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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The year 2011 is coming to a close and by the time this issue is read, 2012 will be upon us. Hence it is not inappropriate to wish each of our readers a "Happy New Year". I do hope that 2012 will bring to all of you good health and good fortune. I also sincerely hope that 2012 will bring peace to all parts of the world and no natural disasters.

The last quarter of 2011 witnessed some notable events, one of which was the proclamation of Sultan Tuanku Abdul Halim of Kedah as the 14th Yang di-Pertuan Agong of Malaysia. The significance of this event is that Sultan Tuanku Abdul Halim was also Malaysia's 5th Agong from 1970 to 1975 and hence, is the only Sultan who has the distinction being appointed twice as the Agong of Malaysia.

The last quarter has been an eventful one for our firm. We organised the Skrine Regatta which raised RM25,000 for charity. We also held our Annual Dinner & Dance as well as a Motor Treasure Hunt for our staff. Last but by no means the least, our firm was given the privilege to sponsor the printing of the World Intellectual Property Organisation's comic books by the International Chamber of Commerce (Malaysia) to help promote awareness of intellectual property in Malaysia.

For businesses, 2012 will be a significant year in terms of compliance. The reason for this is because the Competition Act 2010 will come into force on 1 January 2012. In a nutshell the Act prohibits arrangements and conduct which are anti-competitive in nature, such as monopolies, cartels, price-fixing and abuse of dominant position.

Businesses cannot take compliance with the Competition Act lightly as an offender which is a body corporate will be liable to a fine of up to RM5,000,000 for a 1st offence and a fine of up to RM10,000,000 for a 2nd or subsequent offence. An individual who commits an offence under the Act will be liable to a fine of up to RM1,000,000 or to imprisonment for a term not exceeding 5 years or to both. For a 2nd or subsequent offence by an individual, the maximum fine is doubled but the other sanctions which may be imposed remain the same.

Thank you,

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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WIPO COMIC BOOKS

The International Chamber of Commerce Malaysia (ICC Malaysia) has, with the permission from World Intellectual Property Organisation (WIPO), reproduced and distributed a set of comic books on Intellectual Property Rights (IPR), namely Copyright, Trade Marks and Patents.

The comic books explain and raise awareness of the various concepts of IPR and seek to encourage businesses to create, register and respect IPR.

SKRINE is honoured to have sponsored the printing of the WIPO comic books.

Readers who wish to obtain a set of the WIPO comic books, without charge, may contact Ms Audrey Choo at 603-20813999 ext 852 or *acpl@skrine.com*. As limited copies are available, requests will be entertained on a first come first served basis.

LEGAL UP-DATE

In Issue 3/11 of Legal Insights, we featured a commentary on *Group Lotus & Anor v 1 Malaysia Racing Team Sdn Bhd and Ors* [2011] EWHC 1366 where the High Court in England held that the Defendants had the right to use the name "Team Lotus" and the trade mark Lotus Roundel concurrently with the use by Group Lotus of the word "Lotus" as part of the name "Lotus Renault GP" in Formula One motor racing.

StarBiz (15 November 2011) reported that the parties have settled their dispute. Although it was reported that the terms of the settlement were confidential, a statement released by Proton Holdings Berhad (the holding company of Group Lotus) to Bursa Malaysia stated that the settlement would result in the "Lotus" brand, including the rights to the "Lotus" and "Team Lotus" names in Formula One motor racing being reunited under Group Lotus.

The news report also stated that 1 Malaysia Racing Team would race under the name "Caterham F1 Team" in the 2012 Formula One season.

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.

MORE HATS

A commentary on the Pesaka

On 8 November 2011, the Court of Appeal handed down its judgment in 4 appeals that arose from a High Court action relating to an issue of corporate bonds in Malaysia. This commentary highlights certain aspects of the judgment by the Court of Appeal.

BRIEF FACTS

Pesaka Astana Sdn Bhd ("Pesaka") was awarded 3 contracts by the Government of Malaysia ("contracts"). It decided to issue *Al-Bai Bithaman Ajil* bonds ("bonds") to part-finance the execution of these contracts.

To facilitate the issue of the bonds, Pesaka appointed KAF Discounts Berhad ("KAF") as the lead arranger, facility agent and issue agent and Mayban Trustee Berhad ("MTB") as the trustee for the bonds.

Pesaka issued an information memorandum ("IM") in relation to the proposed bond issue. The IM stated that various bank accounts ("designated accounts") would be established under the control of MTB as the sole signatory. The revenue from the contracts ("assigned revenue") would be deposited into one of the designated accounts controlled by MTB ("revenue account") and be applied to redeem the bonds. This arrangement, often described as "*ring fencing*", would in effect put the assigned revenue beyond the control of Pesaka to protect the interest of the bondholders.

The bonds were to be issued to a primary subscriber, namely K&N Kenanga Bhd ("Kenanga"), who would then sell the same to other investors.

Various transaction documents were entered into in relation to the bonds, including a Subscription and Facility Agreement between Pesaka, KAF and Kenanga ("Agreement"), a Trust Deed whereby Pesaka appointed MTB as trustee for the bondholders ("Trust Deed") and an Assignment and Charge whereby Pesaka assigned to MTB, as trustee for the bondholders, the assigned revenue that would be deposited into the revenue account maintained by Pesaka with CIMB Cosway Branch ("CIMB")("Assignment").

As the revenue under two of the contracts had been assigned to CIMB, the relevant parties, including CIMB executed a Release and Assignment Agreement ("Release") which amongst other matters, disclosed that the assigned revenue would be assigned by Pesaka to MTB as trustee for the bondholders.

A notice of assignment was issued by Pesaka to CIMB pursuant to the Assignment. Amongst others, the notice informed CIMB that all rights in respect of the revenue account maintained with CIMB and all moneys therein had been assigned to MTB and irrevocably instructed CIMB to act upon the instructions of MTB in relation to any withdrawals and all other matters relating to the revenue account.

Although Pesaka had passed a resolution to appoint MTB's nominees as signatories for the revenue account, it did not

THAN HEADS ?

Astana Saga by Wong Chee Lin

WONG CHEE LIN

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appear that the resolution had been delivered to CIMB.

The bonds were issued on 1 April 2004 and the proceeds of approximately RM149.3 million (less agreed deductions and payments to various parties) were disbursed by KAF to Pesaka on the same day.

Sometime between July 2004 and September 2005, the assigned revenue was deposited into the revenue account and withdrawn by Pesaka. This was due to the fact that KAF and MTB had not taken steps to ensure that the signatories for the revenue account had been changed to MTB's nominees. Although CIMB was aware of the Assignment, it did not stop Pesaka's signatories from withdrawing the assigned revenue from the revenue account.

The bondholders declared an event of default on the bonds on 30 September 2005. Subsequently they filed a claim in the High Court against various parties including Pesaka, KAF and MTB. Arising from this proceeding, KAF filed a claim for an indemnity against Pesaka. Similarly MTB filed an indemnity claim against Pesaka and other parties. MTB also filed a claim against CIMB seeking damages on grounds that CIMB had breached its duties as a constructive trustee of the assigned revenue.

> **"KAF had to be absolutely sure that the "ring fencing" arrangements … were in place before the issuance of the bonds"**

DECISION OF THE HIGH COURT

Upon completion of the trial, the High Court awarded judgment to the bondholders in the sum of RM149.3 million against KAF and MTB in the proportion of 60%:40% respectively. The Court dismissed KAF's claim against Pesaka as well as MTB's claim against Pesaka and other parties. It also dismissed MTB's claim against CIMB.

Appeals were filed by various parties to the Court of Appeal.

THE DECISION OF THE COURT OF APPEAL

Liability of KAF and MTB

The Court of Appeal highlighted the following provisions of the Agreement –

(i) one of the conditions precedent that had to be fulfilled for the issue of the bonds was that KAF, the lead arranger, had received confirmation from Pesaka that it had opened the designated accounts and the mandates were in form and content satisfactory to KAF and Kenanga (clause 3.1 read with paragraph 11 ("CP11") of Schedule A);

(ii) the conditions in Schedule A could only be waived by Kenanga (clause 3.2); and

(iii) the issue of the bonds was subject to the condition that no event of default had occurred or is continuing (clause 4.3).

According to Dato' Jeffrey Tan JCA, the above-referred provisions required KAF to be satisfied that there was no default in CP11. His Lordship further ruled that in order to be so satisfied, KAF as lead arranger, facility agent and issue agent could not rely on Pesaka's confirmation but had to independently verify that all were in place before the bonds were issued.

In His Lordship's opinion, KAF had to be absolutely sure that the "ring fencing" arrangements, namely the establishment of the designated accounts with MTB in sole control, were in place before the issuance of the bonds. As it transpired, these arrangements were not in place when the bonds were issued, nor were they in place when the bond proceeds were disbursed or more critically, when the assigned revenue was deposited into the revenue account.

In the absence of the "ring fencing", the assigned revenue which belonged to the bondholders was not controlled by MTB but rather by Pesaka and this enabled the latter to withdraw all the assigned revenue from the revenue account.

The Court of Appeal held that despite the strenuous arguments by KAF and MTB, there was no getting away from the fact that there were no designated accounts or any "ring fencing" in place when the bonds were issued.

The learned Court of Appeal Judge held that KAF had failed to ascertain that CP11 had been complied with and that such non-compliance constituted an event of default under clause 4.3 of the Agreement. His Lordship concluded that by permitting the bonds to be issued in the face of an event of default, KAF had breached the IM and the Agreement as the promised security was not in place. In the opinion of the learned Judge, that was the next proximate cause for the loss (apart from the unauthorized withdrawals of the assigned revenue by Pesaka).

According to His Lordship, the absence of "ring fencing" was not the proximate cause of the loss. Had KAF not permitted the bonds to be issued, no loss would have arisen even in the absence of those arrangements.

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THE RAISING OF LAZARUS

Kwan Will Sen discusses the decision of the High Court in Drico Ltd v Drico (Water Specialist) Sdn Bhd & Ors

Can the dead be resurrected, only to be laid to rest again?

That, in short, was the issue faced by the High Court in *Drico Ltd v Drico (Water Specialist) Sdn Bhd & Ors* [2011] 1 LNS 488.

On 30 August 2008, a members' resolution was passed to wind-up Drico (Water Specialist) Sdn Bhd ("DWS"). The final nail was laid on the coffin of DWS. Or so it seemed.

DRAMATIS PERSONAE

The sole petitioner in this case, Drico Ltd ("Drico"), is a company incorporated in Japan. Drico has been engaged in a wide variety of projects in Japan and overseas, including water resource development and water supply projects.

The first respondent, DWS, was a company incorporated in Malaysia. At all material times, Drico was the majority shareholder of DWS.

The second respondent, Ismail Bin Johari ("Ismail"), was a director and shareholder of DWS at the material time.

> **"The Court found that the notice convening the EGM was never sent to Drico"**

The third respondent, Kinoshita Masao ("Kinoshita") was also a director of DWS at the material time. Kinoshita was a long serving employee of Drico and moved to Malaysia to oversee and manage the operations of DWS in the interest of Drico.

The fourth respondent, Tam Kok Meng ("Tam") was purportedly appointed as the liquidator of DWS upon the passing of the members' resolution to wind-up DWS on 30 August 2008.

BACKGROUND FACTS

On or about 6 February 2008, Drico and Kinoshita entered into an agreement ("Memorandum") whereby Drico agreed to pay ¥12 million to Kinoshita in consideration of Kinoshita initiating proceedings for the voluntary winding-up of DWS.

As it appeared that Kinoshita did not take any steps to convene a general meeting for the voluntary winding-up of DWS, Drico filed a petition to wind-up DWS pursuant to section 218 of the Companies Act ("Act") on 7 October 2008 ("218 Petition").

Unbeknownst to Drico, DWS had already been allegedly wound-up voluntarily. It appeared that an extraordinary general meeting ("EGM") had been called on 30 August 2008 and that Kinoshita had purportedly been appointed as Drico's proxy to attend the EGM on its behalf. Both Ismail and Kinoshita attended the EGM and voted in favour of the resolutions for the voluntary winding-up of DWS and the appointment of Tam as liquidator of DWS ("the Relevant Resolutions").

It was by chance that Drico discovered the documents which indicated that DWS had purportedly been wound-up voluntarily when it conducted a company search several months after the filing of the 218 Petition.

The discovery of these documents provided the catalyst for Drico to file a petition under section 181 of the Act ("181 Petition") which sought, amongst others, a declaration that the Relevant Resolutions were null and void and an order that DWS be wound-up (in a proper manner and in accordance with law), as opposed to the initial voluntary winding-up of DWS which Drico contended was invalid.

THE RAISING OF LAZARUS

The Court found that the notice convening the EGM was never sent to Drico. The Court held that the proof of postage showed that the notice had been posted to Kinoshita instead. Thus, Drico had no knowledge of the EGM or the resolutions to be passed at that meeting.

The Court was satisfied that the evidence adduced showed that Kinoshita had signed the proxy form to appoint himself as Drico's proxy. In actual fact, Drico had not authorized Kinoshita to do so. The Court held that the signing of the proxy form by Kinoshita purportedly on behalf of Drico was contrary to Note 2 of the proxy form which required an appointor which is a corporation to sign the form under its common seal or under the hand of its officer or attorney.

The Court accepted the petitioner's contention that the fact that Kinoshita had acted as Drico's proxy on previous occasions did not automatically authorize him to continue acting as Drico's proxy. In this respect, the Court relied on *Puran Singh v Kehar Singh* [1939] MLJ 71 and *Veetak Enterprise Sdn Bhd v The Kuala Lumpur Finance Bhd* [1985] 1 LNS 9 where it was held that there can be no *estoppel* against a statutory provision in an enactment which legislates on a matter of general interest.

The Court rejected the argument by Ismail, Kinoshita and Tam that Kinoshita had been appointed as a proxy for Drico under the Memorandum. The Court held that whilst the Memorandum contained a request by Drico for Kinoshita to convene a general meeting for purposes of winding-up DWS, Drico had not given any authority to Kinoshita to attend the meeting or to vote on its behalf.

The Court also rejected the respondents' contention that Kinoshita had acted as the corporate representative of Drico as they had failed to adduce any documents or evidence, such as a Certificate of Appointment of Representative envisaged under section 147(5) of the Act, to support their contention.

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By reason of the procedural irregularities in the convening of the EGM, the Court declared the EGM to be invalid. The Court also held that in consequence, the Relevant Resolutions whereby DWS was wound-up and Tam was appointed as liquidator were also invalid.

Thus, DWS came back to life.

THE RETURN TO HADES

Although Drico put forward various grounds in support of its contention under the 181 Petition that Ismail, Kinoshita and Tam had acted in a manner that was oppressive to Drico and in disregard of its interest as a shareholder of DWS, the Court upheld certain of the grounds raised by Drico while rejecting several others.

Amongst the allegations by Drico that were dismissed by the Court was the contention that Tam by aligning himself with Ismail and Kinoshita had failed to act in an impartial manner as the liquidator of DWS and had thereby acted in a manner that was oppressive to Drico.

> **“ there can be no estoppel against a statutory provision … which legislates on a matter of general interest ”**

The Court also rejected several allegations by Drico that certain conduct of the respondents were oppressive of Drico and that certain payments made by DWS to Ismail and Kinoshita were unauthorized.

The Court was however satisfied that Drico had succeeded in establishing that the following conduct by Ismail and Kinoshita were oppressive and in disregard of Drico's interest as a shareholder in DWS:

(i) The purported transfer by Kinoshita on behalf of Drico of 15,000 shares in DWS to Ismail which the Court found, contrary to Kinoshita's arguments, had not been authorized by Drico;

(ii) The payment of RM450,000.00 by DWS to Ismail on 1 August 2008, purportedly as dividend, was in fact a loan made in contravention of section 133 of the Act;

(iii) The failure by Ismail and Kinoshita to disclose their interest in a company known as East Trade & Technology Sdn Bhd which entered into certain contracts with DWS had contravened section 131 of the Act and amounted to a disregard of the interest of DWS and of its shareholders;

(iv) The failure by Ismail and Kinoshita to retrieve some monies paid to DWS's solicitors, in particular, monies paid for work yet to be done was a breach of fiduciary duty and amounted to oppression;

(v) By affirming affidavits on behalf of DWS in the 218 Petition after the alleged voluntary winding-up of DWS on 30 August 2008 without informing the Court that DWS was already in voluntary liquidation and without authorization from the liquidator, Ismail had breached sections 256 and 258 of the Act and had acted with disregard to DWS's interest.

The Court was satisfied that the afore-mentioned conduct of Ismail and Kinoshita, taken jointly and severally, clearly indicated that the affairs of DWS had been conducted in a manner which was oppressive to the interest of Drico and wholly disregarded its interest as a shareholder of DWS.

In view of the fact that the Court had ruled that the purported voluntary winding-up of DWS was invalid, the Court was of the view that the appropriate remedy in the circumstances was to make an order to wind-up DWS and that it was just and equitable to do so.

The Court was also satisfied that there was no commercial reason to keep DWS alive as a company.

With that DWS was once again laid to rest.

IS THERE LIFE AFTER DEATH?

This is the first reported case in Malaysia where a company, having been wound-up voluntarily, albeit unlawfully, was resurrected only to be wound-up again.

A novel point in this case is that among the oppressive conduct complained of was the improper voluntary winding-up of the subject company.

Ismail and Kinoshita have appealed against the decision of the High Court. Similarly, Drico has filed a cross-appeal against the findings of the High Court that certain acts by the respondents were not oppressive of or in disregard of its interest. The appeals are now pending hearing.

Should the Court of Appeal uphold the High Court's decision to set aside the resolution purportedly passed on 30 August 2008 for the voluntary winding-up of DWS and at the same time, set aside the order made by the High Court to wind-up DWS under the 181 Petition, we could witness yet another miracle where DWS would be resurrected once again!

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WITHOUT DOUBT, IT'S MINE

Leong Wai Hong and Lam Wai Loon discuss the Sediabena Case

INTRODUCTION

The last two issues of Legal Insights featured articles which discussed the grounds of decision of the High Court and the Court of Appeal in *Sediabena Sdn Bhd & 1 Other v Qimonda Malaysia Sdn Bhd (In Liquidation)* ("*Sediabena*").

To recap, the High Court in *Sediabena* decided on 22 April 2011 that retention monies retained by the employer, Qimonda Malaysia Sdn Bhd ("Employer"), under the building contract were monies held on trust for the contractors, Sediabena Sdn Bhd and APC Corporate Holdings Sdn Bhd ("Contractors"), and that therefore, the Contractors were entitled to these retention monies which had not been set aside in a separate account but had been mixed with the general funds of the Employer.

The appeal by the liquidators of the Employer against the decision of the High Court was dismissed by the Court of Appeal on 12 July 2011.

Thereafter, the liquidators applied to the Federal Court for leave to appeal against the decision of the Court of Appeal. The liquidators' application was dismissed by the apex court on 30 October 2011. With that, the litigation drew to a conclusion with a favourable outcome for the Contractors.

> **"a trust can be imported into a commercial relationship in appropriate circumstances even where there was no express trust provision in the contract"**

This article examines the differences between the approaches taken by the Malaysian Courts in *Sediabena* and the English Courts in dealing with the right of recovery of retention monies by a contractor after the liquidation of an employer.

THE SEDIABENA CASE

In *Sediabena*, the building contract for a construction project provided that the Employer was entitled to retain 10% of the total certified amount for the work done and materials supplied by the Contractors under every Certificate of Payment issued by the Consulting Engineer, subject to the maximum amount of the retention monies being limited to RM6,127,884.50.

The Employer was obliged under the building contract to release one half of the retention monies after the issuance of the Handing Over Certificate and the other half after the issuance of the Maintenance Certificate or Certificate of Statutory Completion for the Works, whichever is the later.

The Contractors completed and handed over the works to the Employer. Accordingly, the Consulting Engineer recommended the release of part of the retention monies to the Contractors. The Employer did not release the retention monies to the Contractors as recommended. Soon thereafter, the Employer declared voluntary liquidation.

At the time of its liquidation, the Employer had not set aside the retention monies in a separate account but its general funds exceeded the total amount of the retention monies.

The Contractors requested the liquidators of the Employer to release to them the retention monies on the basis that the retention monies were monies held on trust by the Employer in favour of the Contractors.

The Contractors' request was rejected by the liquidators citing, in the main, that the building contract did not provide that the retention monies are trust monies. The liquidators further contended that as the Employer had not set aside the retention monies in a separate account, the said retention monies had become part of the general funds.

Given the position taken by the liquidators, the Contractors commenced proceedings in the High Court against the liquidators, seeking an order declaring the retention monies as trust monies and compelling the liquidators to release the retention monies to the Contractors.

On the application of the Contractors, the High Court Judge issued an interim injunction to compel the liquidators to set aside and preserve the retention monies in a separate account pending the disposal of the full trial.

After hearing testimonies of the witnesses and submissions from counsel, the High Court ruled in favour of the Contractors and declared that the retention monies were monies held on trust by the Employer for the Contractors and ordered the liquidators to release the same to the Contractors.

As mentioned earlier, the decision of the High Court Judge was upheld by the Court of Appeal and the liquidators' application for leave to appeal against the decision of the Court of Appeal was dismissed by the Federal Court.

THE ENGLISH APPROACH

The English principles in this area can be traced back to the Chancery Division Court case of *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 34 ("*Rayack*"). *Rayack* concerned an application by a contractor under a building contract for, *inter alia*, an injunction to compel the employer to pay all retention monies under the contract into a separate account to be applied only in accordance with the trust provision in the building contract.

The employer was solvent at the time of the contractor's


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application. The application was grounded upon the specific provision in the building contract which stated that the employer's interest in the retention monies so retained was fiduciary as trustee for the contractor.

In allowing the contractor's application, the Chancery Court held that the trust provision in the building contract effectively imposed an obligation on the employer to appropriate and set aside any retention monies so retained by it.

The Chancery Court went further to opine, *obiter dicta*, that the contractor's beneficial interest in the retention monies could only subsist in a fund so appropriated and set aside, and that in the absence of such appropriation and setting aside, the contractor would run the risk of being ranked as an unsecured creditor with regard to the retention monies in the event of liquidation of the employer.

These principles were extended in another Chancery Division Court case of *Re Jartay Developments Ltd* [1982] 22 BLR 134 ("*Re Jartay*") to disallow a similar application by the sub-contractor for an order to release the retention monies retained under the sub-contract as the contractor has gone into voluntary liquidation. Nourse J held that if the application had been made before the employer went into liquidation, the Court would have followed *Rayack* to allow the application.

The principles in *Rayack* were subsequently applied by the English Court of Appeal in *Wates Construction (London) Ltd v Franthom Property Ltd* (1991) 53 BLR 27 ("*Wates Construction*"), a case that involved a solvent employer, and *Mac-Jordan Construction Ltd v Brookmount Erostin Ltd (in receivership)* [1992] BCLC 350 ("*Mac-Jordan*"), a case that involved an insolvent employer.

THE DIFFERENCES

Unlike the English cases discussed above, there was no provision in the building contract in *Sediabena* which declared that the employer's interest in the retention monies was fiduciary as trustee for the contractors. In spite of this, the High Court construed the provision dealing with retention monies as evincing an intention of the parties to treat the retention monies as trust monies and accordingly, implied a trust with regard to the retention monies.

In coming to this conclusion, the High Court applied the Malaysian Supreme Court decision in *Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and other appeals* [1991] 1 MLJ 293 ("*Geh Cheng Hooi*") which held that a trust can be imported into a commercial relationship in appropriate circumstances even where there was no express trust provision in the contract.

In arriving at its decision in *Geh Cheng Hooi*, the Supreme Court had referred to *Re Kayford Ltd* [1975] 1 All ER 604 where Megarry J held that it is well settled that a trust can be created without the use of words like 'trust' or 'confidence' or similar expressions and that the question is whether in substance a sufficient intention to create a trust had been manifested.

The Supreme Court also referred to Megarry J's observation in *Re Kayford Ltd* that payment into a separate bank account is a useful, though by no means conclusive, indication of an intention to create a trust and that there is nothing to prevent a company from binding itself by a trust even if there are no effective banking arrangements.

In affirming the High Court decision, the Court of Appeal held that retention monies in construction contracts were, by their nature and purpose, trust monies. This is predicated upon the fact that the building contracts in this case recognized the retention monies as monies belonging to the contractors but were retained by the employer for the specific purpose stated in the contract. The Court of Appeal was of the view that if the retention monies were not applied for that purpose, the monies were to be returned to the contractors.

> **"the Court of Appeal held that retention monies in construction contracts were, by their nature and purpose, trust monies"**

The recognition in *Sediabena* of retention sums under a construction contract as trust monies is not new and accords with the decisions of the Malaysian High Court in *Syarikat Pembinaan Woh Heng Sdn Bhd v Meda Property Services Sdn Bhd* (unreported), *Kumpulan Liziz Sdn Bhd v Pembinaan OCK Sdn Bhd* [2003] 4 CLJ 709, *ABB Transmission & Distribution Sdn Bhd v Sri Antan Sdn Bhd* [2008] 10 CLJ 1 and *Merino-O.D.D. Sdn Bhd v PECD Construction Sdn Bhd* [2009] MLJU 671.

The decision in *Sediabena* on the status of retention monies is consistent with the English cases of *Rayack* and *Wates Construction* in a situation where the employer has not gone into liquidation. The difference however is where the employer has gone into liquidation. In this situation, the English Courts in *Re Jartay* and *Mac-Jordan* held that the retention monies ceased to be trust monies if such monies have not been set aside in a separate account and in such event, the contractor's claim for the retention monies would rank as an unsecured debt.

The Courts in *Sediabena* declined to follow *Re Jartay* and *Mac-Jordan.* Instead, the Malaysian Courts held that the contractors' beneficial interest in the retention monies could survive the

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HOW MUCH SHOULD THE ESTATE GET?

Harold Tan examines the decision of the Federal Court on Section 58(1) of the Employees Provident Fund Act

In *Lembaga Kumpulan Wang Simpanan Pekerja v Ong Lian Chee* (unreported), the Federal Court was called upon to answer the following question of law:

"Whether the correct interpretation of sections 54(1)(a) and 58(1) of the Employees Provident Fund Act 1991 ("Act") and the Fifth Schedule of the Act, all of which as amended by Act A1080/2000 and which came into force on 1 July 2000, is that the additional amount as set out in the Fifth Schedule that is payable is the amount stipulated therein as at the date of granting of authority for withdrawal under section 54(1)(a) rather than the date of death of the deceased member".

FACTS

Goh Tin Poh ("the deceased") was a member of the Employees Provident Fund ("EPF"). He died on 12 October 1998. Letters of Administration to the estate of the deceased were granted to his wife, Ong Lian Chee, the Respondent.

In August 2001, the Respondent had applied for the withdrawal of all sums of money standing to the credit of the deceased with the EPF pursuant to section 54(1)(a) of the Act. The relevant portion of the section in force at the material time reads:

"54(1) The Board may authorise the withdrawal of all sums of money standing to the credit of a member of the Fund upon any terms and conditions as may be prescribed by the Board if the Board is satisfied that ... (a) the member of the Fund has died;"

"the right to receive the additional payment under section 58(1) ... accrues to the estate of a deceased member upon the grant of withdrawal under section 54(1) by the EPF Board"

The Respondent's application under section 54(1)(a) was approved by the EPF Board ("Board") on 27 September 2001 and 9 July 2002 for the sums of RM29,999.00 and RM135,208.00 respectively. The said sums were paid to the Respondent on 2 October 2001 and 15 July 2002 respectively.

Subsequent to the withdrawal, the EPF paid to the Respondent an additional amount of RM2,000.00 pursuant to section 58(1) of the Act which provides as follows:

"58(1) Where authority for withdrawal under section 54(1)(a) has been granted, an additional amount as set out in the Fifth Schedule shall be payable:

Provided that where the Board is satisfied that a member of the Fund has died, and no authority for withdrawal under section 54(1)(a) has been granted, the Board may as it deems fit, pay the additional amount to such person as the Board may approve."

It was not in dispute in the case that prior to an amendment made to the Fifth Schedule to the Act which came into force on 1 July 2000, the additional amount payable to the Respondent would have been RM30,000.00. However, following the amendment, the additional amount payable stipulated in the Fifth Schedule was reduced to RM2,000.00.

Aggrieved by the decision of the EPF to pay her RM2,000.00, the Respondent initiated a suit to challenge the validity of the EPF's decision.

THE RESPONDENT'S CONTENTION

The Respondent contended that her right to the additional amount under section 58(1) of the Act accrued upon the death of the deceased, namely on 12 October 1998, and that therefore, she ought to have received RM30,000.00 instead of only RM2,000.00 from the EPF as provided for in the Fifth Schedule prior to the amendment.

EPF'S CONTENTION

The EPF on the other hand submitted that the event which entitled the Respondent to payment of the additional amount under section 58(1) of the Act was not the death of the deceased member *per se*, but the approval or exercise of the discretion by the EPF Board to grant the authority for withdrawal under section 54(1)(a).

DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

The Respondent's arguments were accepted by both the High Court and Court of Appeal which both held that the event which gave rise to the withdrawal of a deceased member's money pursuant to sections 54(1)(a) read together with section 58(1) and the Fifth Schedule is the death of the member. Accordingly both Courts held that the additional amount payable under section 58(1) of the Act should be based on the date of the member's death and not the subsequent approval by the EPF.

DECISION OF THE FEDERAL COURT

Leave to appeal was granted by the Federal Court on the question of law set out at the beginning of this article.

The Federal Court unanimously allowed the appeal and found that both the High Court and Court of Appeal had erred in law in their decisions.

The Federal Court held that the statutory provisions of sections 54(1)(a) and 58(1) of the Act were plain and unambiguous, and ought to be given their ordinary meaning.

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WITHOUT DOUBT, IT'S MINE

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The apex court agreed with the contention by counsel for the EPF and held that section 58(1) of the Act clearly provided that the event which entitles the respondent to payment of the additional amount under that section is not the date of the death of the deceased *per se*, but the approval or exercise of discretion by the EPF to grant the authority for withdrawal under section 54(1)(a).

The Court also noted that there is no mention in section 58(1) that the additional amount is payable upon the death of a member.

On the facts of the case under appeal, the Federal Court found that since the authority for withdrawal was granted by the EPF Board to the Respondent on 27 September 2001 and 9 July 2002, after the amendment to the Fifth Schedule had come into force on 1 July 2000, the additional amount payable was RM2,000.00 and not RM30,000.00.

The Federal Court explained that the additional amount payable under section 58(1) of the Act did not constitute the deceased member's contribution to the EPF but is a subsidy which object and purpose is to alleviate the hardship faced by the deceased's dependants that ensued after his demise. Consequently, the decision as regards the quantum of the additional amount to be paid out was a matter of policy consideration for the legislature to determine.

CONCLUSION

The decision of the Federal Court is significant as it establishes that the right to receive the additional payment under section 58(1) read together with the Fifth Schedule to the Act only accrues to the estate of a deceased member upon the grant of withdrawal under section 54(1) by the EPF Board and not as at the date of death of a member.

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liquidation of the employer, irrespective of whether or not the monies have been appropriated and set aside in a separate bank account. The liquidators would then bear the burden to account for the monies, failing which, the amount up to the total retention monies in the general funds would belong to the trust concerned.

In adopting the above position, the Courts in *Sediabena* followed *Geh Cheng Hooi* where the Supreme Court applied the long established principles laid down by the English Courts in *Re Hallet's Estate* (1880) 13 Ch 696 which held that if money held by a person in a fiduciary character, though not a trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and *Re Tilley's Will Trust* (1967) Ch 1179 which held that if a trustee mixes trust assets with his own, the onus lies on the trustee to distinguish the separate assets, and to the extent that he fails to do so, they belong to the trust.

> **"The decisions in Sediabena … have enhanced a contractor's prospects of recovering retention monies in the event of the employer's liquidation"**

It is interesting to note that the tracing principles laid down in *Re Hallet's Estate* and *Re Tilley's Will Trust* were not referred to in *Re Jartay and Mac-Jordan*. It is possible that the English Courts in these cases may have come to a different decision had they considered those cases.

CONCLUSION

The decisions in *Sediabena* are significant for the construction industry in Malaysia. They have enhanced a contractor's prospects of recovering retention monies in the event of the employer's liquidation as they enable a contractor, in appropriate circumstances, to recover the retention monies from the general funds of the employer.

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THE HALLMARK OF A VEXATIOUS LITIGANT

Claudia Cheah explains the case of a serial litigant

Access to justice is a common law right which has found place in the Federal Constitution. This right is enshrined in Article 8 of the Federal Constitution which provides equal entitlement to protection of the law to all persons. The recent decision of the Court of Appeal in *Sim Kooi Soon v Malaysia Airline System (No 2)* [2010] 9 CLJ 936 illustrates that there are restrictions to this fundamental right.

In a rare exercise of its power under Article 17 of the Schedule to the Courts of Judicature Act 1964 ("Article 17"), the Court of Appeal unanimously ordered that Sim Kooi Soon ("Applicant") be declared a 'vexatious litigant' by a notification to be published in the Gazette.

Article 17 provides as follows:-

"17. Vexatious litigants

Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a Judge. A copy of any such order shall be published in the Gazette."

This decision has a significant impact on a litigant's right of access to the courts.

BRIEF FACTS

The facts surrounding the Applicant's claim can be gleaned from the High Court decision in *Sim Kooi Soon v Malaysia Airline System* [2005] 2 CLJ 797. Briefly, the Applicant was a pilot with the rank of Captain in the employ of the Respondent. In November 1995, the Applicant operated a flight from Kuala Lumpur to Langkawi without a load sheet in breach of international and domestic law. The Applicant was subsequently suspended from his flying duties.

Pursuant to a non-technical inquiry, the matter was reported by the Respondent to the Department of Civil Aviation ("DCA"). After receiving an explanation from the Applicant, the DCA suspended the Applicant's air transport pilot licence for a period of 30 days with immediate effect. The Respondent decided to reduce the Applicant's salary for 1 month and downgraded him to the rank of First Officer which effectively rendered him to be a co-pilot. The Applicant, contrary to directions from the Respondent, continued to wear the 4 bar epaulettes depicting him as Captain despite having been downgraded.

In April 1997, the Review Board of the Respondent unanimously decided that the Applicant was not yet ready to regain his command status. The Applicant informed the Board that he was not accepting the decision of the Board and that he would not operate as a co-pilot anymore.

The Board gave the Applicant one week to reconsider his decision. When the Board reconvened, the Applicant informed the Board that he maintained his stand. The Board recommended the Applicant be suspended and charged for insubordination. Dissatisfied with the Board's decision, the Applicant filed a claim for constructive dismissal in the Industrial Court.

The Applicant's claim for constructive dismissal was dismissed by the Industrial Court. The Applicant then applied for an order of *certiorari* to quash the Industrial Court's Award but his application was dismissed by the High Court in May 2005. The Applicant filed an appeal to the Court of Appeal against the High Court decision, which was dismissed in December 2006.

The Applicant then began successive filing of review applications at the Court of Appeal. At the hearing of the second review application, the Applicant was advised to seek leave to appeal to the Federal Court. However, the Applicant refused to do so and continued to file repeated review applications at the Court of Appeal which were all dismissed by different panels of the Court of Appeal.

> **"a vexatious proceeding is one where the vexatious litigant had little or no basis in law"**

By an 11th review application, the Applicant applied to annul the 10 previous decisions of the Court of Appeal. In his affidavits, the Applicant sought reinstatement of his previous position as captain/commander of the Respondents' aircraft. The Applicant further prayed for an order that the Respondent train him as an Airbus A380 commander to successful completion at no cost to the Applicant and that the Respondent employs him in that capacity till legal retirement.

The Applicant further sought back wages, benefits of every imaginable kind as well as perks, privileges, benefits derived from agreement between the Malaysia Airlines Pilots' Association (MAPA) and the Respondent and general and aggravated damages to the tune of RM8 billion. The Applicant also made grave insinuations against the judiciary and baseless and scandalous allegations against the solicitors representing the Respondent.

DECISION OF THE COURT OF APPEAL

The Court began its judgment by asking the question, "*What is the hallmark of a vexatious litigant?*". The answer, according to the Court of Appeal, is as follows:

"The claimant who sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, is termed as a vexatious litigant."

The Court then explained that *"a vexatious proceeding is one where the vexatious litigant had little or no basis in law and its*

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effect was to subject the opposing party to inconvenience."

The Court held that it is clearly vexatious, frivolous and an abuse of the court process for the Applicant to seek annulment of 10 previous decisions of the Court. The Court found that the Applicant exhibited the classic symptoms of a variant of *de Clerambault's* syndrome. It is a syndrome named after a French psychiatrist, who described such syndrome as "litigious behaviour".

The persistent and relentless filing of frivolous and vexatious applications shows that the Applicant was attempting to re-open the appeal and re-litigate the same. Having found the Applicant a 'serial litigator', the Court invoked its powers under Article 17 and ordered that the Applicant be restrained from instituting any further legal proceedings in any court save by leave of the Court of Appeal and that a copy of the order be published in the Gazette.

The Court further warned the Applicant that should he persist in instituting further legal proceedings without leave of the Court of Appeal, contempt proceedings may be initiated against him by the Respondent and the Applicant could be incarcerated. The Applicant's 11th review application was unanimously dismissed by the Court and the Applicant was ordered to pay cost of RM10,000 to the Respondent.

CONCLUSION

This decision illustrates that the court may interfere to restrain a litigant from filing repeated, unmeritorious and vexatious claims. 'Serial litigators' who persist in filing such claims may be subject to contempt proceedings and could even be punished with imprisonment.

This decision is neither perverse nor unreasonable and is an example of a considered decision based on clear logic necessitated by underlying policy reasons. Precious judicial time should not be wasted on vexatious proceedings which cause delays and worsen the current backlog of cases pending in court.

Nonetheless, it must be noted that the court will only exercise its power to deny a litigant from access to the courts in exceptional circumstances where the claim is clearly vexatious and without basis.

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SKRINE TREASURE HUNT

On 10 December 2011, Skrine organised for the very first time a Motor Treasure Hunt with the assistance of Trailblazers, a professional event organiser.

A total of 18 teams, each comprising 4 members, signed up for the hunt. To encourage greater interaction amongst our staff, each team was required to have at least 1 lawyer and 1 general staff member. Family members were allowed to form part of a team.

The teams gathered early on that Saturday morning for a final briefing after which they were flagged off. The hunt was on!

The hunt covered a distance of about 70 km and took the teams to Subang Jaya, Shah Alam and back to Kuala Lumpur. In the midst of solving riddles, deciphering clues and cracking passwords, the teams also had to figure out and hunt down 5 treasures. Thanks to the initiative of the Trailblazers, the treasures comprising of food items were donated to the Agathians Shelter for children in Petaling Jaya.

The Hunt ended at the Royal Lake Club at 1.30 p.m. where the teams were treated to a sumptuous lunch. *The Gold Diggers* (Isaac, Aufa, Ee Va and Eyza) emerged as champions followed by *The Raiders* (Dato' Philip, Azrina, Teddy and Ai Hsian) and *Men United* (Gopi, Susruthan, Zhen and Mira).

The participants enjoyed the hunt tremendously and learnt the importance of teamwork, time management and thinking out of the box.

OF BIMBOS, BLACK SWANS, EX-DATES, ETC.

C.K. Kok explains the meaning of some terms in corporate-speak and legalese

To the ordinary man, the expressions "Black Swan", "bimbo", "Russian Roulette" and "tailgating" have specific meanings. Yet, each of these, and other terms, have acquired a different meaning in the legal and financial services industry. Here are some interesting expressions in corporate-speak and legalese.

BIMBO

According to the Shorter Oxford English Dictionary (5th Edition), a "*bimbo*" is an attractive but unintelligent woman.

In the world of finance, the acronym "BIMBO" stands for "Buy In Management Buy Out" where existing shareholders of a company are bought-out by a consortium comprising outside investors who "buy in" and existing management who undertake a "management buy out".

To this day, the finance wizards at Harvard, Wharton and INSEAD and top-notch investment bankers on Wall Street have yet to find an appropriate use for the expression, "*himbo*", which according to the above-referred dictionary, describes an attractive but unintelligent man. Perhaps the jocks of the NFL and the EPL can provide an 'assist' here, duh?

BLACK SWAN

Black Swan is the name of the movie in which Natalie Portman won the Academy Award for Best Actress in 2010 for her brilliant portrayal of the psychological meltdown of a *prima ballerina* (the principal ballerina in a ballet company).

In corporate-speak, a "Black Swan" describes a rare event of extreme impact which lies outside the realm of predictability. The appearance of a "Black Swan" usually wreaks havoc in the financial markets. The term was coined by Professor Nassim Nicholas Taleb, a professor at Oxford University and the Polytechnic Institute of New York University, in his book "The Black Swan".

BLITZKRIEG TENDER OFFER

In military parlance, "*blitzkrieg*" means "lightning war" in German. This strategy was deployed with great success at the outbreak of World War II when Germany, relying on heavy bombardment by its aeroplanes, artillery and tanks, conquered most of Western Europe with ease and in quick time.

A "blitzkrieg tender offer" is similar to the military strategy insofar as its objective is to secure success quickly. It differs radically from its military counterpart in that unlike the latter which creates "shock and awe", a "blitzkrieg tender offer" is a take-over offer which is so attractive that it receives minimal or no objections from the shareholders of the target company.

The reclusive Malaysian billionaire, T. Ananda Krishnan, has deployed this tactic with great success in his privatisation of Maxis Communications Berhad, ASTRO All Asia Networks plc and Tanjung plc by offering substantial premiums of 20%, 23.6% and 21.9% respectively over the last-traded price of the shares of those companies before the issue of the respective take-over notices. Each offer attracted more than 90% acceptances, thereby enabling the offeror to acquire the remaining shares of each company using the compulsory acquisition provisions under the relevant securities law.

BREAK-UP FEE

In the world of mergers and acquisitions, a "*break-up fee*" is a fee which a purchaser pays to a target company or the seller if the purchaser withdraws from the transaction. Although less common in practice, this term can also apply to a fee that is payable by a seller or the target company to a purchaser if seller or the target company withdraws from the sale. Such payment is to compensate the relevant party for time and resources spent on the transaction and for loss of opportunity.

The payment of break-up fees is a common practice in international transactions. On 21 March 2011, Bloomberg reported that AT&T agreed to pay T-Mobile USA a break-up fee of US$3 billion if it did not proceed with the acquisition of the latter. It was also reported in *overheard@wsj.com* that AOL and Pfizer had each agreed to pay break-up fees in excess of US$4 billion in their purchase of Time-Warner and Wyeth. The AOL-Time-Warner and the Pfizer-Wyeth transactions, valued at US$160 billion and US$68 billion, were completed in 1980 and 2009 respectively.

> **"the acronym "BIMBO" stands for "Buy In Management Buy Out""**

Although break-up fees are presently not a common practice in the Malaysian merger and acquisition scene, the practice may find its way to our shores in due time.

On 6 March 2011, asiaone.com.sg reported that Ms Tan, a waitress, demanded S$30,000 from her former boyfriend, Mr Du, as a break-up fee when he ended their 6-year relationship. Ms Tan alleged that Mr Du had signed an agreement with her and a certain Mr Ng, her other boyfriend (yes, life gets complicated in a triangular relationship) to pay her that sum and a further sum of S$15,000 to Mr Ng.

The online news portal further reported that Ms Ng has since obtained legal advice that the agreement was not legally binding. A case of life imitating art?

EX-DATE

In the trading of securities, an "ex-date" refers to a date on and after which a security is traded without the entitlement to a right, distribution or dividend which has been announced. On Bursa Malaysia, the ex-date usually falls 3 market days before the entitlement date.

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In the larger scheme of life, the prefix "ex" connotes a relationship which once existed, but no longer. For example, an ex-spouse refers to a person's former husband or wife, and an ex-girlfriend is a person's former girlfriend. By extending the same logic, an "ex-date" would be someone whom a person once dated but no longer does.

FRONT RUNNING

In horse-racing, "front running" describes a horse whose style is to race from the front of the pack as soon as the race starts.

In corporate parlance, front running is the practice where a market intermediary, such as a broker, acquires a particular security before his company recommends the same security to its clients.

On 1 April 2011, *The Australian* reported that Oswyn de Silva, a Malaysian fund manager with Macquarie Bank in Sydney, was sentenced to 2½ years imprisonment for this form of insider trading. De Silva had purchased certain stocks using insider knowledge that a Macquarie Group company would be purchasing these stocks to align its investments with its investment model and subsequently sold them to the Macquarie Group company for a profit.

GO-SHOP PERIOD

A "go-shop period" is not a time when one allows his wife to go on an unbridled shopping spree during the Grand Prix Sale, Mid-Year Sale, Year-End Sale, Hari Raya Sale, Chinese New Year Sale, Deepavali Sale, Christmas Sale or a host of other sales that seem to be perpetually on-going in Malaysia.

In mergers and acquisitions, a "go-shop period" is a time period during which a company that is being sold is permitted to seek competing offers even though it has agreed on the principal terms of the sale with a prospective buyer. This period enables the directors of the target company to fulfil their fiduciary duty to obtain the best possible price for the sale.

In November 2010, Del Monte Foods Company entered into a merger agreement with a group of investors led by Kohlberg Kravis and Roberts & Co, L.P. which gave Del Monte the right to solicit alternative bids from third parties for a period of 45 days. The "go-shop period" ended on 8 January 2011 without the company finding any alternative bidders. The merger was completed on 8 March 2011.

RUSSIAN ROULETTE

The deadly game of Russian Roulette probably came to attention of the public in the 1978 multiple Academy Award (including Best Picture) winning movie "Deer Hunter" where the American POWs were forced by their Vietcong captors to play a deadly game where they took turns to spin the cylindrical ammunition chamber of a revolver which contained one bullet before placing the gun against their temples and pulling the trigger. Extreme sports at its ultimate!

In legal terms, a "Russian Roulette" is a form of dead-lock breaking mechanism in a shareholders' agreement whereby a party, A, offers to purchase all the shares of the other party, B, and alternatively, at the election of B, to sell all of A's shares to B, in each case, at the price set by A. B must elect, within a specified time period, to buy A's shares or sell its shares to A. If B fails to respond by the expiry of the specified period, B is deemed to have agreed to sell its shares to A.

SIDECAR INVESTMENT

The expression "sidecar" refers to a motorcycle sidecar. The pillion in the sidecar entrusts his safety to the skills of the rider of the motorcycle.

A sidecar investment strategy is one where an investor allows another investor to control the manner in which the former's funds are to be invested. In other words, the first investor relies on the investment expertise of the other.

On 25 March 2011, *StarBiz* reported that a number of French investors in LuxAlpha Sicav-American Selection Fund sued Swiss bank, UBS, in Paris for failing to disclose in the prospectus that the fund's assets were to be invested through Bernard Maddoff's firm.

While it remains to be seen whether the suit will be successful, it appears that UBS had adopted a sidecar investment strategy by entrusting Lux-Alpha Fund's assets in the care of the now disgraced former NASDAQ Chairman and *Ponzi-scheme* operator extraordinaire.

TAILGATING

In everyday life, tailgating is an incident that you encounter when a *Proton Satria* or *Perodua Kancil* with its HID-lights blazing on high-beam races right up to the rear bumper of your BMW as you cruise along on the PLUS Highway at a leisurely speed of 180 kmh.

In corporate-speak, tailgating is the practice where a market intermediary buys or sells a security for its own account immediately after carrying out the same transaction on behalf of its client. Unlike front running, tailgating may not be illegal unless the intermediary is in possession of insider information or is a tippee (one who knowingly receive a tip from an insider) when he executes the trade for his own account.

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2012 BUDGET HIGHLIGHTS

Melvyn Seah provides a summary of the salient points of the 2012 Budget

On 7 October 2011, the Prime Minister and Finance Minister of Malaysia, Dato' Sri Mohd Najib Tun Abdul Razak, tabled to the nation the Government's proposed budget for the Year 2012. The theme of the 2012 Budget was "*National Transformation Policy: Welfare for the Rakyat, Well-Being of the Nation*".

The 2012 Budget focuses primarily on five areas, namely:

1. Accelerating Investment;
2. Generating Human Capital Excellence, Creativity and Innovation;
3. Rural Transformation Programme;
4 Strengthening the Civil Service; and
5. Easing Inflation and Enhancing the Well-Being of the Rakyat.

Amounts of RM181.6 billion and RM51.2 billion will be allocated for operating expenditure and development expenditure respectively. Against that, the Government expects to generate RM186.9 million in revenue in the Year 2012. With the implementation of the 2012 Budget, the Prime Minister estimates that the government deficit will improve from 5.4% of the Gross Domestic Product (GDP) of the country to 4.7% of GDP in 2012.

> **"RM20 billion (has been allocated) to assist the private sector to develop projects with strategic value"**

To further boost economic growth in Malaysia, the Government has drawn up several proposals targeted at attracting foreign investment and improving the physical and economic infrastructure of Malaysia to make it a more vibrant and attractive choice for investors. Some of the key proposals affecting corporations and businesses are set out below.

ACCELERATING ECONOMIC DEVELOPMENT

The Government has allocated RM20 billion under the public-private partnerships Facilitation Fund to assist the private sector to develop projects with strategic value.

A further sum of RM978 million is provided to accelerate the development of the five regional corridors in Malaysia. Among the projects to be implemented are the construction of a coastal highway in the Iskandar Development Region, a heritage tourism project in the Northern Corridor, an agropolitan scheme in the East Coast Economic Region, a palm oil industrial cluster project in the Sabah Development Corridor and a water supply project in the Sarawak Corridor of Renewable Energy.

KUALA LUMPUR INTERNATIONAL FINANCIAL DISTRICT

The Kuala Lumpur International Financial District ("KLIFD") forms part of the Government's aim to transform Kuala Lumpur into an international hub for banking and finance and related professional services.

The following incentives are proposed to accelerate the development of KLIFD:

1. KLIFD status companies will be given 100% income tax exemption for 10 years and stamp duty exemption on loan and services agreements;

2. KLIFD Marque Status Companies will be given industrial building allowance and accelerated capital allowance; and

3. Property developers in KLIFD will be given income tax exemption of 70% for 5 years.

LIBERALIZATION OF THE SERVICES SECTOR

To improve Malaysia's competitiveness in an ailing global economy, the Government proposes to further liberalize the services sector. Seventeen service sub-sectors will be liberalised in phases in 2012. These sub-sectors include private hospital services, medical and dental specialist services, architectural, engineering, accounting and taxation services, legal services, education and training services and telecommunication services.

The Prime Minister stated that up to 100% foreign equity ownership will be allowed in selected sub-sectors but did not identify the sub-sectors that will be fully liberalized.

TREASURY MANAGEMENT OPERATIONS

The Prime Minister has proposed several incentives in the 2012 Budget in order to attract multi-national corporations to establish their Treasury Management Centre ("TMC") in Malaysia. A TMC provides financial and fund management services to a group of related companies within or outside the country.

The proposed incentives to attract the establishment of TMCs by multi-national corporations include a 70% tax exemption on statutory income for a period of 5 years. Statutory income comprises all fee income and management income from providing qualifying services to related companies within or outside Malaysia, interest income from related companies within or outside of Malaysia, foreign exchange gains from managing risks for the group and guarantee fees.

The qualifying services of a TMC are cash management, current account management, financing and debt management, investment services, financial risk management and corporate and financial advisory services.

In addition, interest payments on borrowings by TMCs to overseas banks and related companies will be exempted from withholding tax. Full exemption from stamp duty will be given on all loan agreements and service agreements executed by TMC in

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Malaysia for qualifying activities.

Expatriates working in a TMC will only be taxed on the portion of their chargeable income attributable to the number of days they are in Malaysia.

Applications for the establishment of TMCs received by the Malaysian Industrial Development Authority (MIDA) from 8 October 2011 to 31 December 2016 will enjoy the above benefits.

ISLAMIC SECURITIES

An extension of the tax exemption period for years of assessment 2012 to 2014 will be given for activities relating to the issuance and trading of non-ringgit *sukuk* (Islamic bonds) on the following types of income:

1. Fees received by qualified institutions in undertaking activities related to arranging, underwriting and distribution of non-ringgit sukuk originating from Malaysia; and

2. Profits of qualified institutions received from the trading of non-ringgit sukuk originating from Malaysia.

The existing tax exemption for expenses incurred on the issuance of Islamic securities under the principles of *Mudharabah, Musyarakah, Ijarah, Istisna', Murabahah* and *Bai Bithamin Ajil* based on *Tawarru*, will be extended to securities issued under the *Wakalah* principle which are approved by the Securities Commission or the Labuan Financial Services Authority.

THE LOSERS OF THE 2012 BUDGET: INSURANCE AND SHIPPING COMPANIES

Government assistance towards the insurance and shipping companies will be reduced following the 2012 Budget.

Insurance companies

The allowable deductions for the purposes of income tax computation for insurance companies will be reduced. Currently, an unabsorbed business loss of an insurer is allowed to be set off against the statutory income for the year of assessment.

However, from 2012, the Government proposes that only the adjusted loss from a life fund for a year of assessment is allowed to be deducted against the statutory income of the life fund of the insurer for subsequent years of assessment until it is fully utilized. Also, any adjusted loss or unabsorbed business loss apart from those accruing from the business of a life fund of an insurer is not allowed to be deducted against the aggregate statutory income for the year or subsequent years of assessment.

Shipping companies

Income tax exemption for shipping companies will be reduced from 100% to 70% of statutory income following the implementation of the 2012 Budget. The income derived from each Malaysian ship will be treated as income from a separate and distinct business source.

TAX-RELATED MATTERS

Real Property Gains Tax (RPGT)

With the aim of curbing real estate speculative activities and to relieve pressure on the prices of real estate, the Government proposes to implement the following increases in RPGT. Companies and individuals disposing property within 2 years of ownership will be subject to RPGT of 10% while a disposal between 2 to 5 years will be subject to RPGT of 5%. Any disposal after 5 years will not be subject to RPGT.

Tax Audit

Presently, the time bar for a tax audit is 6 years from the date on which the tax assessment is made. In order to enhance investor confidence and to increase certainty in the cost of doing business, the Government proposes to reduce the time bar for a tax audit to 5 years from the date of the tax assessment being made. This will not be applicable for cases of false declaration, wilful late payment and negligence and will not alter the requirement to keep records for 7 years in accordance with sections 82 and 82A of the Income Tax Act 1967. This proposal will come into effect from the year of assessment 2013.

Late Refund of Income Tax

A compensation of 2% per annum on the amount of income tax refunded late will be imposed on the Inland Revenue Board (IRB). The calculation for late payment will commence 1 day after 90 days from the due date for e-filing or after 120 days from the due date of manual tax filing. This proposal will be effective from the year of assessment 2013.

CONCLUSION

The 2012 Budget includes many initiatives by the Government to boost investor confidence and enhance the efficacy of doing business in Malaysia. In the light of the uncertainties during these economically trying times, such initiatives will enhance the attractiveness of Malaysia as an investment hub.

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THE ROLE OF ETHICS IN BUSINESS

Syed Adam Alhabshi examines the role of ethics from the Islamic perspective

Everything in this world happens for a reason. Such reasoning may be obvious or hidden. In most cases, men would always try to articulate what could be the closest reason for any given circumstances. It is easier to extrapolate the closest rationale when the actions leading towards it are guided by some form of standards.

CORPORATE GOVERNANCE

Corporate governance is a standard which can be used to determine how the expected behavior of an organization can be guided in order to achieve the expected goals.

Corporate governance relates to the style and discipline structure on how business is to be managed. It revolves around oversight, direction, shared values and rights of an organization. Having good corporate governance means having a good set of vision and mission, strategies, management and a wholesome oversight or supervision. Good corporate governance will improve operational performance as well as efficiency and enhances stability within the organization.

Setting an organization's corporate governance is therefore very important. It must be clear, practical and must contain the fundamental values which are relevant to the organization.

THE ROLE OF ETHICS IN ISLAM

Ethics in general, encompasses the moral values of a society. It is learning to see and set a standard through reflection. Understanding ethics is like taking oneself out to reflect what is right and what is wrong. Unfortunately, moral values change with the development of civilization. What may be morally right before may not be so in the present day.

Ethics in Islam on the other hand, is a mirror of good values that is enshrined in the Shariah. Shariah, which is often described as Islamic law, includes a set of norms, values and laws that governs all aspects of Islam, including the Islamic way of life. It covers not only the outward acts but also includes that which is spiritual in nature. In some circumstances, it is also the omission of doing evil, the ability to abstain from bad deeds and most importantly, to do so with wisdom and good manners.

Islamic ethics govern the relationship that man has with man and man's relationship with God. These include the ethics of individual, society, legal creatures (like companies, corporations, organizations etc.) and most importantly, the relationship between them.

CORPORATE GOVERNANCE IN ISLAM

Numerous Muslim scholars have expanded and explained in minute detail about Islamic ethics. This has provided us with comprehensive corporate governance guidelines in line with Islamic ethics which are ready to be adopted and utilized. For example, Imam Ghazali, one of the great thinkers and reformers in the history of Islam, had identified in his compilation of Revival of the Religious Science, the seven qualities which a businessman should have in order that he continues to love his religion in his daily business conducts, that is:

(1) To have good intention and faith at the beginning of a business;

(2) That business is to fulfill a *Fardhu Kifayah* (community obligation);

(3) It is legal and does not stop one from performing his Islamic obligations;

(4) That he continuously remembers God in the conduct of his business;

(5) There should not be any undue haste in completing a business;

(6) To avoid the *Shubhah* (doubtful) and the *Haram* (illegal) businesses; and

(7) To prepare proper accounting and to be responsible.

> **“ Ethics in Islam … is a mirror of good values that is enshrined in the Shariah ”**

In studying each of the seven qualities, one can see how Imam Ghazali stresses the importance of constantly maintaining a close relation between business ethics and religion. Each quality is related and the way it is arranged allows it to be relevant even in the present circumstances.

The synthesizing of Islamic ethics and governance into an organization enables its business to be regulated according to the concepts of justice, fairness, integrity, sincerity and other virtuous values expounded by the Shariah. This creates a healthy and open environment within as well as around an organization.

The value of Islamic ethics does not lie only in the formulation of a policy or a mere regulation. Rather, it must be developed into a strong culture within the organization itself. This means that such ethical values must be practiced from the top management all the way down to the lowest hierarchy of the company. An organization that cultivates its symbolic system of values breathes life into its corporate governance. In so doing, the corporate governance of an organization will not be just a dead letter.

An organization's corporate governance must be instilled so that it becomes like a custom to its members. Applying it must be like a normal habit and second nature. It must be practiced to the effect that if one was to omit from doing it, other members would

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sense that something is wrong somewhere. Just like a complete human body, when one part is not well, other parts would feel pain as well. This sense of trouble will allow the management or the board of the organization to initiate investigations into the matter before it gets out of hand. There will be less damage to the organization if a problem is discovered at an early stage.

History has shown that having a good corporate governance structure by itself is not good enough. Enron could be said to have one of the best corporate governance structures but the failure of its employees to adhere to the principles ultimately led to its demise.

> **"Imam Ghazali stresses the importance of constantly maintaining a close relation between business ethics and religion"**

CONCLUSION

Applying Islamic ethics with its dual consistency role within an organization's corporate governance would ensure the expected behavior of an organization to be well established and properly regulated.

An organization should adopt the values which are relevant to its business and strenuously inculcate the same into its management and workforce. It would then be easier for the organization to plan its future development as the expected behavior would be highly probable. Articulating the closest rationale for the organization's success would no longer be a difficult task.

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EXPEDITED EXAMINATION

It is possible to apply for expedited examination of trade mark and patent applications in Malaysia, subject to the fulfillment of certain conditions. The Intellectual Property Corporation of Malaysia (MyIPO) projects that through expedited examination, a trade mark may be registered within 6 months and 3 weeks and a patent, within 20 months, from the date of application/ priority date.

PROCEDURE

Request for Approval : An applicant may file a request for approval for expedited examination simultaneously with, or within 4 months after, the filing of the trade mark application. In the case of a patent application, the request can be filed once the application has been made available for public inspection which is 18 months from the application/priority date. The request is to be accompanied by a statutory declaration giving reasons in support of the application.

Reasons : The reasons which may be provided are (a) national or public interest; (b) infringement proceedings are ongoing or evidence exists that shows potential infringement; (c) that registration is a condition to obtaining monetary benefits from the Government or institutions recognized by the Registrar; (d) that the invention relates to green technologies; or (e) other reasonable grounds which support the request.

Request for Expedited Examination : If the Registrar approves the request, the applicant will be notified in writing. The applicant is required to file the request for expedited examination within 5 days of receipt of the Registrar's approval.

DERAILING A FAST TRACK APPLICATION

An application filed utilizing this mechanism expedites, but does not by-pass, the prosecution procedures for an ordinary application.

Certain circumstances can derail an application from the fast track route. In respect of a patent application, an applicant is required to respond to an examination report within 3 weeks from the mailing date of the report. If he fails to do so, the application for expedited examination will be deemed withdrawn and the application will be dealt with under the normal examination process.

In a trade mark application, the expedited timeline will no longer apply if there is an examination report for non-compliance with substantive laws or formal requirements, or the applicant appeals against any condition imposed on registration, or there is an opposition by a third party to its registration.

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STRIKE THREE – YOU'RE OUT!

A commentary on the curious (winding up) case of Smartframe v Anjung Bahasa by Shannon Rajan

INTRODUCTION

The ground most commonly relied upon in a petition to the Court for an order to wind up a company is Section 218(1)(e) of the Companies Act 1965 ("the Act") wherein the Court may order a company to be wound up if it is unable to pay its debts.

However, the Court will not order a winding up of a company where the debt is *bona fide* disputed on substantial grounds.

In the present case, *Smartframe Sdn Bhd v Anjung Bahasa Sdn Bhd* [2011] 4 CLJ 416, the Respondent *inter alia* disputed the judgment debt on the ground that it had a substantial cross-claim against the Petitioner.

BACKGROUND FACTS

On 17 February 2006, the Petitioner obtained a summary judgment against the Respondent and 3 others for the principal sum of RM1,538,239.26 together with interest and costs ("Judgment Sum") before the Senior Assistant Registrar. The judgment was based on a corporate guarantee issued by the Respondent in respect of a contract undertaken by another company.

> **"the Respondent's cross-claim was not a genuine or serious claim as there was little or no evidence to support its claim for damages for malicious prosecution"**

The Respondent appealed against the decision of the Senior Assistant Registrar to the Judge-in-Chambers who dismissed the appeal. The Respondent's appeal to the Court of Appeal was subsequently dismissed. The Respondent then applied for leave to appeal to the Federal Court but its application was rejected.

The Petitioner filed a winding up petition against the Respondent in respect of the Judgment Sum on 10 March 2006. On 28 July 2007, the Court dismissed the petition upon the Petitioner's request to withdraw the same.

Thereafter, the Petitioner filed a second winding up petition against the Respondent in respect of the Judgment Sum on 31 October 2007 and the same was struck out by the Court on 17 September 2008 on technical grounds.

On 5 February 2010, the Petitioner served a statutory notice pursuant to Section 218(2)(a) of the Act ("Section 218 Notice") on the Respondent demanding payment of the Judgment Sum. The Respondent did not pay the Judgment Sum or any part thereof within the 3-week period prescribed by that section.

The Petitioner filed a third winding up petition to wind-up the Respondent on 10 March 2010.

On 3 May 2010, the Respondent filed an action against the Petitioner for damages not exceeding RM5 million for malicious prosecution and abuse of the Court's process for commencing the third winding up petition after the High Court had dismissed the 2 previous winding up petitions filed by the Petitioner against the Respondent on the same Judgment Sum.

The Respondent objected to the third winding up petition and alleged *inter alia* that by filing its cross-claim for damages for malicious prosecution against the Petitioner, it has established that a valid and justifiable cross-claim has been made against the Petitioner and accordingly, the petition should be struck out or stayed.

DECISION OF THE HIGH COURT

The Court held that not every claim filed by a respondent after a winding up petition has been filed against it will amount to a cross-claim which will afford the respondent with good grounds to strike out or to stay the petition. The Respondent's cross-claim must be a claim which arises out of or in some way connected to the Petitioner's claim.

The Court found that the Respondent's cross-claim was not a genuine or serious claim as there was little or no evidence to support its claim for damages for malicious prosecution. The High Court allowed the Petitioner's petition and ordered that the Respondent be wound up.

THE GROUNDS OF DECISION

The Court held that the Respondent's cross-claim was not a genuine or serious claim for the reasons set out below.

The Petitioner had obtained a valid judgment against the Respondent. As the Respondent had exhausted all venues of appeal against the judgment, the Petitioner had the *locus standi* to present the winding up petitions against the Respondent. Accordingly, the petitions were not presented falsely or maliciously without reasonable cause calculated to injure or exert undue pressure on the Respondent.

The Petitioner's petition was filed on 10 March 2010 whereas the purported cross-claim was filed on 3 May 2010. The Respondent's solicitors, in response to the Section 218 Notice, failed to mention any intended cross-claim against the Petitioner. The Respondent also failed to provide any explanation for the delay in filing the purported cross-claim, which would have crystallised as early as 2007 or 2008. The learned Judicial Commissioner concluded that the only plausible conclusion is that the purported cross-claim was made *mala fide* and filed for the purpose of delaying the disposal of the third winding up petition.

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The Judge further observed that the Respondent's claim for general damages for malicious prosecution of a sum not exceeding RM5 million was an arbitrary figure plucked by the Respondent.

The Court also held that there was little or no evidence adduced in the Respondent's affidavit to support its cross-claim for damages for malicious prosecution. The Respondent had merely stated in its affidavit opposing the winding up petition that it had filed a suit for damages for malicious prosecution but failed to set out the facts on which its cross-claim was based so that the Petitioner could have a fair opportunity to state its case on affidavit.

> **"in an action for malicious prosecution, it is essential for the Respondent to ... prove that the previous petitions were terminated in its favour"**

The Court further held that in an action for malicious prosecution, it is essential for the Respondent to aver and prove that the previous petitions were terminated in its favour. As the two previous petitions were dismissed on technical grounds without addressing the merits of the same, they could not be said to be terminated in the Respondent's favour. Accordingly, the Court concluded that the purported cross-claim had little or no reasonable prospect of success.

CONCLUSION

The *Smartframe Case* illustrates that the mere fact that a respondent company in a winding up petition has filed a cross-claim against the petitioning creditor may not be a sufficient ground to stave-off a winding up order. The respondent must pursue its claim in a diligent manner as the failure to do so may give rise to an inference that the cross-claim is not a genuine or serious one.

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SKRINE'S ANNUAL DINNER AND DANCE 2011

On the 19th of November 2011, SKRINE hosted its Annual Dinner and Dance at the Royale Chulan Hotel in Kuala Lumpur.

Many kept faithful to the theme of *Arabian Nights*, dressing-up in sequinned tops, harem pants, elaborate headdresses and flowing robes. Candles that were aglow on the tables of the Taman Mahsuri Courtyard added to the mysterious and romantic setting.

Entertainment for the evening included a magic show, a best dressed parade as well as a boat race. The most anticipated event of the night however was the talentime competition, which pitted the 4 "Houses" against each other for the grand prize of RM1,000.

All four Houses put up entertaining performances but it was ultimately the Blues who – with their impersonations of multiple SKRINE partners in their skit entitled *Sivaji-nie the Boss and the 3 Wishes* – eventually and deservedly emerged as the champions.

CHRISTIAN LOUBOUTIN'S RED OUTSOLES

Jeffri Cheong explains some recent developments in colour trade marks

JEFFRI CHEONG SIU KONG

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Some women's handbags and shoes cost more than a car. Leading designers like Louis Vuitton, Gucci, Hermes and Prada fight for designer handbag supremacy every fashion season.

As for shoes, Manolo Blahnik and Ferragamo made way to Christian Louboutin ("Louboutin") in 2011, currently one of the hottest names for women's shoes.

Louboutin shoes have a distinctive red outsole which is recognised as a registered trade mark the UK. The specific shade of red is pantone 18.1663TP to be precise.

In November 2011, the UK Intellectual Property Office also acknowledged the registrability of the colour purple, Pantone 2865c, by Cadbury in relation to their chocolate bars, tablets and drinks.

Orange, the UK telecommunications company also holds a UK registered mark for the colour orange, or pantone 151, for telecommunication services.

In the UK a trade mark is defined as any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. All the applicant would have to show is that the mark, or colour in this case, had acquired sufficient distinctiveness.

Louboutin's red outsole was also registered as a trade mark in the US. In August 2011, Louboutin tested their rights against Yves Saint Laurent ("YSL") in New York when they sued YSL for infringing their trade mark by using red outsoles on their shoes. YSL counterclaimed that the red outsole trade mark was invalid.

The action by Louboutin against YSL failed. The New York Court allowed YSL's counterclaim and did not consider that the red colour was capable of protection. However the New York Judge's decision may have been influenced by the negative impact monopolies for colours have on competition. Strictly speaking, there is nothing under the provisions of the UK and US trade mark laws which prevent the registrability of a colour. It is questionable whether the effect of competition law should have been within the Judge's contemplation in making his decision.

In Malaysia, the definition of a trade mark is similar to the UK. It is simply defined as a mark proposed to be used in relation to goods or services for purposes of indicating a connection in the course of trade between those goods or services. The principal requirement is that it is a distinctive mark. The definition of distinctive is being capable of distinguishing goods or services with the proprietor of the mark used in the course of trade.

Given the similarity of the definition of a trade mark in Malaysia to that of the UK, it will be interesting to see whether the Registrar of Trade Marks in Malaysia will approve an application to register a colour as a trade mark where distinctiveness can be established.

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OF BIMBOS, BLACK SWANS, EX-DATES, ETC.

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TEXAS SHOOT-OUT

A "Texas Shoot-Out" is not a B-Grade direct-to-video remake of the "Gunfight at the O.K. Corral". It is another form of dead-lock breaking mechanism in a shareholders' agreement.

In a "Texas Shoot-Out", a party, A, offers to purchase all the shares of the other party, B, at a price set by A. B must, within a specified period, indicate whether he will accepts A's offer or that he will purchase all of A's shares at a higher price. If B indicates that he wishes to purchase A's shares, a sealed bidding process will ensue and the shares will be sold to the party who sets the highest price.

Dead-lock resolution clauses like a "Texas Shoot-Out" and "Russian Roulette" are usually provisions of last resort when the parties wish to end their relationship as shareholders in a joint-venture company.

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SKRINE REGATTA: PADDLING FOR CHARITY

On 1 October 2011, the Firm hosted the inaugural Skrine Regatta at the Putrajaya Water Sports Complex. Themed "*Paddling for Charity*", the Skrine Regatta is Malaysia's first-ever corporate dragon boating event organised by a law firm with a charitable theme.

The event brought together corporate dragon boat teams from Bursa Malaysia, HSBC, KPMG, PwC and Skrine to compete for the Skrine Regatta Challenge Trophy. In the process, the teams raised RM25,000 for the Persatuan Kanak-Kanak Istimewa Kajang Selangor (PKIK).

The dragon boat teams - Bursa Malaysia, HSBC, the KPMG Vikings, the Pirates of PwCea and the Skrine Dragons converged on the waters of Putrajaya and were divided into 2 heats with the winners of each heat heading straight into the Grand Finals. The remaining teams then battled it out in the *repechage* round, with the winners advancing to the Grand Finals. Both the KPMG Vikings and the Skrine Dragons won their respective heats, and HSBC was the victor in the *repechage* round. In the tightly-contested Grand Finals race, the KPMG Vikings edged the Skrine Dragons to emerge as champions of the Skrine Regatta.

Overall, the Skrine Regatta was a resounding success and a good time was had by all.

PUTRAJAYA INTERNATIONAL DRAGON BOAT FESTIVAL

Barely 3 weeks after the Skrine Regatta, the Skrine Dragons took to the waters again by participating in the International Dragon Boat Festival at Putrajaya on 20 to 23 October 2011 alongside teams from over 14 countries, including Canada, Australia, Japan, China, Hong Kong, Singapore, Indonesia and Malaysia.

The team paddled in both the Malaysian and International races and clinched their best ever dragon boat performance so far. In the Malaysian events, the team obtained a bronze medal in the Malaysia Corporate Mixed-12 race after a closely fought battle with teams such as those from Pacific West, MMU and the KL Bar.

In the International events, the team qualified from the heats to advance into the International Corporate Mixed-12 Grand Finals against other corporate teams from Holland, Philippines, Singapore and Malaysia. The Skrine Dragons then ended the Putrajaya competition on a high by winning a second bronze medal in the International Corporate Mixed-22 race.

MORE HATS THAN HEADS ?

continued from page 3

Although MTB had agreed under the Trust Deed to take sole control of the designated accounts, it had failed to do so not only before the issuance of the bonds, but it also failed to act with urgency even after the bonds were issued. This enabled Pesaka to withdraw the assigned revenue from the revenue account. The Court of Appeal concurred with the findings of the High Court that MTB had failed to exhibit the level of professionalism, competence and skill expected of professional trustees.

In the opinion of Dato' Jeffrey Tan JCA, both KAF and MTB had failed to appreciate that it was absolutely necessary for MTB to control the designated accounts before the issuance of the bonds. He then concluded that this was a serious lapse for which MTB must be held to account.

The Court of Appeal also ruled that MTB had failed to discharge its statutory duties to "exercise reasonable diligence" under section 82(1)(c) of the Securities Commission Act ("SCA") by failing to ascertain whether Pesaka had committed any breach of the provisions of the Trust Deed.

> **"the exemption clause... must be strictly construed"**

The Court of Appeal held that both KAF and MTB had failed to carry out their statutory and contractual duties. The Court then unanimously held that both were equally liable for the loss and to that extent, allowed KAF's appeal against MTB.

Liability to bondholders

One of the grounds of appeal put forward by KAF was that it was not liable to the bondholders as there was no contract between KAF and the bondholders and that KAF was in any event exempted from liability by the disclaimer of liability on the front page of the IM.

In the opinion of the Court of Appeal, KAF could not include the disclaimer of liability in the IM as it could not contract out of its statutory duties or liabilities. The Court relied on section 65 of the SCA which renders void any agreement to the extent that it purports to exclude liability under certain provisions of the SCA, including section 57 (right to recover loss or damage for false or misleading statement in a prospectus) and section 153 (civil liability of person in contravention of the SCA).

After considering the provisions of the bond documentation, the Court was of the opinion that the IM was issued not only to the primary subscriber but to all potential bondholders. Thus, KAF could not elude its statutory and contractual obligations and duties under the IM and other security documents to all bondholders, both primary and secondary.

For the aforesaid reasons, the Court of Appeal unanimously dismissed this ground of appeal by KAF.

Pre-judgment interest

The bondholders appealed against the refusal by the High Court to grant pre-judgment interest. The Court of Appeal allowed the bondholders' appeal as the provisions of the Agreement and the Trust Deed imposed an obligation on Pesaka to pay compensation on overdue amounts at such rate as may be prescribed by the Syariah Advisory Council ("SAC") of the Securities Commission or any other relevant authority.

In coming to its decision to award pre-judgment interest at 3% on the amount claimed by the bondholders, the Court relied on a resolution passed by the SAC on 26 May 2005 which recognized that the court may impose late payment penalty charges on judgment sums as decided by the court's compensation mechanisms. The SAC had also resolved that the court may impose penalty charges for actual loss (*ta'widh*) and to adopt the "annual average overnight weighted rate" of the Islamic money market as a reference point.

Indemnity claim against Pesaka

Both KAF and MTB appealed against the decision of the learned High Court Judge to disallow their claim for a full indemnity from Pesaka for losses suffered by them.

KAF relied on clause 13.1 of the Agreement whereas MTB relied on breach of contract, negligence, fraud or misrepresentation by Pesaka.

The learned trial judge had rejected KAF's indemnity claim as KAF's loss had all resulted from its own gross negligence in failing to ensure that MTB became the sole signatory of the designated accounts.

In the case of MTB, the High Court held that clause 14.1 of the Trust Deed disallowed the indemnity claim where there was gross negligence on the part of MTB.

The Court of Appeal overturned the decision of the High Court on grounds that the exemption clause contained in clause 13.1 of the Agreement and clause 14.1 of the Trust Deed must be strictly construed and their application must be restricted to those particular circumstances of gross negligence, willful misconduct or fraud or willful default by KAF or MTB.

Dato' Jeffrey Tan JCA held that on its true construction, the exemption clauses could not reasonably have been intended to

apply when Pesaka had by its unauthorized conduct intervened to alter the circumstances in which those clauses would ordinarily apply. He added that any other construction would mean that Pesaka could break every covenant with impunity and that such an absurd result could never be right.

Although KAF and MTB were negligent, it was ultimately Pesaka which caused KAF and MTB to suffer for their negligence by its unauthorized withdrawal of the assigned revenues from the revenue account. Accordingly, the Court of Appeal unanimously allowed the appeals of KAF and MTB against Pesaka.

However, the Court of Appeal did not deem it fit to order a full indemnity as that would mean that KAF and MTB were blameless. As both KAF and MTB had been found wanting in their respective roles as lead arranger/facility agent and trustee, the Court of Appeal judges unanimously ruled that they should jointly bear 1/3 of the total loss of approximately RM149.3 million and ordered Pesaka to pay KAF and MTB 2/3 of the aforesaid sum.

> **"CIMB was constructive trustee of the assigned revenue as it had knowledge that such revenue … belonged to the bondholders"**

MTB's claim against CIMB

MTB also appealed against the decision of the High Court to dismiss its claim for damages against CIMB on grounds that the latter was a constructive trustee of the assigned revenue.

Although the High Court had made a finding that CIMB had received the notice of the Assignment, CIMB contended that the Assignment required its consent which had not been obtained and that the signatories of the revenue account had not been changed from the nominees of Pesaka to those of MTB. CIMB further contended that without a change in the mandate being made, it was obliged to execute the instructions of Pesaka or its nominees.

According to the Court of Appeal, the issue was whether CIMB had a duty to hold onto the assigned revenue regardless of the fact that the mandate had not been changed.

The Court of Appeal found that CIMB had actual knowledge that the assigned revenue did not belong to Pesaka and that by permitting Pesaka to transfer such moneys to others, it had knowingly facilitated and so participated in a breach of trust.

In the opinion of the Court of Appeal, the notice of assignment cast a duty on CIMB not to participate in a breach of trust.

The Court of Appeal rejected CIMB's contention that it had not consented to Assignment. The Court held that by entering into the Release, CIMB had agreed to Pesaka's assignment of the assigned revenue to MTB as trustee.

The Court was of the view that CIMB was a constructive trustee of the assigned revenue as it had knowledge that such revenue in the revenue account belonged to the bondholders. The Court ruled further that CIMB could not permit Pesaka to transfer the assigned revenue out of the revenue account. In permitting so, CIMB had permitted a breach of trust and breached its duty as constructive trustee.

The Court of Appeal allowed MTB's appeal against CIMB. However, as the Court was of the view that greater fault lay with MTB, it unanimously ordered CIMB to indemnify MTB to the extent of 1/3 of the liability that MTB had to bear.

CONCLUSION

The decision of the Court of Appeal in the *Pesaka Astana Case* has been long awaited by stakeholders in the Malaysian capital market.

The decision is noteworthy as it sets out the legal principles and provides guidance on the Court's expectations on the standard of conduct of the key participants in a private debt securities issue, namely, an issuer, a lead arranger and facility agent, a trustee and a bank at which an assigned account is established.

The Court of Appeal's decision is also noteworthy as it provides a cogent interpretation of indemnity and exemption clauses commonly found in bond issue documents.

It is appropriate to conclude this article by reproducing the last paragraph of the judgment of Dato' Jeffrey Tan JCA –

"As our final remark, we wish to add *en passé* that bonds is complex financial business which needs more heads than there are hats. We like to ask, had there been more heads than there were hats, could the instant bond fiasco have been averted?"

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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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