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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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MESSAGE FROM THE EDITOR-IN-CHIEF

I TAKE GREAT PLEASURE TO BRING YOU THE INAUGURAL ISSUE OF OUR NEWSLETTER, LEGAL INSIGHTS.

Due to work commitments and time constraints, it has taken a while for us at Skrine to pull together our talents and resources to launch our newsletter. I dare say that by judging from the looks of this issue it's been well worth the wait.

The purpose of our newsletter is to educate you on complex legal areas and update you on the latest developments to the law. We hope to provide insights on new and amended legislation and case commentaries in a format that is clear and easy to understand with the least amount of legal jargon possible. Useful legal tips will be provided in our articles that will help you in your respective work industries.

Among the topics of focus in this issue are, what you should do if your company is raided, the effects of the demutualisation of the KLSE, and the effectiveness of a retirement age clause in an employment contract. Two of our contributors have also given case commentaries on how employers can be personally liable if their companies fail to pay their employees' EPF and the danger of reporting court proceedings in the media.

My gratitude goes to the editorial team, as well as to all the writers and reviewers for having made this first issue a reality. They have graciously volunteered their talents, expertise and time and have done a terrific job as evidenced by the articles published in this very first issue. I sincerely hope that the editorial team will continue to fulfill its responsibilities in the most effective and positive manner with the single objective of keeping you informed of your legal obligations and exposing you to your legal rights.

On a more humble note, now would be a good time to take complete responsibility and apologise for any errors and mistakes that leaked into this inaugural issue. We will certainly endeavour to improve and develop our newsletter to serve you better. I hope you find our newsletter insightful and informative. If you have any queries or need assistance or clarification on the contents of our newsletter, do feel free to contact us at et@skrine.com.

Lee Tatt Boon
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Editor-In-Chief

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ANNOUNCEMENTS

The Firm is pleased to announce that its Consultant, Tun Mohamed Dzaiddin Haji Abdullah was recently appointed the Chairman of the Kuala Lumpur Stock Exchange Bhd as well as the Special Commission to Enhance the Operations and Management of the Royal Malaysian Police (Police Royal Commission).

As of 1 January 2004, Lim Koon Huan, Eow Khean Fatt, Kamraj Nayagam and Ashok Kumar Mahadev Ranai have become partners in Skrine, whilst the following Legal Assistants have been promoted to the position of Senior Legal Assistant at the Firm.

- George Chong
- Kwan Kin Sum
- Rajita Suntharalingam
- Suaran Singh Sidhu
- Mahaletchumi Balakrishnan
- Pang Lee Moi
- Kua Lay Theng
- Claudia Cheah Pek Yee
- Sharon Barbosa

Meanwhile, the Partners at Skrine would like to extend a warm welcome to Ms. Choo Suit Mae who joins the Firm as Partner with effect from 1 February 2004.

Mr. Lee Tatt Boon, a Senior Partner was made the Vice Chairman of the Malaysian Chapter of the International Chamber of Commerce (ICC Malaysia) when it was inaugurated on 16 February 2004.

LEGISLATION UP-DATE

The following statutes came into force recently :-

- Demutualisation (Kuala Lumpur Stock Exchange) Act 2003 [Act 632]
  c.i.f : 2 January 2004 [P.U.(B) 6/2004]
- Securities Industry (Amendment) Act 2003 [A1218]
  c.i.f : 5 January 2004 [P.U.(B) 3/2004]
- Securities Commission (Amendment) Act 2003 [A1217]
  c.i.f : 5 January 2004 [P.U.(B) 2/2004]
- Securities Industry (Central Depositories) (Amendment) Act 2003 [A1216]
  c.i.f : 5 January 2004 [P.U.(B) 4/2004]
- Futures Industry(Amendment) Act 2003 [A1215]
  c.i.f : 5 January 2004 [P.U.(B) 5/2004]
- Islamic Banking (Amendment) Act 2003 [A1214]
  c.i.f : 1 January 2004
- Central Bank of Malaysia (Amendment) Act 2003 [A1213]
  c.i.f : 1 January 2004
- Takaful (Amendment) Act 2003 [A1212]
  c.i.f : 1 January 2004
- Banking and Financial Institutions (Amendment) Act 2003 [A1211]
  c.i.f : 1 January 2004 (sec. 9) and 15 January 2004 (remaining sections) [P.U.(B) 40/2004]

IT'S A RAID!

What to do when your company is raided under an Anton Piller or Search Order?

One of the legal tools available in the fight against piracy, counterfeit goods and the infringement of intellectual property rights is the 'Anton Piller Order' ("the Order") (from the case of **Anton Piller KG v. Manufacturing Processes Ltd and Others** [1976] 1 Ch 55) or APO, which is also sometimes referred to as the 'Search Order'.

The Order is principally obtained to enable owners of intellectual property rights to preserve evidence prior to trial. The Order permits an applicant and his solicitors to enter and inspect the respondent's premises, and seize or copy any information relevant to the alleged infringing activities.

As the Order aims to ensure that evidence is not destroyed, the respondent will not be given notice of the application. This "surprise" or "ambush" aspect of the Order is crucial to the effectiveness of the remedy, and the extent of incriminating evidence that is subsequently collected and preserved. The application for the Order may be combined with an interlocutory injunction against infringement, and a Mareva Injunction (i.e. "Freezing Order") ordering the retention of property pending the outcome of litigation.

However, due to the draconian nature of the remedy, it is common to find respondents being subjected to abuse. The over zealousness of some applicants in seizing all forms of available documents, and putting the respondents out of business, sometimes results in the non-observance of safeguards to the respondents' rights. It is imperative that the reader understands that the Order is an Order of the Court, and like any other Court Order, non-compliance is tantamount to contempt of Court resulting in imprisonment or fine to the applicant. Therefore, it is important to bear in mind that the applicant's conduct is strictly confined to what is stated in the Order.

The article aims to educate the reader on the legal safeguards required for the execution of the Order.

Safeguards

1. The Order is to be served by a solicitor, who will at the same time supply a copy of all the relevant Court papers (including the application, Court Order and affidavits), to the respondent.
2. The solicitor is required to read out and explain to the respondent, the exact terms of the Order in clear everyday language. This must be done before entry into the respondent's premises can be effected. Entry cannot be made by force.
3. The solicitor is required to advise the respondent to seek immediate legal advice and that he has a reasonable time to obtain legal counsel. The respondent is entitled to call his lawyer immediately, and insist that the search is not carried out until his lawyer is in attendance.
4. The Order will specify the premises that is to be raided. The applicant is not permitted to enter any neighbouring premises to conduct the search.
5. The applicant is required to have a separate solicitor to supervise the execution of the Order. It is the duty of this solicitor to ensure compliance with the terms of the Order.
6. The applicant has to ensure that the number of persons accompanying him is specified in the Order, to enable the respondent to identify them.

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DEMUTUALISATION OF THE KUALA LUMPUR STOCK EXCHANGE

Skrine discusses the Demutualisation of the KLSE under the Demutualisation (Kuala Lumpur Stock Exchange) Act, 2003

INTRODUCTION

Among the various initiatives recommended by the Securities Commission ("SC") under the Capital Markets Masterplan ("CMCP") introduced in February 2001 is the demutualisation and listing of the Malaysian stock exchange to enable it to respond to changing market dynamics and pursue commercially-oriented strategies in an effective and timely manner (Strategic Initiative 3.2).

The first stage of this initiative was achieved on 5th January 2004 with the enforcement of the Demutualisation (Kuala Lumpur Stock Exchange) Act 2003 ("Demutualisation Act"). At the same time, amendments were made to the Securities Industries Act 1983, the Securities Commission Act 1993, the Securities Industry (Central Depositories) Act 1991 and the Future Industries Act 1993 to address issues that arise from the demutualisation and the eventual listing of the Kuala Lumpur Stock Exchange ("KLSE").

THE DEMUTUALISATION PROCESS

Demutualisation entails the conversion of the KLSE from a non-profit company limited by guarantee of its members into a public company limited by shares.

Demutualisation of the KLSE is facilitated by the provisions of the Demutualisation Act which *inter alia* permits the KLSE, with the prior written approval of the Minister of Finance ("Minister"), to convert its legal status from a company limited by guarantee to a public company limited by shares on a date to be determined by the Minister (sec. 3). The conversion took effect vide Gazette Notification P.U.(B) 9/2004 whereby the Minister appointed 5th January 2004 as the effective date of the conversion.

The Demutualisation Act also provides that upon the conversion of the KLSE –

- any member who is recorded on the register of members of the KLSE shall cease to be a member thereof immediately before the conversion date;
- the KLSE shall issue voting shares to such persons and in such proportions as specified by the Minister on the recommendation of the SC (sec. 4);
- the Minister may designate a wholly-owned subsidiary of the KLSE as the "transferee company" to whom such assets, rights, obligations and liabilities of the KLSE as may be specified by the Minister, are to be vested (sections 8 and 9); and
- each existing member company of the KLSE shall be recognised as a "participating organisation" by the "transferee

In furtherance of the powers under sec. 4, the Minister has authorised the KLSE to issue five hundred million fully-paid voting shares of RM0.50 each as mentioned in the next column.

Shareholders	Percentage (%)
Capital Market Development Fund	30
Minister of Finance, Inc	30
Licensed Stockbroking Companies	30
Eligible Remisiers	10

In the exercise of his powers under sections 8 and 9, the Minister has designated the Malaysia Securities Exchange Berhad ("MSEB") as the "transferee company" and has vested therein the stock exchange business of the KLSE with effect from 5th January 2004 (Gazette Notifications P.U.(B) 8/2004 and P.U.(A) 16/2004). At the same time, the KLSE has been approved as an "exchange holding company" pursuant to sec. 11D of the Securities Industry Act 1983.

Demutualisation entails the conversion of the KLSE from a non-profit company limited by guarantee of its members into a public company limited by shares.

It is interesting to note that under the Rules of the MSEB, which took effect from 5th January 2004, access to trading facilities of the stock exchange will henceforth be accorded to corporations which are registered as "participating organisations" (Chapter 3, Rules of the MSEB). This represents a radical departure from the previous regime where trading access was restricted exclusively to members of the KLSE.

CONCLUSION

It can be seen from the foregoing that apart from facilitating the demutualisation of the KLSE, the Demutualisation Act has enabled the KLSE to be transformed into a holding company with subsidiaries that operate securities, financial and derivative exchanges and ancillary businesses such as a central depository for securities, and clearing houses for securities and derivatives.

We shall, in the next issue of LEGAL INSIGHTS, examine the safeguards put in place by the Malaysian legislators to deal with the concerns as to the ability of the MSEB to exercise effective oversight over its holding company upon the listing of the KLSE on the MSEB and to resolve conflicts of interest that may arise from such a relationship between the parties.

KOK CHEE KHEONG (kck@skrine.com)

Work Till You Drop?

Siva Kumar addresses the retirement age issue in employment contracts.

Employment contracts often make no mention of a retirement age. This omission is normally caused by the employer's and employee's failure to give thought to the latter's retirement. Eventually time does pass, and unsuspecting employers find themselves in the awkward position of being unable to terminate their employee's contract on the basis of retirement due to the absence of a retirement age clause.

It is well settled that when there exist a 'retirement age' clause in a contract of employment, an employee's contract may be terminated upon him reaching the specified retirement age. The problem arises where the contract is silent on this issue. In such an instance, whether or not the employee can claim to be entitled to work for as long as he wants to, or until he can work no longer, is dependent on the facts surrounding his employment. Several possible situations could arise such as;

a) where an employee has received a pre-contract promise that he could work 'as long as he liked'; or
b) where there is no 'retirement age' clause in the contract of employment; or
c) where the employee continues working in the company after his 'retirement age'.

PRE-CONTRACT PROMISE

In the case of **Dr. Satwant Singh v Hospital Assunta** [1998] 4 CLJ 47, the employee commenced employment with the hospital on a fixed term contract for a duration of three years in 1963. His contract was renewed for a further period of three years in 1967, and finally in 1970 he was issued with a permanent employment contract. None of these written contracts contained a retirement clause. The employee claimed that when he left the government service to join the hospital in 1963, he was promised by one 'Mother Mary' that he could work for the hospital for '*as long as he liked*'. He said that this promise, made when he was 30 years old, induced him to leave his government job and join the hospital. At the time he joined the hospital, there was no retirement age policy. The hospital did however subsequently introduce a retirement age policy of 55 years. As a result, when Dr. Satwant reached the age of 55, the hospital notified him in writing that he had reached the retirement age and that his contract was being extended for a further period of five years. Dr. Satwant then responded in writing to the hospital that he was not subject to a retirement age. In 1993, at the age of 60, Dr. Satwant was retired by the hospital.

Consequently, Dr. Satwant made a claim for 'unjust dismissal' under sec. 20 of the Industrial Relations Act 1967. The Industrial Court dismissed his claim. However, on an application to the High Court for judicial review, the Industrial Court's award was quashed and Dr. Satwant was reinstated. The High Court held that there was a collateral contract which existed at the time Dr. Satwant joined the hospital due to the promise made by Mother Mary. The High Court also held that the variation which was attempted to be introduced in 1988 was not valid and a violation of Dr Satwant's right to livelihood which is guaranteed by the Federal Constitution. The Court further held that at the age of 60 (and his then age of 65), it was not unreasonable for Dr. Satwant to continue being active in his profession as a consultant at the hospital. Hospital Assunta's appeal to the Court of Appeal was dismissed. It should be noted that Mother Mary was never called as a witness to prove Dr. Satwant's pre-contract promise and that the issue of proof was not addressed by the High Court in its judgment.

ABSENCE OF A RETIREMENT AGE CLAUSE

In the absence of a 'retirement age' clause, the law was unsettled for a while as to whether it would be justified for an employee to be required to retire. However the Court of Appeal case of **Colgate Palmolive (M) Sdn. Bhd. v Yap Kok Foong** [2001] 3 CLJ 9 has removed some doubt in this area. In this case, the company was unable to rely on a contractual provision that stipulated that the employee ought to retire at 55 years. This was because the Court refused to accept a unilateral variation of the contract of employment by the introduction of a retirement age policy after the employee had joined theorganisation. The employee complained that he had been dismissed without just cause or excuse when he was retired a year and three months after he attained the age of 55. The Court of Appeal endorsed the following passage from the award of the Industrial Court which dismissed his claim:-

"The Court is of the opinion that the Claimant ought to be permitted to contend that in the absence of a contractually agreed retirement age, he is entitled to work up to the normal retirement age of employees in his category. This requires a determination of what that normal retirement age is, an issue which the Court will now address.The non-existence of a retirement clause in an employment contract cannot mean that no employer can ever bring an employee's service to an end by retiring him at a certain retirement age, or that such an action would tantamount to dismissal without just cause or excuse. The Court has to constantly remind itself - and the parties before it that in reference under Section 20, the true question posed to the Court for adjudication is not whether a termination of an employee's services is lawful in that it was pursuant to a contractual provision or otherwise, but whether the same was for just cause or excuse. A justification based on contractual grounds might be a relevant factor; however, it will certainly not be conclusive of the matter."

In the **Colgate-Palmolive Case**, the Court of Appeal held that as the employee was retired at the normal retirement age for someone in his category, there was just cause or excuse for his dismissal. However, this case does leave open the situation where the employer has no track record for retiring employees and retires an employee for the first time.

WHERE AN EMPLOYEE IS RETIRED AFTER HIS CONTRACTUAL RETIREMENT AGE

In the very recent case of **MBf Country Homes & Resorts Sdn. Bhd. v Suppiah Manickam** [2003] 5 CLJ 459, the High Court had to deal with the issue of whether employees who had been retired after their retirement age were entitled to termination benefits under the Employment (Termination & Lay-Off Benefits) Regulations 1980.

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BANKING LEGISLATION - RECENT AMENDMENTS

Amendments were introduced to the Central Bank of Malaysia Act 1958, Banking and Financial Institutions Act 1989, and Islamic Banking Act 1983 from 1st January 2004. We set out below, a commentary on the salient amendments to these statutes.

CENTRAL BANK OF MALAYSIA ACT 1958 ("CBA")

Promotion of payment and settlement systems

The CBA has been amended to provide for the promotion of reliable and efficient operation of national payment and settlement systems as an additional object of the Central Bank of Malaysia i.e. Bank Negara Malaysia ("BNM") (sec. 4).

Establishment of Syariah Advisory Council

A new sec. 16B has been introduced to provide for the establishment of a Syariah Advisory Council ("the Council") as the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business and any other business based on Syariah principles which is supervised and regulated by BNM (collectively "regulated Syariah based business"). To avoid potential conflict of interest, a member of the Council is prohibited from becoming a member of any Syariah advisory body or acting as a Syariah advisor or assuming office of similar effect with any banking or other financial institutions except with the written approval of BNM. BNM may consult with the Council and issue written directives in relation to regulated Syariah based business in accordance with the advice of the Council. The amendments also seek to ratify retrospectively the Council appointed on the 2nd August 1996 and to validate directives, notices and circulars issued by BNM in accordance with the advice of the Council in relation to regulated Syariah based business.

Establishment of Body Corporate for Human Resource Development

The amendments authorise BNM to establish a body corporate for the purposes of training, research and development of human resource in relation to banking and financial services and to finance (by grant, donation, loan or advance) the establishment and operations of such a body corporate (sec. 30A). The amendments also ratify all preparatory work carried out and expenses incurred hitherto for the implementation of sec. 30A.

We believe that these amendments relate to the establishment of the International Centre for Leadership in Finance, a company limited by guarantee, established in 2003 to accelerate the development of top management talents for the financial sector and corporations.

BNM's Rescue Powers Widened

The powers of BNM under sec. 42 to make loans and advances to any banking institution or other financial institution in circumstances where BNM deems such action is necessary to safeguard monetary stability is extended to authorise BNM to enter into any other transactions with such institution for the aforesaid purposes provided that the proposed transaction does not involve any element which is not approved by Syariah in accordance with the advice of the Syariah Advisory Council.

Debt Securities Market

New sections 44A to 44D empower BNM to establish and operate systems relating to the debt securities market and to regulate such market. These provisions *inter alia* confer powers on BNM to –

1. establish and operate systems to facilitate the transfer, clearing and settlement of funds and debt securities; the tendering, issuance, borrowing and lending of debt securities; the dissemination of information relating to the money market or the tender, issue, trading and bidding for debt securities; and the handling of debt securities deposited with BNM by means of a scripless trading system;
2. function as a depository and paying agent in relation to the operation of the mentioned systems;
3. make rules with the Minister's approval to regulate the operation of the mentioned systems; and
4. require debt securities holders to submit information, verified by statutory declaration, pertaining to such securities held by them.

Sections 44A to 44D(3) are deemed to have come into operation on 1st January 1990 and ratify actions taken by BNM in relation to debt securities' systems prior to the said date. The said provisions therefore remove doubt as to the validity of actions taken by BNM in establishing and operating the Real Time Electronic Transfer of Funds and Securities (RENTAS) System, the Fully Automated System for Issuing/Tendering (FAST) and the Bond Information Dissemination System (BIDS) and the central depository of debt securities.

BANKING AND FINANCIAL INSTITUTIONS ACT 1989 ("BAFIA")

Dual Licensing of Financial Institutions

A licensed financial institution is now permitted to apply for and hold two licences, namely a licence to carry on banking business and one to carry on finance company business. An institution which holds these licences is defined as a "banking and finance company".

Change of Regime for Credit Token Business and Electronic Fund Transfer Systems

With effect from 1st January 2004, the regulation of credit token business (including credit cards and charge cards businesses) and electronic fund transfer systems will come under the purview of the Payment Systems Act 2003 which came into force on 1st November 2003. As such all provisions in BAFIA which relate to these businesses have been deleted.

ISLAMIC BANKING ACT 1983 ("IBA")

Approval of Syariah Advisory Body

One of the criteria to be fulfilled for a company to be issued an Islamic banking licence under sec. 3 of the IBA is that the applicant's articles of association must provide for the establishment of a Syariah advisory body to advise the applicant to ensure that its banking operations do not involve any element which is not approved by the religion of Islam. This provision has been amended so that the Syariah advisory body must now be one that is approved by BNM.

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LEGAL ISSUES TO BE CONSIDERED WHEN CONTEMPLATING

Companies and institutions ranging from SMIs to multinationals are increasingly outsourcing their outsourcing vendors. Chew Yu Shen discusses the dos and don'ts in respect of outsourcing in Malaysia.

Outsourcing refers to the transfer of certain business activities or functions to a third party 'outsourcing vendor', which is usually a specialist in that particular business activity or function. Examples of business activities or functions that are commonly outsourced include information technology related services, contract manufacturing, logistics, marketing and distributorships.

There are numerous benefits to outsourcing. Generally, outsourcing gives an enterprise or principal a competitive edge over its rivals, as it allows the principal to focus more on its core business. In many cases, enterprises outsource in order to achieve a reduction in cost whilst achieving greater operational efficiency. The right outsourcing vendor typically offers greater expertise and specialisation. Outsourcing from an enterprise's perspective is also a solution to insufficient resources such as manpower.

From the legal aspect, there are two main phases in negotiating and concluding an effective outsourcing deal – the pre-outsourcing contract phase and the outsourcing contract phase.

PRE-OUTSOURCING CONTRACT PHASE

Regulatory Issues – The outsourcing deal may be subject to the approval of certain regulatory bodies, depending on the type of industry the principal is involved in and the activities the principal intends to outsource. For example, banks and financial institutions in Malaysia are required to comply with certain guidelines issued by Bank Negara Malaysia in relation to their outsourcing activities.

Selecting the Right Outsourcing Vendor – It is common practice for the principal to prepare what is known as the Request for Proposal ("RFP"). It is always better to include at least the salient or basic terms of the deal in the RFP so that the bidders are aware of the terms even before negotiations on the actual contract commences. The RFP should specify a closing date for the submission of the bidders' proposals or responses to the RFP.

Due Diligence - Before deciding to appoint a particular outsourcing vendor, principals are encouraged to conduct a proper and adequate due diligence on the outsourcing vendor to ascertain the commercial viability of the vendor and its ability to perform the services at the principal's expected service levels. A preliminary step is to conduct a company search on the outsourcing vendor.

Interim Agreements - Structuring and negotiating an outsourcing contract can be a long process depending on the nature and complexity of the deal. If the principal requires the outsourcing vendor to provide the services urgently, it may be wise to execute an interim agreement. This agreement is a binding contract, albeit a more concise version of the actual outsourcing contract. It sets out the salient terms of the deal such as the scope of work or services, payment and ownership of intellectual property rights. The outsourcing contract when executed will supersede and replace the interim agreement. There are however some drawbacks in executing such agreements, as they may make it difficult for parties to back out from a deal and some times may also impact or at worse prejudice the bargaining power of a party.

OUTSOURCING CONTRACT PHASE

The outsourcing contract should capture the actual commercial relationship between the parties. It should prevent a mismatch of expectations between the parties, which often proves to be the major stumbling block of a deal. The general rule in negotiating and drafting any contract is that its terms and conditions must be made certain at the outset to avoid any potential dispute from arising later. At the same time because most outsourcing deals tend to be long term in nature, the outsourcing contract must also be flexible enough to accommodate any changes in the deal, which may arise at a later date. It is therefore pivotal to have a strong, balanced and yet flexible outsourcing contract. Here are some important issues to be considered when negotiating an outsourcing contract.

Services or Work Performed - It is crucial to have a clear and detailed description of the scope of work or services undertaken by the outsourcing vendor. The performance of such works or services is usually measured against certain specified service levels (benchmarks) which must also be clearly set out in the outsourcing contract.

Change Management or Appropriate Change Control – The outsourcing contract should contain change management or change control procedures that set out the manner and ways in which the terms of the outsourcing contract or the scope of services may be varied. Change management procedures give the parties a certain degree of flexibility in performing under the outsourcing contract and is important where the scope of services may change over time or where the duration of the contract is rather long.

Payment - This is one of the most important commercial terms in the outsourcing contract. The outsourcing contract must specify the amount and manner of payment and whether or not such payments are inclusive or exclusive of any applicable taxes such as service tax. Parties may agree to vary payment where there has been a change in the scope of services pursuant to the established change control procedures.

Ownership of Intellectual Property Rights - Generally, intellectual property rights in an outsourcing deal can be divided into four main categories – (i) rights possessed by the principal prior to the outsourcing deal and made available to the outsourcing vendor; (ii) rights possessed by the outsourcing vendor prior to the outsourcing deal and used by the outsourcing vendor in the performance of any services/works pursuant to the outsourcing deal; (iii) rights created or developed in the course of the outsourcing deal; and (iv) rights belonging to third parties that are licensed to either the outsourcing vendor or principal.

Representations and Warranties - The principal should also consider obtaining certain representations and warranties from the outsourcing vendor. The type of warranties will depend on the outsourcing activity. For example, where certain services are being outsourced, there should be a warranty from the outsourcing vendor

AN OUTSOURCING DEAL

business activities or functions to specialised

that all services will be performed with a high degree of care and skill using only suitably qualified personnel.

Limitation of Liability - It is common for outsourcing vendors to limit or exclude its liability for any losses or damages suffered by the principal in connection with the deal as potential losses or damages suffered by the principal can be enormous. However for the principal, ideally there should be no limit or exclusion of liability. This ultimately depends on the bargaining position of the parties.

Transfer of Physical Assets – Consider whether there will be any transfer or sale of physical assets to the outsourcing vendor. If so, the outsourcing contract to provide for this. Equally important to consider is the tax implications of the transfer.

Third Party Contracts - In an outsourcing deal, existing contracts between the principal and third parties may be affected. Depending on the terms and conditions of these contracts, the principal may be required to inform the third party of the deal and its impact on the latter. Depending on the nature of the deal, third party contracts may have to be assigned or novated to the outsourcing vendor.

Transfer of Employees – Consider whether there will be a transfer of employees to the outsourcing vendor. There are strict legal requirements to be met by the principal in dealing with its employees, and care should be taken to ensure that they are met.

Confidentiality - Confidentiality is a pertinent aspect in any outsourcing deal, especially where the outsourcing vendor is dealing with sensitive data belonging to the principal or the principal's customers. The outsourcing vendor may also disclose valuable proprietary information such as know-how. The outsourcing contract should therefore contain adequate provisions that safeguard and protect any confidential information that is disclosed.

Dispute Resolution Procedure - In complex outsourcing deals especially where the activity or function being outsourced is technical in nature such as IT, it is advisable to adopt an alternative dispute resolution procedure such as arbitration.

Termination and its Consequences - The outsourcing contract must set out the duration of the outsourcing deal and the grounds upon which either party is entitled to terminate the contract. It is important to specify the consequences that will ensue upon expiration or termination of the outsourcing contract. For example, there should be some sort of winding-down process whereby the outsourcing vendor transfers the activity back to the principal.

CONCLUSION

The issues highlighted here are not exhaustive and much depends on the size, nature and complexity of the deal as well as the parties involved. Apart from negotiating and concluding an effective outsourcing deal, parties must properly manage their respective obligations and relationship in accordance with the agreed Outsourcing Contract. Proper contract management is essential in ensuring a lasting and successful outsourcing deal!

CHEW YU SHEN (cys@skrine.com)

THE RAID CONTINUES...

Continued from page 2

7. Entry can only be effected at a reasonable time, preferably during working hours on a weekday and the execution of the Order should end within a reasonable time. If the execution takes too long, the respondent may request the supervising solicitor to continue the execution of the Order on the next working day. The supervising solicitor may then suggest certain measures to secure the premises.
8. The applicant may only inspect, seize and copy information, documents and/or items that are specified in the Order. If the respondent is unclear, he should seek clarification from his solicitor and point out any instances when the applicant and/or his solicitor went beyond the Order.
9. The applicant is required to tabulate and make an inventory of all the documents or items he makes copies of or seizes.
10. The respondent should insist on getting copies of the inventory list; check the contents of the list against the items that have been taken or copied; lodge a protest with the supervising solicitor in cases of inconsistency or discrepancy; insist on the names of those conducting the raid; and insist that the documents or items are handled with utmost care.
11. The respondent should keep accurate minutes of the raid. This would include the names and number of persons who entered the premises; any improper or biased behaviour especially by the supervising solicitor; and the complaints or protests that were made relating to the the raid.
12. If there were any disagreements with any conduct or the execution of the Order, the respondent should voice out his protest and insist that the supervising solicitor take note of the objections.
13. The respondent should not attempt to hide documents or delete data as this will be contempt of Court and an adverse inference may be drawn against him by the Court.
14. If the applicant's solicitor or supervising solicitor were to ask questions and the respondent is afraid that the answers may be incriminating, he should check with his solicitor before responding. It is not clear whether the respondent can claim privilege against self incrimination in the case of the Order.
15. If the applicant was to call or attempt to speak to the respondent during or after the raid, possibly to settle the matter, the respondent should not entertain such calls and insist that the applicant speaks to his solicitor.

The purpose of the safeguards is to ensure that the execution of the Order is carried out in a peaceful and orderly manner. The burden is on the applicant to ensure that the Order is carried out strictly on its terms. The guiding principle in any Anton Piller raid is that the entry, search and seizure are to be carried out on reasonable terms without causing undue hardship to the respondent.

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DIRECTORS, PARTNERS AND OFFICE BEARERS TO BE PERSONALLY LIABLE FOR THEIR ORGANISATIONS' FAILURE IN PAYING THEIR EMPLOYEES' EPF

Lembaga Kumpulan Wang Simpanan Pekerja v. Adorna RMIT Sdn Bhd & 9 Others [2003] 1 LNS 482

The High Court held that the directors of a company were to be jointly and severally liable for contributions which were due and payable by the company under the Employees Provident Fund Act 1991 ("the Act").

The plaintiff, the Employees Provident Fund Board, sued the 1st defendant for failure to remit a sum of RM303,867.00 being the aggregate of its contribution as employer and its employees' contributions, which the 1st defendant was obliged to remit to the plaintiff under sec. 43 and sec. 45 of the Act, for the period from October 1998 to July 2000.

The plaintiff also claimed a sum equivalent to the dividends it paid for the relevant periods by way of additional contribution and interest against the 1st defendant, pursuant to sec. 45(3) and sec. 49(1) of the Act. The plaintiff contended that the 2nd to 10th defendants, being directors of the 1st defendant, were jointly and severally liable for the aforesaid sums under sec. 46 of the Act which *inter alia* provides as follows:-

"*(1) Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund.*

(2) In this section the word "contribution" shall be deemed to include any dividend and interest due on any contributions."

Upon the application of the plaintiff, the Senior Assistant Registrar granted summary judgment against all the defendants. The 6th defendant appealed against the decision of the Senior Assistant Registrar on the following grounds:-

- that neither he nor the 1st defendant had complied with sec. 123(4) of the Companies Act 1965 by filing the requisite statutory declaration with the Registrar of Companies and the Official Receiver before his appointment as director;
- that he was appointed informally as a director of the 1st defendant for the sole purpose of re-negotiating a joint venture agreement between certain parties;
- that he neither held shares nor equity in the 1st defendant;
- that he was not involved in the day to day running of the 1st defendant nor received any remuneration from the 1st defendant;

The learned Judge held that the 6th defendant could not rely on his own default in complying with sec. 123(4) of the Companies Act 1965 as a defence. According to the learned Judge, if such an argument is accepted then every director will with impunity refuse to comply with the mandatory requirements of the Companies Act 1965 and set up such defaults as defences.

The Court also rejected the remaining arguments raised by the 6th defendant. The learned Judge held that sec. 46 of the Act is sufficient to render directors jointly and severally liable for amounts due to the plaintiff in the event that the employer, namely the 1st defendant, failed to pay such sums. According to R.K. Nathan, J:-

"*It is a sensible section which ensures that directors owe a duty to see to it that the companies' employees' savings are protected. Directors are alter egos of a company. It is therefore not appropriate for a director to attempt to escape culpability by pleading that he is a sleeping partner or director, or a silent director or a non-active director.*"

The **Adorna RMIT Case** is a timely reminder to directors, partners and office bearers of their personal liability in the event that the organisations in which they are directors, partners or office bearers default in making the requisite contributions under the Employees Provident Fund Act.

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CAN A JUDGMENT CREDITOR BE SUED FOR MAKING A JUDGMENT DEBTOR A BANKRUPT, IF THE LATTER HAS SETTLED HIS DEBT DURING BANKRUPTCY PROCEEDINGS?

Mohamed Yusop Bin Abdul Wahab v. American Express (M) Sdn Bhd [2002] 6 MLJ 507

In this case, the High Court was required to determine whether the plaintiff's cause of action against the defendant for negligently making him a bankrupt was tenable in law.

The plaintiff alleged that the defendant had negligently and/or in bad faith made him a bankrupt for a judgment debt he owed the defendant despite having settled the judgment debt half way through the bankruptcy proceedings. As a result, the plaintiff claimed losses and damages.

On 4th April 2000, the defendant filed an application to strike out the plaintiff's claim on the ground that the latter's cause of action was un tenable in law. On 25th August 2000, the learned Senior Assistant Registrar allowed the defendant's application. The plaintiff appealed to the High Court against the decision.

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HOW MUCH TO REPORT? THE DANGER ASSOCIATED WITH REPORTING COURT PROCEEDINGS IN THE MEDIA

Joceline Tan Poh Choo & Ors v. V. Muthusamy [2003] 3 CLJ 705

On 12 September 1991, the New Straits Times carried a report by Ms. Joceline Tan (first appellant) under the caption "Lawyer and trader conspired to cheat me, claims driver". Alongside the report was a photograph of M (respondent). The report stated *inter alia* that M allegedly conspired to cheat his illiterate client, P, of a piece of property in Kulim and purported to cover the details of a court trial that took place on 11 September 1991 in the Penang High Court of an action brought by P against *inter alia* the respondent in respect of the transfer of the said land.

Pursuant to the newspaper report, the respondent filed an action against the first appellant as the author of the report, the second appellant as the editor, and the third appellant as the proprietor and publisher of the newspaper. The respondent sought compensatory and aggravated damages and an injunction to restrain the appellants from printing, circulating, distributing or otherwise publishing the newspaper report or similar reports. The respondent won at the Kuala Lumpur High Court (HC) and was awarded RM300,000 as general damages and RM50,000 as aggravated damages. The appellants appealed.

One of the issues before the Court of Appeal (CA) was whether the appellants had a complete defence of absolute privilege under sec. 11(1) of the Defamation Act 1957. Section 11 provides *"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 and finding of any such court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation."*

In support of their defence, the appellants had contended that (i) the newspaper report was of a judicial proceeding in the Penang High Court; (ii) in the statement of claim filed by P, it was pleaded that the respondent had by fraud and misrepresentation induced him to *inter alia*, part with his beneficial ownership of the land in breach of contract and contrary to the respondent's professional ethics; (iii) these allegations were referred to by the learned trial judge and P's counsel at the trial; and (iv) the newspaper report contained these allegations as well as P's evidence given at the trial which was recorded by the learned trial judge in the official notes of evidence.

As the crux of the appellants' defence therefore turned upon the applicability of sec. 11(1), the CA had to determine whether they had met the criteria set out in the provision to enable them to claim the statutory protection i.e. whether firstly the newspaper report was published contemporaneously with the proceedings; and secondly whether the newspaper report could be regarded as a fair and accurate report of proceedings publicly heard before a court The contemporaneity of the report was accepted by the CA as it was published a day after the proceedings. The more pertinent issue was whether the report was fair and accurate.

The question was whether the report should have been confined to what was publicly heard in open court and not to matters stated in the documents that were filed but not read in court. This was because the respondent contended that neither the witness (P) nor the trial judge or counsel in the action made the defamatory statements mentioned in the report. The first appellant admitted that 'the article was based on evidence given in open court as well as the statement of claim'. However the judge found no evidence of this. Instead it was held that the newspaper report was derived from the amended statement of claim filed in court which was made available to the first appellant by P's counsel.

The CA agreed with the findings of the trial judge and affirmed the decision of the HC on liability "*as the publication by the appellants of part of the amended statement of claim which has not been read out in open court is not within the scope of the protection given by section 11(1) of the Act.*" As such, the newspaper report could not be considered a fair and accurate report of a court proceeding as the statements in the report were not made or read out during the course of the actual proceeding.

The case therefore makes it clear that sec. 11(1) will not be available to a defendant if it publishes the contents of pleadings, affidavits and other papers filed in civil proceedings, which are not read out in open court. The reason for this distinction is stated in para. 13.44 of *Gatley on Libel and Slander, 9th Edition, "It would be carrying privilege further than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation would be laid for scattering any libel broadcast with impunity."* In the English case of *Stern v Piper* [1996] 2 All ER 385 Hirst LJ said at page 394, "*... it is significant that privilege only protects reports of proceeding taking place in open court, and that its foundation is that those proceedings took place in public so that the public in general should have access to fair and accurate reports thereof ... This is a consideration of public policy, and does not extend to court documents which have not been brought into the public arena.*"

This case illustrates the importance of ensuring that only words uttered in the course of court proceedings are reported in the media. "*The fact that the public is bound to become aware of the contents of the documents at the trial does not justify their prior dissemination on the grounds of public interest*" (para 13.44 of *Gatley*). The media is therefore advised to take the necessary precautions to report only what was said in open court otherwise they will overstep the boundary of the statutory protection afforded to them. This case cautions the media of the danger involved in obtaining copies of relevant cause papers filed in court from a litigant, for the purpose of publicising the case even before it has been called for trial or heard in open court. (On the issue of quantum of damages, the CA reduced the award for general damages to RM100,000 in the light of *inter alia* the current downward trend in awarding damages for libel suits in the country. The CA also set aside the award of RM50,000 for aggravated damages as it found no evidence to support it.)

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Regulation 4(1) essentially states that an employee is not entitled to termination benefits upon retirement, unless there is a stipulation on 'retirement' in the contract of employment.

Here, each of the four respondents who were employed by the company, received a letter informing them of the company's intention to discontinue their employment as they had attained the age of retirement. Therefore, pursuant to art. 44 of the MAPA/AMESU Collective Agreement 1995, the company was giving them the required eight weeks notice. The respondents claimed that they were entitled to termination lay-off benefits as their services were being terminated prior to the mandatory retirement age of 60 years. The appellants however, refuted their claims on the ground that the mandatory retirement age was not 60 but 55 years. Article 44(a) of the Collective Agreement stated that "*the age of retirement of employees shall be 55 years*". The proviso in art. 44 was that "*employment may be continued thereafter by mutual agreement between the employer and the employee concerned up to the age of 60 years*". The High Court held that just because the employee had not been retired at 55 years, it did not mean that they were guaranteed work until 60 years, and dismissed their claim. In His Lordship's judgment, Vincent Ng J stated as follows:-

"In my judgment this article has been so specifically couched in order to enable the employer and employee to enter into a fresh employment contract for any period of service, such that the period so agreed upon does not extend beyond the employee attaining 60 years of age. And, should the parties fail to enter into such fresh employment contracts, the employee is deemed to have continued employment on a month to month basis. This must be so, otherwise an employee who continues in employment after he or she has attained 60 years of age (as happened in the case of the third respondent) would ipso facto contend that the retirement age set in art. 44(a) of the CA has been uncapped and he or she need not retire at all. Most importantly in the instant case, it has to be concluded, and I would hold, on the evidence adduced, that the proviso (second limb) in art.44(a) was not triggered into operation, as clearly, no fresh employment agreement, in writing or orally, has been entered into between the appellant and any of the respondents to re-cap the retirement age at 60. It cannot in law or logic be concluded or presumed, bereft of any evidential basis, that the appellants had agreed to re-cap the retirement age at 60 on the sole basis that the appellants had in fact allowed the respondents to continue in employment after they had turned 55 years of age."

> The non-existence of a retirement clause in an employment contract cannot mean that no employer can ever bring an employee's service to an end by retiring him at a certain retirement age, or that such an action would tantamount to dismissal without just cause or excuse.

The interesting aspect of this case is that, in effect, the judgment above results in an automatic retirement of an employee upon the retirement age, even without a formal letter confirming the same. The Court also held that the period following the retirement age is deemed to be month to month unless the parties contractually agree otherwise.

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Removal of Restriction on Foreign Ownership or Control

Section 6 of the IBA which prohibited an applicant for or holder of an Islamic banking licence from having majority foreign shareholding or being foreign-controlled has been repealed.

Advice of Syariah Advisory Council

A new sec. 13A permits an Islamic bank to seek advice of the Syariah Advisory Council, established under sec. 16B of the CBA, on Syariah matters in relation to its banking business and imposes an obligation on the Islamic bank concerned to comply with the advice of the said Council.

CONCLUSIONS

The amendments to the CBA are primarily housekeeping in nature and are to ratify certain actions taken by BNM, such as the establishment of a Syariah Advisory Council and the RENTAS, FAST and BIDS systems in relation to private debt securities. The widening of the powers of BNM under sec. 42 to safeguard monetary stability is welcomed.

The introduction of a new category of dual licensing under BAFIA that enables licensed financial institutions to carry on banking business and finance company business offers interesting prospects and may facilitate group rationalisation and the creation of one-stop financial centres envisaged under Recommendation 3.7 of BNM's Financial Sector Master Plan. Dual licensing may also assist in the further consolidation of the financial services industry in Malaysia.

The removal of the restriction in the IBA against majority foreign ownership or foreign control of Islamic banks may be aimed at fulfilling Recommendation 5.5 of the Financial Sector Master Plan which contemplates the issue of Islamic banking licences to qualified foreign Islamic banking institutions that have presence in the global Islamic banking industry. The liberalisation of ownership and control of Islamic banks in Malaysia offers interesting investment opportunities for qualified international Islamic banking institutions. The issue of new Islamic banking licences would assist the Malaysian Government to achieve its objective of establishing Malaysia as a regional Islamic financial centre.

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"... THE COMMENCEMENT OF BANKRUPTCY PROCEEDINGS ... CANNOT FOUND AN ACTION IN DAMAGES UNLESS ASSOCIATED WITH MALICE ... ."

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The High Court Judge dismissed the appeal and held as follows:-

1 The plaintiff's claim against the defendant for negligently making him a bankrupt was not a cause of action recognisable in law. The plaintiff's claim against the defendant for negligently making him a bankrupt was not a cause of action recognisable in law. The only recognised torts would be the tort of malicious prosecution and the tort of an abuse of process. However, in this case the plaintiff had not pleaded either of these torts. At any rate, it was not disputed that at the time the defendant commenced bankruptcy proceedings against the plaintiff, the judgment debt was actually due. There was thus no malice since the plaintiff was in fact indebted to the defendant when the bankruptcy proceedings were commenced. In the circumstances, it was a plain and obvious case for striking out as the plaintiff's claim was unsustainable.

2 The plaintiff had filed this action only against the defendant and not against the latter's solicitors. Thus, any allegation of a duty of care that was allegedly owed by the defendant's solicitors was totally misconceived.

The decision in this case is noteworthy as it sets out the following propositions of law, namely:-

- Mere negligence in the use of a legal process cannot establish a legal cause of action and the only recognized actions in law would be that of malicious prosecution and the tort of an abuse of the process of the court. In support of this proposition, the High Court Judge applied the principles of law distilled in **Ng Ah Ho v. Hong Leong Finance Bhd** [1996] MLJU 364 and **Business Computers International Ltd v. Registrar of Companies & Ors** [1987] 3 WLR 1134.

  In the **Ng Ah Ho Case**, the defendant had after commencing proceedings and obtaining judgment, presented a bankruptcy petition against the plaintiff. However the claim was settled in the course of the bankruptcy proceedings. The defendant proceeded to obtain the adjudication and receiving orders against the plaintiff. As a result the plaintiff filed a suit against the defendent claiming that he was wrongfully made a bankrupt. The learned judge in the **Ng Ah Ho Case** held that since neither malicious prosecution nor the tort of an abuse of process had been pleaded, the plaintiff's claim was not grounded upon any accepted cause of action and was doomed to failure. Further, in the English case of **Business Computers International**, Scott J (at p. 1138) said that

  "It is implicit in the decision that the commencement of bankruptcy proceedings or the presentation of a winding up petition cannot found an action in damages unless associated with malice."

- A solicitor acting for a client in a civil case owes no duty of care to the opponent either in litigation or in non-contentious business. In support of this proposition, the High Court Judge referred to the following English cases, namely **Al-Kandari v. JR Brown & Co** [1988] QB 665; **Gran Gelato Ltd v. Richcliff (Group) Ltd & Ors** [1992] Ch 560; **Ross v. Caunters** [1980] Ch 297; **Clarke v. Bruce Lance & Co** [1988] 1 WLR 881 and **White & Anor v. Jones & Anor** [1995] 2 AC 207.

The Court of Appeal in the **Al-Kandari Case** affirmed the general rule that a solicitor does not normally owe any duty of care to the opposing party in hostile litigation since such claims could lead to endless re-litigation. In litigation, solicitors are entitled to act without regard to the opposing party's interest since parties are attempting to achieve the best for themselves.

In the **Gran Gelato Case**, the plaintiffs proposed to purchase an underlease from Richcliff. Before entering into the contract, the plaintiffs' solicitors sent enquiries on whether there were any rights affected by the headlease which could inhibit the enjoyment of the underlease. The second defendants, who were Richcliff's solicitors, mistakenly replied "not to the lessor's knowledge." In fact, there were redevelopment break clauses in the headlease which could have caused the underlease to determine prematurely. Although Richcliff was found to be liable for this misrepresentation, its solicitors were not. Nicholls VC applied the relevant test to determine whether the solicitors owed a duty of care to the plaintiff and found that it would be unfair for such a duty to exist especially since the principal was already liable.

Sir Robert Megarry in the case of **Ross v Caunters** (at p.322A-B) aptly said:

"In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention... The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client."

These passages were cited with approval by the Court of Appeal in **Clarke v. Bruce Lance & Co** at p. 887D-F and by Farquharson LJ in **White & Anor v. Jones & Anor** at p. 231E-H.

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