellectual Property Office of Singapore (the “IPOS”) issued a consultation paper on proposed changes to the Singapore patent system. Such reviews are conducted regularly to update the patents legislation with Singapore’s economic development and trends in patent protection. The principal statute governing patents in Singapore is the Patents Act. The consultation is open for submission of comments until **14 August 2009**.

Key proposed changes

In the present review, the IPOS is seeking feedback on proposed changes to the following aspects of the patent system:

- **Patent self-assessment regime:** Changes will be made to the search and examination processes (the local route, the mixed route and the foreign route) to accommodate a positive examination system. The IPOS is proposing to amend the patent system to grant patents only when the examination report is positive. This is notwithstanding that only a minority of patents are granted based on a mixed/negative report. At present, a Singapore patent can be granted so long as the procedural requirements under the Patents Act have been fulfilled, irrespective of the substantive results of the examination report. Along with this change, a hearing process for the applicant to overcome objections by the examiner is proposed, where local examination is requested, and the examination report is mixed or negative. Where a positive foreign examination report is relied upon, a claim allowability checking process is proposed.

It is also proposed that all post-grant amendments are to be examined. The proposed change here would require the patentee to file a request for leave to amend with reasons for the post-grant amendments and details of the amendments including a claims correspondence table. The amendments will be subjected to formalities check and assessment of allowability. Another proposed change in the self-assessment regime is to allow any party to request post-grant search and examination. Where the party requesting is not the patentee, the patentee will be allowed to make observations before the commencement of the examination.

- **Patent application process:** The patent application process will be amended to accommodate the changes to the patent self-assessment regime. Two process options have been suggested:
 - (a) A minimal-change approach where all the filing routes and fast-slow tracks are retained, and timelines undergo adjustments to meet certain requirements of a positive grant system.
 - (b) A clean slate approach where on top of fitting in the requirements for a positive grant system, existing filing routes, fast-slow tracks and timelines are reviewed.
- **Extension of time (“EOT”):** It is proposed that for automatic EOT, blocks of three months up to a maximum of six months be given, instead of the current EOT limit of three months. Further, the IPOS proposes to allow only automatic EOT up to the maximum of six months (and no discretionary EOT) for the periods prescribed for (a) filing a request for a search and examination report or for an examination report, (b) filing a request for a deferred search and examination report or for a deferred examination report, and (c) meeting the requirements for grant. At present, discretionary EOT beyond the automatic EOT period is possible, making it difficult for third parties to determine whether a patent application will eventually proceed to grant in Singapore even though the period prescribed has long lapsed.
- **Restoration of a lapsed patent:** Currently, a patent owner in the restoration of a lapsed patent must satisfy the Registrar of Patents that he took *reasonable care* to see that any renewal fee was paid within the prescribed period or that that fee and any prescribed additional fee were paid within the six months immediately following the end of that period. The IPOS proposes to change the criterion for restoration from “reasonable care” to “unintentional”. It is also suggested that an application for the restoration of a lapsed patent may be made at any time within 20 months from the day on which it ceased to have effect. Currently, such an application to restore a lapsed patent may be made within 30 months from the day on which it ceased to have effect.

Apart from the above, the IPOS is also suggesting changes to areas related to renewal reminder and second or subsequent new medical use claims.

Reference materials

Please click on the following links to access the required information:

- [Consultation paper](#)
- [Feedback Template](#)
- [Press release](#)

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These resources are available from the IPOS website www.ipos.gov.sg

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Human Organ Transplant (Amendment) Act 2009: Allowing payment for living donors and other changes with effect from 1 November 2009

With effect from 1 November 2009, the Human Organ Transplant Act (the “**Act**”) will be amended to achieve the following:

- Comprehensive reimbursement, in money or money’s worth, of costs, expenses and loss of earnings reasonably incurred by altruistic living organ donors will be allowed. The provision of reasonable costs or expenses of short-term or long-term medical care or insurance protection which is or may reasonably be necessary as a result of the donation of the organ by an altruistic living donor will also be allowed. Payment will be made by the organ recipient.
- The upper age limit for cadaveric organ donation will be lifted. Currently, organs may not be removed from the body of a deceased person who is above 60 years of age for the purpose of transplantation. However, those who opted out of the Act before this amendment will continue to be excluded even when they turn 60, unless they have withdrawn their objections.
- The upper age limit of 60 years for patients to be placed on the transplant waiting list will be removed.
- Paired living donor organ transplant arrangements will be permitted.
- Increasing the penalties for organ trading syndicates and middlemen. A person convicted of such offences may be liable to a maximum fine of S\$100,000 or a maximum term of imprisonment of 10 years, or both.

Background

As a matter of background, the Human Organ Transplant (Amendment) Act 2009 (the “**Amendment Act**”) was introduced in Parliament following a public consultation exercise which was conducted by the Ministry of Health (the “**MOH**”) in November/December 2008. The Amendment Act was passed on 24 March 2009.

The Allen & Gledhill Legal Bulletin has been following the development of the Amendment Act. Please click on the relevant titles below to read previous articles on the subject:

- [Parliament passes Human Organ Transplant \(Amendment\) Bill 2009: Allowing payment for living donors](#) (March 2009)
- [Human Organ Transplant \(Amendment\) Bill 2009 tabled for first reading in Parliament](#) (January 2009)

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Cases

Banking

Singapore High Court considers bank's entitlement where instrument is forged

Raffles Money Change Pte Ltd (formerly known as Honest Money Changer Pte Ltd) v Skandinaviska Enskilda Banken AB (Publ) (formerly known as Skandinaviska Enskilda Banken AB) [2009] 3 SLR 1; [2009] SGHC 37

The Singapore High Court in *Raffles Money Change Pte Ltd (formerly known as Honest Money Changer Pte Ltd) v Skandinaviska Enskilda Banken AB (Publ) (formerly known as Skandinaviska Enskilda Banken AB)* discussed the principles governing a bank's entitlement where it was presented with a counterfeit bank draft for collection.

Facts

Raffles Money Change Pte Ltd (the "**Appellant**") operated a foreign currency account with Skandinaviska Enskilda Banken AB (Publ) (the "**Respondent**"), a bank (the "**Appellant's Account**").

The Appellant presented a bank draft (the "**Euro Draft**") drawn on the Bank of Ireland, Glassen Dublin (the "**Bank of Ireland**") to the Respondent for collection. The Respondent sent the Euro Draft to its wholly-owned subsidiary, SEB AG Merchant Banking in Frankfurt (the "**Frankfurt Subsidiary**"), for clearance and collection. Then, the Appellant's Account was credited with the sum it was entitled to under the Euro Draft (the "**Sum**"). An employee of the Respondent had called the Appellant's managing director to inform him of that before crediting the Appellant's Account with the Sum (the "**Telephone Conversation**").

Subsequently, the Respondent informed the Appellant that the Euro Draft was counterfeit and that the Bank of Ireland would not be paying the draft. The Respondent accordingly debited the Appellant's Account with the Sum.

The Appellant then commenced the current proceedings in the District Court against the Respondent to recover the Sum on the ground that the Respondent had wrongfully debited its account. The Respondent defended the Appellant's claim in reliance on two exclusion clauses governing the operation of the Appellant's Accounts. The provisions, Clauses 1.23 and 13.1, were part of the Respondent's standard terms and conditions (the "**General Terms**") in respect of the Appellant's Account.

Grounds of appeal

The District Judge had dismissed the Appellant's claim and the Appellant appealed against the District Judge's judgment to the High Court on the following grounds:

- Clauses 1.23 and 13.1 of the General Terms had no application to the facts of the case.
- The Respondent had made a misrepresentation of fact (that the payment made by the Respondent into the Appellant's Account was final and irreversible), which led the Appellant to rely on it to its detriment (by paying the funds to its customer). Accordingly, the Respondent was estopped from reversing the payment to the Appellant.

- A SWIFT message received by the Respondent from the Frankfurt Subsidiary (the “**SWIFT message**”) before crediting the Sum in the Appellant’s Account was proof that the Respondent had received payment from the Frankfurt Subsidiary and the Respondent had failed to disprove that the payment was not complete and irrevocable.

Applicability of Clauses 1.23 and 13.1 of the General Terms

The Respondent argued that it was entitled to debit the Sum in the Appellant’s Account because Clauses 1.23 and 13.1 of the General Terms reserved its right to debit the Sum credited to the Appellant’s Account when the Respondent did not receive payment for the Euro Draft.

Applicability of Clause 1.23

Clause 1.23 provided as follows, and according to the interpretation of the High Court, is divided into the following two limbs:

First limb: “...Cheques, financial instruments received for collection will be **credited** after the Bank receives **payment**...”

Second limb: “...provided the Bank may, however at its sole discretion give **immediate credit** for **cheques**, provided that the Bank reserves the right to debit such credited amount from the account if the cheques are dishonoured.”
[Emphasis added]

The High Court agreed with the Appellant that Clause 1.23 did not provide a defence to the Respondent based on the following findings:

- Ordinarily, the word “payment” means final payment and not conditional or revocable payment, while the term “credited” means an irrevocable crediting. The High Court was of the view that these words found in the first limb of Clause 1.23 were intended to have the ordinary meanings because their fulfilment imposed an obligation on the part of the Respondent to pay the customer. However, in the present case, the Respondent could not rely on the first limb of Clause 1.23 as a defence because its case was on the basis that it did not receive “final payment” and also that it only credited the Appellant’s Account subject to final payment from the Bank of Ireland or the Frankfurt Subsidiary (namely, not an “irrevocable crediting”).
- On the facts of the present case, the Respondent did not give immediate credit for the Appellant. Instead, it sent the Euro Draft to the Frankfurt Subsidiary for collection from the Bank of Ireland, and it later credited the Appellant’s Account with the net proceeds of the collection after receiving the SWIFT message from the Frankfurt Subsidiary. The crediting was subject to final payment. For this reason, the court held that the second limb of Clause 1.23 was also not applicable to protect the Respondent.

Applicability of Clause 13.1

Clause 13.1 provided that “*The Bank has the right to debit the customer’s account with drafts, cheques or similar instruments previously negotiated for the customer’s account, in case of their non-payment.*”

The Appellant argued that in order to rely on Clause 13.1, the Respondent had to establish as a fact that it did not receive payment from the Frankfurt Subsidiary before it was entitled to debit the Appellant’s Account, and this the Respondent had failed to show. The Appellant further argued that the fact

that the Euro Draft was counterfeit did not establish that the Respondent was not paid, and that the Respondent's own documents showed that its own account was in fact credited.

In this respect, the High Court found that the Appellant's argument had no merit. The High Court pointed out that although the Respondent's own account was credited (as alleged by the Appellant), it was credited by the Frankfurt Subsidiary and not the Bank of Ireland. This was a collecting bank-correspondent bank communication between the Respondent and the Frankfurt Subsidiary. Since the Bank of Ireland did not pay on the forged draft, the Frankfurt Subsidiary could not have been paid, and, similarly, it could not have paid the Respondent. In the High Court's view, the word "payment" in Clause 13.1 must mean payment from the drawee bank, and not from the collecting bank, which was only a conduit for the collection of the proceeds of the bank draft from the drawee bank. As the High Court found that the Respondent had produced sufficient evidence to show that it was not able to collect the proceeds of the Euro Draft from the Bank of Ireland, it was therefore a case of non-payment under Clause 13.1. Accordingly, the High Court held that the Respondent could rely on Clause 13.1 as a defence.

Even if Clauses 1.23 and 13.1 did not apply

In addition, the High Court held that even if Clause 1.23 or 13.1 did not provide a defence to the Respondent in the present case, the Appellant would not be entitled to the Sum as the Euro Draft was a forged instrument and the Appellant had not shown that it had changed its position to its detriment.

The High Court reiterated that it was trite law that the payee of a forged instrument has no right to receive payment on the instrument. Therefore, the Frankfurt Subsidiary, who was merely a collecting agent, had no right to receive payment. If a bank making the payment was unaware of the forgery, the payment was made under the mistaken belief that the payee was entitled to receive payment on the instrument. In that situation, if the Respondent, as the collecting bank, had paid to the Appellant finally and irrevocably the Sum which it had not collected, it would have been making a mistake of fact in so doing. So, the Respondent would be entitled at common law to recover the payment from the Appellant unless the Appellant had been able to show that it had changed its position to its detriment.

Representation, reliance and detriment to the Appellant not proved

On appeal, the Appellant's second argument on misrepresentation was that the District Judge failed to recognise the significance of the Telephone Conversation between the Respondent's employee and the Appellant's managing director when she informed him that the Euro Draft had been cleared and the Sum would be credited to the Appellant's Account the next day. The Appellant had argued that it was an unsolicited conversation which occurred about two weeks after the Euro Draft was handed to the Respondent for collection and therefore there must have been a reason for it, which reason was that the Respondent's employee wanted to convey a piece of important information.

The High Court did not accept this argument as an online bank statement was sent to the Appellant later, stating that the amount credited into the Appellant's Account was "subject to final payment". The High Court found that this statement had two implications. First, if no payment was received by the Respondent, the credit entry would be reversed irrespective of whether Clause 1.23 or 13.1 applies. Second, if the Appellant alleged that it had acted on the representation by the Respondent's employee in the Telephone Conversation, it had to produce evidence that it had made payment of the

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amount credited to its account to its customer before it received notice of the Respondent's bank statement, and that it had made an attempt to recover the payment from its customer and was not able to do so. However, no such evidence was produced by the Appellant.

The SWIFT message

The Appellant had relied strongly on the effect of the SWIFT message from the Frankfurt Subsidiary as evidence of a complete and irreversible payment by the Frankfurt Subsidiary to the Respondent. Hence, the Appellant argued that the Respondent's crediting of the Sum was final and irrevocable. The High Court rejected this argument and distinguished the cases cited by the Appellant in support of its argument.

Based on the facts, the High Court held that it was contrary to commercial sense for a collecting bank to make a complete and irreversible (or unconditional) payment of funds to its instructing bank if it had not collected the funds. The fact that the Frankfurt Subsidiary had not collected the funds was proved by the Respondent's caveat that the crediting to the Appellant's Account was subject to final payment. The High Court consequently held that the Appellant's arguments of misrepresentation and estoppel in the present case, which were based on the Respondent having received a complete and irreversible payment as evidenced by the SWIFT message, had no merit. The High Court highlighted that SWIFT was just a swift means of communication between banks and was not in itself a system of settlement of accounts between banks.

Accordingly, the High Court dismissed the present appeal with costs for the foregoing reasons.

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English Court of Appeal holds no proprietary claim over money paid into overdrawn current account

Moriarty & Anor v Various Customers of BA Peters Plc [2008] EWCA Civ 1604

In *Moriarty & Anor v Various Customers of BA Peters Plc*, the English Court of Appeal held that where a client's money had been paid into a company's overdrawn current account, the money went to reduce the company's liability with the bank and it effectively disappeared so that there was never any fund on which a proprietary claim could operate.

Until it went into administration, the business of BA Peters Plc (the "**company**") consisted of activities connected with boats, including brokering the sale and purchase of boats for clients. At all material times, the company operated two bank accounts, a client account and a current account.

The company had received money on behalf of Mr and Mrs Atkinson (the "**Atkinsons**") from the sale of their boat. The company had also received money from Mr and Mrs Clark (the "**Clarks**") to purchase a boat. In both cases, the clients had been assured that the money would be paid into the company's client account and that the money would be treated as belonging to the clients rather than the company. In actual fact, the money was paid into the company's current account save for a small amount from the sale of the Atkinsons' boat which was paid into the client account. When the company went into administration, the current account was very

substantially overdrawn. In contrast, the client account appeared always to have been in credit.

The administrators needed to determine how much of the money in the client account was subject to proprietary or trust claims and sought directions from the court in an application which named as respondents a number of former clients of the company, each of whom claimed that some of the money in the client account was subject to a trust or a proprietary right in their favour.

The only claims with which this appeal was concerned were those of the Atkinsons and the Clarkes (the “**appellants**”). It was common ground that the part of the sales proceeds from the Atkinsons’ boat that had been paid into the client account was held on trust by the company for the Atkinsons. Equally, it was common ground that, had any money handed over by the Clarkes been paid into the client account, it would have been held on trust for them by the company.

Decision at first instance

Aside from the sum paid into the client account, the judge at first instance declared that the Atkinsons were not entitled to any relief for the balance of the sum owing to them, in respect of which they were held to be unsecured creditors of the company. He also held that the Clarkes were not entitled to claim any beneficial interest in the client account monies in respect of the money which they had paid to the company. They were held to be unsecured creditors of the company in that sum.

The judge’s reasoning was based on the fact that the money which the company had received on behalf of the Atkinsons and the Clarkes had not been paid into the client account, but had been paid into the current account, which had at all times been in debit, so that the money was used to reduce the company’s liability to the bank under the current account. In those circumstances, the judge concluded that there had never been a fund on which a trust obligation or proprietary claim could bite so far as the appellants were concerned. The fact that the money should have been paid into the client account did not make any difference as it did not answer the point that, as soon as the money was paid into the current account, there ceased to be any fund against which a trust or proprietary claim could be maintained.

The Atkinsons and Clarkes appealed against the judge’s conclusions.

Court of Appeal decision

The Atkinsons and the Clarkes contended that any money remaining in the client account, after all other equitable and proprietary claims had been satisfied, was subject to their respective claims before it could be treated as beneficially the company’s property.

The Court of Appeal disagreed. The court pointed out that the problem which the appellants’ case had to confront was that, because the money in issue was paid by the company into the current account (which was always in debit), it was effectively used to reduce the company’s liability with the bank and it effectively disappeared so that there was never any fund on which a proprietary claim could operate. The money, which was paid over by the appellants to the company, and then paid by the company into the current account, never formed part of the fund against which a claim was sought to be made, namely the money in the client account.

The Atkinsons and the Clarkes argued that if a trustee who had been guilty of a breach of trust had any beneficial interest under the trust instrument, he

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should not be allowed to receive any part of the trust fund in which he was equitably interested until he had made good the breach of trust.

The court held that the trust fund in the present case was the client account, and there had been no breach of trust in relation to any money in that account. Unfortunately for the appellants, the breach of trust occurred before the money in question could become part of any trust fund. Indeed, the breach of trust complained of had the very consequence that the money never became part of the trust fund, as it resulted in the money ceasing to exist. In other words, the breach of trust of which the appellants complained about did not relate to the trust fund in which they claimed a proprietary interest.

In the circumstances, the appeal was dismissed.

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Dispute resolution

Singapore High Court considers possible exceptions to privity rule in connection with rights of non-parties to arbitration clause in application for stay of court proceedings

Jiang Haiying v Tan Lim Hui and Another Suit [2009] 3 SLR 13

In *Jiang Haiying v Tan Lim Hui*, the Singapore High Court considered two appeals against the decision of an Assistant Registrar (the “AR”) refusing to order a stay of proceedings in the High Court in favour of arbitration. The court eventually upheld the general rule that arbitral proceedings must be consensual but in reaching this conclusion the court considered at length the possible exceptions to the privity rule, from which the arbitral rule springs.

Facts

In August 2001, the plaintiff transferred 50,000 and 490,000 shares in Dehai Marine Shipping (Singapore) Pte Ltd (“**Dehai**”) to the defendants, Tan and SPP. The plaintiff subsequently asserted that he was under the impression that Tan and SPP held the transferred shares on trust for him; the defendants denied this. In 2003, SPP sold the 490,000 to a third party (“**SPH**”) and the plaintiff alleged that he was unaware of this sale.

In 2004, the plaintiff, Tan and SPH exchanged their share in Dehai for shares in another company, Kingley Agents Ltd (“**Kingley**”). The plaintiff subsequently sold his shares in Kingley to SPH and other parties pursuant to a sale and purchase agreement (the “**SPA**”). The SPA contained an arbitration clause.

After the sale of his Kingley shares and the conclusion of the SPA, the plaintiff claimed against SPP for conversion of the 490,000 Dehai shares which were transferred to SPP in August 2001 on the basis that SPP had sold the shares without the plaintiff’s consent. The plaintiff also sought a declaration that Tan was holding shares in another company through Kingley on trust for the plaintiff (both suits herein collectively known as “**the suits**”).

SPH applied before the AR to be joined as a defendant in both of the above suits. At the same time, SPH and the defendants together applied to have both suits stayed in favour of arbitration provided for in the SPA. The AR

allowed SPH to be joined as a defendant to both suits but dismissed the application to have both suits stayed in favour of arbitration.

Appeal against decision of AR

The matter before the High Court in this case was an appeal against the AR's decision regarding the stay of proceedings.

The plaintiff submitted that the arbitration clause could not apply as it was contained in the SPA to which the defendants were not party.

The court noted that it is well-established that, generally, non-parties to an arbitration agreement cannot participate in an arbitration conducted pursuant to the agreement. The court went on to state that this principle is a "natural offspring" of the rule in contract that a third party cannot enforce the rights arising under a contract to which he is not a party (the "**privity rule**"). However, there are accepted exceptions to the privity rule and it was on these that the defendants sought to rely. The court therefore considered all possible exceptions to the privity rule.

Exception 1: Whether the claims alleged by the plaintiff against the defendants was so intertwined with the SPA that the doctrine of equitable estoppel was applicable

The court noted that the oft-cited authority for the operation of estoppel in an arbitration context, *The Smaro* [1999] 1 Lloyd's Rep 225, did not advance the cause of the defendants in the present action as the facts of *The Smaro* differ considerably. In that case, the English court was of the opinion that a third party may join an existing arbitration. However, the third party in that case was in fact a party to the contractual agreement being arbitrated. The term "third party" was in the case used by the English court to refer to a literal third party in a multi-party contract and not to a non-party as was the case here.

The defendants also cited several American cases in support of the operation of equitable estoppel as an exception to the privity rule. The court was unconvinced that these cases reflected Singapore law and in any event held that the facts of the present case were far removed from the American cases cited.

The court found that there was very little scope for the operation of equitable estoppel in the present case. The plaintiff claimed against Tan as trustee and SPP in restitution, alleging that Tan and SPP held the 50,000 and 490,000 Dehai shares in trust for him. The court said that these claims have little to do with the SPA that the plaintiff later signed with SPH for the sale of the Kingley shares. The court stated that, unlike the case law cited in support of the operation of estoppel, where the agreement containing the arbitration clause was heavily relied on and was the basis for the claims made, the SPA in the present case had no relation to the claims made by the plaintiff in the suits. Further, the defendants did not need to plead the SPA to mount their defence that the plaintiff had transferred the Dehai shares to them free and clear.

The court therefore found that the present dispute was not one that was so closely intertwined with the SPA such that the plaintiff was estopped from denying the defendants arbitration.

Exception 2: Whether the defendants were intended beneficiaries

The defendants contended that they could rely on the arbitration clause in the SPA if they were the SPA's intended beneficiaries. The American case of *Wesley Locke v Ozark City Board of Education* 910 So. 2d 1247 ("**Wesley**

Locke") was cited in support of this contention. The Supreme Court of Alabama in that case stated the conditions for a third party beneficiary to enforce a contract as follows:

"To recover under a third-party beneficiary theory, the complainant must show: (1) that the contracting parties intended, at the time the contract was created, to bestow a direct benefit upon a third party; (2) that the complainant was the intended beneficiary of the contract; and (3) that the contract was breached".

The court noted that such a third party beneficiary exception to the privity rule had yet to be recognised in Singapore, outside of the Contract (Rights of Third Parties) Act which did not apply in this case. The court did note, however, that *Halsbury's Laws of Singapore* (Vol 2, 2003) seems to have accepted this exception but reiterated that it was not convinced.

The court went on to state that even if *Wesley Locke* was applicable in Singapore, it was clear from a plain reading of the SPA that the parties to the SPA did not intend for the defendants to be beneficiaries of the SPA.

Exception 3: Whether there was a collateral contract between the plaintiff and SPP

It was also contended, only on behalf of SPP, that a collateral contract existed between SPP and the plaintiff which settled all disputes in respect of the 490,000 Dehai shares.

Traditionally, the existence of a collateral contract has been acknowledged as an exception to the privity rule. The court noted, however, that collateral contracts are not an exception as such as the collateral contract argument rests on a finding by the court that the third party is not a third party but is actually a party to the collateral contract on which the claim is based.

The court dismissed the possibility of a collateral contract existing between the plaintiff and SPP as it could not find any intention to create legal relations between the plaintiff and SPP nor any consideration attributable to SPP under any purported collateral contract.

Exception 4: Risk of inconsistent results with arbitration

The plaintiff was involved in an arbitration not involving the defendants, but the defendants submitted that the operative facts surrounding that arbitration were the same as those relating to the plaintiff's claims against them. The defendants argued that a refusal to stay the High Court proceedings in favour of arbitration could result in inconsistent rulings and that this was an exception to the privity rule. The defendants cited the American case of *Waste Management, Inc. v Residuos Industriales Multiquim, S.A. de C.V.* 372 F3d 339 where the United States Court of Appeals for the Fifth Circuit stated, as a reason for allowing a stay of proceedings, that "allowing the litigation to proceed would risk inconsistent results and 'substantially impact' the arbitration".

As with the third party beneficiary exception, the court was not sure that the potential for inconsistent rulings is an accepted exception to the privity rule. However, the court agreed with the AR that the potential for inconsistent rulings could not outweigh the strict rule that arbitration may only proceed when both parties had consented to it.

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Judgment for plaintiff

Given that there appeared to be no exception to the privity rule applicable in this case, the court found that there was no ground to stay the suits and that the general rule that arbitral proceedings had to be consensual ought to be followed.

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Singapore High Court holds party who destroys prejudicial documents risks having claim or defence struck out

K Solutions Pte Ltd v National University of Singapore [2009] SGHC 143

The Singapore High Court decision in *K Solutions Pte Ltd v National University of Singapore* concerned allegations of destruction and withholding of documents related to ongoing or anticipated litigation.

Facts

The dispute between the parties concerned the breakdown of a working relationship between the National University of Singapore (“**NUS**”) and KS Solutions (“**KS**”) and claims made by both in court concerning the termination of a contract.

In April 2005, KS entered into a contract with NUS for IT services (the “**Project**”). NUS alleged that in mid-June 2006, KS informed NUS that KS had financial difficulties which prevented it from continuing with the Project. On 20 September 2006, NUS issued a written notice requiring KS to correct its defaults. On 6 October 2006, NUS terminated KS’ contract.

On 4 January 2007, KS commenced action against NUS for wrongful termination and claimed damages. NUS counterclaimed for damages. In the course of the proceedings, NUS complained about KS’ obligation to make discovery of relevant documents for the litigation, alleging non-compliance with that obligation, and applied to strike out KS’ statement of claim and defence to counterclaim. Among other things, NUS argued that there was a serious or real risk that a fair trial of the action might no longer be possible. An assistant registrar granted the application by NUS, upon which KS filed an appeal.

The complaints concerned four categories of documents:

- (a) Documents in the e-mail account of Albert Lim, Managing Director of KS (“**AL**”).
- (b) Documents in e-mail accounts provided by NUS to KS staff (“**NUS e-mail accounts**”).
- (c) Documents in e-mail accounts provided by KS to KS staff (“**KS e-mail accounts**”).
- (d) Audio recordings of meetings.

Internal e-mail not disclosed

For the purpose of these proceedings, the court treated e-mail and audio recordings as documents and the parties accepted that their discovery obligations extended to disclosure of both.

NUS complained that KS did not disclose any internal e-mail between its staff from either the NUS e-mail accounts or the KS e-mail accounts, including any e-mail from AL's e-mail account.

No internal e-mail was disclosed in KS's first list of documents ("**first LOD**") and there was no explanation from KS as to what had happened to the internal e-mail. NUS sought further discovery from KS which resulted in KS stating that it had just discovered further documents. KS then filed a supplementary list of documents ("**second LOD**"). A few days later, AL filed his eighth affidavit which disclosed two DVDs containing 27,000 e-mails and attachments. The e-mails only originated from one KS staff, the Project Manager (the "**Project Manager**"). NUS also noted that the documents disclosed included a substantial number of e-mails between the Project Manager and AL but these e-mails were not disclosed in KS' first LOD.

In response to a request by counsel for NUS to explain why AL had previously stated in an affidavit that there were no other related documents than those previously disclosed, KS stated that there was a housekeeping policy at KS whereby e-mails more than six months old were deleted. Coupled with the fact that AL was, for a significant period prior to the termination of the Project, directing KS' actions in relation to the Project, NUS submitted that it was "shocking" that AL would delete these e-mails when there was evidence in other e-mails showing that he had contemplated litigation in relation to the Project since well before the six-month period. NUS argued that there would have been relevant e-mail in AL's account and that AL ought to have stopped the deletion of these e-mails.

NUS also submitted that it was "disingenuous" of AL to state that KS had "no inkling" that the e-mail in his account were "somehow relevant or discoverable", particularly as there were internal e-mails which apparently showed knowledge on AL's part of the sensitivity and importance of the e-mails. AL had also allegedly been untruthful when, in response to an order from the court to state where any of his e-mails had been archived, stored or were otherwise available in hardcopy, he responded in the negative. NUS stated that KS' first LOD contained e-mail between AL and NUS staff and NUS submitted that the copies provided before the court had to have originated from AL's own e-mail account as no one else from KS was copied.

E-mail from NUS accounts and audio recordings

It was also shown that KS had, prior to the termination of the Project, instructed its staff with NUS e-mail accounts to back-up the e-mails therein. The majority of these e-mails were not disclosed; in fact, AL denied having them in his possession. Data on laptops was also deleted, supposedly out of obligations of confidentiality to NUS.

There was, however, e-mail evidence that KS requested, after the termination of the Project, information from its staff who worked on the Project, including asking for opinions as to specific incidents that may have caused the delays. KS later contended that it had deleted the requesting e-mail and, further, that it had not received any response, which NUS disputed given the nature of the request and the timing.

There were also alleged recordings of both project management and Steering Committee meetings but none were disclosed by KS. NUS sought in particular the audio recording of a meeting that took place on 7 July 2006 and this was ordered by the court to be produced. AL filed, in response, his 26th affidavit wherein he confirmed that KS has made an audio recording of that meeting but that that recording was no longer with KS as the Project Manager had taken the recorder to Australia and could not now recall what had happened to the recording. NUS found this explanation hard to believe

and adduced evidence which showed that the Project Manager had requested the audio recorder prior to the meeting and noted to a KS staff member that “it crossed my mind that we may need some evidence of things said”. It was, therefore, unlikely that the Project Manager would thereafter misplace or accidentally erase the recording.

Rules of Court

The court set out in full Order 24 rule 16(1) of the Rules of Court (the “**Rules**”) which stipulates that if any party so required fails to make discovery of documents or produce any document for inspection, the actions may be dismissed or the court may order that the defence be struck out and judgment entered. The court also quoted Order 92 rule 4 of the Rules which declares that nothing in the Rules limits or affects the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

The court noted that while there is no specific provision in the Rules which prohibit a party from destroying relevant documents in his possession, custody or power, the court thought it implicit in the scheme of discovery that the party should not do so especially if he is aware they are relevant to the issues in the litigation. The court here stressed that discovery is only concerned with the disclosure of documents relevant to the issues and not documents in general. Any reference to the disclosure of documents in the court’s judgment, therefore, are to documents that are relevant.

The court found that if a party discloses that he once had the sought after documents but it is established that the destruction was deliberate and occurred either after the action commenced but before discovery was ordered, or after the action commenced and after discovery was ordered, the party would be in breach of his discovery obligations and his conduct would fall under Order 24 rule 16 even though such conduct does not fall under the express wording of that rule. The court held that the word “deliberate” should be contrasted with “intentional”. While the latter does not mean accidental, there is no intention to put the documents out of reach of the other party. By “deliberate”, the court meant that the destroyer intends to put the documents out of reach of the other party in pending or anticipated litigation.

In relation to sanction for such actions, the court stated that there was no reason in principle to distinguish between pre-action and post-action destruction where it is established that the destruction is deliberate. While the intent behind the destruction is crucial, the court cautioned that even a deliberate destruction will not necessarily lead to a striking out as all the circumstances of the case must be considered. It may be that notwithstanding the deliberate destruction, a striking out should not be ordered because, for instance, there is other evidence of the destroyed document or the destroyed document was not critical in the light of all the other available evidence. However, the court stressed that the court may order a striking out even where a fair trial is still possible.

The court concluded that the evidence demonstrated that KS was preserving and/or collating evidence in anticipation of litigation. There were several e-mails which strongly pointed to this. The court did not believe the contention of KS that all internal e-mail was deleted without back-up due to an internal housekeeping policy. The court agreed with NUS’ contention that KS was suppressing documents. The court also felt the same about the audio recordings and noted that KS had lied again and again as demonstrated by evidence which directly contradicted many statements in filed affidavits. There were more than 20 affidavits filed by KS where it could have explained its failure to comply with its discovery obligations. The court stated that it was of the opinion that KS’ suppression and lies were deliberate.

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The court found that a striking out of KS' claim and defence to the counterclaim was warranted and therefore dismissed KS' appeal.

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Real estate

Singapore High Court finds grave breach of fiduciary duty by estate agents and orders housing agency to compensate client

Yuen Chow Hin & Anor v ERA Realty Network Pte Ltd [2009] SGHC 28

In *Yuen Chow Hin & Anor v ERA Realty Network Pte Ltd* [2009] SGHC 28, the Singapore High Court ordered a company in the housing agency business to pay damages and costs to its client in compensation for the secret profit made by the company's agents in breach of the agents' duty not to create a conflict of interest between their client and themselves and to act honestly.

Facts

The plaintiffs appointed an estate agent, Jeremy, to market and sell their apartment. Jeremy was regarded as an agent of "ERA" (as the defendant is more famously known). The plaintiffs understood ERA to be a company that provided the services of a housing agency, and that a person who carried an ERA calling card or who advertised himself as a housing agent under the banner of ERA was an ERA agent. Jeremy worked as a subordinate to Mike, who was a divisional director of the defendant. The arrangement in place was that whenever an agent under Mike had successfully helped a client to complete a sale and purchase transaction, he would share his commission with Mike and the defendant.

Jeremy told the second plaintiff that he would place an advertisement for the sale of the flat. Some time later, he informed her that he had found a buyer for the apartment. The buyer was Mike's wife, Natasha, but Jeremy did not inform the second plaintiff that Mike was his superior or that the buyer was Mike's wife. Also, unknown to the plaintiffs, Mike had placed newspaper advertisements for the sale of the flat, and conversely, Jeremy did not place any advertisement. The second plaintiff granted an option to Natasha for the purchase of the apartment. She also signed a commission agreement which was on the defendant's letterhead and the addressor was the defendant. It later transpired that Mike's wife onsold the apartment to a third party for a profit of S\$257,000.

The plaintiffs sued the defendant for breach of contract and, specifically, for the breach of the implied terms that the defendant would use its best endeavours to obtain the best price for the plaintiffs and not act in conflict of interest, or obtain any secret profit.

Breach of duty

The Singapore High Court found that Mike and Jeremy were ethically wrong and in breach of contract by reason of creating a conflict of interest between their client and themselves. Jeremy's duty to act honestly required him to disclose to the plaintiffs his boss's interests in the sale and purchase. The court held that the evidence established that the conduct of Mike and Jeremy amounted to a breach of duty and fraud. The court explained that a buyer is

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entitled to use a nominee when buying a property, but when the buyer is closely connected to the agent as to give rise to a situation of conflict, the true facts must be disclosed to the sellers. The result of the concerted efforts of Jeremy, Mike, and Natassha resulted in the plaintiffs' selling their flat for less than what they might have had they been properly and honestly advised.

Servants or agents of defendant

The defendant argued that if there was any wrongdoing, it did not amount to a breach of contract between the defendant and the plaintiffs because neither Mike nor Jeremy was its servant or agent. The court rejected this argument and held that the defendant had held out Jeremy as its agent. In the circumstances, unless the plaintiffs were expressly told otherwise, they were entitled to regard Jeremy as a servant or agent of the defendant. The court was satisfied that such disclosure was not made to the plaintiffs.

The evidence showed that the option form had the defendant's logo printed on it. The agent's commission agreement was in fact executed between the second plaintiff and the defendant. Mike and Jeremy were agents of the defendant and their conduct bound the defendant.

Judgment for plaintiffs

In the circumstances, the court gave judgment in favour of the plaintiffs and ordered that the defendant pay them the sum of S\$257,000, being the secret profit made by Natasha. The defendant was also ordered to pay costs to the plaintiffs on an indemnity basis to emphasise the gravity of the misconduct and breach of duty in this case.

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General

Contract

Singapore Court of Appeal examines issues relating to guarantees and limitation period

PT Jaya Sumpiles Indonesia & Anor v Kristle Trading Ltd and Another Appeal [2009] SGCA 20

The decision of the Singapore Court of Appeal in *PT Jaya Sumpiles Indonesia & Anor v Kristle Trading Ltd and Another Appeal* [2009] SGCA 20 is instructive for the court's interpretation and construction of the terms of the guarantee in question.

Facts

Kristle Trading Ltd ("**Kristle**") and International Coal Pte Ltd ("**ICP**") entered into an agreement (the "**Second Novation Agreement**") pursuant to which Kristle novated its rights and obligations to develop coal reserves and conduct coal mining operations to ICP. As consideration for the novation, ICP agreed to pay Kristle US\$4.5 million in five instalments. Low Tuck Kwong ("**Low**") was the managing director and majority shareholder of both ICP and PT Jaya Sumpiles Indonesia ("**PTJS**") at that time. PTJS and Low (collectively referred to as the "**Guarantors**") gave a guarantee to Kristle (the "**Guarantee**") to secure ICP's obligations under the Second Novation Agreement.

A dispute under the Second Novation Agreement arose between ICP and Kristle when ICP defaulted on the third instalment which was due on 20 December 1997.

The dispute was referred to arbitration and ICP was ordered to pay Kristle US\$3.5 million (the “**Outstanding Sum**”) and interest accrued thereon (the “**Accrued Interest**”). ICP was also ordered to pay Kristle other sums including costs of the award and costs incurred in the proceedings (the “**Remaining Sums**”). After the award was made, attempts were made at settlement in the course of which ICP wrote a letter to Kristle (the “**ICP Letter**”) claiming that it had reached a settlement with the latter. The ICP Letter was signed by ICP’s director, Helen Ong. However, no settlement agreement was ever signed by the parties.

Kristle applied to the High Court for leave to enforce the Award in the same manner as a judgment pursuant to section 19 of the International Arbitration Act. Leave to enforce was granted. Judgment was entered against ICP for all the sums set out in the Award.

The Guarantors applied to court and sought a declaration that they were not liable to Kristle under the Guarantee. Kristle counterclaimed against the Guarantors for the Outstanding Sum, the Accrued Interest, and the Remaining Sums. In the court below, the Judge dismissed the Guarantors’ action and gave judgment to Kristle on its counterclaim for the Outstanding Sum and the Accrued Interest, but not for the Remaining Sums. Both the Guarantors and Kristle appealed against the Judge’s decision. At the end of the proceedings, the Court of Appeal dismissed both appeals.

The issues on appeal

The parties raised only two main issues before the Court of Appeal namely:

- (a) whether Kristle’s counterclaim against the Guarantors was barred by limitation; and
- (b) if Kristle’s counterclaim was not time-barred, whether the Guarantors were liable for only the Outstanding Sum and interest thereon, or for all the amounts payable by ICP under the award.

These two main issues gave rise to a number of sub-issues and these were individually considered by the court as set out below.

Was the Guarantee a guarantee payable on demand?

The court was of the view that the Guarantee was a guarantee payable on demand. The court noted that the Guarantee clearly provided that the Guarantors would pay “upon demand” or “on demand” by Kristle. Therefore, in relation to Kristle’s counterclaim, time did not start to run until Kristle’s demand on the Guarantors for payment on 26 March 2001. Time did not start running from 20 December 1997, the due date for the third instalment.

Was clause 4 of the Guarantee an acceleration clause?

Clause 4 of the Guarantee provided that in the event of non-payment under the Second Novation Agreement, the Guarantors would pay *all* the balance payable under the Second Novation Agreement.

The Guarantors argued that, under clause 4 of the Guarantee, ICP’s default on the third instalment due under the Second Novation Agreement had the effect of accelerating the due date of the remaining instalments (i.e. the fourth and fifth instalments), such that, for the purposes of limitation, time

started to run on 20 December 1997. As a result, Kristle's counterclaim for the outstanding moneys payable under the Second Novation Agreement became time-barred on 20 December 2003.

The court held that clause 4 could not have the effect of accelerating the liability of the Guarantors for the fourth and fifth instalments. If clause 4 did indeed have such an effect, the Guarantors' liability (which was secondary in nature) as at 20 December 1997 would have exceeded ICP's liability on that same date under the Second Novation Agreement, which *did not* contain an acceleration clause. This would be contrary to the principle of co-extensiveness, which provides that the guarantor's liability is co-extensive with the principal debtor's liability, such that, as a general rule, the guarantor's liability is no greater and no less than that of the principal debtor in terms of the amount, the time for payment and the conditions under which the principal debtor is liable.

Was the ICP Letter an acknowledgment of liability by Low for the purposes of section 26 of the Limitation Act?

The court was of the view that the ICP Letter was not an acknowledgment of liability because the Limitation Act requires every acknowledgment referred to in section 26 of the Act to be signed by either the person making the acknowledgment or his agent. In the present case, ICP's letterhead appeared on the ICP Letter, and the letter was signed by Helen Ong as ICP's director. The letter referred to a meeting between ICP's representatives and Kristle's representatives. While it was possible that Low, who was one of ICP's representatives at the meeting, had also represented himself *qua* guarantor at that meeting, the fact remained that he did not sign the ICP Letter.

Was the limitation period extended under section 6(3) of the Limitation Act upon the conversion of the Award into an enforceable judgment?

The court held that section 6(3) was not applicable to Kristle's counterclaim against the Guarantors because their counterclaim was based on the Guarantee, and not on a judgment.

Was the principle laid down in *Re Kitchin* applicable in the present appeals?

The present appeals raised for the first time before the Singapore Court of Appeal the status of the principle laid down in *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 ("**Re Kitchin**"). The question was whether the principle was applicable to Kristle's counterclaim against the Guarantors.

Re Kitchin lays down the principle that a judgment or an award against a principal debtor is not binding on the guarantor and is not evidence against the guarantor in an action by the creditor against the guarantor based on the judgment or the award. Instead, should the creditor sue the guarantor, it must prove the guarantor's liability in the same way as it must prove the principal debtor's liability if it were to bring an action against the principal debtor.

In view of the numerous authorities affirming the decision in *Re Kitchin* and the principle laid down therein, the court held that the *Re Kitchin* principle remained good law in Singapore and was applicable in the present appeals.

Did the Guarantee have the effect of an indemnity?

The key difference between a guarantee and an indemnity is that a guarantor's liability is collateral to and dependent upon the liability and

default of a third person (i.e. the principal debtor) whereas an indemnitor's liability is original and independent.

Kristle argued that the Guarantee was in effect an indemnity because each of the Guarantors had guaranteed "not as surety only but as a primary obligor" the performance by ICP of its obligations under the Second Novation Agreement.

The court rejected Kristle's argument that the Guarantee was effectively an indemnity. The "principal debtor" clause (which is also referred to as a "primary obligor" clause) is a common feature of modern guarantees. It is also sometimes used together with words such as "indemnity" or "indemnify" to describe the guarantor's liability. The purpose of incorporating a "principal debtor" clause in a guarantee is typically to preserve the guarantor's liability in the event that the principal debtor's obligation is, for some reason, discharged or unenforceable. However, it is a matter of construction in each case involving a "principal debtor" clause whether a guarantee or an indemnity has been given. The dominant view of the effect of a "principal debtor" clause is that it does not convert what would otherwise be interpreted as a contract of guarantee into a contract of indemnity.

For the purposes of the present appeals, the court looked at the terms of the Guarantee, read with the Second Novation Agreement, and highlighted that the Guarantee was replete with the words "guarantor" and "guarantee" (with the latter used both as a noun and, more importantly, as a verb). The words "primary obligor" were used only once in the Guarantee. The words "indemnity" and "indemnify" did not appear in the Guarantee at all, and the word "indemnify" appeared only once in the Second Novation Agreement. In the court's view, the overall effect of the Guarantee was that it was not an indemnity, nor did it make the Guarantors liable as principal debtors to Kristle.

Was the Guarantee a "performance guarantee" or a "payment guarantee"?

Kristle argued that, even if the Guarantee were not an indemnity, the Guarantors had entered into a "performance guarantee", as opposed to a "payment guarantee".

In the present appeals, the Guarantee contained elements of both types of undertakings in that, the Guarantee, the Guarantors guaranteed "the due, prompt and faithful *performance* by ICP of all its obligations under the [Second Novation] Agreement" (i.e. the Guarantors gave a *performance* guarantee). The Guarantors also guaranteed "the due and punctual *payment* by ICP of the money payable by ICP under the [Second Novation] Agreement (i.e. the Guarantors gave a *payment* guarantee).

However, the court noted that the fact that the guarantor has guaranteed the due performance of the contract between the principal debtor and the creditor does not, in the absence of express words, render the guarantor also liable to pay any sum awarded in an arbitration between the principal debtor and the creditor, even if the award arises out of an arbitration clause in the contract between the principal debtor and the creditor. The court thus held that Kristle was entitled to recover from the Guarantors only the Outstanding Sum, but not the Accrued Interest and the Remaining Sums.

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UK House of Lords prefers commercial sense approach over syntactical analysis when correcting drafting mistakes in contract

Chartbrook Limited v Persimmon Homes Limited & Anor [2009] UKHL 38

The House of Lords decision of *Chartbrook Limited v Persimmon Homes Limited & Anor* demonstrates that, in cases involving interpretation and construction of contracts, the courts are prepared to disregard the ordinary rules of syntax if it makes no commercial sense. The case also highlights that a strong case is required before the court is persuaded to correct drafting mistakes in a contract. The House of Lords also had the opportunity to consider, although *obiter*, the suggestion to admit evidence of pre-contractual negotiations in aid of construction.

Facts

Chartbrook Limited (“**Chartbrook**”) entered into an agreement with Persimmon Homes Limited (“**Persimmon**”) for the development of a site acquired by Chartbrook. The structure of the agreement was that Persimmon would obtain planning permission and then, pursuant to a licence from Chartbrook, enter into possession, construct a mixed residential and commercial development and sell the properties on long leases. Chartbrook would grant the leases at the direction of Persimmon, which would receive the proceeds for its own account and pay Chartbrook an agreed price for the land. Planning permission was duly granted and the development was built.

However a dispute arose over the price which became payable and the calculation which was set out in the terms of the agreement for an “additional residential payment” which was defined in the agreement.

General principles

The principles upon which a contract should be interpreted are well established. The question to be asked would be what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.

The House of Lords emphasised that “we do not easily accept that people have made linguistic mistakes, particularly in formal documents”, but explained that in some cases the context and background drove a court to the conclusion that “something must have gone wrong with the language”. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.

Lord Hoffmann, delivering the leading judgment of the House of Lords, pointed out that when the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the parties is no reason for not giving effect to what they appear to have meant.

The Lordships were also prepared to disregard the ordinary rules of syntax if it produced an interpretation of the contract which made no commercial sense.

Correct drafting mistakes by construction

The Lordships referred to *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 where Brightman J stated the conditions for what he called “correction of mistakes by construction”:

- There must be a clear mistake on the face of the instrument.
- It must be clear what correction ought to be made in order to cure the mistake.

These two conditions are subject to two qualifications:

- It is not a summary version of an action for rectification.
- In deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

The House of Lords’ decision

In the present case, the House of Lords decided that the drafting was careless and had gone unnoticed. It was thus an exceptional case which required the court to intervene and correct mistakes made in the contractual drafting.

The House of Lords ruled in favour of Persimmon’s interpretation of the contract which made commercial sense although it might not be in accordance with the ordinary rules of syntax. Chartbrook’s interpretation of the contract would have made the structure and language of the relevant provisions in the agreement appear arbitrary and irrational, when it was possible for the concepts employed by the parties to be combined in a rational way.

Admissibility of pre-contractual negotiations

As an alternative argument, Persimmon asked the House of Lords to consider admitting evidence of pre-contractual negotiations in aid of interpretation of the contract. It is an established rule that pre-contractual negotiations are inadmissible in aid of interpretation of a contract. As such, to allow evidence of pre-contractual negotiations to interpret a contract would require the House of Lords to depart from a long and consistent line of authorities. In the end, the House of Lords concluded that there was no clearly established case for departing from the exclusionary rule.

Rectification of contract

The Lordships were also asked by Persimmon to consider the issue of rectification should Chartbrook’s interpretation of the contract have been correct. In his judgment, Lord Hoffmann stated that rectification required a mistake about whether the written instrument correctly reflected the prior consensus, not whether it accorded with what the party in question believed that consensus to have been. Following the general approach in English law, the terms of the prior consensus were what a reasonable observer would have understood them to be and not what one or even both parties believed them to be.

In the instance case, Persimmon would have been entitled to rectification if the Lordships had decided in favour of Chartbrook’s interpretation of the contract.

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English High Court allows recovery of all losses suffered by trader flowing directly from fraudulent misrepresentations

Parabola Investments Limited & Anor v Browallia Cal Limited (formerly Union Cal Limited) & Ors [2009] EWHC 901 (Comm)

In *Parabola Investments Limited & Anor v Browallia Cal Limited (formerly Union Cal Limited) & Ors*, the English High Court held that a claimant is entitled to recover all of its losses which flow directly from fraudulent misrepresentations made by a defendant. In this case, the losses were not only limited to the depletion of the claimant's trading fund and the loss of profits it would have made on that fund during the period of the fraud, but the loss of profits that it continued to suffer up until the trial.

Facts

The claimant company, Tangent was a special purpose vehicle formed by its ultimate beneficial owner, Mr Gill, for the purposes of trading. Mr Gill's trading on world markets had been consistently profitable, apart from the period between July 2001 and February 2002 (the "**Fraud Period**"). During this period he was the victim of the systematic fraud with which this case was concerned.

The first defendant, Man, was a financial institution, which, among other things, carried out stockbroking activities trading on the London Stock Exchange and other markets. The second defendant, Mr Bomford, was a senior futures broker employed by Man. During the Fraud Period, Tangent traded in contracts for differences through Man.

The primary claim against Man and Mr Bomford was a claim in deceit, namely that on a daily basis for a period of almost eight months, Mr Bomford fraudulently misrepresented to Mr Gill, and thereby to Tangent, that the trading being conducted by Mr Gill was profitable and also made a series of fraudulent representations as to the amount of funds in Tangent's account with Man (in particular a representation in October 2001 that the account stood at £9.27 million when the balance was actually as low as £2.8 million and had been declining rapidly for months).

Damages claimed

Tangent claimed damages for deceit on the basis of recovering not only the capital loss of the amount by which the trading fund was depleted due to the fraud but also loss of profits:

- which Tangent would have made on investment in alternative trades during the Fraud Period, had it not been for the fraud; and
- from the end of the Fraud Period until the time of the trial, essentially on the basis that, as a result of the fraud, Tangent had a much smaller trading fund than it would have done and that it would continue to remain in the grip of the fraud until its fund was restored.

Issues for decision

The three issues were:

- Was Tangent induced by the misrepresentations made?
- What identifiable heads of loss were suffered as a consequence of the fraud?

- What measure of damages was recoverable as a direct result of the fraud?

Inducement

The court highlighted that the English Court of Appeal had recently confirmed the correct legal test of inducement in *Dadourian v Simms & Ors* [2009] EWCA Civ 169 as follows:

- it is a question of fact whether a representee has been induced to enter into a transaction by a material misrepresentation, which the representor intended the representee to rely on;
- if the misrepresentation is likely to play a part in the decision of a reasonable person to enter into a transaction, the presumption will be that it did, unless the contrary is proved;
- the misrepresentation does not have to be the sole inducement, it is enough if it plays a real and substantial part in inducing the representee to act;
- the presumption of inducement will be rebutted if the representor shows that the misrepresentation did not play such a real and substantial part; and
- the issue must be decided by the court on a balance of probabilities based on all of the evidence before it.

The court was in no doubt that Tangent had established the requirement of inducement on the facts of the case.

Recovery of loss

The court considered the second and third issues referred to above together, having regard to the principles used in assessing damages for fraud set out in the English case of *Smith New Court Securities v Citibank NA* [1997] AC 254:

- the defendant must make good all damage flowing directly from the transaction;
- although such damage does not need to have been foreseeable, it must have been directly caused by the transaction;
- the claimant is entitled to recover the full price paid by him, but must give credit for any benefits he received as a result of the transaction;
- as a general rule, the benefits received by the claimant include the market value of the property acquired as at the date of acquisition, but this rule is not to be inflexibly applied so that it deprives a claimant of full compensation for the wrong suffered;
- the general rule will not normally apply where either (a) the misrepresentation has continued after the date of acquisition of the asset and induced the claimant to retain it, or (b) the circumstances of the case are such that the claimant is locked into the property because of the fraud;
- the claimant is entitled to recover consequential losses caused by the transaction; and
- on discovery of the fraud, the claimant must take all reasonable steps to mitigate its loss.

The court stressed the overriding principle that a court must strive to award damages which compensate a claimant fully for loss flowing directly from a fraud. The court then considered the two types of loss of profit claimed in this case.

Loss of profits during the Fraud Period

The court considered the fact that Mr Gill had had previous and subsequent success (often great success) in trades other than those subject to the fraud and that he had continued to trade profitably in these alternative trades during the Fraud Period. The court felt that this was strong evidence that had Mr Gill not been deceived he and Tangent would have continued to trade successfully in other areas. It would therefore be wrong to conclude that, because of the nature of the trading, the whole claim for loss of profits was too speculative to be recoverable. Tangent was therefore entitled to recover loss of profits during the Fraud Period on the alternative trading it would have carried out but for the fraud.

Loss of profits after the Fraud Period

It was suggested that Tangent was claiming “profits on profits” because it argued that each year its trading fund would have increased as a result of successful trading and that increased fund would have been used to trade in the following year, giving it a larger fund to trade with in that forthcoming year and therefore a larger fund on which to earn a profit. Relying on a number of English authorities, the court held that such “profits on profits” could be recovered. If a claimant is able to demonstrate, on a balance of probabilities, that it is still suffering from the adverse effects of fraud at the date of the trial and has still not made profits from its business that it would have made had the fraud not occurred, damages should be assessed at the date of the trial and those lost profits should be recoverable as damages for the entire period until the trial. The fact that this was a period of more than seven years in Tangent’s case did not prevent it from seeking such damages, particularly as there was no evidence that Tangent had failed to mitigate its loss.

Tangent was therefore entitled to damages representing loss of capital (the reduction in the value of the fund account) and loss of profits suffered both during and after the Fraud Period.

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In brief

MAS consults on draft Regulations supplementing changes to licensing and business conduct requirements under SFA and FAA

On 23 June 2009, the Monetary Authority of Singapore published a consultation paper on drafting amendments to be made to the subsidiary legislation dealing with capital markets licensing and business conduct requirements under the Securities and Futures Act and the Financial Advisers Act. The consultation ended on 21 July 2009.

Please [click here](#) to read an article about this development in the July 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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MAS requires financial institutions to perform enhanced customer due diligence on domestic PEPs from 2 December 2009

Financial institutions in Singapore are required to comply with the Notices on Prevention of Money Laundering and Countering the Financing of Terrorism issued by the Monetary Authority of Singapore (the “**MAS AML/CTF Notices**”). The MAS AML/CTF Notices prescribe the measures that must be taken by the financial institutions to detect and deter money laundering and terrorism financing activities.

Please [click here](#) to read an article about this development in the July 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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News

Hongkong Land establishes US\$3 billion guaranteed medium term note programme

The Hongkong Land Notes Company Limited, The Hongkong Land Finance (Cayman Islands) Company Limited and The Hongkong Land Treasury Services (Singapore) Pte Ltd have established a US\$3 billion guaranteed medium term note programme, unconditionally and irrevocably guaranteed by The Hongkong Land Company, Limited. The Hongkong and Shanghai Banking Corporation Limited and Standard Chartered Bank (Hong Kong) Limited acted as arrangers for the programme.

Advising The Hongkong Land Treasury Services (Singapore) Pte Ltd in respect of Singapore law and acting as listing agent are Allen & Gledhill LLP Partners Tan Tze Gay and Glenn Foo, Senior Associate Bernie Lee and Associate Lu Zhu An.

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FCT MTN Pte Ltd’s inaugural issue of notes under its multicurrency medium term note programme

FCT MTN Pte Ltd (the “**Issuer**”) has issued its inaugural issue of S\$75 million fixed rate notes due 2012 under its S\$500 million multicurrency medium term note programme. The payment obligations of the Issuer in respect of the Series 001 Notes are unconditionally and irrevocably guaranteed by HSBC Institutional Trust Services (Singapore) Limited (as trustee of Frasers Centrepoint Trust). DBS Bank Ltd and Oversea-Chinese Banking Corporation Limited were the joint lead managers for the issue. The programme and the notes are rated BBB by S&P.

Advising on the transaction are Allen & Gledhill LLP Partner Au Huey Ling and Senior Associate Ong Kangxin.

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Yanlord Land Group Limited's concurrent placement of shares and convertible bonds

Yanlord Land Group Limited (the "**Company**") has launched a concurrent placement of 110 million new shares (the "**Share Offering**") and up to S\$375 million convertible bonds (including up to S\$100 million convertible bonds that may be issued pursuant to an upside option granted by the Company to the joint lead managers) (the "**Convertible Bond Offering**"). Concurrent with the Share Offering, Yanlord Holdings Pte. Ltd., a substantial shareholder of the Company, sold 10 million ordinary shares (together with the Share Offering, the "**Placement**"). The Placement was completed on 23 June 2009, raising gross proceeds of S\$249.6 million. The Convertible Bond Offering is scheduled to be completed in July 2009 and, assuming that the upside option is fully exercised, is expected to raise gross proceeds of S\$375 million, bringing the total gross proceeds from the dual offering to S\$624.6 million. The transaction is the largest dual offering of equity and convertible bonds in Singapore this year. J.P. Morgan (S.E.A.) Limited and ABN AMRO Bank N.V., Singapore Branch acted as joint placement agents to the Placement and as joint lead managers of the Convertible Bond Offering.

Advising J.P. Morgan (S.E.A.) Limited and ABN AMRO Bank N.V., Singapore Branch are Allen & Gledhill LLP Partners Tan Tze Gay and Rhys Goh, Senior Associate Bernie Lee and Associate Wu Zhaoqi.

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Flextronics International Ltd's bonds tender offer and consent solicitation

Flextronics International Ltd ("**Flextronics**") has completed a tender offer to purchase for cash up to an aggregate of US\$100 million in principal amount of its US\$400 million 6.5 per cent. senior subordinated notes due 2013 and up to an aggregate of US\$100 million in principal amount of its US\$500 million 6.25 per cent. senior subordinated notes due 2014 and its solicitation of consents of the holders of the aforementioned notes to certain proposed amendments to the indentures relating to such notes.

Advising Flextronics are Allen & Gledhill LLP Partners Au Huey Ling and Sunit Chhabra and Senior Associates David Teo and Long Pee Hua.

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Frasers Commercial Trust's three-for-one rights issue and Series A convertible perpetual preferred units

Frasers Centrepoint Asset Management (Commercial) Ltd, as manager of Frasers Commercial Trust ("**FCOT**"), has announced the proposed fully underwritten three-for-one renounceable rights issue of 2,252.0 million new units in FCOT to raise gross proceeds of approximately S\$213.9 million, and the proposed issue of 342.5 million of Series A convertible perpetual preferred units to satisfy in full the purchase consideration for the proposed acquisition by FCOT of a 99-year leasehold interest in Alexandra Technopark from Orrick Investments Pte Limited, a wholly-owned subsidiary of Frasers Centrepoint Limited (the sponsor of FCOT). This is the first time that a Singapore REIT is issuing convertible perpetual preferred units which are classified to be equity for purposes of the Property Funds Guidelines

(Appendix 2 of the Code on Collective Investment Schemes issued by the Monetary Authority of Singapore); and the first time an acquisition by a REIT amounts to a very substantial acquisition or reverse takeover under the Listing Manual of Singapore Exchange Securities Trading Limited which requires prospectus-like disclosures in its unitholders' circular.

Advising the manager and sponsor of FCOT are Allen & Gledhill LLP Partners Jerry Koh and Foong Yuen Ping and Associates Louis Lim and Chong Ying Chiang. Allen & Gledhill LLP Partners Margaret Soh and Eudora Tan and Senior Associate Lynn Ho are involved in the acquisition of a 99-year leasehold interest in Alexandra Technopark.

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Allen & Gledhill named Who's Who Legal Singapore Law Firm of the Year 2009 for fourth consecutive year

Allen & Gledhill LLP has been named Singapore Law Firm of the Year 2009 by *Who's Who Legal*. This is the fourth consecutive year that the Firm has won this award. The awards are based on a number of factors, including the feedback received in the ongoing research process, past performance in the research and the overall aggregate number of weighted votes cast in the Firm's favour.

Editor-in-chief of *Who's Who Legal*, Callum Campbell, said: "In a highly competitive field, receiving the *Who's Who Legal* Law Firm of the Year Award for Singapore for a fourth time is an outstanding achievement. Allen & Gledhill LLP has won the award every year since its inception, and is among a select band of firms to achieve such a feat. The consistently positive feedback we received recognises its continuing and exceptional individual and collective talent in this jurisdiction, and we have no hesitation in once again declaring Allen & Gledhill LLP the leading firm in the country."

Partners from Allen & Gledhill also received sufficient nominations from their clients and peers to be listed 20 times across 12 practice areas in *The International Who's Who of Business Lawyers 2009*, a compendium edition of all the individual *Who's Who Legal* publications. The Firm had more practitioners included than any other firm in Singapore.

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