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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

Thank you for reading our 'LEGAL INSIGHTS'.

The continued support is greatly appreciated. It is extremely gratifying when our readers write back to say how they like our articles. Some even seek permission to reprint our articles in their publications. It is an encouraging sign that our writers do have writing skills to engage our readers.

As I sit down to pen this message, it is almost the end of September 2011. As I reflect back on the past nine months, I get a sense that we are witnessing the dawn of a new age. The economic hard times in the USA, the debt crisis in Europe and the unprecedented tsunami disaster in Japan are shifting the economic power-base to China, India and to a lesser extent to Russia and South East Asia. Then there is the rise of gold which could well become the new safe haven for investors.

Politically, the landscape is also changing in the Middle East with revolutions in Tunisia and Egypt completed and Muammar Gadaffi's 42-year rule in Libya all but over. The civil unrest in Yemen, Syria and Bahrain indicate that more governments may fall. Saudi Arabia, for the first time in her history, will allow women to vote and run for office in municipal elections.

At home, we are witnessing the impending repeal of some of our draconian laws such as the Internal Security Act, the Banishment Act, the Restricted Residence Act and three Emergency Declarations.

Are all the above a sign of the birth of a whole new world? Only time will tell. But there is belief, and it is my personal belief, that it may well be the case. But another question lingers ... is it for the better? Let us hope so.

As usual, this issue of LEGAL INSIGHTS offers our readers a variety of articles to enjoy, hopefully more so than previously in the light of the dawning of a "Whole New World". Happy reading.

Thank you,

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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ANNOUNCEMENTS

The Firm extends its heartiest congratulations to Mr Justice Anantham Kasinather, a former Partner of SKRINE, on his elevation to the Court of Appeal on 11 August 2011.

Who's Who Award

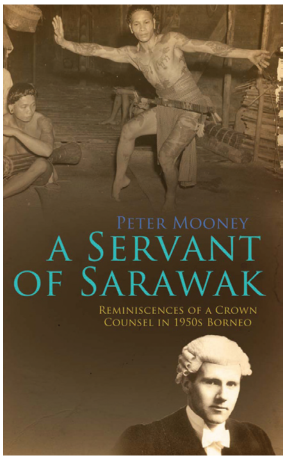
We are pleased to announce that the Firm has been named the Malaysian Law Firm of the Year 2011 by the Who's Who Legal Awards for the fourth consecutive year. The firm congratulates the following lawyers for their outstanding work and commitment to excellence leading to this Award:

Lee Tatt Boon, Vinayak Pradhan, Janet Looi, Leong Wai Hong, Khoo Guan Huat and Wong Chong Wah.

ALB Employers of Choice (Malaysia) 2011

We are pleased to further announce that SKRINE has been named one of 5 Employers of Choice for Malaysia. The results were based on an online survey conducted by ALB Magazine in which over 20,000 lawyers across the Asia-Pacific region rated employers based on key areas which included remuneration, quality of work, professional development and training, work/life balance, standard of knowledge management and information technology systems.

A SERVANT OF SARAWAK: REMINISCENCES OF CROWN COUNSEL IN 1950S BORNEO



The Firm organised a celebratory event at the Royal Lake Club on 26 July 2011 to launch Dato' Dr. Sir Peter Mooney's memoirs entitled "A Servant of Sarawak: Reminiscences of a Crown Counsel in 1950s Borneo". A founding partner of the firm and now consultant, Dato' Mooney left Edinburgh in 1953 after accepting the position of Crown Counsel in far flung Sarawak.

Dato' Mooney's memoirs are peppered with recollections of intriguing court cases and historically significant details of Sarawak's indigenous people and colonial life. The book launch was attended by Dato' Mooney's family and friends and by members and friends of the Firm.

CLIENTS' FEEDBACK

In an effort to enhance the quality of our legal service for our valued clients, we have created an email address namely: executivecommittee@skrine.com for our clients to provide feedback on matters undertaken by our lawyers. Clients are encouraged to use it to help our lawyers assist you better.

"STEEL"ING

Lim Koon Huan and
first petition under

PROLOGUE - THE GENESIS

A safeguard action is used to restrain international trade in order to protect a particular home industry from foreign competition. A country may take a safeguard action (e.g. restrict importation of a product temporarily) to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the domestic industry that produces like or directly competitive products.

Unlike anti-dumping or countervailing measures which are remedies against unfair trade, a safeguard measure may be imposed on fairly traded imports. It is thus important to understand that safeguards are an "extraordinary" remedy to be considered in "unforeseen" circumstances by way of temporary "emergency actions".

When a country imposes restrictions on imports to safeguard its domestic producers, in principle it must give something in return. The exporting country or countries can seek compensation through consultations. If no agreement is reached, the exporting country may retaliate by taking equivalent action. For instance, it can raise tariffs on exports from the country that is enforcing the safeguard measure. The safeguard measure is thus a very delicate measure which needs to be exercised with utmost care.

In Malaysia, the Safeguards Act 2006 ("the Act") and the Safeguards Regulations 2007 were put in place to govern this important aspect of international trade. The Act expressly provides that its application must be in conformity with the obligations of Malaysia under the Agreement Establishing the WTO, including the General Agreement on Tariffs and Trade 1994 ("GATT") and the WTO Agreement on Safeguards.

MALAYSIA'S "MEGA STEEL" EXPERIENCE

On 1 April 2011, Megasteel Sdn Bhd ("Megasteel") submitted a petition requesting the Government of Malaysia ("Government") to initiate a safeguard investigation on the imports of hot rolled coils ("HRC") on the basis that the surge in imports of HRC in Malaysia from 2007 to September 2010 had seriously injured the domestic industry.

Megasteel sought an additional 35% import duty on HRC which would bring the total duty payable on HRC up to 60% for 5 years (notwithstanding that the Act limits the duration of a safeguard measure to a maximum of 4 years unless an extension is granted).

Megasteel is the sole producer of HRC in Malaysia and thus represents 100% of the total production of HRC in Malaysia.

By a Notice of Initiation of Safeguard Measure with Regard to Imports of Hot Rolled Coils imported into Malaysia published in the Government Gazette (P.U.(B) 250/2011) on 25 April 2011, the Government through the Ministry of International Trade and Industry ("MITI"), the appointed investigating authority under the

THE LIMELIGHT

Jason Teoh report on the the Safeguards Act


LIM KOON HUAN (L)

Koon Huan is a Partner in the Dispute Resolution Division of SKRINE. Her practice areas include international trade and competition law.

JASON TEOH (R)

Jason is an Associate in the Dispute Resolution Division of SKRINE. He is a graduate of the University of the West of England, Bristol.

Act, initiated an investigation based on Megasteel's petition after finding that there is sufficient evidence to support Megasteel's claim of serious injury or threat caused by the increased imports.

Given the delicate nature of a safeguard measure, the Government's decision to initiate an investigation based on Megasteel's petition attracted much attention both domestically and internationally. Domestic downstream steel players, the Japanese Chamber of Trade & Industry, Malaysia representing the interest of 545 Japanese companies in Malaysia, foreign exporters of HRC and embassies of various countries such as Japan, China, Indonesia, South Korea, Taiwan and Thailand ("Interested Parties") objected to Megasteel's petition. The petition and the ensuing developments also received much coverage in the local trade press.

THE SAFEGUARD PROCESS

In its investigation, the Investigation Authority must make a preliminary determination on the following: (i) whether HRC is being imported into Malaysia in increased quantities; (ii) whether such increased quantities of imported HRC causes or threatens to cause serious injury to the domestic industry that produces like or directly competitive products; and (iii) the causation between the two. In addition, the imposition of the safeguard measure must only be as a result of unforeseen developments.

> **" A safeguard action is used to restrain international trade … to protect a particular home industry from foreign competition "**

If the Investigation Authority makes a negative preliminary determination, the Government may either continue or terminate the investigation. If it makes an affirmative preliminary determination, the Government is required to continue the investigation and has the option to apply provisional safeguard measures.

On 28 June 2011, MITI held a public hearing for Megasteel and all Interested Parties to put forward their respective arguments before a Hearing Panel. Prior to the public hearing, all affected HRC importers were given questionnaires to be completed to assist MITI to assess the situation. All Interested Parties were also requested to file their pre-Hearing Written Views to MITI.

MEGASTEEL'S JUSTIFICATIONS

In arguing for intervention by the Government for the safeguard measure set out in its petition, Megasteel alleged that the surge in imports of HRC in Malaysia from 2007 to September 2010 had seriously injured the domestic HRC industry.

Megasteel reasoned that its inability to revert to its 2008 performance is testament that it has not been able to share in the overall economic recovery of Malaysia. Megasteel appealed for a safeguard duty at a level which would enable it to earn sufficient profits during the safeguard period to implement an adjustment plan i.e. to complete a blast furnace that will allow it to be competitive at an international level.

THE COUNTER-ARGUMENTS

The Interested Parties submitted that the whole basis of Megasteel's petition was misconceived and ought to be rejected. Amongst the rebuttals put forward were –

(a) that Megasteel had used inaccurate figures in its petition. In this regard, the Japanese steel mills pointed out the discrepancies between the figures used in the petition and Megasteel's parent company's annual reports for the relevant years;

(b) that Megasteel did not produce HRC products like or directly competitive to the majority of the imported HRC products;

(c) as a result of the above, the domestic HRC industry did not suffer serious injury or threats of serious injury;

(d) that any injury suffered by the domestic HRC industry was not caused by increased imports of HRC but by Megasteel's own rising production costs and operational inefficiencies;

(e) that there were no unforeseen developments;

(f) that there was no actual adjustment plan by Megasteel. The adjustment plan was in fact that of Megasteel's parent company; and

(g) that the imposition of any safeguard measures in this matter would be contrary to Malaysia's public interest as many multinational manufacturing companies dependent on imported HRC may relocate their businesses to other countries as it would no longer be economically viable for them to remain in Malaysia.

Further, developing ASEAN countries like Indonesia argued that any safeguard measures imposed by the Government should not affect them under the *de minimis* rule.

After the public hearing, all parties filed their post-hearing written submissions to assist the MITI to make a preliminary

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NEW ICC RULES OF ARBITRATION 2012

Sharon Chong highlights some aspects of the new ICC Arbitration Rules

On 12 September 2011, the International Chamber of Commerce ("ICC") issued its revised Rules of Arbitration, which updates its 1998 Rules of Arbitration ("the 1998 Rules") which have been in force since 1 January 1998.

The New Rules of Arbitration 2012 ("the New Rules") is the result of a two-year effort by the ICC Commission of Arbitration and will come into force on 1 January 2012. The New Rules retain the essential features of ICC arbitration while adding new provisions to provide more flexible and effective procedures to meet the current developments in arbitration practice and information technology.

This article highlights some of the changes that will be introduced under the New Rules.

JURISDICTION CHALLENGES

Under the 1998 Rules, the International Court of Arbitration ("ICC Court") is required to make a *prima facie* finding on the existence of an arbitration agreement. Under Article 6 of the New Rules, any jurisdictional issues will be referred directly to and decided by the arbitral tribunal, unless the Secretary General decides to refer the matter to the ICC Court for its decision pursuant to Article 6(4).

MULTI-PARTY AND MULTI-CONTRACT ARBITRATIONS

The New Rules include provisions that deal with issues in complex arbitrations such as joinder of additional parties, claims between multiple parties, multiple contracts and consolidation of arbitrations.

(i) Article 7

Article 7 of the New Rules allows a party to join an additional party to the arbitration by submitting a Request for Joinder to the Secretariat. However, if the application is made after the confirmation or appointment of any arbitrator, the consent of all parties, including the additional party, will be required.

(ii) Article 8

Any party in a multi-party arbitration may make any claim or counterclaim pursuant to Article 8 of the New Rules against any other party prior to the approval of the Terms of Reference, after which such claims or counterclaims will require the authorisation of the arbitral tribunal.

This provision addresses a common problem arising from the 1998 Rules in relation to the filing of a cross-claim by a Respondent against a co-Respondent. Whilst Article 5 of the 1998 Rules provides for counterclaims filed by the Respondents against the Claimants, the 1998 Rules do not provide for the filing of cross-claims.

Various writers have commented on the scope of Article 5 of the 1998 Rules and its applicability to the filing of a cross-claim. Bernard Hanotiau in *Complex Arbitrations (Kluwer Law International, 2005)* commented that *"in the absence of any express provision and taking into account the objection raised by one of the respondents, ... the cross-claim brought by one respondent against another was not admissible, and that consequently, the respondent should pursue the matter with the said co-respondent in a separate arbitral proceeding. The Court considered that claims between co-respondents would only be admissible with the consent of the parties, since the ICC Rules do not provide for this type of cross-claim."*

Similarly, Yves Derains and Eric A. Schwartz in *A Guide to the New ICC Rules of Arbitration* (*Kluwer Law International)* were of the view that it is the exclusive privilege of the Claimant to determine who are the parties to the arbitration and that where there are multiple Respondents, "*a Respondent is also not entitled to make a cross-claim against another Respondent, unless all of the parties otherwise agree. In such circumstances, a Respondent party wishing to join a third party to the proceedings or to file a cross-claim against a co-Respondent will be left with no alternative but to commence a new arbitration against such party, unless all of the parties concerned otherwise consent.*"

This view was shared by Michael W. Buhler and Thomas H. Webster in their book, *Handbook of ICC Arbitration (2nd Edition, 2008)* which states that the current view is that in the absence of an arbitration agreement drafted to cover also cross-claims, it is generally not possible to pursue such claims under the 1998 Rules.

> **"Article 9 of the New Rules allows claims arising out of or in connection with more than one contract to be made in a single arbitration"**

Article 8 of the New Rules now empowers a Respondent to file a cross-claim against a co-Respondent without having to commence a new arbitration.

(iii) Article 9

With regards to multi-contract arbitrations, Article 9 of the New Rules allows claims arising out of or in connection with more than one contract to be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement.

(iv) Article 10

Article 10 of the New Rules allows the parties to request for the consolidation of two or more arbitrations into a single arbitration

SHARON CHONG

Sharon is an Associate with the Dispute Resolution Division of SKRINE. Her main practice areas are Corporate and Commercial Litigation and International Arbitration.

provided that all parties agree to the consolidation or where all the claims in the arbitrations are made under the same arbitration agreement.

In cases where the claims in the arbitrations are made under more than one arbitration agreement, the following conditions must be satisfied – (a) the arbitrations must be between the same parties, (b) the disputes in the arbitrations arise in connection with the same legal relationship, and (c) the ICC Court must be satisfied that the arbitration agreements are compatible.

When arbitrations are to be consolidated, they will be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

CONDUCT OF THE ARBITRATION AND CASE MANAGEMENT CONFERENCES

(i) Article 22

Article 22 of the New Rules imposes an express general obligation on the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

(ii) Article 24

To encourage the avoidance of unnecessary delay and expense in the arbitral process, Article 24 of the New Rules requires the arbitral tribunal to convene a case management conference with the parties when drawing up the Terms of Reference or soon thereafter to consult the parties on procedural measures which it considers appropriate. The tribunal may, after the consultation, adopt such procedural measures. Appendix IV of the New Rules provides examples of case management techniques that can be used by the tribunal and the parties for controlling time and cost.

(iii) Article 37

Article 37(5) empowers the arbitral tribunal to take into consideration the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner when it decides on the costs of the proceedings.

EMERGENCY ARBITRATORS

Article 29 of the New Rules permits the parties to make an application under the Emergency Arbitrator Rules in Appendix V of the New Rules for an emergency arbitrator for urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal, provided that such application is received by the Secretariat before the file is transmitted to the tribunal.

The emergency arbitrator's order does not bind the arbitral tribunal and may be modified, terminated or annulled by the tribunal. Article 29 and the Emergency Arbitrator Rules (collectively "Emergency Arbitrator Provisions") are inapplicable where (a) the arbitration agreement was concluded before the effective date of the New Rules (1 January 2012), or (b) the parties have agreed to opt out of the Emergency Arbitrator Provisions, or (c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures. These provisions do not preclude the parties from seeking interim relief from a competent judicial authority.

IMPARTIALITY, INDEPENDENCE AND AVAILABILITY OF ARBITRATORS

Article 11 of the New Rules imposes on the arbitrators an additional requirement, apart from being independent, to be impartial. Arbitrators will be required to confirm their availability before accepting an appointment or confirmation. Further, arbitrators must sign a statement disclosing any facts or circumstances which might be of such a nature as to call into question their independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to their impartiality.

NEW TECHNOLOGY MEASURES

In order to update the rules to reflect changes in the technology age, Article 3 of the New Rules specifically allows communications to be made by e-mail. Although the New Rules omit references to communications by facsimile transmission, telex and telegram which were expressly permitted under the 1998 Rules, communications by facsimile transmission and telex (but not telegram) are still permitted as they comprise "other means of telecommunication that provide a record of sending thereof" which has been retained from the 1998 Rules.

NEW TERMINOLOGY

The designation of the 'Chairman' and 'Vice-Chairmen' of the ICC Court have been replaced by the designation 'President' and 'Vice-Presidents' respectively.

CONCLUSION

The amendments are welcomed as they provide more modern and flexible procedures in order to address and deal with the increasing number of complex arbitrations and to ensure expeditious and cost-effective resolution of disputes without compromising on the quality of decisions.

Writer's e-mail: **sharoncty@skrine.com**

TIGHTENING UP THE ACT

Chan Su-Li summarizes the key amendments to be made to the Capital Markets and Services Act 2007

The Capital Markets and Services (Amendment) Act 2011 ("Amendment Act") became law on 16 September 2011. It will come into operation on a date to be appointed by the Minister of Finance ("Minister").

This article provides an overview of the key changes that will be made to the Capital Markets and Services Act 2007 ("CMSA") when the Amendment Act comes into operation.

REGULATORY MATTERS

Directorships

Presently, Section 10 of the CMSA empowers the Minister, in consultation with the Securities Commission ("SC"), to appoint one-third of the number of directors on the boards of directors of an exchange holding company and certain stock exchanges and derivatives exchanges as public interest directors ("PID"). The section also requires a person to obtain the concurrence of the SC before accepting an appointment or election as a director (other than a PID) of any of the afore-mentioned boards.

> "the SC's concurrence is required before a person can accept an appointment, reappointment, election or re-election as a director"

The Amendment Act expands and clarifies the supervisory powers of the SC in relation to board appointments in the following respects –

- the term of office of a PID, as determined by the Minister, shall not exceed 3 years but the person concerned shall be eligible for reappointment;
- the SC's concurrence is required before a person can accept an appointment, reappointment, election or re-election as a director (other than a PID); and
- the Minister may, on the recommendation of the SC, vary the number of PIDs to be appointed in place of the one-third presently prescribed.

The requirements of Section 10 will also apply to a chief executive of an exchange holding company or the relevant stock exchange or derivatives exchange.

Expansion of Powers to Compel Action

Section 26(1) of the CMSA empowers the SC to compel an exchange holding company, a stock exchange, a derivatives exchange, an approved clearing house, a central depository or a relevant body corporate to take action to resolve conflicts of interest.

The Amendment Act expands the SC's power under this provision to compel action to be taken where it is necessary or expedient to ensure fair and orderly markets, or to protect investors or in the public interest, or to ensure integrity of the capital markets, or for the effective administration of securities laws.

Assumption of Powers of an Exchange

A new Section 26(6) will confer power on the SC to discharge certain duties of a stock exchange or a derivatives exchange, namely the supervision of the capital market and market participants, the enforcement of the rules of a stock exchange that govern the quotation of securities on the stock market and the listing requirements or that govern compliance by participating organisations of the stock exchange or affiliates of the derivatives exchange.

The powers under this new provision are exercisable where the SC deems it necessary or expedient for the protection of investors or effective administration of securities laws or in the public interest.

Renewal of Licences

The requirement under the CMSA for a licensee to apply for renewal of a Capital Markets Services Licence ("CMS Licence") or a Capital Markets Services Representative's Licence ("CMSR Licence") is abolished under the Amendment Act. In other words, a licence once issued will remain in force until it is revoked in accordance with the CMSA.

Revocation and Suspension of licence

The power of the SC under Section 72 to revoke licences issued under the CMSA will be amended in the following respects –

- non-payment of licence fees will be an additional ground for revoking a licence;
- the revocation or suspension of a CMS Licence for dealing in securities or derivatives will no longer require the concurrence of the Minister;
- the SC is no longer obliged to give a licensee the right to be heard before it imposes restrictions on the activities of the licensee; and
- upon the revocation of a CMS Licence, the holder of a CMSR Licence will cease to hold its representative's licence for the holder of the CMS Licence and may apply for a variation of its licence.

Transfer of Licence

The Amendment Act confers power on the SC to approve the

CHAN SU-LI

Su-Li is a Senior Associate with the Corporate Division of SKRINE. She is a graduate of the University of Melbourne, Australia.

transfer of a CMS Licence after the licensee has obtained a court vesting order under Section 139 of the CMSA.

Chief Executive

Under the Amendment Act, the approval of SC will be required before a person can be appointed as a chief executive of a holder of a CMS Licence.

CONDUCT OF BUSINESS

Information on capital market products

A new Section 92A will be introduced to empower the SC to specify information that must be disclosed to investors in respect of a capital market product, such as an explanation of the key characteristics of the product, the nature and obligations assumed by the parties and the risks associated with the product.

Protection of client's assets

Section 125 of the CMSA empowers the SC to direct a licensed person or an approved trustee (i.e. a trustee which has been approved by the SC to act as a trustee for debentures or for unit trusts and prescribed investments schemes) to take such action or prohibit such person from taking such action as may be specified by the SC.

The Amendment Act will expand the categories of market participants who may be subject to such directives or prohibitions by the SC to include a custodian of assets held in trust by a holder of a Fund Management Licence on behalf of its clients, an approved private retirement scheme administrator, a registered person and any person who maintains a trust account for clients' assets.

MANAGEMENT OF SYSTEMIC RISK

The Amendment Act introduces a new Part IXA (Sections 346A to 346D) to address systemic risks. A "systemic risk in the capital market" refers to a situation when one or more of the following events occur, or is likely to occur, namely (a) financial distress in a significant market participant or in a number of market participants; (b) an impairment in the orderly functioning of the capital market; or (c) an erosion of public confidence in the integrity of the capital market.

The SC may require a person to submit to the SC any information or document which the SC considers necessary for the purposes of monitoring, mitigating and managing systemic risks in the capital market or where the SC receives a request from Bank Negara Malaysia. The person concerned must submit the information or document requested notwithstanding any obligation under any contract or arrangement to the contrary.

The SC may issue a directive to any person under a new Section 346C to take such measures as the SC considers necessary in the interest of monitoring, mitigating or managing systemic risk in the capital market.

The SC is required to give the relevant person an opportunity to be heard before it issues a notice under Section 346C unless the delay in issuing the directive would aggravate the systemic risk. In the latter event, the person is to be given an opportunity to be heard after the directive has been issued. A directive may be amended or modified.

PRIVATE RETIREMENT SCHEMES

The Amendment Act will introduce a new Part IIIA (Sections 139A to 139ZM) to the CMSA. This Part provides a framework for the establishment of private retirement schemes and is the subject of a separate article of our newsletter.

DERIVATIVES

Futures contracts in the CMSA will be replaced by two categories of derivatives, namely *standardized derivatives* and *over-the-counter derivatives*. Standardized derivatives will be governed by sub-division 3 of Division 3 of Part III (Sections 99 to 107).

The Amendment Act will introduce a new sub-division 4 of Division 3 of Part III (Sections 107A to 107J) to the CMSA to regulate over-the-counter derivatives. This new sub-division will establish a trade repository. Persons dealing with over-the-counter derivatives can be required to provide the trade repository with such information relating to those derivatives as may be specified by the SC and the repository may, in turn, be required to furnish the information to the SC.

VESTING

Section 139 of the CMSA requires a holder of a CMS Licence for dealing in securities or dealing in derivatives to obtain the approval of the Minister (acting on the recommendation of the SC) for any agreement or arrangement for the sale or transfer of the whole or any part of its business or for any amalgamation, merger or reconstruction of such holder.

The Amendment Act transfers the foregoing power of approval from the Minister to the SC. With this amendment, the SC will be the sole approving authority for all such agreements or

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NEW WEAPONS TO COMBAT COPYRIGHT PIRATES

Sri Richgopinath provides an overview of the proposed amendments to the Copyright Act 1987

Malaysia is still placed on the "Watch List" of the 2011 Special 301 Report ("301 Report") that was published by the Office of the United States Trade Representative ("USTR") in April 2011.

Since 2006, the USTR has recommended the amendment of the outdated Copyright Act 1987 ("Act") to fully implement the World Intellectual Property Organisation's Copyright Treaty and Performances and Phonograms Treaty and the continuation of enforcement actions to combat the growing problem of piracy on the internet. Last year, the USTR also recommended that Malaysia consider adopting legislation to address unauthorised camcording in cinemas.

The Copyright (Amendment) Bill 2010 ("Bill") that has been tabled before the Dewan Rakyat proposes significant amendments to the Act. The Bill substantially adopts the recommendations by the USTR as described above.

Amongst others, the Bill will introduce a voluntary mechanism for notification of copyright works, anti-camcording provisions, impose responsibilities and set limitations on the liability of internet service providers and strengthen the regulatory framework in the battle against copyright pirates.

NOTIFICATION OF COPYRIGHT

The Bill will introduce new provisions (Sections 26A to 26C) whereby a Register of Copyright ("Register") will be maintained by the Controller of Copyright ("Controller"). The author or owner of a work, or an assignee or licensee thereof, may notify the Controller of the existence of copyright in the work by providing prescribed particulars and upon payment of a prescribed fee.

The Register is open for examination by any person who may obtain certified extracts of the same upon payment of a prescribed fee.

A copyright is a property right that subsists in certain types of works provided for under the Act. This right is conferred automatically and is governed by the Berne Convention to which Malaysia is a signatory since 1990. The Berne Convention does not provide for a regime for registration of copyright. This means that copyright will subsist in a work irrespective of whether it is registered or not.

To avoid any doubt that the proposed copyright notification regime will not change the basis on which copyright is conferred under the Act, the explanatory notes to the Bill state that the proposed Register is merely a voluntary notification system which "*does not impede the requirement of non-formality for the enjoyment and exercise of the copyright protection under the Berne Convention.*"

A comparison can be made with the copyright regime in the United States of America. The United States already had an internal registration mechanism for copyright works before it became a signatory to the Berne Convention in 1989. It retained its internal registration mechanism despite becoming a signatory.

As registration is not a requirement for protection under the Berne Convention, copyright law in the United States provides several incentives to encourage copyright owners to register their works. Some of the incentives are as follows –

- Registration made within 5 years of publication will be *prima facie* evidence in court of the validity of the copyright and of the facts stated in the certificate;
- Statutory damages and recovery of attorney's fees will be available to the copyright owner in court actions if registration is made within 3 months of publication or prior to an infringement of the work;
- Registration will enable the copyright owner to record the registration with the customs service for protection against importation of infringing copies.

"Section 43A makes it clear that an act of recording a film in a screening room is strictly prohibited"

The new sub-section (5) of Section 26B provides that a certified true extract of the Register is *prima facie* evidence of the particulars entered in the Register and that such extract is admissible in all courts. This means that once notification of copyright has been recorded in the Register, the onus of disproving that copyright subsists in the work shifts to the infringer.

The owner of a copyright who takes advantage of the copyright notification regime can therefore bypass the often difficult task of proving the subsistence of copyright in an action against an infringer.

However, it remains to be seen whether the Malaysian Government will provide any other incentives, such as those which subsist in the United States, to encourage copyright owners to submit notification of copyright for entry into the Register.

ANTI-CAMCORDING

The proposed Section 43A makes it an offence to operate any audiovisual recording device in a screening room (i.e. cinema) to record any film. An attempt to do so also constitutes an offence.

The current provisions of the Act merely make it an offence to make for sale, sell, distribute and import pirated goods. The introduction of Section 43A makes it clear that an act of recording

SRI RICHGOPINATH SALVAM

Gopi is an Associate in the Intellectual Property Division of SKRINE. He graduated from the University of London in 2009.

a film in a screening room is strictly prohibited. This a significant development in the measures taken to curb piracy in Malaysia, which is one of the issues highlighted by the USTR in 2010.

RESPONSIBILITY OF INTERNET SERVICE PROVIDER

The proposed new Sections 43B to 43I set out the responsibilities of internet service providers ("service provider") to address issues relating to copyright infringement on the internet.

Presently, a service provider may be held liable for copyright infringement pursuant to Section 36(1) read together with Sections 13(1)(a) and 13(1)(aa) of the Act for reproducing in a material form or communicating to the public copyright work without the permission of the owner.

Exemption from liability

The proposed new Sections 43C to 43E exempt a service provider from liability for copyright infringement by reason of the following activities –

- transmitting, routing or providing connections of an electronic copy of the work through its primary network or any transient storage of the electronic copy of the work in the course of the aforesaid activities (Section 43C);
- making any electronic copy (system caching) of the work from an electronic copy of the work made available on an originating network, or through an automatic process, or in response to an action by a user of the service provider's primary network, or to facilitate efficient access to the work by a user (Section 43D);
- storing an electronic copy of the work at the direction of a user of the service provider's primary network or linking a user to an online location on an originating network at which an electronic copy of the work is made available by the use of an information tool such as a hyperlink or directory, or an information location service such as a search engine (Section 43E).

A service provider must satisfy the various conditions set out in Sections 43C to 43E in order to obtain the benefit of the exemptions under the respective provisions.

Take-down provision

The proposed Section 43H confers the right on the owner of a copyright which has been infringed to notify (in the manner determined by the Minister) a service provider to remove or disable access to the electronic copy on the service provider's network. A service provider who has received a notification as aforesaid is required to remove or disable access to the infringing electronic copy on its network within 48 hours from the time of receipt of the notification. Otherwise, the service provider may be held liable for the infringing activity.

The person whose electronic copy of the work was removed or to which access has been disabled may issue a counter-notification (in the manner determined by the Minister) to the service provider, requiring the latter to restore the electronic copy or access to it. The service provider must promptly provide a copy of the counter-notification to the issuer of the notification and inform him that the removed material or access to such material will be restored in 10 business days.

The service provider must restore the removed material or access to it not less than 10 business days after its receipt of the counter-notification, unless it receives a further notification from the issuer of the notification that he has filed an action seeking a court order to restrain the issuer of the counter-notification from engaging in any infringing activity in relation to the material on the service provider's network.

> **“ Sections 42B to 42I set out the responsibilities of internet service providers ”**

Section 43H requires the owner of the copyright to compensate the service provider or any other person against any damages, loss or liability arising from the service provider's compliance with the notification. The provision also imposes a corresponding obligation on the issuer of a counter-notification.

The section also renders it an offence for a person who issues a notice to make any statement which is false, which he knows to be false or does not believe to be true, and which touches on any point material to the object of the notice. For this purpose, a person who makes a statement outside Malaysia may be dealt with as if the offence was committed in Malaysia.

One of the issues in relation to Sections 43B to 43I is the scope of the term "service provider". The definition provided in Section 43B is wide enough to encompass internet service providers (e.g. TMNet and P1) as well as any person who provides or operates facilities for online services or network access. Therefore, it is possible for the operators of websites, such as Facebook and YouTube, to fall within the definition of "service provider" for the purposes of the aforementioned provisions.

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IT'S STILL MINE

Tan Lai Yee reports on the decision of the Court of Appeal in the Sediabena v Qimonda Case

In the previous issue of Legal Insights, we reported in "*Yours or Mine*?" that the High Court decided in *Sediabena Sdn Bhd v Qimonda Malaysia Sdn Bhd* that retention monies are monies held by an employer in trust for its contractors even though such monies were not kept separately from the employer's own funds prior to its liquidation.

On 12 July 2011, the Court of Appeal upheld the decision of the High Court in favour of the Respondents/Plaintiffs ("Respondents").

This follow up commentary discusses the Court of Appeal's decision in dismissing the Appellant/Defendant's ("Appellant") appeal.

DECISION OF THE COURT OF APPEAL

The Court of Appeal considered the question as to whether a trust can be implied where a contract does not contain an explicit provision that the retention monies are to be held on trust by the employer. The Court relied on the Supreme Court case of *Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and anor* [1991] 1 MLJ 293 for the proposition that the Court could and should consider all the facts to determine whether a fiduciary relationship existed in the circumstances.

In this respect, the Court held that the question was whether in substance, a sufficient intention to create a trust had been manifested. The Court would consider the circumstances governing the relationship between the parties and the arrangements as to how monies were deducted from the progress payments under the contract.

Their Lordships cited *Re Kayford* [1975] 1 All ER 604 as authority that it was settled law that a trust could be created without the words "trust" or "confidence" or similar expressions being used. The Court of Appeal referred to *Geh Cheng Hooi* where the Supreme Court held that a trust could be implied even where the agreements themselves did not contain an express clause for the creation of a trust.

The Court held that the retention monies are monies already earned by the Respondents, as contractors, for works already done and formed part of the progress payments claimed and certified for payment to the Respondents in accordance with the contract.

The Court was satisfied that under the terms of the contract, the purpose of deducting the retention monies was to make provision for making good the defects only, and if such monies were not applied for that purpose, it was understood that the monies would be returned to the Respondents after the expiry of the defect liability period.

The Court further held that the use of the word "deduction" in the contract for the creation of the retention monies from the monies due to the Respondents supported the fact that the parties recognised that the retention monies belonged to the Respondents.

Their Lordships were satisfied that all requisites of a valid trust were present in the instance case. The parties had manifested a clear intention to create a trust from the outset and this was backed by the whole purpose of what had been done had been to ensure that the retention monies remained in the beneficial ownership of the Respondents. As such, the Court held that the retention monies held by the Appellant did not belong to the Appellant and were held by them as trustees for the Respondents.

The Court also relied on several authorities, namely *F.R. Absalom Ltd v Great Western Garden Village Society* [1933] AC 592 and *Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd* [1998] 1 MLJ 444, which suggested that until such time when the retention monies were actually disbursed to the employer for rectification of defects, the property in such monies resided with the contractor even though the monies may be held by the employer. As such, the employer's interest in the retention monies was "fiduciary" in nature, in that the employer is trustee for the contractor in respect of the monies in question.

"the failure to separate the retention monies before the liquidation ... did not, and could not, defeat the trust"

Their Lordships also took cognisance of the fact that that the Appellant's consulting engineer had issued a Certificate of Practical Completion for the project concerned and the absence of any claim made by the Appellant against the Respondents for rectification cost for the work done.

The Court of Appeal rejected the Appellant's contention that the Respondents were not entitled for the release of the retention monies since no part of those monies had been set aside before the liquidation of the Appellant. The Court held that the failure to separate the retention monies before the liquidation of the Appellant did not, and could not, defeat the trust. The Court also held that there was no requirement for the Respondents to request for the monies to be kept in a separate bank account.

The Court of Appeal declined to follow the English case cited by the Appellant in support of its foregoing contention, namely *Rayack Construction Ltd v Lampeter Meat Co Ltd* [1979] BLR 34. Their Lordships held that the apex court of Malaysia in *Geh Cheng Hooi* had recognised the principle laid down in *Re Kayford Ltd* and noted that this principle had been followed by the Malaysian Courts in *Syarikat Pembinaan Woh Heng Sdn Bhd v*

TAN LAI YEE

Lai Yee graduated from Oxford Brookes University in 2007. She is an Associate with the Dispute Resolution Division of SKRINE.

Meda Property Services Sdn Bhd (unreported) and *Merino O.D.D. Sdn Bhd v PECD Construction Sdn Bhd* [2009] MLJU 671.

The Court of Appeal held that the setting aside, release or preservation of the retention monies where the Appellant is under liquidation would not amount to a preferential payment under Section 223 of the Companies Act 1965 for the simple reason that the said monies were trust monies which did not belong to the Appellant in the first place. Their Lordships also held that the monies could not be treated as part of the general funds of the Appellant as that would only result in the other creditors of the Appellant being unjustly enriched.

In coming to its decision, the Court of Appeal also recognised the hardship that contractors would face if a requirement was imposed that the retention monies must be kept in a designated account during pendency of the contract. The Court of Appeal agreed with the High Court that such an onerous obligation would not reflect the commercial reality of the construction industry, particularly in the Malaysian context.

SIGNIFICANCE OF THE DECISION

The decision of the Court of Appeal suggests that the question as to whether or not a trust can be implied in cases where a contract does not contain any express provision that retention monies are to be held on trust by the employer, turns on the facts of a particular case and would to a large extent depend on whether a fiduciary relationship existed in the circumstances and whether sufficient intention to create a trust has been manifested.

In deciding whether the requisites of a trust are present, the Court will take into consideration the terms of the contract and examine the arrangements as to how the retention monies are created, the conditions for its release and whether parties intended that the beneficial ownership thereof is to remain with the contractors.

The Appellant has applied for leave to appeal to the Federal Court. The application has been fixed for hearing on 31 October 2011.

Writer's e-mail: tanlaiyee@skrine.com

"STEEL"ING THE LIMELIGHT

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determination.

THE NEGATIVE PRELIMINARY DETERMINATION

After considering the oral and written submissions, MITI made a negative preliminary determination on 19 August 2011 and recommended that the Government terminate the safeguard investigation.

The negative preliminary determination and the recommendation to terminate the investigation were based on the following findings -

(a) that although there was an increase of imports of HRC during the relevant period, Megasteel did not suffer any injury due to such increase;

(b) that there was insufficient evidence of threat of serious injury as claimed by Megasteel;

(c) that the adjustment plan was not an investment made by Megasteel; and

(d) that the elements necessary for the imposition of safeguard measures will not to be found to exist even if the investigation is continued.

By a Notice of Negative Preliminary Determination with Regard to the Investigation on Hot Rolled Coils imported into Malaysia published in the Government Gazette (P.U.(B) 465/2011) on 22 August 2011, the Government terminated the investigation.

EPILOGUE - COMPETITION ACT VERSUS SAFEGUARDS ACT

After the negative preliminary determination and the termination of the investigation by the Government, there is speculation that the Government may consider new protective incentives for Megasteel. It remains to be seen what these new incentives will be but it is understandable that the Government would want Megasteel, the sole domestic HRC producer, to be or remain a viable option for local businesses that require HRC in their production processes.

With the Competition Act 2010 coming into force next year, it would be interesting to see how the Government would react to petitions by monopolistic companies seeking safeguard protections under the Act in an anti-monopoly environment.

The Megasteel petition is noteworthy as it is the first safeguard action instituted under the Act.

Writers' e-mail: lkh@skrine.com & jasontch@skrine.com

LOTUS V LOTUS

A commentary on Group Lotus plc & another v 1 Malaysia Racing Team Sdn Bhd and others [2011] EWHC 1366 (Ch)

A BLOSSOMING RELATIONSHIP

On 5 September 2009, the Prime Minister of Malaysia announced the formation of the 1 Malaysia Formula 1 Racing Team under the 1st Defendant, 1 Malaysia Racing Team ("1MRT"). It also marked the return of the iconic name "Lotus" to the Formula One ("F1") racing scene after an absence of 16 years as 1MRT would race as Lotus Racing under a licence agreement ("Licence Agreement") with the 1st Claimant, Group Lotus plc ("GL"), a subsidiary of Proton Holdings Berhad.

It was the start of a relationship that held much promise, with both sides aspiring to have the team based, and the racing cars designed, built and tested, in Malaysia eventually.

THE WHEELS FALL OFF

As 1MRT's Lotus cars trundled around the racing circuits in the lower half of the field (a commendable achievement as compared to those of its fellow rookie teams, the Hispania and Virgin racing teams), the relationship between the parties deteriorated and culminated in GL terminating the Licence Agreement on grounds of "flagrant and persistent" breaches of the licence by 1MRT.

After the 2010 F1 season ended, 1MRT announced that it had acquired the right to use the "Team Lotus" name in F1 racing through its acquisition of the 2nd Defendant, Team Lotus Ventures Limited ("TLVL").

GL disputed the validity of TLVL's ownership of the Team Lotus brand and filed a claim in the High Court in England.

Subsequently, GL announced that it had entered into a strategic partnership with Genii Capital to race cars under the name "Lotus-Renault GP" in the 2011 F1 season.

THE CLAIMS AND COUNTERCLAIM

Among the claims made by GL and Lotus Cars Ltd (collectively "Claimants") were that –

(1) the use of the name "Team Lotus" and the trade mark Lotus Roundel ("Trade Mark") by the Defendants in relation to F1 motor racing without the authorization or endorsement by the Claimants tantamount to wrongful passing off;

(2) the trade marks that were registered in the name of TLVL ought to be revoked for non-use; and

(3) 1MRT had breached the Licence Agreement.

The Defendants filed a counterclaim ("Counterclaim") seeking, among other relief, an injunction to restrain the Claimants from passing off as an F1 racing team which is connected to Team Lotus or the Trade Mark.

According to the learned Judge, the case involves 2 major issues. First, whether or not 2 sets of Lotus cars can legitimately race in F1 under a name that incorporates Lotus in some way and the use of the Trade Mark. Second, whether or not F1 racing under Team Lotus is part of the goodwill attached to GL or is an independent goodwill vested in Team Lotus Limited ("TLL").

DECISION OF THE HIGH COURT

After a full hearing, the Judge was satisfied that –

(1) the founder of Lotus cars, the late Colin Chapman, had raced cars under the name "Team Lotus" for at least 10 years before GL came into existence and that GL had manufactured sports cars under the Lotus name since it was created in 1958;

(2) to safeguard GL's sports car manufacturing business from the risks and liabilities associated with motor racing, including F1, all motor racing activities were carried out through separate companies, firstly, TLL and its successor, Team Lotus International Limited ("TLIL") which had both raced under the name "Team Lotus" since 1961;

(3) GL had not at any time raced in F1 under the name Group Lotus or Lotus before its entry for the 2011 F1 season as Lotus-Renault GP together with Genii Capital;

(4) except for a brief period of about 1½ years in 1967 through 1968, TLL existed independently from GL and was never its subsidiary;

(5) after the demise of Colin Chapman in 1982, GL, TLIL and other parties entered into an agreement in 1985 ("the 1985 Agreement") which, among other matters, provided as follows–

   (a) TLIL acknowledged that the business of GL was manufacturing and marketing motor vehicles other than single seat racing vehicles whilst GL acknowledged that the business of TLIL was making racing vehicles and entering them in motor racing events;

   (b) GL and TLIL each acknowledged that the other had operated their respective businesses as separate businesses since at least 1968;

   (c) GL acknowledged that TLIL had the right to continue using the name Team Lotus in relation to its business and to use the Trade Mark with or without the words "Team Lotus" whilst TLIL acknowledged that GL had the right to continue using the names "Group Lotus", "Lotus" and the Trade Mark in relation to its business;

   (d) GL would cancel its registration for various trade marks, including the Trade Mark, and undertook not to use any rights under its remaining trade marks against TLIL in relation to the latter's motor racing business. GL also agreed to consent to the registration of the cancelled

KOK CHEE KHEONG

Chee Kheong is a Partner in the Corporate Division of SKRINE.

marks, including the Trade Mark, by TLIL; and

(e) upon the termination of the 1985 Agreement, GL would have the right to own, run or be associated with another motor racing team running single seat racing vehicles which may have in its title and the use of the name "Lotus" and TLIL's right to use the name "Lotus" would be restricted to "Team Lotus", with the words "Team" and "Lotus" having substantially equal prominence.

(6) TLIL had sold certain of its assets (including its racing business, trade marks, trade or brand names) and such assets had devolved to TLVL through a series of transactions. However, TLIL had not executed any assignment in respect of its rights under the 1985 Agreement.

Effect of the 1985 Agreement

One of the main contentions by the Claimants was that TLVL was not entitled to exercise the rights under the 1985 Agreement as TLIL had not assigned any of its rights under that agreement.

The learned Judge was of the view the 1985 Agreement achieved 3 purposes. First, GL and TLIL acknowledged each other's rights in relation to the business and arrangements that existed before the execution of the 1985 Agreement. Second, the 1985 Agreement created additional rights, such as GL's agreement to cancel its registration of the Trade Mark and for TLIL to re-register the same and third, the 1985 Agreement contained provisions which set out the consequences of its termination.

As the rights created by the 1985 Agreement, such as arrangements relating to the cancellation and re-registration of the Trade Mark, had not been assigned to TLVL, His Lordship upheld the Claimants' contention to the extent that TLVL could not assert these rights against GL.

However, the Judge further held that the 1985 Agreement did not prohibit TLIL from dealing with the rights which it had before the 1985 Agreement, namely the right to make and race vehicles in motor racing events and to use the name Team Lotus in connection with such activity. As these rights (including trade marks, trade or brand names) had been disposed by TLIL and had devolved to TLVL, it could assert these pre-existing rights. Accordingly, the Judge had, in the main, rejected the Claimant's contention insofar as it relates to the pre-existing rights held by TLIL.

As the 1985 Agreement had lapsed, His Lordship ruled that GL was entitled to compete in single seat car racing.

Goodwill

The Judge then proceeded to consider whether the rights purportedly acquired by TLVL existed as part of GL's goodwill or are divisible.

The Claimants' case was that there is one indivisible goodwill which is vested in GL whereas the Defendants contended that the goodwill had been divided so that GL had the benefit of the use of the word Lotus in isolation while the Defendants through the chain of transactions discussed earlier had the benefit of the goodwill associated with Team Lotus.

According to the learned Judge, the identification of the goodwill associated with the names Lotus and Team Lotus was the key to the case. Once the goodwill is identified, the next question is whether or not GL has the entire goodwill in the word Lotus which extended to the use of the word in conjunction with any other word, including the word Team.

His Lordship held that the Claimants' contention that there existed one indivisible goodwill which rested with GL was an oversimplification. According to the Judge, Colin Chapman had created a goodwill in "Team Lotus" which came into existence before GL was incorporated in 1958 and was identified with his primary activity before then, namely motor racing.

The Judge was of the view that the 1985 Agreement clearly indicates that GL and TLIL acknowledged that they each had separate and independent goodwill in respect of their separate businesses, namely the manufacturing of sports cars by GL and motor racing by TLIL. Other evidence tendered by the parties did not undermine the position that was acknowledged in the 1985 Agreement.

The Judge concluded that there was no realistic possibility of confusion so long as TLVL or anyone authorized by it competes in F1 as opposed to building and selling sports cars. The position would be otherwise if GL had a reputation in F1 racing (which it had not, given the fact that it did not participate in F1 racing before 2011) as opposed to sports car manufacturing.

Cancellation of Trade Mark

The Court was satisfied that there was non-use of the Trade Mark for a period of 5 years from 2003 to 2008. As the Defendants had failed to adduce evidence that there were proper reasons for such non-use, the Court ordered that TLVL's Trade Mark be cancelled.

The Court accepted the Defendant's submission that if there is no evidence of confusion, there can be no infringement of GL's trade marks despite the cancellation of the Trade Mark.

The Judge held that TLVL's loss of the Trade Mark registration

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THE SOCIAL NETWORK PART 2

Joanna Loy helps companies avoid the pitfalls of using social media

Social media marketing is growing at a staggering rate daily. It is one of the easiest and fastest means for businesses to reach out to their customers and is perhaps, the most extensive means by which to do so.

A recent global survey conducted by Regus, a Belgium-based workplace solutions provider, found that 51% of Malaysian companies have been successful in securing new business through social networking activities last year. The survey also revealed that 68% of businesses in Malaysia use websites such as Twitter to engage, connect with and inform existing customers. About 75% of Malaysian companies encourage their employees to join social networks such as LinkedIn and Xing compared with 53% of companies globally. The survey also discloses that 52% of Malaysian companies devote up to 20% of their marketing budget to business social networking activities.

Gone are the days where companies can afford to simply sit back and draw in customers with their products and services in a 'take it or leave it' manner or reach out to customers through traditional marketing methods such as networking or third party testimonies about a company's product or service.

Customers today are likely to be demanding and crave for attention and engagement. It is not uncommon to see both positive and negative information being passed on at lightning speed, thanks to social media engines such as Facebook, Twitter and YouTube. Double-edged sword it may be, but a company which ignores social media would do so at its own peril.

How then can a company navigate itself through the dangerous world of social media?

EMPLOYEE SOCIAL MEDIA POLICY

A company must establish clear and specific guidelines for social media usage by employees both at work and home. Employees who speak publicly about the company and their products or services as well as their personal lives need to make it clear that although they are employed by the organization, the views and opinions expressed by them are their own and do not represent the views and opinions of the organization.

The guidelines should impose a mandatory obligation on the employees to adhere to the same, failing which they may be subjected to disciplinary actions or termination. Otherwise, companies may find themselves at the short end of the stick by ending up with a wrongful termination suit by the employee or a potential defamation suit.

The need to set out clear and specific guidelines is particularly important for companies that have specific marketing personnel who engage with their customers on a daily basis via social media. Similar safeguards should be applied to independent third party marketing specialists engaged by companies.

INTELLECTUAL PROPERTY ISSUES

Intellectual property rights, such as trade marks, copyright, patents, industrial designs, trade secrets and confidential information, protect the product of a person's work by hand or intellect against unauthorized use or exploitation by another.

Users of social media, including companies, are often unaware that content such as photographs and videos which are uploaded online often include copyrighted materials. Similarly, users who adopt the word, name, symbol or sound of another party or falsely misrepresent or identify themselves as another party, or as being associated with another party, may give rise to legal liability under the Trade Marks Act 1976 or the Trade Descriptions Act 1972.

Just because the content is online does not mean that it is free for all to be re-posted. Companies may find themselves embroiled in a copyright or trade mark infringement suit if they are not careful.

Ultimately, users and companies simply need to bear in mind that the online environment is not a legal vacuum. In general, if something is illegal "offline", it will also be illegal "online".

COMMUNICATIONS AND MULTIMEDIA ACT

Companies that use social media to reach out to customers should be aware of the provisions of Sections 211 and 233 of the Communications and Multimedia Act 1998 and take steps to ensure that contents posted or disseminated by them do not run afoul of these provisions.

Section 211 prohibits the provision of content (namely any sound, text, still picture, moving picture or other audio-visual or tactile representation or any combination of the foregoing, which is capable of being created, manipulated, stored, retrieved or communicated electronically) which is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person.

Section 233 *inter alia* renders it an offence for any person to make or initiate the transmission of any obscene, indecent, false, menacing or offensive comment or communication with the intention to annoy, abuse, threaten or harass any person at any electronic address.

CODE OF PRACTICES

Various Codes of Practices, namely the Malaysian Communications and Multimedia Content Code, the General Consumer Code of Practice for the Communications and Multimedia Industry Malaysia and the Malaysian Code of Advertising Practice by the Advertising Standards Authority Malaysia, have been adopted by specific industries such as providers of communication and multimedia services and the advertising industry in Malaysia. These codes form the framework for self-regulation by the aforementioned industries.

JOANNA LOY

Joanna is an Associate in the Intellectual Property Division of SKRINE. She is a graduate of the University of London.

Companies that use social media to promote their products and services should ensure that their practice comply with the relevant codes.

For example, it is common practice for a company to set itself apart from its competitors by way of comparative advertising, i.e. an advertisement that makes comparisons of the products or services of the advertiser and those of their competitors to encourage the customers to select the products or services of the advertiser.

Companies need to be aware that comparative advertisements should adhere to the principles of fair competition and that there is no likelihood that the customer could be misled. The subject matter of comparison should not be chosen in such a way as to confer an artificial advantage to the advertiser or to suggest that a better bargain is offered than is truly the case. Points of comparison should be based on facts which can be substantiated and should not be unfairly selected.

CyberSecurity Malaysia, an agency of the Ministry of Science, Technology and Innovation of Malaysia, has also introduced the Best Practices on Social Networking Sites to draw the attention of individuals and organizations to the possible impact of using social media. Companies that use social media may also wish to familiarize themselves with this publication.

PERSONAL DATA PROTECTION ACT

Although the Personal Data Protection Act 2010 ("PDPA") became law on 10 June 2010, it will only come into operation on a date to be appointed by the Minister. To come within the ambit of the PDPA, personal data must be in respect of a commercial transaction.

Various restrictions will be imposed on the use and dissemination of personal data once the PDPA comes into operation. Personal data may only be processed with the consent of the data subject and for the purpose for which the consent was given. Such data may not be disseminated to other persons without the express consent of the data subject.

Further, the PDPA imposes an obligation on a data user to take steps to protect the personal data from loss, misuse or unauthorized access or disclosure and to retain such data only for the duration for which it is required. Restrictions are also imposed on the transfer of such data to any place outside Malaysia.

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TIGHTENING UP THE ACT

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arrangements entered into by a holder of any category of CMS Licence.

ENHANCED SANCTIONS

The Amendment Act will introduce a mandatory term of imprisonment for certain offences under the CMSA. A person who commits an offence under Section 317A (causing wrongful loss to a listed corporation or any of its related corporations by a director or officer) or Section 320A (causing financial statements or the audited financial statements to be false or misleading) will be liable to a mandatory term of imprisonment of not less than 2 years.

A mandatory term of imprisonment will also be imposed for an offence under Section 71 (false statements in relation to an application for licence), Section 368 (falsification of records), Section 369 (false reports to SC, exchange or clearing house) and Section 371 (destruction, concealment, mutilation and alteration of records).

> **" The Amendment Act will introduce a mandatory term of imprisonment for certain offences under the CMSA "**

CONCLUSION

The Amendment Act streamlines certain administrative procedures in the CMSA and confers greater regulatory powers on the SC. It also introduces new provisions on systemic risks and private retirement schemes.

The amendments will go some way towards achieving the objectives set out in the Capital Market Masterplan 2 and address concerns about the efficacy of markets in the aftermath of the last global financial crisis.

Writer's e-mail: **sli@skrine.com**

NEWS ALERT! At press time it was learnt that the Amendment Act will come into operation on 3 October 2011.

RIGHTS OF BIOLOGICAL PARENTS VS ADOPTIVE PARENTS

A commentary on Sean O'Casey Patterson v Chan Hoong Poh by Ezane Chong

The Federal Court in *Sean O'Casey Patterson v Chan Hoong Poh & Ors* [2011] 3 CLJ 722 recently held that the rights of biological parents remain and are not extinguished, notwithstanding the registration of an adoption of their child under the Registration of Adoption Act 1952.

BACKGROUND FACTS

The Appellant, an American citizen, first met the 1st Respondent, a Malaysian citizen in 1998 in Malaysia. They soon began dating and in April 1999, they got "married" at the Little Church of the West in Las Vegas. Following this "marriage", the 1st Respondent returned to Malaysia while the Appellant remained in America.

As a result of the relationship between the Appellant and the 1st Respondent, the 1st Respondent, on 21 March 2000, gave birth to a baby boy whom we shall refer to as "**J**" in this article. It was not in dispute that the Appellant was the biological father of J.

> **"Act 253 caters for de facto ... adoptions whilst adoption orders made under Act 257 includes adoptions de jure"**

From the birth of J until 2004, the Appellant claimed to have travelled to Malaysia several times to visit the 1st Respondent and J and regularly sent money for their use. Sometime in September 2004, the Appellant retained the services of lawyers to set up a more structured maintenance scheme for J. Through his lawyers in Malaysia, the Appellant discovered, amongst other things, that the 2nd Respondent, who is the sister of the 1st Respondent, and her husband, the 3rd Respondent ("Adoptive Parents"), both Muslims, had adopted J under the Registration of Adoption Act 1952.

THE APPELLANT'S CLAIMS

The Appellant thus applied to the High Court for various orders, including an order that the adoption of J by the Adoptive Parents and the registration of the adoption be declared null and void. The 1st Respondent, in the same suit, challenged the adoption of J and sought an order that custody of J be given to her instead of the Appellant.

The High Court dismissed the Appellant's and the 1st Respondent's applications to invalidate J's adoption by the Adoptive Parents and its decision was upheld by the Court of Appeal.

THE DECISION OF THE FEDERAL COURT

The Appellant sought and obtained leave to appeal to the Federal Court. One of the questions for determination before the Federal Court was:

"Whether the rights of the Appellant, the biological father, remain and are not extinguished despite the registration of the adoption of the child under the Registration of Adoption Act 1952."

Although the Federal Court dismissed the Appellant's appeal, it answered the aforesaid question in the positive.

James Foong FCJ, in delivering the decision of the Federal Court, explained that it was necessary to appreciate the difference between an adoption under the Registration of Adoption Act 1952 ("Act 253") and an adoption under the Adoption Act 1952 ("Act 257").

According to the Federal Court, an adoption under Act 257, generally referred to as a "court adoption", is one that has to be made through a court process, whereas an adoption order made under Act 253, commonly known as a "registrar adoption", is an order made by the Registrar of Adoption.

Act 253 caters for *de facto* (as a matter of fact) adoptions whilst adoption orders made under Act 257 includes adoptions *de jure* (as a matter of law).

In the opinion of the Federal Court, the most crucial difference between the two Acts lies in the *effect* of the adoption. Act 257 contains a provision which expressly extinguishes all rights, duties, obligations and liabilities of the parent or guardian in relation to the future custody, maintenance and education of the adopted child (including all rights to appoint a guardian or to consent or give notice of dissent to marriage) and vests all such rights, duties, obligations and liabilities in the adopter as though the adopted child was a child born to the adopter in lawful wedlock.

The Court pointed out that a provision similar to the aforementioned provision in Act 257 is conspicuously absent from Act 253. Accordingly, Act 253 only caters for the registration of a *de facto* adoption. As such it is of limited effect and parents who adopt under Act 253 only have custodial rights to the child. A child adopted under Act 253 will also not have a right to inherit any property of the adoptive parents should they die intestate.

The Federal Court concurred with the views expressed by the courts below that Act 253 was enacted to cater for Muslims (though its application is not restricted to Muslims only) whose personal laws are repugnant to adoption yet it is common practice for Muslims in this country to "adopt" children. Thus in order to legitimise such customary practices, the adoption could be registered under Act 253 so as to safeguard the right to custody of the adoptive parents.

The Federal Court then drew a distinction between the rights of the adoptive parents over a child in an adoption registered under Act 253 and the validity of the adoption itself. The Federal Court did not accept that just because the adoptive parents under Act 253 only have custodian, care, maintenance and educational rights over the child, the adoption is invalidated by the appearance of a natural parent who demands it so. The Federal Court took the

EZANE CHONG

Ezane, a graduate from the University of Leeds, is a Partner in the Dispute Resolution Division of SKRINE. Her main practice areas are commercial litigation and family law.

view that the adoption remains valid as it was properly registered after due process in accordance with the law.

As regards the rights of the Appellant as the biological father of J, the Federal Court held that his right as a natural parent remains based on the rationale that an adoption under Act 253 only confers custodian, care, maintenance and educational rights over the child.

> “ persons who adopt under Act 257 will possess all rights and obligations over the adopted child as if that child were born to them ”

CONCLUSION

This decision illustrates an important difference between adoptions made under the two Acts, both of which were enacted in the same year and relate to the adoption of a child.

In brief, where a child is adopted under Act 253, the legal rights of the biological parents remain as conferred by law. Legal rights ‘conferred by law’ include the right to custody or upbringing of a child or the administration of any property belonging to or held in trust for the child. The implication of this recent ruling thus appears to be that only custodial rights pass on to the adoptive parent under Act 253, and nothing more. Act 253 also confers no rights of succession on the adopted child if the adoptive parent dies intestate.

On the other hand, a child adopted under Act 257 is deemed to be a child born to the adoptive parent in lawful wedlock and persons who adopt under Act 257 will possess all rights and obligations over the adopted child as if that child were born to them.

Writer’s e-mail: **ec@skrine.com**

NEW WEAPONS TO COMBAT COPYRIGHT PIRATES

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STRENGTHENING THE POWERS OF ENFORCEMENT

The proposed Section 45A extends the powers of search and seizure by authorised officers under Section 44 of the Act to include the right of access to any computerized or digitalized data stored in a computer or any other medium.

A new Section 50B gives the Public Prosecutor the power to allow authorised officers to intercept or to listen to any communications that is likely to contain information that is relevant for the purpose of any investigation into an offence under the Act.

The proposed Section 51A provides for the admissibility of evidence given by an *agent provocateur* (e.g. trap purchaser). The purpose of this provision is to eliminate any allegation of entrapment by the accused person.

A new Section 52A will make it an offence to disclose information in relation to an investigation in such a manner which is likely to prejudice the investigation. This covers tipping-off situations and is applicable not only to the public but also to any officers who are privy to the information.

CONCLUSION

The amendments to be introduced under the Bill are much welcomed as a revamp of the outdated Act is long overdue.

The regime of voluntary notification of copyright will greatly assist owners of copyright to discharge the burden of proving the existence of copyright.

There will finally be provisions that set out the responsibilities and liabilities of internet service providers and website operators. However, these provisions are ambiguous and more studies should be conducted into refining and clarifying the same.

The anti-camcording provisions coupled with the Optical Discs Act 2000 show that the Malaysian Government is taking serious steps to combat copyright piracy in Malaysia.

To quote Datuk Seri Ismail Sabri Yaakob, the Minister of Domestic Trade, Cooperatives and Consumerism, “*We hope steps taken by my ministry to combat the menace will be noticed by the US authorities and they will take us off the list (the Special 301 Report’s Watch List)*” (“Malaysia may be out of DVD piracy watch list”, The Star Online, 10 March 2010).

Writer’s e-mail: **richgopinath.salvam@skrine.com**

BUILDING A RETIREMENT NEST

Khor Wei Min examines the proposed framework for Private Retirement Schemes

INTRODUCTION

The Capital Market Masterplan 2 (CMP2) was launched by the Prime Minister of Malaysia, Datuk Seri Mohd Najib Tun Razak at Invest Malaysia 2011 on 12 April 2011. Under the CMP2, a new private pension fund framework which facilitates the establishment of private retirement schemes is to be launched by year-end.

Following the announcement, the Capital Markets and Services (Amendment) Act 2011 ("Amendment Act") was passed to amend the Capital Markets and Services Act 2007 ("CMSA"). The Amendment Act became law on 16 September 2011 and will come into operation on a date to be appointed by the Minister of Finance.

The statutory provisions referred to in this article are the new provisions which will come into effect when the Amendment Act comes into operation.

NEW PART IIIA

The Amendment Act will introduce a new Part IIIA (Sections 139A to 139ZM) into the CMSA which provides the framework for the private retirement scheme industry in Malaysia.

The new Part IIIA will introduce the following concepts, namely a private retirement scheme, a private retirement scheme provider ("Scheme Provider"), a private retirement scheme administrator ("Scheme Administrator"), a private retirement scheme trustee ("Scheme Trustee"), an employer-sponsored retirement scheme ("Employer Scheme") and an employer trustee of an Employer Scheme ("Employer Trustee").

> **"The approval of the SC is required before a person can establish or operate a Scheme"**

PRIVATE RETIREMENT SCHEME

Section 139A defines a private retirement scheme ("Scheme") as a retirement scheme which is governed by a trust, offered or provided to the public for the sole purpose or having the effect of building up long term savings for retirement for members where the amount of the benefits is to be determined solely by reference to the contributions made to the scheme and any declared income, gains or losses in respect of such contributions.

A pension fund approved under Section 150 of the Income Tax Act 1967 and a retirement scheme or fund established by the Federal Government, State Government or any statutory body established by federal or state law are specifically excluded from the definition of a Scheme.

Matters relating to approval

The approval of the Securities Commission ("SC") is required before a person can establish or operate a Scheme (Section 139V)). Such approval may be given on such terms and conditions as the SC thinks fit. The SC may refuse an application or withdraw its approval for an approved Scheme on the grounds set out in Section 139W and Section 139X respectively.

The withdrawal of an approval for a Scheme will not affect a member's accrued benefits (Section 139ZB(1)).

Safeguards for accrued benefits

A contribution by a member to a Scheme vests in that member as accrued benefits as soon as the contribution is paid to the Scheme Provider or the Scheme Trustee, whichever is earlier (Section 139Y(1)).

A Scheme Provider and Scheme Trustee are prohibited from paying or disposing of any part of the accrued benefits to any member or other person except in the manner specified by the SC (Section 139Z). To further safeguard a member's interest in the accrued benefits, Section 139ZA prohibits the accrued benefits from being taken in execution of a judgement debt or being subject to any encumbrance, transfer or assignment by or on behalf of a member. Any purported disposition which contravenes this provision is void.

SCHEME PROVIDER

A Scheme Provider is defined in Section 139A as a person who provides and manages a Scheme.

Matters relating to approval

Section 139P(1) prohibits a person from establishing, offering or providing a Scheme or from holding himself out as establishing, offering or providing a Scheme unless the SC approves (a) that person as a Scheme Provider under Section 139Q, (b) the Scheme under Section 139V, and (c) the Scheme Trustee under Section 139ZC.

The SC may approve an application on such terms and conditions as it thinks fit or may refuse an application on any of the grounds set out in Section 139R. The SC may withdraw an approval granted to a Scheme Provider on the grounds enumerated in Section 139S(1) or on the request of the Scheme Provider under Section 139S(2).

Notwithstanding the withdrawal of an approval, the SC may require a Scheme Provider to continue conducting the activities that are affected by the withdrawal on or after the withdrawal takes effect for the purposes of closing down the operations of the Scheme Provider or protecting the interest of the public or the members (Section 139S(4)).

KHOR WEI MIN

Wei Min is an Associate in the Corporate Division of SKRINE. He is a graduate of the University of Cardiff.

The withdrawal of an approval under Section 139S will not avoid or affect any agreement entered into by the Scheme Provider in relation to the Scheme before the withdrawal of the approval or, after the withdrawal of the approval in the circumstances set out in Section 139S(4).

Notification of disqualifying event

A Scheme Provider is required under Section 139U to immediately notify the SC of the occurrence of any of the events set out in Section 139S, namely events that give the SC the right to withdraw an approval.

SCHEME ADMINISTRATOR

A Scheme Administrator is a person who performs the function of record keeping, administration and customer service for members and contributors in relation to a Scheme and such other duties as may be prescribed by the SC (Section 139A).

Matters relating to approval

A person must obtain the approval of the SC before he can be a Scheme Administrator (Section 139B(1)). Such approval will only be granted to a body corporate.

The SC may withdraw an approval granted to a Scheme Administrator on the grounds enumerated in Section 139F(1) or on the request of the Scheme Administrator under Section 139F(2).

Notwithstanding the withdrawal of an approval, the SC may require a Scheme Administrator to continue conducting the activities that are affected by the withdrawal on or after the withdrawal takes effect for the purposes of closing down the operations of the Scheme Administrator or protecting the interest of the public or the members (Section 139F(4)).

As in the case of a Scheme Provider, Section 139G provides that the withdrawal of an approval under Section 139F will not avoid or affect any agreement entered into by the Scheme Administrator in relation to the Scheme before the withdrawal of the approval or, after the withdrawal of approval under the circumstances set out in Section 139F(4).

Directors or chief executive

Section 139E(1) prohibits any appointment, election or nomination of a director or chief executive of a Scheme Administrator without the prior approval of the SC.

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LOTUS V LOTUS

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did not enable GL to stop the use of the words Team Lotus and the Trade Mark as being an infringement of GL's trade marks. The Judge did not accept that the name and mark were confusingly similar and that the parties had accepted this fact when they entered into the 1985 Agreement. The Judge also took cognizance of the fact that GL had acknowledged in the Licence Agreement that it should not licence 1MRT to race under the name Team Lotus as that could result in TLVL asserting a claim for passing off.

His Lordship ruled that the cancellation of trade marks for non-use is an entirely different exercise as compared to the loss of goodwill. The Judge was satisfied that substantial goodwill remains attached to the name Team Lotus and the Trade Mark notwithstanding that it may have been diminished by non-use since 1994. The Judge concluded that the right to such goodwill rested with TLL and had devolved to TLVL. Accordingly the Judge rejected GL's contention that the goodwill associated with the name and the Trade Mark had been abandoned by non-use.

Breach of Licence Agreement

The Court was satisfied that 1MRT had committed a material breach of the terms of the Licence Agreement by using GL's trade marks on poor quality merchandise and in a manner which had not been authorized by GL. Accordingly the Court upheld the termination of the Licence Agreement by GL and ruled that it was entitled to damages by reason of 1MRT's breach of the terms of the Licence Agreement.

CONCLUSION

The terms of the 1985 Agreement were pivotal to the High Court's decision. Firstly, the agreement recognized the late Colin Chapman's legacy of manufacturing sports cars and racing F1 cars under the Lotus name and trade mark but, at the same time, keeping these businesses separate from each other, thus resulting in the creation of separate and independent goodwill in the respective activities.

Secondly, by allowing GL to compete against 1MRT and TLVL in F1 under the Lotus name, the Court had given effect to the arrangements that had been contemplated and agreed upon by the parties to 1985 Agreement in the post-Colin Chapman era.

Writer's e-mail: **kck@skrine.com**

Note: It was reported in the New Sunday Times (25 September 2011) that Team Lotus may change its name to Caterham, a sportscar company owned by Tan Sri Tony Fernandes, a co-owner of 1MRT.

COURT ASSISTANCE IN ENFORCEMENT OF ADMINISTRATIVE DECISIONS

A case commentary on Bursa Malaysia Securities Berhad v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 3 Others by Ong Doen Xian

On 28 December 2010, the High Court allowed an application by Bursa Securities Malaysia Berhad ("Bursa") pursuant to Section 360 of the Capital Markets and Services Act 2007 ("CMSA") to enforce penalties imposed on the Defendants by Bursa's Listing Committee.

This article discusses the events that took place and examines the judgment of the High Court.

THE FACTS

Cepatwawasan Group Berhad ("Company") is a company listed on the Main Board of Bursa. The Defendants were directors of the Company at the material time until they were removed on or around 6 August 2004.

Shortly before their removal, the Defendants caused Prolific Yield Sdn Bhd, a wholly-owned subsidiary of the Company, to make payments totalling RM13 million to a company called Opti Temasek Sdn Bhd, and another RM3 million to one Sheikh Abdul Rahim, who was the driver of the 1st Defendant. These payments were in breach of the financial assistance provisions in Bursa's Listing Requirements.

Bursa issued show cause letters to the Defendants but did not receive any response from them. The Listing Committee proceeded to determine the matter and found that the Defendants had breached the Listing Requirements. Bursa then imposed various penalties on the Defendants *inter alia* to pay fines to Bursa and to rectify the breaches of the Listing Requirements by repaying to the Company the RM16 million that had been wrongly paid out to Opti Temasek Sdn Bhd and Sheikh Abdul Rahim within a stipulated timeframe.

The Defendants' appeal (conducted with the Defendants' and their counsel in attendance) to Bursa's Appeals Committee against the findings and penalties imposed by the Listing Committee was dismissed.

THE APPLICATION UNDER SECTION 360

As the Defendants failed to remedy the breaches committed by them, Bursa filed an application to Court under Sections 360(1)(c)(i), 360(J) and 360(K) of the CMSA to seek orders and directions which mirrored the penalties imposed by the Listing Committee on the Defendants.

The Defendants opposed Bursa's application primarily on 3 grounds. Firstly, that Section 360 does not permit Bursa to enforce administrative reprimands or actions decided upon by its regulatory committees. The Defendants submitted that Bursa must bring fresh judicial proceedings against them and prove that they had in fact breached the Listing Requirements.

Secondly, the Defendants contended that the Securities Commission ("SC") was the sole party entitled to commence the proceedings. Thirdly, they submitted that Bursa's application ought to have been made under the repealed securities legislation as the alleged breaches of the Listing Requirements had been committed while that legislation subsisted.

The Defendants also contended that there was an issue of double recovery as a consent judgment had been entered into between the Company and the Defendants (and 14 others) in separate legal proceedings whereby the defendants therein had agreed to pay the sum of RM3 million to the Company in full and final settlement of the claimed sum of RM16 million.

THE DECISION OF THE HIGH COURT

The High Court allowed Bursa's application and granted orders in the terms sought.

His Lordship, Dato' Abdul Aziz bin Abdul Rahim J, citing the decision of the Court of Appeal in *Bursa Malaysia Securities v Gan Boon Aun* [2009] 4 MLJ 695, 704, 719, recognised that the role of Bursa under Section 11 of the CMSA is to regulate the securities market, safeguard public interest and protect investors and that Bursa also has a duty to ensure an orderly and fair market in respect of securities and to act in public interest to ensure protection of investors.

The Judge held that the Court has the power under Section 360(1)(c) of the CMSA to grant orders sought by Bursa once it "*appeared*" to the Court that a person has contravened a relevant requirement. His Lordship referred to *Bursa Securities Malaysia Berhad v Azimudin bin Ab Ghani* (an unreported decision) where Zabariah Mohd Yusof JC held that the plaintiff could satisfy the requirements of the sub-section by showing, via affidavits, that the defendants have been found by the Listing Committee to have breached the Listing Requirements and that fines had been imposed.

His Lordship also referred to *Capital Market Laws of Malaysia* where the learned author, Shanti Geoffrey, opined that "*Section 360 of the CMSA ... may also be relied upon by the stock exchange as well as an aggrieved person where there is contravention of a relevant requirement.*"

Defendants' First Ground

According to the learned Judge, the scheme of things under the CMSA does not contemplate, as contended by the Defendants, that Bursa must first commence an action in a court of law against the Defendants and therein produce evidence to prove that the Defendants are guilty of the breach of the relevant requirements, and only thereafter apply to the Court under section 360(1)(c) for the necessary orders to enforce any penalty imposed on the wrongdoers.

The Court was satisfied that the Listing Committee has the necessary jurisdiction to conduct its own investigations to satisfy

ONG DOEN XIAN

Xian is an Associate in the Dispute Resolution Division of SKRINE. She is a graduate of University College London.

itself whether the Defendants had committed the breach and on being so satisfied, to impose any necessary penalty or reprimand.

The Court further held that if the Defendants failed to comply with any directives or orders of the Listing Committee (after having exhausted the in-house appeal process), the SC or Bursa may apply under Section 360 for the necessary order to enforce compliance.

His Lordship further opined that when making such application, it is mandatory for the plaintiff to produce by way of affidavit evidence (which was done in this case) the material facts on which the Listing Committee had found the Defendants to be guilty of the breach of the relevant requirements and the penalty or reprimand imposed.

The Court then has to form an opinion, based on the affidavit evidence, whether there was sufficient basis for the Listing Committee to come to such findings as it did. If the Court is satisfied in that regard, then it would appear that the Defendants have committed the breach of the relevant requirements. If it appears so to the Court and the Court is satisfied on the evidence, then the orders may be made.

The Judge was satisfied that the findings of the Listing Committee in the present case were justified by the evidence presented to them.

In this regard, the Court also rejected the Defendant's argument that the word "appears" in the expression "appears to the Court" which is repeated several times in Section 360 of the CMSA implied that the High Court had to make a finding of fact based on witness testimony brought before the Court.

As the word "appears" was not defined in the CMSA, Abdul Aziz J drew on case authorities which interpreted the corresponding expression in Section 24 of the Indian Evidence Act 1872 and Section 24 of the Malaysian Evidence Act 1950, the provisions of which are identical and relate to the admissibility of a confession made by an accused.

In *Pyarelal Bhargava v State of Rajasthan* AIR 1963 1094, the Supreme Court of India held that the word "appears" in Section 24 of the Indian Evidence Act means 'seems' and imports a lesser degree of probability. The Supreme Court in the same case added that "*the standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed.*"

In relation to the corresponding provision of the Malaysian Evidence Act, Sharma J in *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199 took the view that "*it is left entirely to the court*

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THE SOCIAL NETWORK PART 2

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Companies that use social media for their businesses should ensure that their practices of collecting, processing, using, storing and disseminating personal data comply with the provisions of the PDPA as Datuk Joseph Salang Gandum, the Deputy Minister of Information, Communications and Culture, has indicated that the PDPA will be enforced in early 2012 (New Straits Times Online, 21 June 2011).

The PDPA will not apply to a company which carries on credit reporting business. Instead, such a company must comply with the provisions of the Credit Reporting Agencies Act 2010 when it comes into operation.

CONCLUSION

The use of social media is no longer the domain of individuals. Many companies have successfully adopted social media as a platform to promote their business. A company which seeks to reap the benefits of social media must ensure that its practices comply with the existing legal and regulatory framework and evolve rapidly to embrace changes that take place in the ever-evolving world of the Internet.

Writer's e-mail: **lws@skrine.com**

LEGAL UPDATE

The Malaysian Industrial Development Authority (Amendment) Act 2011 ("Amendment Act") came into force on 19 August 2011.

Among other amendments, the Amendment Act changes the name of the principal Act to "Malaysian Investment Development Authority (Incorporation) Act 1965" and the name of the statutory corporation to Malaysian Investment Development Authority.

It also extends the powers of the statutory corporation to include the promotion of the services sector (excluding the financial and utilities sectors) in Malaysia.

An article on the main changes under the Amendment Act was published in Issue 2/2011 of LEGAL INSIGHTS.

BUILDING A RETIREMENT NEST

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To safeguard the interests of members and the public, a Scheme Administrator is required to ensure that at least 1/3rd of its directors are public interest directors in accordance with the criteria specified by the SC.

Duties and responsibilities

The duties and responsibilities of a Scheme Administrator include receiving and transmitting instructions in the form and manner specified by the SC, keeping records of all transactions or monies received and paid out and providing information to the Scheme Provider, Scheme Trustee, a member or any other person specified by the SC (Section 139(H)).

A Scheme Administrator is required to establish a set of terms of reference approved by the SC to govern the administration of a Scheme Administrator (Section 139I). The terms of reference may not be amended without the prior approval of the SC.

Financial and accounting matters

Section 139J requires a Scheme Administrator to pay into a trust account all monies received by it in respect of the Scheme and prohibits it from withdrawing the same except in accordance with the written instruction of a person entitled to the monies or for his benefit or otherwise authorised by law.

The provisions relating to audit in Sections 126 to 137 of the CMSA apply to a Scheme Administrator.

Power of SC to issue directions

Where the SC reasonably believes that the interests of the members of a Scheme are likely to be affected, it may issue directives that require a Scheme Administrator to take one or more of the actions specified in Section 139L(1).

SCHEME TRUSTEE

A Scheme Trustee is a person who acts as a trustee of a Scheme (Section 139A).

Matters relating to approval

The approval of the SC is required before a person may act or be appointed as a Scheme Trustee (Section 139ZC(1)). The SC may grant the approval on such terms and conditions as it thinks fit. It may also refuse an application or withdraw an approval granted to a Scheme Trustee on the grounds set out in Section 139ZD(1) and Section 139ZE(1) respectively.

EMPLOYER TRUSTEE

An Employer Trustee refers to a trustee of an employer-sponsored retirement scheme (Section 139A). An Employer Scheme is a retirement scheme established by a corporation for the purpose or having the effect of providing retirement benefits to employees of that corporation or of its related corporation.

Matters relating to approval

Section 139ZF requires a person to obtain the approval of the SC before he is appointed or acts as an Employee Trustee.

The SC may approve an application on such terms and conditions as it thinks fit. It may also refuse an application or withdraw its approval on the grounds set out in Section 139ZG(1) and Section 139ZH respectively.

“Section 139J requires a Scheme Administrator to pay into a trust account all monies received by it in respect of the Scheme”

CONCLUSION

The provisions in Part IIIA which regulate the activities of a Scheme Administrator are set out in greater detail than those which regulate a Scheme Provider or a Scheme Trustee notwithstanding that a Scheme Provider and a Scheme Trustee have important responsibilities to discharge in relation to a Scheme. Part IIIA also lacks detail in relation to a Scheme notwithstanding that it forms the basis of this new industry in Malaysia.

While Part IIIA sets out the approval framework for the main participants in the private retirement scheme industry and outlines some of the duties and responsibilities of a Scheme Administrator, the detailed rights, obligations and responsibilities of the main participants in this industry and the operational details of a Scheme are not laid out in this Part. It is likely that these important details will be laid out in the regulations and guidelines to be issued by the SC.

Writer’s e-mail: **khor.weimin@skrine.com**

NEWS ALERT! At press time it was learnt that the Amendment Act will come into operation on 3 October 2011.

COURT ASSISTANCE IN ENFORCEMENT OF ADMINISTRATIVE DECISIONS

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to form its own opinion as to whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature."

Having regard to the above authorities, the learned Judge held that the word "appears" in Section 360(1)(c) of the CMSA indicated a state of mind of the Court as to the affidavit evidence presented before it in order to be satisfied as to whether there had been a breach of the relevant requirements or of a provision of the CMSA and that the breach had been committed by the Defendants.

Defendants' Second Ground

Abdul Aziz J rejected the Defendants' second contention that only the SC could commence proceedings. The Court agreed with the Plaintiff's submission that Section 354 of the CMSA deals with an entirely different matter and was not relevant to the present case. That section applies where the SC imposes penalties whereas Section 360 applies when Bursa imposes the penalties.

His Lordship held that upon reading Section 360 with Section 11 of the CMSA, it is clear that it is the function of the SC and Bursa to promote a healthy and fair capital market and to ensure adequate protection of the public investors by instilling public confidence in the market. Towards this end, both the SC and Bursa are clothed with the necessary powers and authority to regulate and discipline market players and to come down hard on any person who breaches the relevant requirements (including the Listing Requirements) or the provisions of the CMSA which could affect the confidence of the public and players in the market.

Defendants' Third Ground

The Defendants' breaches of the Listing Requirements were committed at the time when the Securities Industries Act 1983 ("SIA") was in force. Similarly, proceedings were taken and penalties imposed by Bursa on the Defendants in 2005, before the SIA was repealed and replaced by the CMSA in 2007.

As the SIA has already been repealed by the time Bursa filed the proceedings in Court against the Defendants, the Judge said that it is common sense that Bursa could not file the action under that legislation.

According to the learned Judge, Section 390(1) of the CMSA preserves Bursa's right to take action against any person who is liable to be prosecuted or punished for offences or breaches committed under the repealed legislation. More importantly, Section 381(3) of the CMSA provides that all decisions, directions or notifications made, given or done under the repealed legislation are deemed to have been made, given or done under or in accordance with the corresponding provisions of the CMSA.

His Lordship concluded that by virtue of Sections 381(3) and 390 of the CMSA, the action taken by Bursa and its decision to impose penalties survived the repeal of the SIA as if they had been made or imposed under the CMSA.

Accordingly, the Judge was of the view that the Defendants' third contention was misconceived.

DOUBLE RECOVERY

The Court held that double recovery was not in issue as the proceedings taken by Bursa were distinct from those taken by the Company. Bursa was seeking to enforce an administrative decision against the Defendants whereas the Company was seeking to recover monies that belonged to it in its civil action against the Defendants (and 14 others).

In any event, Bursa had amended its prayers to take into account the consent judgment entered into such that it only sought an order for the return of RM13 million by the Defendants to the Company.

> **"the Court ... will not treat an application ... under Section 360 ... as a full scale trial"**

COMMENTARY

The High Court's decision affirms the functions of Bursa, its regulatory committees and in-house mechanism for taking action against market participants who breach the Listing Requirements.

It also recognises that Bursa has the jurisdiction to conduct its own investigations and to determine for itself whether or not alleged breaches had in fact been committed; and upon being satisfied that the breaches had occurred, to impose the necessary penalties or reprimands.

The judgment is also significant as the Court has affirmed that it will not treat an application by Bursa under Section 360 of the CMSA as a full scale trial but rather, will limit its role to reviewing whether, based on affidavit evidence, there was sufficient basis for the Listing Committee to come to the decision which it did.

CLOSING NOTE

The Defendants have filed an appeal against the decision of the High Court.

Writer's e-mail: ong.doenxian@skrine.com

LEGAL INSIGHTS

A SKRINE NEWSLETTER

SKRINE WAS FOUNDED ON 1ST MAY 1963 AND IS TODAY ONE OF THE LARGEST LAW FIRMS IN MALAYSIA. SKRINE IS A FULL-SERVICE FIRM DELIVERING LEGAL SOLUTIONS, BOTH LITIGATION AND NON-LITIGATION, TO NATIONAL AND MULTINATIONAL CLIENTS FROM A BROAD SPECTRUM OF INDUSTRIES.

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Photography
Natalie Lim

Skrine Publications Sdn Bhd
Unit No. 50-8-1, 8th Floor,
Wisma UOA Damansara,
50, Jalan Dungun,
Damansara Heights,
50490 Kuala Lumpur,
Malaysia.
Tel: 603-2081 3999
Fax: 603-2094 3211

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Nets Printwork Sdn Bhd
58 Jalan PBS 14/4,
Taman Perindustrian,
Bukit Serdang,
43300 Seri Kembangan,
Selangor Darul Ehsan.
Tel: 603-8945 2208
Fax: 603-8941 7262

CONTACT PERSONS FOR SKRINE'S MAIN PRACTICE AREAS:

Acquisitions, Mergers & Takeovers
Cheng Kee Check (ckc@skrine.com)

Aviation
Mubashir bin Mansor (mbm@skrine.com)

Banking (Litigation)
Leong Wai Hong (lwh@skrine.com)
Vinayaga Raj Rajaratnam (vrr@skrine.com)

Banking (Non-Litigation)
Theresa Chong (tc@skrine.com)
Dato' Philip Chan (pc@skrine.com)

Bankruptcy / Insolvency
Wong Chee Lin (wcl@skrine.com)
Lim Chee Wee (lcw@skrine.com)

Capital Markets / Asset Based Financing & Securitisation
Dato' Philip Chan (pc@skrine.com)

Competition Law & Policy
Faizah Jamaludin (fj@skrine.com)

Construction & Engineering
Vinayak Pradhan (vp@skrine.com)
Ivan Loo (il@skrine.com)

Corporate Advisory
Quay Chew Soon (qcs@skrine.com)

Corporate & Commercial Disputes
Wong Chee Lin (wcl@skrine.com)
Lim Chee Wee (lcw@skrine.com)

Corporate Restructuring / Debt Restructuring
To' Puan Janet Looi Lai Heng (llh@skrine.com)
Quay Chew Soon (qcs@skrine.com)

Customs & Excise
Maniam Kuppusamy (mnm@srine.com)

Defamation
Mubashir bin Mansor (mbm@skrine.com)
Leong Wai Hong (lwh@skrine.com)

Employment & Industrial Relations
Siva Kumar Kanagasabai (skk@skrine.com)
Selvamalar Alagaratnam (sa@skrine.com)

Environmental / Energy & Utilities
To' Puan Janet Looi Lai Heng (llh@skrine.com)

Information Technology / Telecommunications
Charmayne Ong Poh Yin (co@skrine.com)

Insurance (Litigation)
Mubashir bin Mansor (mbm@skrine.com)
Loo Peh Fern (lpf@skrine.com)

Insurance (Non-Litigation)
Phua Pao Yii (ppy@skrine.com)

Intellectual Property (Litigation)
Khoo Guan Huat (kgh@skrine.com)

Intellectual Property (Non-Litigation)
Charmayne Ong Poh Yin (co@skrine.com)

Islamic Finance
Dato' Philip Chan (pc@skrine.com)

Joint Ventures
Theresa Chong (tc@skrine.com)
To' Puan Janet Looi Lai Heng (llh@skrine.com)

Land Acquisition
Leong Wai Hong (lwh@skrine.com)
Lim Koon Huan (lkh@skrine.com)

Oil & Gas & Natural Resources
Faizah Jamaludin (fj@skrine.com)

Project Financing / Venture Capital
Theresa Chong (tc@skrine.com)

Real Estate
Dato' Philip Chan (pc@skrine.com)

Securities & Shares
Preetha Pillai (psp@skrine.com)

Shipping & Maritime
Siva Kumar Kanagasabai (skk@skrine.com)
Faizah Jamaludin (fj@skrine.com)

Tax (Litigation)
Harold Tan Kok Leng (tkl@skrine.com)

Trusts / Wills / Probate / Charities
Theresa Chong (tc@skrine.com)
Leong Wai Hong (lwh@skrine.com)