

Legal Bulletin

A summary of developments in the law

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Articles

Parliament introduces Banking (Amendment) Bill 2006: Strengthening prudential safeguards and greater operational flexibility for banks

On 8 November 2006, the Banking (Amendment) Bill (the “**Bill**”) was introduced in Parliament following a public consultation on the draft version of the Bill in July/August 2006. An article on the public consultation conducted by the Monetary Authority of Singapore (the “**MAS**”) on the draft version of the Bill was featured in a previous issue of the Allen & Gledhill Legal Bulletin (August 2006). To view the article entitled “*MAS issues consultation paper on proposed changes to Banking Act*”, please [click here](#).

In finalising the Bill, the MAS has taken into account the feedback received during the consultation and has issued a Response discussing comments that are of general interest to the industry. To view the MAS’ Response to feedback received from the public consultation, please [click here](#).

The enactment of the Bill will give effect to several new policies and measures to strengthen prudential safeguards, facilitate risk-based supervision, provide banks with greater operational flexibility and update regulations. The following are some of the key changes proposed in the Bill.

Strengthening prudential safeguards

The Bill proposes several measures to strengthen the prudential safeguards for the protection of depositors.

- **Revision of methodologies for limiting large exposures and related party exposures.** Currently, the Banking Act (the “**Act**”) sets prudential limits on credit facilities extended by banks to a single borrower or a group of related borrowers. It also sets limits on unsecured credit facilities to parties related to the bank. To ensure that the prudential limits remain relevant and are in line with international best practice, the Bill proposes to apply the limits on all exposures (including equity and off-balance sheet exposures), instead of only credit facilities, to a single counterparty or group of related counterparties posing a single risk to the bank. The MAS will also recognise some common forms of credit risk mitigation adopted by banks. Lending limits to related corporations will also be revised to reduce the risk of exposure of local banks to its substantial shareholder group(s) and to financial entities in which the bank holds a major stake. The MAS will set out the details of the revised exposure-based limits in a Notice to be issued at a later date.
- **Introduction of an asset maintenance regime.** Foreign full and wholesale bank branches will be required to maintain a minimum level of eligible assets in Singapore in proportion to their liabilities. The requirement aims to improve the recovery of assets from a failed foreign bank branch in Singapore to meet the claims of Singapore depositors. A higher asset maintenance regime may be imposed, the details of which will be set out in a Notice to be issued by the MAS at a later date.
- **Amendment of the priority ranking of deposit liabilities of a bank.** Consistent with the objective of protecting non-bank depositors and to encourage prudence and market discipline in banks, the Bill will amend the Act to reorder the priority ranking in the event of a winding up of a bank. As changed, non-bank deposit liabilities will be placed ahead of

inter-bank liabilities, with the latter ranking *pari passu* with other unsecured liabilities.

Enhancing the MAS' role in bank resolution

- **Wider role in the resolution process and broader range of resolution options.** Currently, the MAS has limited powers in dealing with a distressed or insolvent bank. The Bill will enhance the MAS' role in insolvency proceedings of a bank, including the right to be heard and the power to approve the appointed liquidator. The Bill also empowers the MAS, with the approval of the Minister in charge of the MAS, to direct the sale of the business of a bank, and in the case of local banks, the issuance of new shares, the sale of existing shares, and the restructuring of capital. The MAS must be satisfied that the transfer is appropriate, having regard to the interests of depositors of both the transferor and the transferee, and the stability of the financial system in Singapore.

Facilitating risk-based supervision and allowing operational flexibility of banks

- **Calibration of prudential requirements to banks' profiles.** The Bill will allow the application of prudential requirements to be calibrated to an individual bank's financial strength, risk profile and risk management capabilities. The MAS will be empowered to grant exemptions from requirements in the Act in specific cases.
- **Enhancements to the liquidity risk supervision framework.** Part of the enhancements will include allowing the drawing down of liquidity reserves to deal with liquidity stress situations. The details will be set out in a Notice to be issued by the MAS at a later date.

Expanding the MAS' regulatory scope for credit card issuance

- **Extending regulation to all credit card issuers.** Presently, only financial institutions are subject to the MAS' rules on the issuance of credit cards. The Bill will extend the scope of regulation to all issuers targeting the Singapore market, and spell out exemptions.

Updating regulations

The Bill will also update and streamline several banking regulations, where policy objectives are no longer valid or are not being met effectively. These updates include:

- **Lifting the statutory reserve fund requirement.** With the enhancements to the banking regulatory framework over the years, including revisions to the MAS' capital adequacy requirement for Singapore-incorporated banks and the introduction of an asset maintenance regime for foreign banks, there is no longer a need for banks to maintain a statutory reserve fund. The Bill will allow banks to release the reserves over a five year period.
- **Qualification of the restriction on the use of the word "bank".** The restriction on the use of the word "bank" protects consumers from being misled as to the status of the entity they are dealing with. The Bill will qualify the restriction to accommodate legitimate uses, such as representative offices of foreign-licensed banks (subject to disclosure of their licensing status in home jurisdictions), central banks of other jurisdictions, and international financial institutions as prescribed by the MAS.

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- **Flexibility for the MAS to prescribe what constitutes a deposit.** To facilitate response to product innovation, the Bill will empower the MAS to exclude or include any financial product from or in the definition of deposit. This is intended to cater to products that either legally satisfy the definition of “deposit” but do not meet the economic characteristics of a deposit, or conversely meet the economic characteristics of a deposit but do not satisfy the legal definition of “deposit”.
- **Revision of rules on the disclosure of information.** The restriction on disclosure by the MAS of information furnished by banks will be qualified to allow disclosure of only non-customer information under limited circumstances such as sharing of aggregate unpublished information at international fora and contributing to research projects. The revised rules on information disclosure will balance the MAS’ responsibility for surveillance and supervision of the financial sector with its obligation to preserve the confidentiality of individual banks’ information.

To view the MAS’ explanatory brief of the Bill, please [click here](#).

The full text of the Bill is available on the Parliament’s website. To view, please [click here](#).

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Parliament introduces Statutes (Miscellaneous Amendments) Bill 2006: Proposed changes to period for retention of records

On 8 November 2006, the Statutes (Miscellaneous Amendments) Bill 2006 was introduced in Parliament.

Among other things, the Statutes (Miscellaneous Amendments) Bill 2006 proposes changes to the Acts listed in the table below to shorten the period for record keeping retention of records to five years.

This development was first announced in the 2006 Budget Statement. To view the relevant segment of the 2006 Budget Statement, please [click here](#).

When enacted into law, the new period for retention of records will apply to any document whether the obligation to keep or retain such document first arose before, on, or after the date of commencement of the amendment to the relevant Act.

No	Act	Section No	Provision	Current retention period (years)	Proposed retention period (years)
1	Building Maintenance and Strata Management Act 2004	48(2)	Retention of records and books of account by management corporation	7	5

No	Act	Section No	Provision	Current retention period (years)	Proposed retention period (years)
2	Business Trusts Act	75(2)	Retention of accounting records by trustee-manager of registered business trust	7	5
3	Charities Act	12(3)	Preservation of accounting records by charity trustees	7	5
		12(4)	Preservation of accounting records by charity trustees where a charity ceases to exist	7	5
		13(4)	Preservation of statement of accounts by charity trustees	7	5
4	Companies Act	199(2)	Accounting records and systems of control	7	5
5	Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act	36(1)	Definition of "minimum retention period"	6	5
6	Customs Act	90(2)	Retention of trade documents by importer or exporter of dutiable goods	7	5

No	Act	Section No	Provision	Current retention period (years)	Proposed retention period (years)
7	Financial Advisers Act	36(5)	Retention of circular or other similar written communication in which licensee makes a recommendation with respect to securities	6	5
		38(1)(c)	Register of interests in securities kept by licensee who provides financial advisory service in respect of securities	6	5
8	Income Tax Act	67(1)(a)	Retention of records by person carrying on or exercising any trade, business, profession or vocation	7	5
9	Limited Liability Partnerships Act 2005	25(2)	Retention of accounting and other records by limited liability partnership	7	5
10	Money-changing and Remittance Businesses Act	16(2)	Retention of books, accounts, records and registers by licensee	6	5
11	Moneylenders Act	19	Retention of books of accounts by moneylender	–	5
12	Pawnbrokers Act	14(1A)	Retention of books and documents by pawnbroker	–	5

No	Act	Section No	Provision	Current retention period (years)	Proposed retention period (years)
13	Securities and Futures Act	102(3)	Keeping of books by holder of capital markets services (“ CMS ”) licence	6	5
		120(3)	Retention of written offer, recommendation or written statement by holder of CMS licence	6	5
		131	Register of securities kept by holder of CMS licence (a) to deal in securities, (b) to advise on corporate finance, and (c) for fund management	6	5
14	Trust Companies Act	28(4)	Keeping of books and furnishing of returns by licensed trust company	6	5

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Parliament introduces Trade Marks (Amendment) Bill 2006: Giving effect to certain articles of the Singapore Treaty on the Law of Trademarks

On 8 November 2006, the Trade Marks (Amendment) Bill 2006 (the “**Bill**”) was read for the first time in Parliament. Some of the amendments proposed in the Bill are intended to give effect to certain articles of the Singapore Treaty on the Law of Trademarks (the “**Singapore Treaty**”).

The Singapore Treaty was introduced during the Diplomatic Conference for the Adoption of a Revised Trademark Law Treaty, hosted by Singapore in March 2006. It was adopted by Singapore on 27 March 2006 and has not been effected yet.

One of the areas which the Singapore Treaty addresses is the streamlined procedural frameworks for both national and regional trade mark

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administration authorities, which is intended to lead to lowered costs of registration. The Singapore Treaty thus covers many facets of the registration process, including registration formalities, the recordal of trade mark licences, and the avenues of relief available when certain time limits are missed. An article entitled "*The Singapore Treaty on the Law of Trademarks*" was featured in a previous issue of the Allen & Gledhill Legal Bulletin (May 2006). To view, please [click here](#).

For the full text of the Singapore Treaty, please refer to the website of the World Intellectual Property Organization ("WIPO"). To view, please [click here](#).

When the Bill is in force, the Trade Marks Act will be amended to implement changes including the following key amendments:

- To provide for an application for registration of a trade mark to be divided into two or more separate applications for registration of the trade mark, so as to enable Singapore to give effect to Article 7 of the Singapore Treaty;
- To enable a person to make a single application for the registration of a series of trade marks in respect of goods or services belonging to two or more different classes;
- To provide for the grant of a licence under an application for registration of a trade mark to be a registrable transaction under section 41 of the Trade Marks Act.

To view the Trade Marks (Amendment) Bill 2006, please [click here](#).

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Parliament introduces Income Tax (Amendment) Bill 2006: Implementation of income tax changes announced in 2006 Budget Statement

On 8 November 2006, the Income Tax (Amendment) Bill 2006 was introduced in Parliament.

The Income Tax Act will be amended primarily to implement the income tax changes announced in the 2006 Budget Statement.

The following are some of the changes:

- **Tax exemption for locally administered trust.** Pursuant to a new section 13Q, there will be a tax exemption on certain income of a prescribed locally administered trust and of a prescribed holding company established for the purposes of such trust. Where such income is exempt from tax, the share of such income to which a beneficiary of the trust is entitled to receive is also exempt;
- **Tax exemption on income derived by an approved shipping investment enterprise.** A new section 13S will provide for tax exemption on income derived by an approved shipping investment enterprise from the chartering or finance leasing of ships for use outside the limits of the port of Singapore and acquired by the enterprise during its period of approval;

- **Deduction allowed for cost of treasury shares.** A new section 14P will allow a deduction to a company for the cost of acquiring treasury shares when it transfers such shares to any person under a stock option scheme or share award scheme by reason of any office or employment held in Singapore by that person;
- **Computing profits of financial instruments.** A new section 34A will be enacted to provide for changes to the basis of computing profits of financial instruments arising from the adoption of FRS 39 by companies in Singapore;
- **Tax treatment of prescribed Islamic financing arrangements.** A new section 34B will provide for the tax treatment of prescribed Islamic financing arrangements. Sections 10, 12, 13, 14, 15 and 45 and regulations made under section 43Q will apply to such arrangements as if a reference to interest were a reference to the prescribed return in lieu of interest (the effective return) under such arrangement. The effective return is to be excluded in determining the consideration for the sale and purchase of any asset under such arrangement;
- **Concessionary tax rate for discount from qualifying debt securities.** Section 43N will be amended to extend the 10 per cent. concessionary tax rate to a discount derived by a company from qualifying debt securities which are issued during the period from 17 February 2006 to 31 December 2008 and which have a tenure of more than one year, subject to conditions;
- **Concessionary tax rate on specified income of approved shipping investment manager.** A new section 43W will be enacted to enable regulations to be made to levy a concessionary tax rate of five per cent. upon specified income derived on or after 1 March 2006 by an approved shipping investment manager from managing an approved shipping investment enterprise or from other prescribed services or activities carried out for such enterprise, subject to conditions.

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To view the Income Tax (Amendment) Bill 2006, please [click here](#).

From 9 June to 8 July 2006, the Ministry of Finance (the “**MOF**”) conducted a public consultation on the draft Income Tax (Amendment) Bill 2006 (the “**draft Bill**”). The draft Bill sought to amend the Income Tax Act in relation to Budget 2006 tax changes as well as other tax changes.

On 28 September 2006, the MOF announced that it had accepted 28 out of 49 suggestions related to the drafting of the draft Bill. An article about the MOF’s acceptance of the 28 suggestions was featured in a previous issue of the Allen & Gledhill Legal Bulletin (October 2006). To view the article entitled “*MOF accepts 28 suggestions on drafting of draft Income Tax (Amendment) Bill 2006*”, please [click here](#).

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MAS issues consultation paper on proposed modifications to regulatory requirements for trade credit and political risk insurance business

On 1 November 2006, the Monetary Authority of Singapore (the “**MAS**”) issued a consultation paper entitled “Proposed Modifications to Regulatory Requirements for Trade Credit & Political Risk Insurance Business” (the “**Consultation Paper**”). The Consultation Paper contains proposed amendments to be made to the Insurance (Valuation and Capital) Regulations 2004 (the “**Regulations**”) which set out the capital requirements that insurance companies have to maintain in respect of trade credit and political risk insurance (“**TCP**”) business.

Trade credit insurance protects against the risk of non-payment of buyers and importers, while political risk insurance protects against losses from operations as a result of adverse political developments.

The MAS is seeking public comments on the following revisions to be made to the regulatory requirements imposed on TCP business.

Requirement for contingency reserves

By way of background, contingency reserves are reserves set aside by insurance companies to cover catastrophic losses or sharp volatility in loss experience. In the case of TCP business, contingency reserves are necessary to buffer potential surges in loss experience caused by widespread default on accounts receivables arising from cyclical economic downturns or adverse political developments.

The MAS proposes to make the following changes concerning contingency reserves kept by insurance companies writing TCP business (“**TCP insurers**”):

- To permit TCP insurers to draw down on contingency reserves when net claims incurred exceed the net premiums earned for that particular year in condition that the amount drawn down should not exceed the difference between the two items.
- Contingency reserves established by a TCP insurer in the course of its actuarial reserving process may be counted towards the statutory contingency reserve requirement imposed by the MAS subject to conditions prescribed by the MAS.

C1 (Insurance Risk) requirements for TCP business

A TCP insurer is required to establish Component 1 (C1) requirements relating to insurance risks in the manner prescribed in the Regulations.

The MAS is seeking comments on the following issues in relation to the C1 requirements applicable to TCP insurers:

- Aligning the volatility category for TCP business written from Offshore Insurance Fund (“**OIF**”) with those written from the Singapore Insurance Fund (“**SIF**”). As a result, the C1 (insurance risk) factors for SIF and OIF business would be brought down to a level that is more comparable with that imposed by regulatory authorities in other jurisdictions.
- To allow up to 50 per cent. of the C1 (insurance risk) requirements maintained by insurers in respect of a particular insurance fund to be

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met using no more than 50 per cent. of the contingency reserves set aside in that fund. Detailed illustration on how this may be applied is set out in the Consultation Paper.

The consultation closes on 1 December 2006.

To read the full text of the Consultation Paper, please [click here](#).

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MOM conducts public consultation on draft Employment of Foreign Manpower Act

From 17 October 2006 to 6 November 2006, the Ministry of Manpower (the “**MOM**”) conducted a public consultation on a draft Employment of Foreign Manpower Act (the “**EFMA**”). When in force, the EFMA will be the key legislation governing the employment of all foreigners in Singapore.

The MOM intends to table in Parliament a Bill to amend the Employment of Foreign Workers Act (the “**EFWA**”). Upon the amendments taking effect, there will be consolidated under a single Act the legislative authorities for the issuance and enforcement of Work Permits (work passes for unskilled or semi-skilled foreign workers) and S Passes (work passes for mid-level skilled workers such as technicians) under the EFWA and Employment Passes (work passes for foreign professionals) under the Immigration Act. Some provisions from the Immigration Act, such as those relating to the imposition and forfeiture of the security bond, will be replicated under the EFMA.

Following the consolidation, the EFWA will be renamed the EFMA to reflect its broader coverage.

The following are the proposed key changes to the EFWA.

Controller of Work Passes

The Controller of Work Permits under the EFWA will be re-designated as the Controller of Work Passes (the “**Controller**”) under the EFMA, and will be granted additional powers to suspend all types of work passes.

Enhanced penalties for selected offences

To impose a greater deterrent effect, the penalties for the following offences will be increased:

- **Employment of foreign employee without work pass.** Currently, the offence of employing a foreign worker without a valid work permit is punishable with a fine not exceeding 48 months’ levy, or imprisonment for a term not exceeding 12 months, or both. Under the proposed EFMA, a person who employs a foreign employee without a work pass will be liable upon conviction to a fine not exceeding S\$15,000, or imprisonment for a term not exceeding 12 months, or both. In addition, the court is empowered to order the offender to pay a sum which is equal to the levy payable for the period that the offence was committed.
- **Active deception offences.** The penalties for such offences (e.g. providing false information to the Controller, the illegal trade and alteration of work passes) will be increased to a maximum fine of S\$15,000, or imprisonment for a term not exceeding 12 months, or both.

- **Composition of offences.** The ceiling on the sum which may be collected for the composition of offences will be raised from S\$1,000 to S\$2,000. This change will align the position under the proposed EFMA with the Criminal Procedure Code (for any act without specific composition provisions).

Introduction of a new offence

Section 22A of the proposed EFMA provides that it will be an offence if an employer or foreign employee, who knows that false or misleading information has been given to the Controller, fails to notify the Controller. The offence will be punishable with a fine not exceeding S\$5,000, or imprisonment not exceeding six months, or both.

Enhanced investigative powers of the Employment Inspectors

Under section 21 of the proposed EFMA, the investigative powers of Employment Inspectors will be augmented. Specifically, Employment Inspectors will be empowered to arrest without warrant:

- (a) any person employing a foreigner without a valid work pass, or otherwise than in accordance with the conditions of the work pass;
- (b) any foreigner employed without a valid work pass;
- (c) any person who obstructs an Employment Inspector from carrying out his duty;
- (d) any person who makes any statement or furnishes any information to the Controller or an Employment Inspector which is false in any material particular or is misleading by reason of the omission of any material particular;
- (e) any person who gives, sells, forges or unlawfully alters a work pass;
- (f) any person who uses or without lawful authority has in his possession a forged or unlawfully altered work pass; or
- (g) any person who had abetted any person referred to in paragraphs (a) to (f) above.

Presently, the technical provisions defining the administrative requirements and characteristics of the various types of work passes straddle the Immigration Act, the EFWA and the subsidiary legislation enacted thereunder. Following the legislative consolidation, these provisions will be re-enacted as a set of Regulations under the EFMA.

To view the draft Employment of Foreign Manpower Act, please [click here](#).

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Cases

Corporate & financial services

Singapore Court of Appeal restrains beneficiary's call on performance bond where underlying claim is time-barred

Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd & Anor
[2006] 4 SLR 501; [2006] SGCA 32

In the recent case of *Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd & Anor*, the issue which arose before the Singapore Court of Appeal was whether the beneficiary of a default performance bond could make a valid call for payment under the bond when its claim against a contractor under the underlying contract was time-barred.

The Jurong Town Corporation (“**JTC**”) had engaged Econ Piling Pte Ltd (“**Econ**”) under a contract to install bored piles at one of its projects. Aviva General Insurance Pte Ltd (“**Aviva**”) and Econ jointly furnished a performance bond (the “**Bond**”) as security for the due performance of the contract.

In the course of events, JTC called on the Bond. On Econ's application, the District Court granted Econ an injunction restraining Aviva from making payment to JTC under the performance bond. On JTC's appeal to the High Court, the injunction was set aside. Econ appealed to the Court of Appeal.

The only issue before the Court of Appeal was whether JTC could make a valid call on the Bond when its claim against Econ under the underlying contract was time-barred.

On the specific wording of the Bond, the Court of Appeal agreed with the High Court's finding that the Bond was a default bond and that discharge of the obligations under the contract would extinguish the obligations under the Bond. That meant that the Bond did not give rise to independent primary obligations, which are the hallmark of an on-demand bond. Such secondary obligations are characteristic of default bonds.

As to whether JTC was entitled to make a valid call on the Bond even though its claims under the underlying contract were time-barred, the Court of Appeal held that it was important to bear in mind that the purpose of the Bond (as with all performance bonds) was to secure the performance of the building contract by the contractor. Econ had furnished the Bond jointly with Aviva as security for any claims JTC might have had under the contract. As the underlying claim was time-barred, Econ was entitled to restrain JTC from calling on the Bond in the same way it could have pleaded limitation as a defence had JTC sued on the contract.

The Court of Appeal held that the outcome would not be any different, even if the Bond was construed as a demand bond (and therefore treated as an indemnity) rather than as a default bond or guarantee.

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Singapore High Court interprets financial assistance provision under Companies Act

Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd & Ors
[2006] 4 SLR 451; [2006] SGHC 152

The Singapore High Court's judgment in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd & Ors* provides a detailed explanation on the approach in ascertaining whether a transaction constitutes "financial assistance" under section 76 of the Singapore Companies Act (the "**Act**").

The plaintiff was an equitable pledgee or transferee of some shares (the "**Shares**") in VGO Corporation Ltd ("**VGO**"), a Singapore company listed on the Singapore Exchange. The Shares were registered in the name of Kingsea Ltd ("**Kingsea**") and were pledged to the plaintiff to guarantee the repayment of money owed by the second defendant (owner of Kingsea) to the plaintiff.

The second defendant had agreed to transfer the Shares to the plaintiff to offset the amount owed to the plaintiff. After a failed attempt by the plaintiff to register the Shares in its name, the plaintiff applied for a Mareva injunction against the second defendant and Kingsea (the "**Mareva Injunction**"). As a result, the Shares were frozen.

Subsequently, VGO and the fourth defendant ("**Mao**") filed an application to vary the Mareva Injunction. VGO and Mao claimed that they were entitled to the Shares pursuant to a share acquisition transaction between VGO and Kingsea (the "**Transaction**"). In the Transaction, VGO acquired from Kingsea the entire issued and paid-up capital of Spring Wave Ltd ("**Spring Wave**"). VGO entered into a conditional sale and purchase agreement (the "**Agreement**") with Kingsea. The purchase consideration was initially agreed at RMB55m. However, this purchase consideration was later adjusted to RMB50.596m as a result of a financial audit of the Net Asset Value ("**NAV**") of Spring Wave and its subsidiaries. This was due to the fact that a long term debt (the "**Agang debt**") was excluded from the computation of the NAV of Spring Wave and its subsidiaries.

The purchase consideration for the Agreement (which was to be paid by VGO to Kingsea) was to be satisfied by the allotment and issue of new shares in VGO issued in favour of Kingsea (the "**New Shares**") and were registered in Kingsea's name accordingly.

Kingsea undertook specific warranties to VGO as part of VGO's acquisition of Spring Wave pursuant to the Agreement. As partial security for Kingsea's performance of these specific warranties, the New Shares were deposited with VGO as escrow shares. It means that VGO retained those shares with a power of sale reserved to the directors of VGO in the event that Kingsea breached the specific warranties. Kingsea breached the warranties and VGO exercised its power of sale with regard to the escrow shares. The shares were eventually sold to Mao.

The plaintiff resisted the application by Mao and VGO, *inter alia*, on the ground that the Transaction was illegal as it contravened section 76 of the Act and therefore Mao and VGO had no basis for their claims to the Shares.

The plaintiff argued that the NAV of Spring Wave and its subsidiaries should have been lower than what the parties to the Agreement eventually agreed. The purchase consideration for the Agreement was adjusted downwards to RMB50.596m because of the Agang debt. However, the amended figure of RMB50.596m was still an overvaluation of the NAV. The plaintiff claimed that

a potential concession (allegedly valued at RMB5m) that had not been obtained should also be taken into account in reducing the NAV. So, less VGO shares should have been issued as purchase consideration under the Agreement. Therefore, the plaintiff argued that the additional VGO shares that had been issued as purchase consideration under the Agreement for that difference in amount in the calculation in the NAV amounted to financial assistance by VGO in aiding the purchase of its shares and, hence, a contravention of section 76 of the Act.

The plaintiff did not dispute the Transaction on the ground that the original purpose for the Agreement lacked good faith or was a sham transaction. The alleged contravention of section 76 of the Act by the plaintiff centred on only a part of the Agreement proper that was set out in the above paragraph.

The Singapore High Court found that the plaintiff's argument was without merit. The High Court commented that a perfectly legal business venture could be entered into between the parties even though the value of the purchase consideration was not exactly equivalent to the NAV of the businesses purchased. The key question of the present matter was not a mechanistic and carping inquiry into differences between the purchase consideration and the NAV but, rather, whether or not there were legitimate or bona fide reasons for the business transaction to be entered into.

The High Court found that the Transaction was a perfectly legitimate business purpose. VGO had entered into the Agreement in order to diversify its business portfolio by branching out into the food industry and the New Shares were issued to pay for the business of Spring Wave and were an integral part of the purchase consideration. Hence, it was held that the present case did not fall within the literal ambit of section 76 of the Act.

In response to the plaintiff's argument that the miscalculation with respect to the NAV in the Transaction ought to be taken into account, the court explained that, for the purpose of section 76 of the Act, the courts would not generally inquire into the quantum of consideration furnished bona fide by a company as payment for an asset. It was simply not the courts' concern whether a company had struck a good or bad bargain in the transaction. The court emphasised that section 76(1)(a) of the Act was not intended to interfere with business and commercial decisions taken in a bona fide fashion.

The court highlighted that in determining whether a transaction constitutes "financial assistance" within the meaning of section 76 of the Act, the substance of the transaction concerned is of the first importance. A useful and practical approach would be to inquire into the substance of the transaction pursuant to which the shares of the company change hand. If the substance of the transaction is to enable the company to furnish, whether directly or indirectly, financial assistance for the purchase of its shares, then section 76 of the Act would have been clearly contravened.

In *obiter dicta*, the High Court commented that the phrase "in connection with" in section 76(1) of the Act should be read narrowly so as to be consistent with the phrase "for the purpose of". In the opinion of the court, a financial assistance transaction that is "in connection with" the acquisition of shares of a company should be more than a mere literal causative fact *vis-à-vis* the subsequent acquisition of the shares of the subject company. Instead, a closer nexus between the two should be required. The phrase "in connection with" connotes more than a mere factually proximate relationship between the impugned transaction and the subsequent acquisition of the company's shares.

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Dispute resolution

Arbitration

Singapore High Court sets aside arbitral award on grounds of breach of natural justice

Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd
[2006] SGHC 189

The case of *Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd* is noteworthy for dealing with breach of natural justice as a justification for the setting aside of an arbitral award under section 48 of the Arbitration Act (the “**Act**”).

The plaintiff, Fairmount Development Pte Ltd, employed the defendant, Soh Beng Tee & Co Pte Ltd, as the main contractor to develop a condominium housing development project known as Fairmount Condominium (the “**Project**”). The parties entered into a building contract that incorporated the form of the Singapore Institute of Architects’ Articles and Conditions of Building Contract (Measurement Contract), 5th Edition (the “**Contract**”). The commencement date stated in the Contract was 2 August 1997 and the completion date was stated as 1 February 1999.

Whilst the works were in progress, the defendant submitted numerous applications for extensions of time to complete the works on various grounds under the Contract. The defendant was granted an extension of time of five days thereby revising the contractual completion date to 6 February 1999. Subsequently, it was issued a delay certificate which was backdated to 7 February 1999. On 9 November 1999, the plaintiff terminated the defendant’s employment as contractor and appointed a replacement contractor.

At the time of termination, the defendant had overrun the extended contractual date by more than nine months.

The defendant commenced arbitration proceedings pursuant to the terms of the Contract alleging that the plaintiff had wrongfully terminated the defendant’s employment as contractor. The arbitrator issued a final award (the “**Award**”) in favour of the defendant and the plaintiff applied to the High Court to have it set aside.

The Award

The arbitrator recognised that the main issue before him was whether the plaintiff had rightfully terminated the defendant’s employment as contractor. He further stated that one of the sub-issues raised by the main issue was whether the defendant was entitled to extensions of time for the completion of the Project and, if so, whether it had been properly granted such extension or whether such extension had been taken into account by the plaintiff in issuing the termination certificate.

The arbitrator found that he was unable to assess accurately the number of days of extra time to which the defendant was entitled because the defendant had not put sufficient evidence before him to come to a conclusion. However, he also found that the plaintiff had committed acts of prevention that affected the defendant’s ability to meet the contractual completion deadline. The arbitrator concluded that the plaintiff failed to give a fair and reasonable extension of time to the defendant, and declared that time for the performance of the Project was at large.

The statutory provisions

Section 48 of the Act establishes the situations in which the court may set aside an arbitration award. These include:

- when the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (the “**first ground**”), and
- when a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced (the “**second ground**”).

The merits of the application

The High Court, presided by Judith Prakash J, agreed with the plaintiff that the issue of what extensions of time, if any, the defendant was entitled to was pivotal to the resolution of the case because it had an impact on the amount of liquidated damages the plaintiff was entitled to claim as at the date of termination. Also, the time for completion formed the essential yardstick against which progress of the works had to be judged.

On the first ground, the High Court stated that the arbitrator’s finding that time was at large would not necessarily be unanticipated or extraordinary or completely outside the contemplation of the parties when questions of delay had to be considered. Thus, the plaintiff did not have basis to criticise the Award for dealing with a matter beyond the scope of the submission to arbitration.

Passing over to the second ground, the High Court agreed with the plaintiff that a breach of natural justice had taken place in the course of arbitration and that its rights had thereby been prejudiced.

Establishing breach of natural justice

Expounding on section 48 of the Act, the High Court declared that the plaintiff had to establish which rule of natural justice was breached, how it was breached, in what way the breach was connected to the making of the award, and how the breach had prejudiced the plaintiff’s rights.

The plaintiff submitted that the breach consisted in the arbitration tribunal’s failure to give each party the opportunity to be heard on all relevant matters. The tribunal decided on an issue (that time was at large and completion should take place within a reasonable time) without this issue having been raised either in written submissions or in oral arguments by any of the parties or by the tribunal itself. A list of issues to be decided by the tribunal had been submitted by the parties and the issue of time being at large was not on either party’s list. At no time did the arbitrator notify the parties, particularly the plaintiff, that he was considering the issue and wanted submissions on it from them.

The plaintiff cited the case of *Societe Franco-Tunisienne D’Armement-Tunis v Government of Ceylon* [1959] 1 WLR 787 (“**The Massalia**”), where the decision of the umpire was challenged on the basis that his view of the law as applied to the facts involved a radical departure from the cases presented by the parties. The English Court of Appeal upheld the claim of the owners of the vessel that they were not given a sufficient opportunity to reframe their case in the light of the umpire’s views, thus rendering the proceedings to be unsatisfactory and contrary to natural justice.

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The principles established in *The Massalia* were adopted in *Faghirzadeh v Rudolf Wolff (SA) (Pty) Ltd* [1977] 1 Lloyd's Rep 630, which stated that if the arbitration tribunal wishes to make an award supporting a claim that has not been advanced before it, it must first in the interest of fairness indicate to the parties that it is inclined to come to such conclusion and give the parties the fullest opportunity of dealing with the development, including calling evidence if necessary.

The High Court took the plaintiff's view that there had been a breach of natural justice on the basis of its not having been given the opportunity to be heard on the issue of whether time was at large and, if so, what would constitute a reasonable time within which the defendant would have to complete the Project. Simply making time at large could not mean that the defendant could complete at its leisure. It would still have to meet a reasonable schedule. Had the arbitrator informed the plaintiff that he was considering setting time at large, the plaintiff would have been able to address the issue and submit not only why that should not be done but also, what the consequences would be and suggest a reasonable time for completion.

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Civil procedure

Singapore High Court considers claim to legal professional privilege over report collaborated between lawyers and accountants

Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd & Ors and Other Suits
[2006] 3 SLR 441; [2006] SGHC 91

The case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd & Ors and Other Suits* provides an instructive discourse on the scope of legal professional privilege in Singapore, including the extent to which the legal advice privilege under the Evidence Act (the "**Act**") may be claimed for communications made in the presence of third parties.

The relevant facts of the case are as follows:

The defendant Asia Pacific Breweries (Singapore) Pte Ltd ("**APBS**") is a wholly-owned subsidiary of Asia Pacific Breweries Limited ("**APBL**"). On September 2003, officers from the Commercial Affairs Department informed the senior officers of APBL that Chia Teck Leng ("**Mr Chia**"), who was the finance manager of APBS, had used forged documents to borrow large sums of money in APBS's name for his gambling debts incurred overseas. Funds from credit facilities obtained fraudulently in APBS's name from four banks were channeled into APBS's account and then into Mr Chia's personal bank accounts. Mr Chia was arrested on fraud charges and is currently serving a term of imprisonment.

The board of APBL appointed a special committee of directors (the "**Special Committee**") to oversee the investigations and to take any necessary actions in relation to Mr Chia's fraud in order to protect the interests of APBS and APBL. The Special Committee appointed Drew & Napier LLC ("**D&N**") and PricewaterhouseCoopers ("**PWC**") to, *inter alia*,

identify the nature, circumstances and extent of the questioned transactions and quantify the financial impact of any unauthorised transactions.

The appointment by the Special Committee and the completion of the review by PWC were announced by APBL in MASNET. The announcement also stated that the banks had asserted claims and that APBS was prepared to contest these claims vigorously.

The banks sued APBS in contract, negligence and restitution. The banks also applied for and were granted an order by the assistant registrar for APBS to produce for inspection the report prepared by D&N and PWC, and all drafts thereof (the “**PWC Draft Reports**”, as no engrossed final report was issued).

The claim to legal professional privilege

Appealing against the order, APBS contended that it could not be compelled to produce the PWC Draft Reports as these reports were subject to legal professional privilege which comprises legal advice privilege under the Act and common law litigation privilege.

APBS argued that D&N and PWC jointly conducted interviews and jointly worked on the draft reports and thus, D&N and PWC were working as a single team on the matter. The PWC Draft Reports were brought into existence together with D&N for the purpose of giving confidential legal advice to APBS and thus came within the ambit of legal advice privilege. Alternatively, the PWC Draft Reports were subject to litigation privilege as they came into existence for the dominant purpose of contemplated or anticipated litigation by the banks.

Legal advice privilege

Legal advice privilege is governed by sections 128 and 131 of the Act. The privilege protects the client as well as his solicitor from being compelled to disclose confidential communications about legal advice and assistance stemming from the latter’s professional employment. The rationale of the privilege, which belongs to the client and not to the solicitor, is to enable the legal advice to be both freely sought and given in confidence.

The principal dispute between the parties was the extent to which APBS could claim privilege for communications passed in confidence between APBS and D&N in the presence of PWC, which communications were later incorporated in the PWC Draft Reports that also contained D&N’s input.

The starting point is that legal advice privilege only covers communications between the legal adviser and his client. The banks contended that for the purposes of legal advice privilege, the Special Committee was D&N’s client and as such, it did not attach to communications between D&N and the employees of APBS.

In *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556 (“**Three Rivers**”), the English Court of Appeal held that legal advice privilege could not extend to documents prepared by employees or ex-employees of the Bank of England. In that case, the court found that in the context of preparations for an internal company inquiry, the inquiry unit, and not the Bank of England or its individual employees, should be regarded as the client.

In the present case, APBS is claiming the privilege as “client”. In declining to adopt the English position in *Three Rivers*, the court pointed to the wording of section 128(1) of the Act, which expressly includes communications made

to the solicitor “by or on behalf of his client”. The provision makes no distinction between communications made by an individual and those made by his employee or agent. Neither does it make a distinction between communications made by a corporate client and those made by the corporate client’s employees or agents. The court declared that from this perspective, the decision in *Three Rivers* is inconsistent with the provisions of section 128 and is inapplicable in Singapore.

Thus, the communications between APBS and D&N fell within the ambit of legal advice privilege. The court next dealt with the issue of whether confidentiality, which is an essential element of legal advice privilege, was lost when the communications were made in the presence of PWC, which was strictly speaking a third party to the solicitor-client relationship between D&N and APBS.

Confidentiality

The court found that the interviews and meetings jointly conducted by D&N and PWC and the information gathered and incorporated in the PWC Draft Reports were in the context of a legal professional relationship that involved advising on legal rights and obligations in respect of the unauthorised loans taken out by Mr Chia. Although the reports were eventually prepared and sent to the Special Committee in PWC’s sole name, the degree of collaboration between PWC and D&N as a team, and the extent of the latter’s legal input, were real and not peripheral.

From these circumstances, the court inferred an obligation of confidence owed to APBS by both PWC and D&N. It followed that disclosure of the interviews between D&N and APBS’s employees to PWC took place on a confidential basis. The court held that the confidential character of these communications was not destroyed even when passed or made in the presence of PWC. On this basis, the PWC Draft Reports which incorporated such confidential communications continued to be privileged.

Agency

Another ground cited by the court was that PWC was acting as an agent for communication of APBS. The court held that it was implicit from the joint appointment of D&N and PWC that each of them was the agent of APBS in communicating with each other. There would be consent and authorisation from the client to each adviser to request, give and receive information or documents (including privileged material) concerning the unauthorised accounts.

Inseparability of privileged material

The court also considered the unlikelihood that the findings of the accountants could be presented from purely an accounting point of view without a legal dimension or perspective. Separation of parts of the drafts as to exclude passages containing privileged information would not be practical since PWC and D&N acted as a single unit. The court surmised that the PWC Draft Reports were so intertwined with the legal advice given by D&N to PWC that these reports became part of the privileged solicitor-client communications.

Litigation privilege

The test employed by the court for determining whether litigation privilege attaches to the PWC Draft Reports is as follows: (a) the reports must have come into existence when litigation was pending or anticipated or in contemplation; and (b) the dominant purpose of preparing the reports must

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have been for use in, or in connection with, litigation then pending or anticipated or in contemplation.

The court held that the relevant time to consider was the time when the PWC Draft Reports were prepared. On the facts, litigation was reasonably in prospect at the time the PWC Draft Reports were prepared. APBS had announced in MASNET that the banks had asserted claims and that it would contest these claims vigorously. The court also found that the legal advice contained in the PWC Draft Reports was prepared predominantly for the purpose of prospective litigation against APBS.

Accordingly, the court allowed APBS's appeal and ruled against production of the PWC Draft Reports. The banks have appealed the decision, and judgment has been reserved by the Court of Appeal.

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Intellectual property & technology

Singapore Court of Appeal dismisses appeal: Sign of "POLO PACIFIC" does not infringe registered mark of "POLO"

The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd
[2006] SGCA 14

The case of *The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd* concerned an appeal against the decision of the Singapore High Court where the trial judge dismissed an action instituted by the appellant against the respondent for an alleged infringement of the appellant's trade mark under section 27(2)(b) of the Trade Marks Act (the "TM Act"). The High Court decision was significant because it was the first time a Singapore court had to consider the question of infringement under this provision in the TM Act.

A previous issue of the Allen & Gledhill Legal Bulletin featured an article on the High Court decision. To read the article entitled "*Singapore High Court rejected Ralph Lauren trade mark infringement claim: 'it is far-fetched to suggest that confusion could ever arise even in the simplest of minds'*", please [click here](#).

The appellant was the registered proprietor in Singapore of several trade marks, including the word mark, "POLO". The appellant's trade marks were registered in the category for clothing, footwear and headgear in accordance with the International Classification of Goods and Services (the "ICGS").

The respondent was a private company incorporated in Singapore. Unlike the appellant's goods, which were sold at upmarket boutiques located in prime shopping areas and were accordingly pricey, the respondent operated five suburban stores, selling things such as clothing, bags, handbags, shoes, watches and household items at prices affordable to the masses.

The respondent imported from China, shoes, bags, handbags and clothes bearing the sign "POLO PACIFIC" (the "Sign"). Compared to the appellant's mark, the Sign had a different font, typeface and design. Subsequently, the respondent applied to register the Sign in a few categories under the ICGS including that for clothing, footwear and headgear. Before the Sign was registered, the appellant started selling goods bearing the Sign. The Sign was eventually accepted for publication on 2 December 2004. Thereafter the

appellant filed a claim against the respondent for infringing the appellant's trade marks pursuant to section 27(2)(b) of the TM Act. For the purposes of the action and the appeal, only the word mark "POLO" was in issue.

Section 27(2)(b) provides that a person infringes a registered trade mark if, without the consent of the proprietor of the trade mark, he uses in the course of trade a sign where, because the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered, there exists a likelihood of confusion on the part of the public.

In the High Court, the judge held that the sign "POLO PACIFIC" was not similar to "POLO" and that there was no likelihood of confusion on the part of the public. Consequently, he held that the Sign had not infringed the appellant's mark within the meaning of section 27(2)(b). The appellant thus filed the present appeal against the High Court's decision.

Court's approach to determining whether there is infringement

The Court of Appeal first considered the approach which the trial judge adopted to determine whether there was infringement under section 27(2)(b). The trial judge did not accept the respondent's argument that the better approach should be the global assessment test which focused on the ultimate question of whether or not there was a likelihood of confusion. In that test, all the other matters mentioned in section 27(2)(b) would be just factors or circumstances to enable the court to come to the ultimate issue of confusion. The Court of Appeal agreed with the approach of the trial judge that the three following conditions must be present before a case of infringement can be made under section 27(2)(b):

- first, the alleged offending sign must be shown to be similar to the registered mark;
- second, both the sign and the mark must be used in relation to similar goods or services; and
- third, on account of the presence of the first two conditions, there exists a likelihood of confusion on the part of the public.

The Court of Appeal concluded that the global assessment test would likely confound the final issue of confusion with the first two prerequisite conditions. Section 27(2)(b) does not make it an infringement if the likelihood of confusion is caused by some other factor. Although there might be some link and overlap between the first and the third conditions, it is clear that they are different. The fact that a sign is similar to a registered mark does not automatically mean that there will be a likelihood of confusion on the part of the public. The question of similarity is really a matter of degree. In a broad sort of sense, the greater the similarity between a mark and a sign, the greater will be the likelihood of confusion. However, if either of the first two conditions is not satisfied there will not be any need to go into the third question of determining whether there exists a likelihood of confusion. On the other hand, there is no presumption of confusion once the two aspects of similarity are present. The court is entitled to look outside the mark and the sign, as well as the articles, to assess whether there exists a likelihood of confusion.

Although the Court of Appeal endorsed the approach taken by the trial judge to determine infringement under section 27(2)(b) instead of the respondent's global assessment test, the Court of Appeal felt that in a given situation, whichever test the court is to apply, the final conclusion would likely be the same in practice.

Similarity between the marks

Next, the issue of similarity between the appellant's mark "POLO" and the Sign was considered. The appellant had submitted the following main points to contend that the trial judge was wrong to have held that the registered mark and the Sign were not similar:

- The judge was wrong to hold that the mark "POLO" was not distinctive.
- In any event, it was not relevant whether the mark was or was not "strikingly distinctive".
- The fact that the Sign included the word "pacific" did not necessarily mean that the mark and the sign were dissimilar.

The Court of Appeal rejected the appellant's arguments and held that the trial judge was not wrong to have held that the registered mark and the Sign were not similar and that the word mark "POLO" lacked distinctiveness. The appellant had not done anything either to promote or use the mark "POLO" on its own. The mark "POLO" has always been used and linked with Ralph Lauren. It also follows that the argument based on a family of trade marks with the prefix "POLO" cannot carry much weight. The word "polo" *per se* is not distinctive since it is an ordinary English word. Moreover, there is no rigid principle that the first syllable of a word mark is more important. The Court of Appeal recognised that some marks might inherently be distinctive because they consist of inventive words without any notional or allusive quality. The court gave the example of "Volvo". Where common words are included in a registered mark, the courts should be wary of granting a monopoly in their use. Any alleged distinctiveness must be acquired through use. The question of distinctiveness must be determined in the light of all the circumstances of the case. Registration does not render a mark to be distinctive. The incorporation of an entire registered word mark would not automatically lead to infringement.

Bearing in mind that "polo" is a common English word, the Court of Appeal could not see how it could be said that the sign "POLO PACIFIC" with its special font and design could be similar to the mark "POLO" except in the broadest of sense that one word is common. The court held that for the purpose of determining whether there was similarity under section 27(2)(b), one must look at the registered mark and the Sign as a whole and, bearing in mind the actual differences between the two. The Court of Appeal held that the trial judge was correct when he held that the Sign and the mark were not similar.

Likelihood of confusion

For the purpose of discussion, the Court of Appeal assumed that the Sign and the registered mark could be regarded in a sense similar and went on to deal with the issue of whether there could have been a likelihood of confusion. The question of likelihood of confusion has to be looked at globally taking into account all the circumstances including the closeness of the goods, the impression given by the marks, the possibility of imperfect recollection and the risk that the public might believe that the goods come from the same source or economically-linked sources. For instance, relevant factors include the following:

- Steps taken to differentiate goods
- Type of customer
- Pricing

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In the present case, the Court of Appeal held that there was no likelihood of confusion. It was reiterated that what was of particular significance was the fact that none of the articles produced by the appellant bore just the mark "POLO" without other additional words. The greater the exposure and use of a particular registered mark, the greater its reputation is likely to be, and therefore the greater the protection likely to be afforded to it. However, the mark "POLO" had, up to the date of the trial, never been used by the appellant as the only word mark on its products. As such, the court did not think an average consumer would be confused. Further, unlike the respondent's goods which were sold in their stores located in modest suburban shopping centres, the appellant's retail outlets were in prime shopping centres. There was also a great disparity in prices between the appellant's goods and those of the respondent, not counting the fact that the appellant's goods come in nice packaging. The appellant's target consumers, who were likely to be more sophisticated and discerning, were clearly of a different class from those of the respondent.

In the circumstances, the appeal was dismissed.

It is interesting to note the Court of Appeal's concluding view in its judgment that the question of whether there had been trade mark infringement was more "a matter of feel than science" and that the whole question of confusion was one of perception.

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General

Employment

Singapore High Court allows employer to recover bribes received by employee despite employee's conviction and disgorgement of money as penalty

Carrefour Singapore Pte Ltd v Leong Wai Kay
[2006] 4 SLR 412; [2006] SGHC 160

The Singapore High Court, in the case of *Carrefour Singapore Pte Ltd v Leong Wai Kay*, held that the fact that an employee had disgorged an amount equal to the bribes to the State pursuant to a penalty imposed on him under the Prevention of Corruption Act, did not discharge him from further liabilities in respect of civil proceedings brought by his employer to recover the bribes as a civil debt.

The plaintiff, Carrefour Singapore Pte Ltd, brought an action against the defendant, Leong Wai Kay, for the recovery of bribes as a civil debt under section 14(1) of the Prevention of Corruption Act (the "**Act**"). The question which arose was whether, pursuant to section 14(1) of the Act, the defendant, who had already paid to the State the penalty sum imposed on him following his conviction, remained liable to pay the plaintiff as a civil debt a like amount of the bribes received by him.

Prior to his conviction, the defendant was employed by the plaintiff as its facilities manager. The defendant received bribes from several companies who provided services to the plaintiff. The bribes were given in return for awarding contracts to those service providers. The defendant was duly charged for offences punishable under the Act. Upon conviction, the

defendant was sentenced to 10 months' imprisonment and, pursuant to section 13(1) of the Act, was ordered to pay a penalty of S\$292,800, being the amount of bribes received by him. The defendant paid the penalty of S\$292,800.

In his defence to the plaintiff's claim, the defendant admitted to receiving S\$292,800 as gratification corruptly. However, he argued that, having already disgorged all the money he had received, he could not remain liable to the plaintiff as it would be tantamount to making him pay twice for the same gratification. It was equally unjust since he was no longer enriched. The defendant argued that the intention of section 13(1) was not to penalise the offender twice over but to disgorge the gratification.

Sections 13(1) and 14(1) of the Act read as follows:

“13(1) Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and any such penalty shall be recoverable as a fine.

14(1) Where any gratification has, in contravention of this Act, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the defendant in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of that amount or money value.”

The High Court rejected the defendant's argument. In the court's view, the intent of section 13 is to prevent corrupt wrongdoers from keeping or benefiting from the spoils of their crimes but that does not mean that a defendant who has disgorged an amount equal to the bribes to the State pursuant to the penalty imposed on him is discharged from further liabilities in respect of civil proceedings brought by his employer under section 14(1) to recover the bribes as a civil debt. The court held that the defendant's assertion of double payment as a complete defence not only contradicted the clear language of section 14(1), it was also misconceived in that the criminal proceedings are separate and distinct from the civil proceedings which are based on a cause of action given by section 14(1). The plaintiff's right against the defendant remained unfettered by the conviction.

The court held that the charges brought against the defendant were criminal in nature and the penalty was imposed to disgorge corruptly obtained gratification, which the law would not have allowed him to retain. The penalty recoverable as a fine was deterrent rather than compensatory in nature. Plainly, the civil recovery process in section 14 is separate and distinct from the criminal process. Notably, the taking of bribes is the wrongful conduct which is the foundation of the action for a debt. As such, it is not dependent on any loss suffered by the plaintiff. From this perspective, there can be no double payment. Consequently, the court was not persuaded by the defendant's argument that the facts gave rise to a double payment and that such an assertion of double payment could translate into a valid defence to the claim.

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In the circumstances, the court held that the defendant remained liable to pay the plaintiff as his principal (in this case his employer) in like amount the bribes received by him as a civil debt, a cause of action given by section 14(1) which is separate and independent of the penalty imposed under section 13 of the Act.

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News

Initial public offering of PT Berlian Laju Tanker Tbk

PT Tunggaladhi Baskara, through its wholly-owned subsidiary, Meadowstream Limited, has made an offering of 576,062,000 shares in the capital of PT Berlian Laju Tanker Tbk (“**BLT**”). The offering, which comprised an international placement to investors, including institutional and other investors in Singapore, and an offering to the public in Singapore, raised approximately S\$184 million. BLT is the largest provider of seaborne transportation of liquid cargoes in Indonesia and one of the largest in the intra-Asian chemical tanker segment, both by tonnage and by number of ships. BLT is the first Indonesian company to be listed on the Singapore Exchange Securities Trading Limited (the “**SGX-ST**”) and to have a dual primary listing on the SGX-ST and Jakarta Stock Exchange.

Advising BLT were Allen & Gledhill Partner Leonard Ching and Associates Jane Wong and Juliana Kho.

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CapitaLand Limited issues S\$430 million convertible bonds

CapitaLand Limited (“**CapitaLand**”) has issued S\$430 million of convertible bonds due 15 November 2016. The bonds, which have been fully placed to institutional investors and accredited investors, are convertible into new ordinary shares in the capital of the company.

Advising CapitaLand were Allen & Gledhill Partner Lim Mei and Senior Associates Koh Shang Yun and Hilary Low.

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Suntec Real Estate Investment Trust raised S\$180 million to fund acquisition

Suntec Real Estate Investment Trust (“**Suntec REIT**”) has raised S\$180 million from the issue of 120 million new units to fund its acquisitions of office units in Suntec City that it does not already own. The offer, which was priced at S\$1.50 per unit, was more than two times subscribed. The units were allocated to quality institutional investors from Asia, Australia and Europe.

Advising Suntec REIT were Allen & Gledhill Partner Jerry Koh, Senior Associate Rhys Goh and Associate Teh Hoe Yue.

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Sale of shares in Jaya Holdings Ltd

Sime Darby Eastern Limited, a wholly-owned subsidiary of Sime Darby Berhad, sold its holding of approximately 29.3 per cent. in the capital of Jaya Holdings Ltd to Nautical Offshore Services for approximately S\$301.08 million.

Advising the Sime Darby Group were Allen & Gledhill Partners Andrew M. Lim and Christopher Koh, and Associates Zahedah Abdul Rashid and Leona Yuen.

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