

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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MESSAGE FROM THE EDITOR-IN-CHIEF

GREETINGS AGAIN ON BEHALF OF THE TEAM AT **LEGAL INSIGHTS!**

Although the year 2006 is now in its third month, belated good wishes for the New Year are still in order. Hence, my team and I at **Legal Insights** extend our good wishes for the year 2006 and may good health and prosperity continue to be with you.

I do believe that you would have noticed a minor change to our format. Yes, we have decided to introduce photographs of the writers at the top of their articles so that you may put a face to their names. The main aim is to give the writers the recognition that they rightfully deserve - a small reward in comparison to their valuable contributions.

This first issue for the year 2006 has a wide range of reading material on various areas of legal practice. From the Intellectual Property Section, we have two articles - one written by your humbleself (at page 5), posing a million \$\$ question to you whether IP provides good value to businesses and another by Kuek Pei Yee (at page 3) providing you with an update on the maximum protection available for some industrial designs.

We also have an article by N. Pathmavathy (at page 2) giving you a preliminary insight on the new Arbitration Act 2005 which came into force at the time of publication of this issue and an in-depth survey on the recovery of pure economic loss in the Commonwealth nations by Lam Wai Loon (at page 8). Cheah Meng Choo, from the Corporate Section looks at the mysteries of Exchange Traded Funds at page 12. Meanwhile, Jeremy Lee Pheng Yau discusses at page 14 whether the Rules of Etiquette governing the Legal Profession have the force of law. Perhaps, most interesting is the article "Can He be a She and She, a He?" (at page 7). Read it and I'll let you be the judge of whether you agree with me.

You can also read case commentaries by Ezane Chong (at page 11) on the limitation period for actions founded on contract, Sharon Tan (at page 4) on developers' rights to make unilateral changes to building plans and Trevor Jason Mark Padasian (at page 15) on what constitutes a fair and accurate report vis a vis sec. 11(1) of the Defamation Act 1957.

As always, I would like to thank all readers for your continued support, without which, we may not have the strength and drive to carry on publishing this Newsletter. On a parting note, I would like to inform all readers that we have redesigned our firm's website to serve our clients better. In this connection, I invite everyone to visit our website at www.skrine.com if you would like more information about our firm, lawyers and practice areas.



Lee Tatt Boon
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Editor-In-Chief

CONTENTS

Articles

- 2 Newsflash - The New Malaysian Arbitration Act
- 3 A Throw of Dice: Determining the Life of a Design
- 5 The Million \$\$ Question: Does IP Provide Good Value to Businesses?
- 7 Can He be a She and She, a He?
- 8 Recovering Pure Economic Loss in Negligence: The Commonwealth Positions
- 12 Good Times Fund Times?
- 14 A Matter of Courtesy

Case Commentaries

- 4 Tan Tien Seng & Chua Ah Hooi v. Grobina Sdn Bhd [2005] 7 CLJ 70 - Vacation Home or Nightmare in Disguise?
- 11 The Great Eastern Life Assurance Co. Ltd. v. Indra Janardhana Menon [2005] 4 CLJ 717 - The Federal Court Reaffirms the Law of Limitation For Actions Founded on Contract
- 15 Joceline Tan Poo Choo and Others v. V. Muthusamy [2005] 3 CLJ 165 - A Fair and Accurate Report?

2 Announcements

2 Legislation Up-Date

ANNOUNCEMENTS

The firm would like to congratulate Selvamalar Alagaratnam who has been promoted to the position of Partner with effect from 1.1.2006.

The firm also congratulates Lee Shih, one of our Legal Assistants on winning the 3rd Dato' Dr Peter Mooney oratory contest.

Meanwhile, the partners would like to extend a warm welcome to K. Uma Devi who has joined our editorial team with effect from 1.3.2006.

To provide better service to our clients, we have redesigned our website. Please visit us at www.skrine.com for more information about SKRINE and its practice.

LEGISLATION UP-DATE

The following came into force recently :-

Statutes

- Arbitration Act 2005 (Act 646)
c.i.f : 15.3.2006 [P.U.(B) 65/2006]
- Constitution (Amendment)(No. 2) Act 2005 (Act A1260)
c.i.f : 3(b) – 10 October 2003, other clauses – 19.1.2006 [P.U.(B) 14/2006]
- Finance Act 2005 (Act 644)
c.i.f : As provided in the Act
- Langkawi International Yacht Registry (Amendment) Act 2005 (Act A1249)
c.i.f : 18.1.2006 [P.U.(B) 9/2006]
- Loan (Local) (Amendment) Act 2005 (Act A1257)
c.i.f : 1.2.2006 [P.U.(B) 19/2006]
- National Heritage Act 2005 (Act 645)
c.i.f : 1.3.2006 [P.U.(B) 53/2006]

Subsidiary Legislation

- Anti-Money Laundering (Amendment of First Schedule) (No.2) Order 2005
c.i.f : 20.10.2005 [P.U.(A) 416/2005]
- Anti-Money Laundering (Amendment of Second Schedule) (No.2) Order 2005
c.i.f : 20.10.2005 [P.U.(A) 417/2005]
- Anti-Money Laundering (Invocation of Part IV)(No. 2) Order 2005
c.i.f : 20.10.2005 [P.U.(A) 418/2005]
- Pembangunan Sumber Manusia Berhad (Amendment of First Schedule) Order 2005
c.i.f : 1.1.2005 [P.U.(A) 452/2005]
- Securities Commission (Amendment of Schedule 4) Order 2006
c.i.f : 24.2.2006 [P.U.(A) 69/2006]
- The Malaysian Code on Take-Overs and Mergers (Amendment) 2006
c.i.f : 27.1.2006 [P.U.(B) 17/2006]

NEWSFLASH - THE NEW MALAYSIAN ARBITRATION ACT



A new Malaysian Arbitration Act 2005 (“the new Act”) has now come into force. The new Act was passed by Parliament and gazetted on 31.12.2005. It was brought into force on 15.3.2006

The new Act will supersede the Arbitration Act 1952 (“the old Act”) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. The aim of the new Act is to bring Malaysia in line with modern international practice, in keeping with the prevalence of arbitration as the preferred method of resolving international disputes.

The aim of the new Act is to bring Malaysia in line with modern international practice ...

To that end, the new Act is based on the United Nations Commission on International Trade Law Arbitration (UNCITRAL) Model Law but is not identical thereto.

Malaysia has lagged behind the region in arbitral reform. It has been recognised for many years that the old Act is outmoded and unsuitable for the effective resolution of modern commercial disputes. The Malaysian arbitral fraternity has been actively pushing for reform for more than a decade now. The new Act is a welcome sign that Malaysian law is striving to keep pace with global developments.

Changes made to the arbitral regime include sec. 18 of the new Act which sets out expressly paramount arbitral principles, namely the right of parties to be treated with equality and for each party to have a fair and reasonable opportunity to present its case. Others include the waiver of the right to object to any non-compliance in the event such objections are not made within the prescribed time frames, the competence of the arbitral tribunal to rule upon its own jurisdiction and the power of the arbitral tribunal to award security for costs. The new Act codifies many aspects of arbitral law which were previously governed by common law principles e.g. the point of commencement of an arbitration.

Some matters that do not appear to have been addressed by the new Act include provisions for stay of court proceedings and interim measures of protection in aid of foreign proceedings as well as enforcement of international awards issued in Malaysia. Further, it is a cause of concern that sec. 42 of the new Act appears to allow the raising of any question of law ‘arising out of an award’ without any guidelines to filter frivolous applications designed merely to delay proceedings and enforcement.

The old Act will continue to apply to arbitrations commenced before the coming into force of the new Act. Given the pace of some arbitrations, and the resultant court actions, the old Act will continue to be referred to for at least a decade. Any detailed assessment of the merits of the new Act will have to await the outcome of cases which have yet to arise.

The course the Malaysian legislature has taken in implementing arbitral reform has been driven by the desire to keep Malaysia in tune with the international community. The Model Law has been the basis for reform in many countries in the world including all countries in the Asia – Pacific region that have undertaken reform. The new Act will hopefully demonstrate the national commitment to arbitration as an effective mode of dispute resolution and may well be the catalyst to promote Malaysia as the preferred venue in the region for international commercial arbitrations.

N. PATHMAVATHY (npv@skrine.com)



A THROW OF DICE: DETERMINING THE LIFE OF A DESIGN

An update on the maximum protection available to designs registered in Malaysia in relation to UK originating designs. Do they attract a maximum renewal of up to 3 or 5 periods?

Shachihata Inc. & 19 Ors v. Registrar of Industrial Designs & The Intellectual Property Corporation of Malaysia (unreported)

The Plaintiffs are the owners of industrial designs registered under the Registered Designs Act 1949 of the United Kingdom.

During the period from 1.3.2004 to 25.5.2005, the Plaintiffs' UK Registered Designs fell due for renewal in the United Kingdom. During the same period of time, some of the Plaintiffs applied for an extension of the period of registration of the Registered Designs for a further period of 5 years in Malaysia ("Extension Applications").

The protection accorded to industrial designs in Malaysia would generally be governed by the Industrial Designs Act 1996 ("the Act") and the Industrial Designs Regulations 1999 ("the Regulations"), both of which came into force on 1.9.1999.

However, prior to the enactment of the Act, industrial designs in Malaysia were protected by three statutes, namely the United Kingdom Designs (Protection) Act 1949 in West Malaysia, the United Kingdom Designs (Protection) Ordinance in Sabah and the Designs (United Kingdom) Ordinance in Sarawak (collectively, "the Repealed Laws").

The offices of the Registrar of Industrial Designs rejected the Plaintiffs' Extension Applications and informed the relevant Plaintiffs that the Registered Designs could only be extended for two terms (i.e. the 2nd and 3rd periods of registration). They further said that there are no provisions in the Act for extension of the period of registration for the fourth and fifth periods.

The position taken by the Registrar of Industrial Designs affected the rights of several proprietors of industrial designs in Malaysia. Messrs. Skrine decided to represent the affected parties on a pro bono basis to seek a declaration from the Court. The Plaintiffs filed an Originating Summons dated 15.7.2005 in the High Court of Malaya at Kuala Lumpur, naming the Registrar of Industrial Designs and the Intellectual Property Corporation of Malaysia as Defendants, seeking an order that, inter alia, the Extension Applications under the Act be allowed. (*See final paragraph to understand the reason for the urgency*)

PLAINTIFFS' MAIN ARGUMENTS

In order to ascertain what the period of validity is under the Act, one would need to refer to the provisions of the United Kingdom Registered Designs Act of 1949 ("the UK Act").

Position Before 1.8.1989 : Up to 15 Years

Prior to the amendment effected by the Copyright, Designs and Patents Act 1988 of United Kingdom ("CDPA"), the period of validity of UK Registered Designs was 5 years from the date of registration, and this period could be extended for two further periods of 5 years each, thus, giving the registered proprietor a maximum period of protection of 15 years.

Position After 1.8.1989 (amendment under CDPA): Up to 25 years

The amendment under the CDPA effectively increases the maximum period of validity of UK Registered Designs from the existing 15 years to 25 years with regards to designs applied for registration on or after 1.8.1989. In brief, the proprietors of registered designs

who enjoyed rights in Malaysia under the UK Act had a corresponding effect to their designs in Malaysia in the following manner:-

- (a) in respect of designs applied for registration before 1.8.1989, the maximum period of validity of the registered designs is 15 years; and
- (b) in respect of designs applied for registration on or after 1.8.1989, the maximum period of validity of the registered designs is 25 years.

... the Act and the Regulations were not intended to take away the rights granted under the Repealed Laws but to preserve those rights

The Position under the Malaysian Act: 15 or 25 years?

The Plaintiffs' main point of contention was that the 15-year protection prescribed under sec. 25 of the Act does not affect nor supersede the 25-year protection granted to the UK Registered Designs under the repealed laws. Sec. 49(2)(c) expressly stated that "*designs protected under the Repealed Laws shall continue in force and have the like effect as if it had been effected under the The Act.*"

Sec. 50(2) of the Act also explicitly recognises the maximum period of validity accorded to certificates of registration granted under the UK Act. This is further reinforced by reading Item 4 of the ID Form 2 together with note (c) in the Regulations.

Taking into consideration sec. 30 of the Interpretation Acts 1948 and 1967, it was further submitted that that the general purpose behind the enactment of the Act and the Regulations was for the preservation and improvement of the rights of the owners of industrial designs. Thus, the Act and Regulations were not intended to take away the rights granted under the Repealed Laws but to preserve those rights. Reading sec. 50(2) of the Act together with sec. 30(1) of the Interpretation Acts, it would appear that the entitlement of the maximum period of registration of 25 years under the UK Act should not be curtailed by the Act and Regulations.

THE DECISION

The Honourable Judge who agreed with the Plaintiffs on all counts, granted an order in the terms applied for by the Plaintiffs. The grounds of judgment are not available at the time of writing.

IMPACT OF THE CASE

The effect of the outcome of the proceedings would be that proprietors would be entitled to fourth and fifth periods of protection, provided that the corresponding extensions have been obtained in the United Kingdom.

VACATION HOME OR NIGHTMARE IN DISGUISE?



Case note on *Tan Tien Seng & Chua Ah Hooi v. Grobina Sdn Bhd* [2005] 7 CLJ 70 on the limits imposed on developers' rights to make unilateral changes

The case of *Tan Tien Seng* is significant to both property purchasers and property developers as it limits the circumstances in which a developer may make changes to or deviations from building plans without the consent of the purchaser.

BACKGROUND

The Purchasers entered into a Sale and Purchase Agreement (“SPA”) to purchase a penthouse unit of a condominium project in Malacca from the Developer. The unit, to be located on the highest floor of the building, was intended by the Purchasers to be a vacation home.

Before entering into the SPA, the Purchasers informed the Developer’s representative that they wanted to purchase the unit which was to be constructed on the 16th floor i.e. the highest floor of the building. The Storey Plan in the SPA showed that the condominium project would consist of 16 floors.

When the condominium was completed, the Purchasers were informed to inspect and take vacant possession of the unit. It was only then that they discovered that the Developer had built an additional unit above the Purchasers’ unit. In other words, an additional 17th floor had been constructed. The Purchasers objected to this deviation from the building plan which had been effected without their prior written consent. Upon the failure of the Developer to rectify the deviation, the Purchasers terminated the SPA on the ground that there was a fundamental breach of an essential term of the contract by the Developer in failing to deliver a penthouse unit to them.

The Purchasers sought a declaration from the Court that the Developer had breached the SPA and that the Purchasers had effectively rescinded the SPA *ab initio*. The Purchasers also sought various other reliefs, including a refund of the purchase price, repayment of expenses incurred in purchasing the unit as well as damages, interest and costs.

The Developer denied that it had committed a breach of contract. It argued that the unit delivered was the particular unit purchased by the Purchasers. The unit was fully completed and was neither flawed nor uninhabitable. The 17th floor only occupied a part of the roof of the Purchasers’ unit. As such, there was no fundamental breach or total failure of consideration.

The Developer contended that the discrepancies between the completed building, which had an additional floor, and the plan were required and approved by the Appropriate Authority. The Developer relied on Clause 12 of the SPA which read as follows:-

“The said Parcel ... shall be constructed ... in accordance with the description set out in the Fourth Schedule hereto and in accordance with the plans approved by the Appropriate Authority which description and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made without the consent in writing of the Purchaser except such as may be required by the Appropriate Authority...” (Emphasis added)

* Clause 12 of the SPA is a standard wording adopted from clause 14 of Schedules G & H of the Housing Development (Control and Licensing) Regulations 1989

Although the Developer also contended that the construction of the 17th floor arose as a result of structural difficulties, it did not call its civil and structural engineer, architect or any officer from the Appropriate Authority to testify as to the necessity of the additional floor.

DECISION

The High Court Judge gave judgment in favour of the Plaintiffs and granted the reliefs sought by them. The High Court Judge held as follows:-

- a) The Housing Development (Control and Licensing) Act 1966 (“the Act”) and the Housing Development (Control and Licensing) Regulations 1989 are intended to accord protection to housing purchasers (**S.E.A. Housing Corporation Sdn Bhd v. Lee Poh Choo** [1982] 2 MLJ 31);
- b) As the Act is a piece of social legislation, its provisions should be given a liberal and purposive interpretation i.e. to promote the general legislative purpose underlying the provisions (**Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals**) [2004] 2 CLJ 617);
- c) To come within the ambit of changes or deviations which are “required by the Appropriate Authority” as contemplated under Clause 12, it is essential that the initiative for such changes or deviations must originate from or be required by such authority. Changes and deviations initiated by a Developer or its engineer or architect do not fall within the ambit of that provision even though approval of the Appropriate Authority is sought and obtained;
- d) The Developer’s failure to call any officers from the Appropriate Authority to testify that construction of the additional floor was a deviation or change required by the Appropriate Authority gave rise to an adverse inference under sec. 114(g) of the Evidence Act 1950 that such evidence, if produced, would be unfavourable to the Developer;
- e) The intention of the parties at the time the SPA was executed was that the Purchasers’ unit was to be located on the highest floor and that there should not be any other floor above it. This was expressly provided in Schedules 1 and 4 of the SPA which, by virtue of Clause 30, formed an essential part of the SPA. The Developer’s failure to fulfil this term in its entirety constituted a fundamental breach which entitled the Purchasers to rescind the SPA under sec. 40 of the Contracts Act 1950.

SIGNIFICANCE

Tan Tien Seng v. Grobina Resorts Sdn Bhd is the first reported case where the purchaser of a penthouse unit filed a claim against the Developer for failure to deliver a penthouse unit situated on the highest floor of the building. It is also noteworthy as it establishes that where an SPA permits a developer to make changes to or deviations from the building plans if so required by the Appropriate Authority, a developer who initiates such changes or deviations unilaterally cannot rely on this provision even if they are approved by the Appropriate Authority.

THE MILLION \$\$ QUESTION : DOES IP PROVIDE GOOD VALUE TO BUSINESSES?

Complete with brief case situations and illustrations, Lee Tatt Boon explains how IP can bring value to a business



The answer is obvious to many businesses, Intellectual Property or IP does provide good value. Unfortunately, there are many businesses that are skeptical or simply ignorant of the value and benefit that IP could provide to their organisations. The latter situation is evident from businesses which fail to invest money in the protection of IP for reasons ranging from being too costly to not knowing what IP really is.

THE REASONS WHY IP BRINGS VALUE TO A BUSINESS

As a starting point, there are generally four reasons why IP brings value to businesses and they are as follows:-

- 1) keeping business competitors at bay;
- 2) as a source of direct income;
- 3) enhancing export opportunities;
- 4) enhancing the business worth in the eye of investors & bankers.

THE EXPLANATIONS AND CASE STUDIES

1. Keeping business competitors at bay

In what manner does IP help to keep competitors at bay? The answer lies in the nature of protection accorded to IP rights. Almost every IP right gives the owner a way of excluding others from doing something that interferes with or competes against a vital part of the business.

By way of an example, if the IP right is in respect of a patent relating to a product, the owner has the exclusive right to make, import, offer for sale, sell or use the product. If the patent is for a process, the owner has the exclusive right to use the process as well as to make, import, sell or use the product obtained directly by that process.

In the event the IP right is in respect of a registered trademark, the owner will have the exclusive right to use the trademark in relation to goods or services registered. And if the IP right is in respect of a copyright, the owner will have the exclusive right to control:-

- reproduction of the work in any material form;
- communication of the work to the public;
- public performance of the work;
- distribution of the work to the public by way of sale or otherwise;
- commercial rental of the work.

In circumstances when an IP right is infringed, the infringers could be stopped resulting in the owner's exclusivity or monopoly to exploit the IP right being preserved. The owners of IP rights and their businesses enjoy a competitive advantage in the market and considerable legal clout to stifle copycats.

An illustration of how IP helps to keep business competitors at bay is the case of Texas Instruments (TI) a renown US semiconductor company. [Source: "Investors learn to appreciate the value of IP" by Joff Wild" – IP Value 2005 - published by Intellectual Asset Management].

- In the mid 1980s, TI was on the verge of collapse. The future was bleak; the company's market share was dwindling rapidly; profits were also declining; and TI was facing stiff competition from a number of Japanese and Korean companies.

- Luckily, TI had a patent portfolio and when a new CEO was appointed, he decided to focus on TI's patent portfolio and it was discovered that many of their rivals' products were using TI's patent rights and no permission had been obtained.
- TI then started a campaign against a string of competitors to assert TI's IP rights and having established itself as an aggressive enforcer and by winning cases in court, TI recovered from the brink of collapse.
- The key to TI's recovery was the strategic way in which it looked at IP, in particular patents – securing protection, ensuring its competitors did not infringe TI's IP rights and if they did, to immediately assert its rights, even if it meant going to court. TI's patents helped TI to keep the competitors at bay and indeed kept TI in existence.

2. As a Source of Direct Income

The objective behind any business is to make money. Therefore, it is not surprising that making money from existing business assets is on the agenda of any business enterprise. It is not disputed that IP is an asset but how does IP help to generate income for businesses? IP can generate income for businesses in a number of ways:-

- by licensing someone to manufacture a patented product.
- by leasing the commercial identity of the business to another organisation to market products under the business's brand name.
- by franchising others to manufacture or sell the business's goods and services.

As an analogy, licensing IP rights is like renting out a piece of real estate. The business retains the title to the property while collecting rent on a periodic basis in the form of royalties.

IBM is a good illustration of how businesses make money using their IP rights. [Source: "Investors learn to appreciate the value of IP" by Joff Wild" – IP Value 2005 - published by Intellectual Asset Management].

- IBM is without doubt, one of the world's most prolific applicant for patents in the US as well as worldwide.
- IBM has a policy of registering the results of its R & D as patents.
- IBM's early strategy was to regard its patents as a defensive barrier to prevent rivals encroaching on its territory i.e. its patents were meant to keep away the competitors
- During the 1990s, things changed. Profits were down and the business was not growing. This led to a rethinking of the old strategy.
- IBM's new policy was not to view patents merely as a defensive barrier but to license technologies it developed that were not in competition with its core business.
- Because of this change, IBM generates an estimated return of over US\$1.5 billion a year from licensing which finds its way to IBM's bottom line.

IP PROVIDES GOOD VALUE TO BUSINESSES IF THEY ARE PROPERLY IDENTIFIED, PROTECTED AND MANAGED

continued from page 5

The above illustration is but one of many examples which show how IP helps companies and businesses to generate income. Some businesses may question IBM as being a good illustration because IBM is such a big company with deep pockets which the majority of other businesses do not have.

However, it must be agreed that IBM, like any other business, started small and grew over the years. Making money from IP assets is big business in the US and for the record, patent licensing revenues have increased from US\$4 billion in 1980 to US130 billion in 2000 [*Source: Intellectual Asset Management – Licensing in the Board Room 2005 – “To sell or not to sell” by James E. Malackowski*]

3. Enhancing export opportunities

Businesses have to continue growing to sustain profitability and their existence. Although growth of a business can be achieved within the country where the business is operating, it can sometimes be constrained by various factors such as the population size or saturation in the particular category of goods or services that the business is keen to pursue. In such circumstances, the best way to move forward is to export the goods or services. Many businesses have done this to improve the profit margin.

Knowing that export opportunities are vital to business growth and development, what role does IP play in such a case? The role of IP cannot be underestimated in such a situation. Indeed, if a business were to venture to an overseas market, the warning will be that the business should not do so if its products will not be protected by the IP laws in the countries where the business will be exported to. IP rights are territorial in nature and if such rights are not adequately protected, the business will face difficulties in stopping the infringers or copycats in the foreign markets.

However, if the business were to protect its IP rights in the foreign markets, the situation will be different. For instance, if the business's products enjoy patent protection in the foreign countries, the business will have various options to export its innovative products that may not be available otherwise.

- The business can manufacture the products domestically and export the protected product directly or through intermediaries, knowing that no other company will be able to legally produce, sell or export the same products in the selected market without permission from the business owner.
- The business can license its invention to a foreign firm that will manufacture the product locally in exchange for royalties or lump sum licence fees.
- The business can set up a joint venture with other firms for manufacturing and commercialisation of the product in the selected foreign markets.

An illustration of how IP can help a smaller establishment by exporting its products overseas is by doing a case study on a Malaysian company, Watertec Sdn Bhd.

- The company is in the water tap technology.
- Its technology is simple, effective and protected by way of a patent in Malaysia.

- Its technology is extremely useful in developing countries because the product is effective and affordable.
- The company was persuaded to register its technology in most of the developing countries and exercised the first option i.e. to manufacture the patented product domestically and export overseas. The company is now successfully exporting its patented products to Sri Lanka, India, Cambodia, Thailand, Vietnam, Indonesia, Laos, Brunei, Philippines, China and Bangladesh.

The same beneficial effects would also be present if the IP right concerned is a brand or trademark of the business. If such a brand or trademark is registered in foreign countries:-

- the business will be able to maximize product differentiation, advertising and marketing.
- the business will be able to enhance recognition of its products in international markets.
- the business will be able to establish a direct link with the foreign customers.

From the above, it will be safe to conclude that expanding the protection or exploitation of an IP right into foreign markets will result in:-

- the business having a higher revenue as it is now able to capture a bigger market.
- the business generating better customer loyalty.
- the business acquiring a better image internationally.

4. Enhancing the business worth in the eyes of investors and bankers

For any business to grow, there is sometimes a need to attract investors to participate in the business and its ventures as well as to persuade bankers to loan money to the business for expansion. In this regard, the role of IP cannot be questioned. IP, if legally protected, is a valuable business asset which may significantly:-

- improve the market share of the business.
- raise the profit margin of the business.
- raise the value of the business.

How does IP really enhance the worth of a business? The answer lies in the nature of IP rights. Since IP is a form of property, it can be monetised by way of sale, licence, collateral or security for financing and seeking equity from investors and venture capitalists.

It is for these reasons that IP should be looked upon not just as a legal asset but also as a financial instrument.

CONCLUDING REMARKS

There cannot be any doubt that IP provides good value to businesses if the IP rights are properly identified, protected and managed. The significance of IP to businesses cannot be demonstrated better than the given case studies of IBM and Texas Instruments Inc. If these companies believe in the value of IP, the message is clear that all businesses should also do so.

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CAN HE BE A SHE AND SHE, A HE?



Can the Malaysian Courts declare a man to be a woman or a woman to be a man?

INTRODUCTION

Although sex-change operations may have been the stuff of books and Hollywood movies (“Myra Beckinridge” (1970) with Raquel Welch, “Boys Don’t Cry” (2000) with the Oscar-winning Hilary Swank and “Transamerica” (2005) with the Oscar-nominated Felicity Huffman of *Desperate Housewives*), the same cannot be said for the law journals of Malaysia. All this changed in 2005, when, like buses after a long wait, two decisions of the High Court of Malaya arising from sex-change operations, or ‘gender re-assignment surgery’ as it is otherwise called, were reported, namely :

- **Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara** [2005] 1 CLJ 622, a decision of the Ipoh High Court (“the Ipoh Case”); and
- **J-G v. Pengarah Jabatan Pendaftaran Negara** [2005] 4 CLJ 710, a decision of the Kuala Lumpur High Court (“the KL Case”).

... transsexuals should be given an opportunity to lead normal lives and change their gender status after undergoing gender reassignment surgery

The applicant in the Ipoh Case is a female-to-male transsexual, whilst that in the KL Case is a male-to-female transsexual. Both cases involved an application for a declaration that (a) the applicant had changed his or her gender and (b) the National Registration Department (“NRD”) be directed to make changes to the applicant’s identity card to reflect the current gender. The applicant in the Ipoh Case sought a further order that a similar amendment be made to her birth certificate.

The learned judges in each case came to decisions which were diametrically opposite to one another: the applicant in the (earlier) Ipoh Case was unsuccessful while the applicant in the KL Case succeeded in obtaining an order which declared that he is now a she.

THE IPOH CASE

In support of her application, the applicant affirmed an affidavit stating that she was born with two sexual organs. However, she did not produce any medical evidence to support this claim.

The statements in her affidavit were contradicted by records produced by the Registrar General which showed that her parents had notified the authorities that the applicant was a female at the time when they reported her birth and applied for her identity card. Further, the applicant had declared herself as a female when she applied for a new identity card.

The learned judge, Singham J, noted that the practice adopted by the Registrar-General to determine the gender of a child is to apply exclusively the biological criteria, namely the chromosomal, gonadal and genital sex as informed by the parents or guardian of the child. He then held (amongst others) that:

1. The birth register could be amended pursuant to sec. 27 of the Births and Deaths Registration Act 1957 (“1957 Act”) only if an error had been made in the initial registration of the birth. Similarly, an identity card could be amended pursuant to sec. 6(2)(o) of the National Registration Act 1959 only if an error had been made in an entry therein.
2. He was satisfied by the evidence produced by the Registrar General that there was no error in the sex of the applicant as initially entered in her birth certificate and identity card.
3. The fact that it becomes evident later that a person’s “psychological sex” is at variance with the biological constituents cannot be a basis to invoke sec. 27 of the 1957 Act so as to imply that the initial entry was a factual error.
4. The reassignment surgery did not affect the status of the applicant’s gender at the time the entries were made in the relevant documents. Therefore the Registrar General did not have the discretion or power to amend the documents and the Court could not compel him to do so.

Singham J acknowledged that transsexuals should be given an opportunity to lead normal lives and change their gender status after undergoing gender reassignment surgery. However, as he was of the view that the relevant statutory provisions could not be construed in a manner which enables the Court to grant relief to such individuals, it was a matter for which the necessary legislation had to be introduced.

... the psychological factor may become “an overriding consideration” as the individual develops

The approach adopted by Singham J broadly followed the reasoning adopted by the English Courts in the landmark cases of **Corbette v. Corbette** [1970] 1 All ER 33 and **Bellinger v. Bellinger** [2003] 2 All ER 593.

THE KL CASE

The application in this case was supported by evidence from three medical practitioners that after undergoing gender reassignment surgery, the applicant did not suffer any mental or psychological disability but in fact, lived and behaved as a female and had the physique and psychological thinking of one.

The learned judge, James Foong J (as he then was) acknowledged that Singham J in the Ipoh Case had followed the traditional approach laid down in **Corbett v. Corbett** which gave greater emphasis to biological factors by adopting the chromosomal, gonadal and genital tests than to psychological factors.

James Foong J noted that some judges in the UK cases who did not agree with the traditional approach had opined that the psychological factor may become “an overriding consideration” as the individual develops. He also observed that the Australian courts and the European Court of Justice have adopted a more liberal approach and treated biological factors as entirely secondary to psychological ones.

RECOVERING PURE ECONOMIC LOSS IN NEGLIGENCE: THE CO

Lam Wai Loon presents the second instalment of what is now a three-part survey of the development of pure

INTRODUCTION

At the beginning of the first article in this series, it was suggested that the law of Tort, and in particular the tort of negligence, reflects men's expectations of their society, and that changing social morals had perhaps fuelled the rise of the tort of negligence.

It will be recalled that the first part of this overview ended at the unanimous decision of the House of Lords in **Murphy v. Brentwood District Council** [1991] 1 AC 398. It was also stated that this would be the last instalment. Space constraints and the Federal Court's recent decision in **Highland Towers** mean that it is now the second of three instalments. The third and final article will deal with the development of Malaysian law on this topic.

To recap, the successful Plaintiff not only must show that the loss suffered is reasonably foreseeable, but also the existence of a "special relationship" (such as existed in **Hedley Byrne**) between himself and the Defendant.

This instalment will survey the manner in which various Commonwealth jurisdictions have approached the vexed question: "to what extent, if at all, can economic loss be recovered in negligence?" examining positions adopted by the Courts in Canada, Australia, New Zealand and Singapore. Whilst the test in **Murphy** appears firmly entrenched in England, it has not found acceptance by the Courts in these Commonwealth nations.

CANADA

At the same time the English courts were retreating from the **Anns** two-staged test, the Supreme Court of Canada was embracing it and using it as the general framework in approaching the duty of care issue in various contexts, including pure economic loss.

It is now settled Canadian law that the existence of a duty of care in negligence is to be determined through the application of the **Anns** two-staged test, with slight modification, adopted by the Supreme Court of Canada in **City of Kamloops v. Nielsen** (1984) 10 DLR (4th) 641 as follows (Wilson J at pages 662-663)

- "1) is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to the [plaintiff]? If so,
- 2) are there any considerations which ought to negative or limit
 - (a) the scope of the duty and
 - (b) the class of person to whom it is owed or
 - (c) the damages to which a breach of it may give rise?"

Similar to the **Anns** two-staged test, the first stage is to determine whether a prima facie duty is established. If so, then the Court would go on to the second stage to consider whether there are any policy concerns that circumscribe the duty. Only after the policy concerns are canvassed can a final determination of the duty of care issue be made.

The **Anns/Kamloops** test was re-affirmed by the Supreme Court of Canada in **Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.** (1995) 121 DLR (4th) 193, and again in **Hercules Management Ltd v. Ernst & Young** (1997) 146 DLR (4th) 577 (see LaForest J at page 586).

AUSTRALIA

The Australian courts have also refused to follow the **Murphy** test. Neither are they applying the **Anns** two-staged test. It would appear that the Australian Courts are attempting to craft an independent doctrine relating to the recovery of economic loss in negligence; so as to allow themselves to do justice in individual cases.

As such, they have eschewed not only the application of the English doctrines but also any attempt at pronouncing a rigid formula to be applied in such cases.

The leading case in Australia would appear to be the High Court (the highest appellate court in Australia) case of **Woolcock Street Investments Pty Ltd v. CDG Pty Ltd** (formerly **Cardno & Davies Australia Pty Ltd**) (2004) HCA 16. Here, the appellant, a subsequent purchaser of a latently defective commercial building, claimed against the consulting engineers, CDG Pty Ltd, for pure economic loss suffered as a consequence of negligent design or negligent supervision during construction of the building.

In the course of preparing the design of the foundations of a warehouse and office building in Townsville, CDG Pty Ltd obtained a quotation for the carrying out of a geotechnical report on the site. The company developing the site refused to pay for such a report and so construction proceeded without conducting any geotechnical testing on the sub-soil. Some years following completion, Woolcock purchased the building. The contract of sale contained no warranty that the building was free from defects, nor any assignment to Woolcock of any rights of action which the vendor might have had against the original builders and designers. More than a year later the building began to show signs of substantial structural distress due to the inadequacy of the foundations.

Woolcock alleged that CDG Pty Ltd and its employee were negligent on the basis of having breached their duty to take reasonable care in designing the foundations, causing Woolcock to suffer loss and damage. The claim was in the nature of "pure economic loss", namely, the cost of demolishing and reconstructing the affected sections of the building, loss of rent during demolition and reconstruction, and diminution in value.

By a majority of 6:1, the High Court of Australia found that CDG Pty Ltd did not owe a duty of care to Woolcock. It was held that the degree of the Plaintiff's vulnerability, (i.e. Woolcock's ability, or lack thereof, to protect itself from the consequences of CDG Pty Ltd's want of reasonable care) was a critical issue in this case in deciding whether CDG Pty Ltd owed a duty of care to avoid negligently causing pure economic loss to Woolcock.

It was also found that a purchaser of commercial property like Woolcock, as opposed to a purchaser of residential property who is usually more vulnerable, has several means of protecting itself against latent defects, e.g. through contractual warranties, or expert inspection. The High Court of Australia found that Woolcock had failed to do so and therefore was not "vulnerable".

McHugh J (one of the majority) went on to reiterate that the principles he had enunciated in the previous High Court decision in **Perre v. Apand** (1999) 198 CLR 180 should be considered in determining whether a duty exists in "all" cases of liability for pure economic loss, namely, reasonable foreseeability of loss,



COMMONWEALTH POSITIONS

economic loss

indeterminacy of liability, autonomy of the individual, vulnerability to risk, knowledge of the risk and its magnitude, together with other policies and principles which are relevant to the context of the case. This would appear to be as close as the Australian Courts have come to laying down a formula.

NEW ZEALAND

In New Zealand, the courts have also declined to follow the **Murphy** test. In **Invercargill CC v. Hamlin** [1994] 3 N.Z.L.R. 513, the Plaintiff who was the first owner of the defective house claimed against the council the expenses incurred by him to rectify damage to the house for negligently approving the foundations of the house. Applying the **Anns** two-staged test, the Court of Appeal, by majority found in favour of the Plaintiff. It was held that there was sufficient proximity between the council and the Plaintiff because the council had assumed responsibility for the inspection and the Plaintiff had relied on the council. The Court of Appeal's refusal to follow the **Murphy** test was essentially on grounds that the social and economic conditions in New Zealand were very different from those in England. The New Zealand Court of Appeal held:-

"It was settled law that councils were liable to house owners and subsequent owners for defects caused or contributed to by building inspectors' negligence. Although in **Murphy v. Brentwood District Council** [1991] 1 AC 398 there was insufficient proximity between the Council and purchaser for liability for economic loss arising from faulty foundations, in New Zealand there was a relationship incorporating a duty of care because of the degree of reliance by house owners on councils to ensure compliance with building codes and full recognition of that reliance by local authorities."

The Judicial Committee of the Privy Council upheld the majority decision of the Court of Appeal. Their Lordships held that the Court of Appeal's perception of the prevailing circumstances in New Zealand justified its taking a different view of the law from that taken in **Murphy**.

SINGAPORE

In Singapore, the courts have taken a similar stance and declined to follow the **Murphy** test. In the landmark case of **RSP Architects Planners & Engineers v. Ocean Front Pte Ltd** [1996] 1 S.L.R. 113, the Court of Appeal applied the **Anns** two-staged test and held that the developer of a condominium was liable in tort for pure economic losses suffered by the management corporation of the development.

In the subsequent case of **RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v. Management Corporation Strata Title Plan No. 1075** [1999] 2 S.L.R. 449, another action was brought by a management corporation against the architects of a condominium development for economic loss arising from poor design. The Court of Appeal re-affirmed its decision in **Ocean Front** and found the architects liable for pure economic loss.

5 years later, the decision in **Ocean Front** was again before the Court of Appeal for its consideration in the case of **Man b and W Diesel S E Asia Pte Ltd v. PT Bumi International Tankers** [2004] 2 S.L.R. 300. Here, the respondent company entered into a contract with a shipbuilder ("MSE") whereby MSE agreed to build an oil tanker for the respondent company. It was expressly provided in the contract that MSE shall be solely responsible for any defect that could arise in

respect of the vessel. The contract also contained certain clauses limiting MSE's liability to the respondent for such defects. It was also contemplated under the contract that MSE would be sourcing the engine from a third party. Pursuant thereto, MSE entered into a sub-contract with the first appellant ("MBS"), a Singapore company, which sold and serviced engines manufactured by its UK parent company ("MBUK"), the second appellant. There was no contract between the respondent and the first or, second appellant. The engine delivered to MSE pursuant to the sub-contract, started giving trouble within a few weeks of delivery of the completed vessel to the respondent and, thereafter, the problems persisted until the engine finally broke down.

The respondent commenced an action in tort against the first and second appellants on the ground that they had breached their duty of care which they owed to the respondent and claimed for losses in respect of the resultant commercial and business losses, i.e. pure economic losses. At the High Court, the trial judge held that both the first and second appellants owed a duty of care to the respondent, relying on the Court of Appeal decisions in **Ocean Front and Management Corporation Strata Title Plan No. 1075**.

On appeal to the Court of Appeal, the High Court's decision was reversed and a more restrictive approach was adopted to limit tortious liability for pure economic loss. The Court of Appeal took the view that the application of **Ocean Front** should be limited, since it was only that very special factual matrix (i.e. the finding that the relationship between the management corporation and the developer was as close to a contract as could reasonably be) that a remedy in tort was made available to the management corporation, who would otherwise be without any remedy. The Court of Appeal further warned that "extreme caution must be exercised in extending" the decision in **Ocean Front** to new situations, particularly to a scenario which is essentially contractual such as that in the case.

After considering the terms of the main contract between MSE and the respondent, the Court of Appeal found that the respondent had committed themselves to looking only to MSE for redress and therefore, to place the first or the second appellant under a duty of care towards the respondent would run counter to the specific arrangements made between the respondent and MSE.

In effect, the Singaporean courts have sounded a cautionary note against expanding the bounds of a duty of care to avoid causing pure economic loss in negligence especially to a case which is largely contractual. The contractual structure put in place by the parties was recognised as a relevant factor in deciding whether a prima facie duty of care is precluded in a particular case.

CONCLUSION

The Commonwealth jurisdictions have consistently declined to follow **Murphy v. Brentwood** and have gone further in applying and adapting the **Anns** test to suit their perceived needs in the context of their individual societies and in the case of Australia, formulated their own test. Therefore, it will not surprise the reader that the development of the Malaysian position, which will be dealt with in the next and concluding installment, has indeed been a vexed process.

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CAN HE BE A SHE AND SHE, A HE? (CONT.)

continued from page 7

The learned judge held that when the determination of a person's sex is based on medical evidence, the Courts should play its part and grant relief where justice is due. The judge, being satisfied with the medical evidence that the applicant had the necessary behavioral, physical and most importantly, the psychological attributes of a female, granted both orders sought by the applicant.

CONCLUSIONS

The significant differences between the two cases appear to be as follows:-

1. The judge in the Ipoh Case adopted the traditional approach which gave weight to the biological factors existing at the point in time when the relevant entries were made. The judge took the view that the relevant statutory provisions conferred powers on the Registrar to rectify the records only if errors were made at the time when the entries were made;
2. The judge in the KL Case appears to have considered biological factors as well as psychological factors and favoured the more liberal approach by giving greater emphasis to the latter; and
3. The medical evidence tendered by the applicant in the KL Case was sufficient to satisfy the judge that the applicant had the necessary attributes, in particular the psychological thinking, of a female. The applicant in the Ipoh Case did not produce any medical evidence. In view of the evidence produced by the Registrar General, the contents of her affidavit were insufficient to satisfy the judge that an error had been made at the time the entries were recorded.

... the British Parliament can do
anything except make a man into a
woman and vice versa

Appeals have been filed in both cases. Until such time as the issues are authoritatively determined by the Court of Appeal or the Federal Court, any other High Court judge who is called upon to determine the same issues may choose to follow the decision in either case.

It has been said that the British Parliament can do anything except make a man into a woman and vice versa. Based on the decision in the KL Case, the Malaysian Courts can, in the spirit of "*Malaysia Boleh*" do what the British Parliament is unable to, that is, change a man into a woman (and vice versa) through the exercise of its declaratory powers.

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THE URGENCY TO PROTECT A DESIGN

continued from page 3

The Regulations, as they currently appear, do not provide for the fees applicable for the fourth and fifth terms respectively. However, the Registrar's office has indicated that amendments would likely be made to the Regulations to provide for the payment of fees for the fourth and fifth terms of renewal soon.

As it stands, the designs which form the subject matter of these proceedings would be exempted from the payment of fees for the fourth period of renewal. It should be noted, however, that fees may be payable for the fifth period if and when the Regulations are amended to provide for the same.

... proprietors would be entitled to fourth
and fifth periods of protection provided
... the corresponding extensions have
been obtained in the United Kingdom

The Urgency: Why it was Important to Apply for Extension of the 4th Period of Validity

In respect of UK Registered Designs applied for registration before 1.8.1989, their maximum period of validity of 15 years would have expired at the latest on 31.7.2004 in the United Kingdom. In accordance with sec. 50(2) of the Act, the corresponding period of protection in Malaysia would also have expired. The position is, therefore, clear in respect of this group of UK Registered Designs.

Difficulties, however, arose with regards to the UK Registered Designs applied for registration after 1.8.1989. Under the UK Act, the first of these designs fell due for renewal in the United Kingdom for a 4th period of validity on or shortly after 1.8.2004. The majority of these designs also fell due for extension in Malaysia for the first time under the Industrial Designs Act 1996 regime.

The Registrar of Industrial Designs took the view that there were no provisions in the Act that provided for the extension of the period of registration for the fourth and fifth periods. Accordingly, the Registrar was inclined to reject applications for extension pertaining to UK Registered Designs that fell due for renewal on or after 1.8.2004.

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SOME AMUSING FACTS ...

- A surfer once sued another surfer for "stealing his wave". The case was thrown out because the Court was unable to put a price on "pain and suffering" endured by the surfer watching someone else ride "his wave".
- A man filed a lawsuit against his doctor because he survived longer than what the doctor had predicted.

Source: www.amusingfacts.com/facts/legal

THE FEDERAL COURT REAFFIRMS THE LAW OF LIMITATION FOR ACTIONS FOUNDED ON CONTRACT

The Great Eastern Life Assurance Co. Ltd. v. Indra Janardhana Menon [2005] 4 CLJ 717



BACKGROUND

Mr. N.V.J. Menon (“Menon”), now deceased, was an agent of the appellant insurance company (“Great Eastern”). Menon passed away on 26.11.2002 and his daughter, the respondent was substituted as a party in the proceedings. As an agent, Menon earned commissions from insurance policies he sold for the appellant as well as overriding commissions from policies sold by agents introduced by him to the appellant. One such agent was Indrani Subramaniam (“Indrani”). In 1986, Indrani procured a group insurance scheme for the appellant and it is in respect of the overriding commissions payable that Menon made a claim on the appellant, who denied liability.

Menon filed his claim on 8.4.1993 in the High Court which dismissed his claim on several grounds. One of those grounds was that part of Menon’s claim was time-barred. Menon took his case to the Court of Appeal.

... time did not begin to run as and when each overriding commission payment became due ... but was postponed to some date in the future

...

DECISION OF THE COURT OF APPEAL

The Court of Appeal allowed Menon’s appeal, reversing the decision of the High Court. In its decision, the Court of Appeal stated that although Menon’s claim arose more than six (6) years prior to the filing of his suit, it was not time-barred under sec. 6(1)(a) of the Limitation Act 1953 (“the Act”). Sec. 6(1)(a) of the Act provides as follows:-

“Save as hereinafter provided actions founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

Menon’s claim was not time-barred, according to the Court of Appeal, because the appellant’s obligation to pay overriding commissions which would accrue from time to time when an insurance agent’s subordinate agents sold insurance policies, is one continuous obligation that arose from the sale of such policies. Accordingly, time did not begin to run as and when each overriding commission payment became due to Menon upon the sale of insurance policies by his subordinate agents, but was postponed to some date in the future. The date identified by the Court of Appeal was 16.7.1990, when the appellant formally notified Menon that it would not be making any overriding commission payments to him in respect of group insurance schemes sold by Indrani. As such, when Menon filed his suit in April 1993, he was well within the six year limitation period.

In arriving at this conclusion, the Court of Appeal relied on the case of **Loh Wai Lian v. S.E.A. Park Housing Corporation Sdn Bhd** [1987], 2 MLJ, a Privy Council decision. That case dealt with a contract between a housing developer and purchaser under the Housing Developer (Control and Licensing) Rules 1970 (“those Rules”).

Those Rules provide that there should be specific dates for delivery of houses to purchasers and that developers should indemnify the purchasers for any losses suffered in the event that there has been a delay in delivery of the houses for occupation. The loss suffered shall be calculated at a specified rate from the date when possession ought to have been given, until the date when possession was actually given to the purchaser.

While the High Court and Federal Court held that the purchaser’s claim was time barred, the Privy Council stated that since the parties had agreed to a single aggregate sum which could not be calculated until the house was completed and handed over, time did not run until that date. This, the Privy Council held, amounted to a contractual modification or alteration of the general law relating to the computation of limitation in cases of simple contracts. By the agreement, the breach had been shifted from the date the house was to be completed to a date when the house was actually handed over.

Applying the rationale in **Loh Wai Lian**, the Court of Appeal held that Menon’s agency agreement with the appellant was modified so that the date of breach shifted from:-

- i) the date when the appellant breached its obligation to pay overriding commission to Menon in respect of group insurance schemes sold by Indrani in 1986, which obligation would arise the moment the appellant received the cash premiums due on the sale of those schemes in 1986; to
- ii) some date in the future, namely 16.7.1990, when the appellant wrote to Menon informing him that it would not be paying him the overriding commissions claimed.

The Court of Appeal also came to an alternative finding that so long as the parties remain in a contractual relationship no period of limitation exists. The appellant sought and obtained leave to appeal to the Federal Court.

... the Federal Court could not find any provision to show that the parties had expressed any intention to modify or alter the contracts so as to shift the time of breach to some date in the future

ISSUES TO BE DETERMINED BY THE FEDERAL COURT

Leave to appeal was granted by the Federal Court to pose the following two questions of law:-

- a) whether disparate obligations to pay from time to time arising upon the occurrence/fulfilment of contingent events, can be construed as a single continuing obligation so as to displace the effect of sec.6(1)(a) of the Act; and
- b) whether the provisions of the Act cease to apply to breach of contract, where the parties remain in contractual relationship.

continued on page 13

GOOD TIMES FUND TIMES ?

Cheah Meng Choo explains the mysteries of Exchange Traded Funds in the first of a two-part article



AN INTRODUCTION TO ETF: A 60 SECOND GUIDE

Puzzled by what an Exchange Traded Fund (“ETF”) is? Heard about so-called index-linked funds but don’t understand how it works? Well, if you are still puzzled or confused with the mechanics of an ETF, you are not alone! Welcome aboard as we invite you to join the club in learning and understanding the concept of ETFs in Malaysia.

Although a relatively new concept here in Malaysia, ETFs have been around since the early 1990s. In a nutshell, an ETF is an open-ended investment fund that comprises a portfolio of securities, equities, bonds or other commodities. ETFs are listed and traded on Bursa Malaysia Securities Berhad (“Bursa Malaysia”). More importantly, the main feature which distinguishes ETFs from other collective investment schemes such as that of unit trust funds (“UTF”) or real estate investment trust funds (“REIT”) is that ETFs are designed to track the performance of an index in a particular market or sector. Hence, ETFs are also commonly referred to as index-linked funds. ETFs are just about the simplest kind of funds there can be as all that the fund manager needs to do is to mimic the index which the ETF is tracking by making sure that the ETF has exactly the same proportions of components as the index which it is tracking.

The introduction of ETFs adds variety to the type of investments that are available on Bursa Malaysia. The release of the Guidelines on Exchange Traded Funds by the Securities Commission on 21.6.2005 (“ETF Guidelines”) establishes a regulatory framework for the introduction of ETFs and to safeguard the interest of investors. Investing in ETFs allows investors to enjoy diversified exposure to a portfolio of securities in specific markets or sectors without the cost and hassle of buying all the securities individually. Just like trading in specific stocks, the ETF investors may buy and sell this fund through the broker at any time during a trading day.

THE MECHANICS OF AN ETF

To understand what and how an ETF tracks, it is important to know what an index is. An index is a representative number which allows investors to understand the condition of the subject matter in question. Bursa Malaysia is responsible for computing the indices for each of the main sectors traded. The method in which these indices are computed may vary, some are computed on simple average closing price while others are based on a weighted average price of the component stocks. There are at least 14 different indices calculated electronically by Bursa Malaysia, but the most commonly tracked index by most investment funds is the Kuala Lumpur Composite Index (“KLCI”). So for example, a technology index would indicate the health of the technology market which is determined by the performance of technology companies.

As an index-linked fund, the ETF will mimic the performance of an index as close as possible. In order to do this, the ETF must hold the same type of components in the same proportions as the weightings of the index. In that sense, the fund manager may buy a number of stocks proportionate to the amount of stocks of which the index holds to mimic the movement of the index. Quite often, ETFs are exposed to economic, political, social, legal or other risks of a specific sector or market related to the index which the ETF is tracking. These risks inevitably affect the performance of the index. Ideally, the fund manager will try to ensure that the portfolio

components as closely as possible and that the fund stays as fully invested as possible. In reality, it may be difficult to fully replicate most indices, especially those that are based on a large number of underlying components. The disparity between the performance of the ETF and the performance of the underlying index i.e. the measure of the deviation between the ETF’s total return and the total return of the index is known as ‘tracking error’.

TRACKING ERRORS: UNDER THE LENS

Tracking errors may arise due to various factors such as failure of the ETF’s tracking strategy, impact of transaction fees and expenses incurred to the fund or even corporate actions relating to the underlying securities of the ETF. A well-run index will generally have a small tracking error. There are a number of factors (which are not intended to be exhaustive) that may contribute to tracking error. Where an ETF does not fully replicate the index, the tracking error may be greater. Factors that contribute to such deviation may be incorrect weighting of stocks in the portfolio, poor portfolio representation of benchmark or poor stock combination.

Tracking errors may also be related to changes in the composition of the index. The fund manager has the discretion to change the components of the index to give a better reflection of the market conditions. In most cases, stocks that are considered the current market leaders will be included but this may change from time to time. Using the KLCI as an example, Bursa Malaysia will review the KLCI and decide whether to release or replace any companies as component stocks. For example, if a particular company falls into the least active annual trading volume, it may be removed as a component stock underlying the index. The objective of the KLCI is to reflect the changes in the national economy as well as evolution of the corporate sector.

Expenditure incurred by the ETF such as transaction costs associated with trading in securities also affects the ability of the ETF to replicate the performance of the index. Ideally, the entire fund would be invested in the components of the underlying index. This however is not possible as the fund incurs expenses towards the day to day management of the ETF or transaction fees payable at the time of purchase or sale of securities. These expenses will have to be met out of the fund which means that the fund will invest less than what it has collected.

This in turn affects the returns as the fund will receive returns only on the amount which is invested. Hence, the lower the expenditure incurred by the fund, the lower will be the tracking error. Other risk factors such as legal, political, economical and social conditions which could have a material adverse effect on the economy may also affect the performance of the index and in turn affect the trading price of the ETF, its total returns and its ability to meet its objectives. Depending on the performance of the components underlying the ETF, the ETF may either outperform or underperform the index.

WHY ETF?

The ETF being an index-linked fund offers “market level” performance which is aimed to consistently match the market of a specific index no more and no less whether in advancing or declining markets. Investors are able to replicate gains and losses of the basket

SETTING THE LIMITS

of securities which the ETF is designed to track without the expense of buying all the underlying securities.

Traded at affordable levels, ETFs require minimum investment from investors but at the same time offers diversified exposure to a wide array of securities. ETFs are highly liquid investments as they are traded on Bursa Malaysia and may have market makers who act as counter-parties in trade execution. Furthermore, trading information of ETFs is easily accessible on a real-time basis. The underlying index and constituent securities of ETF are transparent and price quotations are disseminated during trading hours. More importantly, ETFs are particularly attractive for those who do not have adequate time or resources to closely monitor business and financial developments of individual companies. The returns may not be as high but the risk is certainly lower too.

WHAT SHOULD INVESTORS LOOK OUT FOR?

Before investing in an ETF, prospective investors should carefully consider all information relating to the fund, such as the investment objectives, tracking strategy and the index which it tracks. Such information is usually available on the ETF's website and promotional materials. Investors are also advised to seek professional advice from their relevant advisers about their particular circumstances before investing. Investors should also take note of the ETF's dividend policy as some ETFs may or may not distribute dividends to its investors. They should also be aware that there are certain fees and charges, such as brokerage, clearing fee and stamp duty, which are to be borne by them. Last but not least, investors should also obtain all relevant information about the management company.

ETF, THE WAY FORWARD?

The first Malaysian ETF known as the Asian Bond Fund (ABF) Malaysia Bond Index Fund ("ABF Fund") was launched on 18.7.2005. The ABF Fund is listed on Bursa Malaysia and is designed for investors who seek an index-based approach to investing in a portfolio of government and quasi-government debt securities. The ABF Fund closely replicates the returns of the iBoxx® ABF Malaysia Bond Index. The launch of the ABF Fund marks another important milestone in the development of the Malaysian bond market in contributing to the growth of Malaysia's economy.

Quite apart from ETFs, there are several alternative collective investment schemes available to potential investors such as REITs, UTFs and close-end funds. As an ETF is designed to track a designated index, investors will reap profits if that index goes up. The corresponding drawback is that they will incur losses if there is a downturn in the sector being tracked. Although investors are unlikely to make exceptional gains by investing in ETFs, risk in such investments are significantly lower. If steady growth over the long haul with less risk is what one desires, an ETF is an interesting option to consider. In the second part of this article, we will explore the ETF Guidelines to provide the reader with some insight into the legal elements involved in the establishment and management of ETFs.

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continued from page 11

DECISION OF THE FEDERAL COURT

The Federal Court answered both questions in the negative.

The Federal Court held that Menon's cause of action arose only when the appellant breached its obligation to pay and that obligation arose when the appellant received the premiums from the group insurance schemes sold by Indrani in 1986. Calculating the six year time-bar from 1986 when Menon's cause of action arose until 1993, when his suit was filed, clearly Menon's claim had become time-barred.

... the general principle of law, that time
begins to run from breach, applied

Whilst the Federal Court recognised that it is open to parties to regulate or modify their rights in the event of breach in any way they think fit, the Federal Court could not find any provision in any of the contracts between Menon and the appellant to show that the parties had expressed any intention to modify or alter the contracts so as to shift the time of breach to some date in the future. In the absence of such modification or alteration, the general principle of law, that time begins to run from breach, applied.

The Federal Court went on to state that the appellant's obligations to pay overriding commissions are disparate obligations that arise at different times and with each breach there arises a complete and distinct cause of action in itself, and time begins to run immediately upon every successive breach. Such breaches occurring at different times cannot be merged into one continuing obligation.

It is pertinent to note that Menon's entitlement to overriding commissions is governed by a Circular forming part of his contract with the appellant which only came into effect on 1.1.1987. As no group schemes were procured by Indrani from 1.1.1987 onwards, the Federal Court found that Menon's claim which relates to the sale of group insurance schemes by Indrani in 1986, was not maintainable as no such entitlement existed prior to 1.1.1987.

COMMENTARY

In reversing the Court of Appeal's decision the Federal Court has essentially reaffirmed the established principles governing the law of limitation for actions founded on a contract.

The net effect of Court of Appeal's decision was to throw open the question of when a cause of action accrues in a case based on contract because it was no longer a simple question of computing six years from the date of breach. Such a decision would appear to erode the general position so that the date of breach is no longer the definitive date. By holding that Menon's claim was time-barred the Federal Court has effectively restored certainty to the law governing limitation of actions.

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A MATTER OF COURTESY



Whether the rules of etiquette governing the legal profession have the force of law

In the case of **Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd** [2005] 4 CLJ 767 (“the Sri Minal”), the Court of Appeal had occasion to consider conflicting views expressed by the High Court on an issue of etiquette of the legal profession. In the Sri Minal, the plaintiff, Mobil Oil Malaysia Sdn Bhd, had obtained judgment in default of appearance and of defence against the defendant. The defendant, having failed in its attempt to set aside the judgment of the Sessions Court, appealed to the High Court. The High Court dismissed the appeal, and the defendant appealed to the Court of Appeal.

The defendant contended, amongst other grounds, that the solicitors for the plaintiff failed to furnish notice to the defendant prior to the entry of the judgment in default; in breach of Rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978 (“Rule 56”), hence rendering the judgment obtained irregular.

Rule 56 provides that an advocate and solicitor shall not enter judgment by default unless he has given his opponent a notice of such intention and seven days have lapsed after the delivery of such notice. The plaintiff/respondent conceded that no such notice was given. The issue before the Court of Appeal was therefore whether a litigant, a client, should be made to suffer the consequences of his solicitors’ omission to adhere to private rules designed to regulate the professional practice, etiquette, conduct and discipline of advocates and solicitors.

The basis on which the defendant appealed upon is not novel. As far back as 1988, Zakaria Yatim J (as his Lordship then was), in **Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors** [1988] 1 MLJ 33 and **PL Construction Sdn Bhd v. Abdullah bin Said** [1989] 1 MLJ 60, decided that rule 56 remains only a rule of conduct and does not have the effect of regulating the procedure of legal proceedings. Wan Yahya J, in **Latchman Singh & Sons v. Tan Kian** [1991] 1 CLJ 128 decided in a similar fashion; as did Faiza Tamby Chik J in **Kewangan Bersatu Berhad v. Yap Ah Kit & Ors** [1999] 1 CLJ 429.

... (the) object (of the rules) is to ensure that advocates and solicitors conduct their affairs in an honorable and fair manner ...

It was then the prevailing view that breaches of the Legal Profession rules remained a matter for the Disciplinary Board. However, in 2000, the High Court produced a series of judgments to the opposite effect. It was decided that once an advocate and solicitor has been shown to have breached Rule 56 then notwithstanding the fact that he has not breached any of the rules of court (the Rules of the High Court, 1980 and Rules of the Subordinate Court, 1980, respectively), the judgment is liable to be set aside by the Court pursuant to its inherent jurisdiction to prevent injustice or to prevent an abuse of the process of court (see **RHB Finance Bhd v. CN Corporate Network (M) Sdn Bhd** [2000] 2 CLJ 251). In **Wan Mohd Sofian bin Wan Md Saad v. MBF Finance Bhd** [2000] 1 CLJ 492, it was opined that the rules of etiquette governing the legal profession

ought to be followed as its object is to ensure that advocates and solicitors conduct their affairs in an honourable and fair manner befitting the practice of law. Failure to observe the requirements of Rule 56 would render the judgment irregular for unconscionable and improper conduct (see **Hasbullah Chan & Associates Architect v. Rahika Development Sdn Bhd** [2000] 7 CLJ 109).

... the rules of etiquette ... have no force of law to override or govern the procedure of the courts

This confusion arose because the foregoing decisions are judgments of courts of concurrent jurisdiction i.e. of the same level; the confusion which the Court of Appeal in Sri Minal finally resolved. In the Court of Appeal, James Foong JCA decided that the Legal Profession (Practice and Etiquette) Rules is, as declared in sec. 77(1) of the Legal Profession Act 1976, only for the purpose of regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors and hence is an in-house regulation of members of the Bar. Preferring the views expressed 17 years earlier by Zakaria Yatim J in **Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors** [1988] 1 MLJ 33, his Lordship pointed out that only the advocate and solicitor in breach will be liable to be disciplined, under the said rules, and not the litigant. In other words, the rules of etiquette of the legal profession have no force of law to override or govern the procedure of the courts.

James Foong JCA explained, “*For example, in the Subordinate Courts, the rules regulating and prescribing the procedure are the Subordinate Courts Rules 1980. These are effected under the powers conferred upon the Rules Committee by virtue of sec. 17 of the Courts of Judicature Act. No other rules except those made under any written law which expressly decree that it should be applied to the Subordinate Courts can have the force of law to change, add on, alter or amend the Subordinate Courts Rules 1980; as otherwise will result in the adulteration of the rules of the court. The requirement of tendering notice to the other side before default judgment can be requested is only one of the many rules in the Legal Profession (Practice and Etiquette) Rules. The courts cannot accept the demand of its adherence over and or besides its own.*”

His Lordship expressed concern that otherwise, “*... other in-house rules, though having the effect of law governing its members in an organization, may demand for its compliance before any order of the courts can be granted...*”.

The decision in Sri Minal should not be construed to mean that lawyers can now act without due regard for courtesy and etiquette when dealing with their brethren. As the law stands, a judgment obtained in default can be set aside in appropriate circumstances. The errant lawyer, however, will still run the risk of being disciplined. Regardless of this *Sword of Damocles*, lawyers must remember that it is adherence to these rules that makes the profession an honourable one.

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A FAIR AND ACCURATE REPORT?



Federal Court rules on what constitutes a “fair and accurate” report of legal proceedings

INTRODUCTION

The inaugural issue of LEGAL INSIGHTS (Issue 1/2004) carried a report on the Court of Appeal’s decision in **Joceline Tan Poh Choo & Ors v. V Muthusamy** [2003] 3 CLJ 705 (“**Joceline**”), a libel action. This decision has been overturned by the Federal Court. A summary of these decisions follows.

BRIEF FACTS

The **Joceline** case arose out of an article in the New Straits Times (“NST”) which reported on a case in the Penang High Court (“the conspiracy action”).

The article stated that two individuals, including the respondent, had conspired to defraud and cheat the plaintiff in the conspiracy action of his land. The respondent - a lawyer and former State Assemblyman - commenced legal proceedings against the reporter, the editor and the publisher of NST for libel. He alleged that the headline and parts of the article meant and were understood to mean that he was a cheat and a dishonest person and not fit to practise law and to hold public office.

The appellants in **Joceline** averred in their defence that the article was based on evidence given in open court as well as the amended statement of claim filed in the conspiracy action. They raised the statutory defence of sec. 11(1) of the Defamation Act, 1957 (“the Act”), the relevant parts of which reads as follows:

“A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected...” [Emphasis added.]

DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

The High Court found that the words in the article were defamatory and held that the appellants were not entitled to rely on sec. 11(1) of the Act as part of the report was based on the amended statement of claim and not what had taken place in the open court. The High Court awarded general damages and aggravated damages to the respondent.

The Court of Appeal upheld the High Court’s decision but reduced the amount of general damages and set aside the award for aggravated damages. It affirmed that the publication of extracts of pleadings which had not been read out in open court was not protected by absolute privilege under sec. 11(1) of the Act.

DECISION OF THE FEDERAL COURT

The appellants, dissatisfied with the Court of Appeal’s decision, appealed to the Federal Court on the following question:-

“Whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings.”

The Federal Court, by a unanimous decision, reversed the concurrent findings of law of the Court of Appeal and the High Court. It held that “the essence of sec. 11(1) of the Act is whether the report published is a fair and accurate and contemporaneous report of the proceedings”. The Court further held that a report that satisfies these three criteria enjoys absolute privilege against an action for defamation.

The apex court ruled that a report of the proceedings publicly heard before the High Court may include an extract of the pleadings and it is not necessary that the pleadings should first be read out in open court before they can be published. In other words, the Court answered the first part of the question referred to them in the affirmative and the second part, in the negative.

“...the essence of sec. 11(1) of the Act is whether the report published is a fair and accurate and contemporaneous report of the proceedings”

COMMENTARY

In the course of its judgment, the Federal Court reviewed a number of Malaysian, English, Scottish and Canadian cases. It also referred to leading academic works, including *Carter-Ruck on Libel and Slander* and *Gatley on Libel and Slander*.

Some of the authorities cited, such as **Stern v. Piper & Ors** [1997] QB 123 and **Gatley**, were those relied upon by the Court of Appeal. Others, such as **Cowie v. Robinson** [1928] 3 DLR 77, **Cunningham v. The Scotsman Publications Ltd** [1987] SLT 698, **Home Office v. Harman** [1982] 1 All ER 532 and **Harper v. Provincial Newspapers Ltd** [1937] SLT 462 support the Federal Court’s determination that a report may include extracts of pleadings that are not read out in open court.

Although the Court arrived at its decision after “(h)aving considered the authorities and the arguments”, their Lordships have done little more than re-iterate the words set out in sec. 11(1). Regrettably, the learned judges did not provide the reasons for their preference of one line of authorities over the other or distinguish the authorities relied on by the Court of Appeal.

SIGNIFICANCE OF THE CASE

The Federal Court’s decision in **Joceline** is of significance to the media who publish reports on court proceedings. It lays down unequivocally (without explaining why) the position that a report on court proceedings, publicly heard, enjoys absolute privilege from defamation actions under sec. 11(1) of the Act, if it is “a fair and accurate and contemporaneous report of the proceedings”. The additional requirement postulated by the Court of Appeal that the pleadings included in the report must have also been read out in open court is now irrelevant.

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