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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

I believe that in writing any message of note for publications, the message should be linked to significant contemporaneous events to give the publication a special sense of time.

Our June 2012 issue of LEGAL INSIGHTS should be remembered as being published at the time when Queen Elizabeth celebrated her Diamond Jubilee as the Queen of England for 60 years. It also coincides with the holding of the UEFA European Championship or Euro 2012.

The second quarter of 2012 saw the introduction of a controversial amendment to the Evidence Act 1950. The Evidence (Amendment) (No.2) Act 2012 was gazetted on 22 June 2012 and will come into operation on a date to be appointed by the Minister. It is controversial as one of the fundamental principles of criminal law namely, "innocent until proven guilty", has been turned on its head in relation to electronic publications so that a person is "guilty until proven innocent".

Amongst others, the amendments provide circumstances where an internet user is deemed to be the publisher of any content if he owns the website or is held out to be the author or editor or has control of a publication unless he proves otherwise. Hence netizens may be subject to unwarranted prosecution for malicious content posted by others persons on their website or address.

The amendments, though intended to catch the real culprits, are equally likely to affect the innocent net users and for this reason, the authorities should not allow the amendments to come into force. To me, it is a grave injustice for a system to convict ten innocent persons in order to bring to book one guilty person, simply by shifting the burden of proof from the prosecution.

For this issue of LEGAL INSIGHTS, we have again lined-up a series of interesting articles for our readers. We hope that you will enjoy reading them.

Best Wishes and Thank You.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

CONTENTS

ANNOUNCEMENTS

PEMUDAH appointment

The Firm congratulates Dispute Resolution partner, Vinayak Pradhan, on his appointment as a member of PEMUDAH (Pasukan Petugas Khas Pemudahcara Perniagaan), the Special Task Force to Facilitate Business, for 3 years from 1 June 2012.

Chambers 2012

We are pleased to announce that 13 of our partners were named as leading individuals in their respective areas of practice by Chambers Asia- Pacific 2012. The Firm extends its congratulations to the following Partners for their outstanding work and commitment leading to this accolade:-

Lee Tatt Boon, Vinayak Pradhan, Janet Looi, Charmayne Ong, Khoo Guan Huat, Quay Chew Soon, Cheng Kee Check, Leong Wai Hong, Philip Chan, Ivan Loo, Lim Chee Wee, Siva Kumar Kanagasabai and Selvamalar Alagaratnam.

VC George

The Firm also extends its heartiest congratulations to our Consultant, Tan Sri Dato' VC George, on being conferred the "Panglima Setia Mahkota (PSM)" Award by the Yang di-Pertuan Agong, Tuanku Abdul Halim Mua'dzam Shah, in conjunction with His Majesty's 84th birthday.

PADDLING WITH THE DRAGONS

The Skrine Dragons participated in the KBSM Watersports Carnival at the Putrajaya Water Sports Complex on 26 to 27 May 2012 and the Malacca International Competition on 16 to 17 June 2012.

In the Putrajaya event, the Skrine Dragons combined with the KL-Barbarians and made it to the Finals of the Women's 12-crew 500 metres despite facing strong veterans such as the Malaysian Police Team, the Armed Forces, Putrajaya Paddlers, Youth and Sports Kedah and Ministry of Finance.

As part of the warm-up for the Malacca event, the Team combined again with the KL-Barbarians to participate in a friendly 200 metres race against the Multimedia University (MMU) team and Casa Del Rio team. The combined team finished first in the Women's 12-crew category and second in the Open 12-crew category. On the following day, the Skrine Dragons powered to second place in the International Competition Corporate Open 12-crew 250 metres event. Paddles Up!

SUPER-

Leong Wai Hong and Aufa Radzi

INTRODUCTION

Most people would already be familiar with the term 'injunction', which is a form of court order to either prohibit a party from doing, or to compel a party to do, a specific act, temporarily or permanently. In appropriate circumstances, a temporary or interim injunction may be granted to maintain the status quo prior to trial.

A breach of an injunction amounts to a contempt of court and the party in breach may be subjected to committal proceedings.

Since 2009, a new form of injunction has emerged in the United Kingdom which has led to growing public concern about its use. This type of injunction is widely known as a "super-injunction" as it restrains a person from publicising the existence of the injunction order. Amongst the concerns were that a super-injunction restrains freedom of speech and is contrary to the principle of open justice. Further, there was a perceived growth in the use of this form of injunction.

These concerns led to the setting-up in the United Kingdom of a Committee on Super-Injunctions chaired by Lord Neuberger, Master of the Rolls, in April 2010 to examine the issues relating to the practice and procedures concerning the use of super-injunctions. The Report of the Committee on Super-Injunctions was released in May 2011 and came to be known as the 'Neuberger Report'.

In Malaysia, super-injunctions came to the attention of the general public due to the widespread coverage given to 2 cases, one of which involved John Terry, the captain of the Chelsea football team and the then captain of the English national football team, and the other, Ryan Giggs, the Manchester United football star. For reasons that will be explained later, the Ryan Giggs case was not a super-injunction case but was wrongly reported as such by the media.

This article provides an overview on super-injunctions and examines whether Malaysian courts would grant a super-injunction.

SUPER-INJUNCTIONS

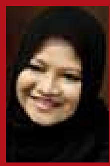
The Committee on Super-Injunctions defines a super-injunction in paragraph 2.14 of the Neuberger Report as –

"an interim injunction which restrains a person/a party from: (i) publishing information which concerns the applicant and is said to be confidential or private; ***and*** *(ii) publicising or informing others of the existence of the order and the proceedings…"*

What makes a super-injunction "*super*" is that it not only prevents publication of information, but the existence of the injunction itself is to be kept secret.

THE ORIGINS OF THE SUPER-INJUNCTION

The term "super-injunction" was coined by *The Guardian*



LEONG WAI HONG (L)

Wai Hong is the Head of the Dispute Resolution Division of SKRINE. He is listed as one of four Malaysian Counsel in The International Who's Who of Commercial Litigators in 2010 and 2011.

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INJUNCTIONS

examine the genesis of super-injunctions

newspaper in relation to an injunction issued by Maddison J on 11 September 2009 which prohibited it from reporting on a question raised in Parliament by Paul Farrelly, a Member of Parliament, on a report commissioned by an oil trading corporation, Trafigura, in relation to the alleged dumping of toxic waste in the Ivory Coast.

The names of parties to the proceedings had originally been anonymised as *RJW & SJW v The Guardian News and Media Ltd and Person or Persons Unknown*. The case has since come to be known as the *Trafigura* case.

ELEMENTS OF A SUPER-INJUNCTION

The features of a super-injunction are:

(1) it will be served not only on the respondents to the application, but also on third parties who are not parties to the proceedings;

(2) the proceedings will be anonymised and heard in private, and as a consequence, the judgment will also be private;

(3) access to court documents relating to the proceedings may be restricted and third parties will have to apply to the court to obtain a note of the hearing or a copy of the materials read by the judge; and

(4) the "super" element is the prohibition on the disclosure or communication of the existence of the injunction order and the proceedings.

> **"What makes a super-injunction "super" is that … the existence of the injunction itself is to be kept secret"**

In practice, most of the super-injunctions have been sought by public figures or celebrities to prevent media organizations from revealing their identities and publishing details of their personal lives. The "super" element of the injunction operates to prevent media organisations from even reporting the existence of the injunction.

SUPER-INJUNCTIONS AND ANONYMISED INJUNCTIONS

There are many other forms of injunctions with the same features, i.e. anonymity and restriction of publication, as a super-injunction. In fact an anonymised injunction, where the names of either or both parties are not disclosed in the cause papers, is often confused with a super-injunction.

In the highly publicised case of *CTB v News Group Newspapers Ltd & Thomas* [2011] EWHC 1232, Ryan Giggs obtained an anonymised order to prevent the disclosure of his alleged affair with model, Imogen Thomas. This case was erroneously reported by certain newspapers as one that involved a super-injunction. As pointed out in the Neuberger Report, no super-injunction was granted, or apparently applied for, in this case.

As mentioned above, an injunction is not a "super-injunction" if there is no restriction in publicising the existence of the injunction.

The following cases, *John Terry (previously referred to as "LNS") v Persons Unknown* [2010] EWHC 119 and *DFT v TFD* [2010] EWHC 2335 (QB), illustrate some of the considerations that the court will adopt in granting or extending a "super-injunction".

THE JOHN TERRY CASE

In *John Terry v Persons Unknown*, the High Court granted a super-injunction on an interim basis in favour of Terry, to restrain the publication of his extra-marital affair with Vanessa Perroncel, the ex-girlfriend of his former team-mate and fellow England football player, Wayne Bridge.

However, the High Court refused to continue the super-injunction and ruled that the freedom of expression outweighed Terry's right to suppress the reporting of his affair. Tugendhat J held that Terry's motivation for the injunction was to protect his endorsement deals rather than his privacy rights.

DFT v TFD

In *DFT v TFD*, a super-injunction was granted pending trial to protect private information as there were allegations of blackmail against the respondent who might avoid service if she had been tipped-off.

A return date of 7 days was fixed by Sharp, J who granted the super-injunction. On the return date, the Court maintained the injunction but discontinued the "super" aspect of the order as the injunction had been served on the respondent before that date.

THE NEUBERGER REPORT

As mentioned above, the controversies surrounding super-injunctions have resulted in the publishing of the Neuberger Report by the Committee on Super-Injunctions.

continued on page 22

LAYING DOWN THE GROUND RULES

Lee Shih explains a significant decision on schemes of arrangement in Singapore

The Singapore Court of Appeal decision of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and Others v TT International Ltd and another appeal* [2012] SGCA 9 sets out guiding principles on how a scheme of arrangement should be implemented. The decision touched on issues concerning the role and duties of a scheme manager, the proof of debt process in a scheme of arrangement and the classification of creditors.

SUMMARY

The Court of Appeal elaborated on the stages leading to the sanctioning of a scheme of arrangement and approved of the English approach that issues of creditors' classification should be considered by a court when it first hears the application for a creditors' meeting.

The Court then laid down the following principles:

(1) A proposed scheme manager must act transparently and objectively and should not be in a position of conflict of interest (*i.e.* if he aligns his interests without good reason with those of the applicant company). In this case, the proposed scheme manager was conflicted because he was also the nominee for the individual voluntary arrangements filed by the chairman and an executive director (who was also the chairman's wife) of the applicant company.

(2) A scheme creditor is entitled to examine proofs of debt submitted by the other creditors in a proposed scheme of arrangement only if he produces *prima facie* evidence of impropriety in the admission or rejection of such proofs of debt.

(3) A scheme creditor should be notified of the proposed scheme manager's decision to admit or reject its own and other creditors' proofs of debt before the votes are cast at the creditors' meeting. In this case, the proposed scheme manager should have completed adjudicating all the proofs of debt submitted (and notified all scheme creditors of the admitted proofs) prior to the Scheme Meeting.

(4) A scheme creditor may appeal the proposed scheme manager's decisions to admit or reject its own and other creditors' proofs of debt for the purposes of voting. In this case, some of those decisions to admit or reject certain proofs of debt were held to be incorrect.

(5) Scheme creditors should be classified differently for voting purposes when their rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest. In other words, if a creditor's position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme assessed against the most likely scenario in the absence of scheme approval (e.g. liquidation), then it should be classified differently.

(6) Related party creditors should have their votes discounted in light of their special interests to support a proposed scheme, by virtue of their relationship to the company. Wholly-owned subsidiaries should have their votes discounted to zero and are effectively classified separately from the general class of unsecured creditors.

BACKGROUND FACTS

The appeal arose from a High Court decision approving the scheme of arrangement of the applicant company, TT International Ltd ("Scheme"), despite the vigorous objections made by a number of creditors. The applicant company had obtained court approval to convene a meeting of a single class of creditors ("Scheme Meeting"). The proposed Scheme Manager chaired the Scheme Meeting and it was noted that the Scheme Manager was also concurrently the nominee for the individual voluntary arrangements (under the Bankruptcy Act) filed by the chairman and an executive director (who was also the chairman's wife) of the applicant.

After the scheme creditors had voted at the Scheme Meeting, they were abruptly informed that the proposed Scheme Manager had not completed his adjudication of the proofs of debt. The proposed Scheme Manager later reported that the Scheme had been passed by a majority of creditors representing 75.06% in value, exceeding the statutory threshold of 75% by a razor thin margin. This prompted the opposing scheme creditors (the Appellants in this case) to seek copies of the proofs of debt lodged by certain creditors and other information regarding the other creditors' claims.

Dissatisfied with the applicant's adjudication of several proofs of debt as well as its response to their requests for information, the opposing scheme creditors objected to the Scheme. The High Court Judge, however, disagreed with those arguments and approved the Scheme. The opposing scheme creditors appealed to the Court of Appeal.

SCHEME OF ARRANGEMENT PROCEDURE

The Court of Appeal noted that there was a paucity of judicial guidance on the more precise mechanics of implementing the scheme of arrangement process and there was no statutory guidance on the many procedural issues relating to passing a scheme of arrangement. Hence, the Court summarised and laid down several guidelines.

The scheme of arrangement process takes place over three stages.

The First Stage

The first stage is the application to the court for an order that a meeting or meetings be summoned. The Court agreed with the approach in England (see the Practice Statement (Companies: Scheme of Arrangement) [2002] 1 WLR 1345) which would essentially require a preliminary determination of the correct classification of creditors.

The applicant would have to notify persons affected by the

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scheme of its purpose and the meetings which the applicant considers will be required. The applicant's solicitors will have to unreservedly disclose all material information to the court to assist it in arriving at a properly considered determination on how the scheme creditors' meeting is to be conducted. Any issues in relation to a possible need for separate meetings for different classes of creditors ought to be unambiguously brought to the attention of the court hearing the application.

After the issuance of the notices summoning the meeting(s), the prospective scheme creditors will submit their proofs of debt and supporting documents. The chairman then has to perform the quasi-judicial task of adjudicating upon disputes as to the voting rights of anyone claiming to be a creditor. His role is akin to that of a judicial manager in deciding whether to admit or reject proofs of debt lodged with him.

The Second Stage

The second stage is where the scheme proposals are put to the meeting or meetings held in accordance with the earlier order and are approved (or not) by the requisite majority in number and 75% in value of those present and voting in person or by proxy.

It has become usual practice for the chairman to post a list of the creditors and the corresponding amounts of their admitted claims (for the purposes of voting) at the meeting venue prior to the meeting. After the creditors cast their votes, the chairman will immediately tabulate the results and announce them by the end of the meeting. If the statutory majority is achieved at the meeting(s), the proposed scheme then proceeds to the third stage.

The Third Stage

The third stage involves an application to the court to obtain the court's sanction of the scheme. The court must be satisfied of three matters, namely (1) the statutory provisions have been complied with; (2) those who attended the meeting were fairly representative of the class of creditors and that the statutory majority did not coerce the minority; and (3) the scheme is one in which a man of business or an intelligent and honest man, being a member of the class concerned, would reasonably approve.

PROPOSED SCHEME MANAGER'S DUTIES AND CONFLICT OF INTEREST

The Court of Appeal then proceeded to deal with the issues before the court. The Court of Appeal explained that a proposed scheme manager has a good faith obligation to the applicant company and the body of creditors as a whole as well. Similar to a liquidator, the proposed scheme manager, in adjudicating proofs of debt, owes duties to be objective, independent, fair and impartial.

On the issue of conflict of interest, a proposed scheme manager must strike the right balance and manage the competing interests of successfully securing the approval of his proposed scheme and uncompromisingly respecting the procedural rights of all involved in the scheme process. He will go too far when he begins to align his interests with those of the company beyond what has been set out.

The Court found it inappropriate in this case that the proposed Scheme Manager was also the nominee for the individual voluntary arrangements (under Singapore's Bankruptcy Act) filed by the chairman and an executive director (who was also the chairman's wife) of the applicant. The Court ordered the proposed Scheme Manager to elect either to continue as such only or as nominee for the two individuals, as a result of which he eventually chose to act for the applicant alone.

ENTITLEMENT TO INSPECT PROOFS OF DEBT

The Court of Appeal highlighted that unlike insolvency and bankruptcy regimes which allow creditors to inspect the proofs of debt of other creditors, the interest of a creditor in a proposed scheme of arrangement is different. In the latter, the creditor has an autonomous voting right which may be critical to the jurisdiction of the court to sanction the scheme. Hence, claims to be given access to proofs of debt of other creditors can only be justified if the information is relevant to his voting rights.

In principle, therefore, a creditor has no legal right to have access to the proofs of debt of other creditors, except where his voting rights have been or are likely to be affected. In other words, he is entitled to such access only if he produces *prima facie* evidence of impropriety in the admission or rejection of such proofs of debt.

NOTIFICATION OF CHAIRMAN'S DECISION TO ADMIT OR REJECT PROOF OF DEBT

The Court of Appeal approved of the practice of the chairman posting a list of the scheme creditors and the corresponding amounts of their admitted claims at the meeting venue before a creditors' meeting. This allows the creditors to commence voting knowing how much their votes will count with or against those of their fellow creditors. In addition, the information allows some measure of informed consultation between the creditors regarding the exercise of their votes.

Therefore, the Court held that in the present case, the proposed Scheme Manager should have completed adjudicating all proofs of debt and then provided all the scheme creditors present with the full list of scheme creditors entitled to vote and the corresponding quanta of their claims that were admitted for the purpose of voting. A proposed scheme manager who cannot comply with such steps prior to the scheme creditors' meeting should seek leave from the court to defer the meeting until the adjudication is completed.

continued on page 19

A RIGHT FOR EVERY WRONG

Loshini Ramarmuty explains the abolition of immunity for expert witnesses in England

INTRODUCTION

For more than 400 years since *Cutler v Dixon* 76 ER 886, expert witnesses in England enjoyed immunity from suits for breach of duty, whether in contract or tort, in respect of evidence given by them during legal proceedings.

On 30 March 2011, the Supreme Court of the United Kingdom, the apex court in England and Wales, by a majority decision of 5-2, abolished this immunity in *Jones v Kaney* [2011] UKSC 13.

FACTS

On 14 March 2001, Mr Jones was stationary on his motorcycle, waiting to turn at a road junction, when he was knocked down by a car driven by a Mr Bennett. Mr Bennett was drunk, uninsured and driving while disqualified.

Mr Jones suffered significant physical injuries and psychiatric injuries, in particular post-traumatic stress disorder (PTSD), depression, an adjustment disorder and associated illness behaviour which manifested itself in chronic pain syndrome.

> **“ a wrong should have a remedy and there would need to be compelling reasons to maintain any immunity ”**

Mr Jones brought proceedings for personal injury and was represented by Kirwans Solicitors. Kirwans instructed Dr Kaney, a consultant clinical psychologist. She concluded that, some two years after the accident, Mr Jones was at that time suffering from PTSD. Kirwans issued proceedings and liability was admitted by the relevant insurer (“Fortis”), so that only the quantum of damages remained in issue.

Upon the instructions of Kirwans, Dr Kaney carried out a further examination on Mr Jones about 18 months later and concluded that, while he did not have all the symptoms to warrant a diagnosis of PTSD, Mr Jones was still suffering from depression and some of the symptoms of PTSD.

A subsequent report prepared by Dr El-Assra, a consultant psychiatrist instructed by Fortis, expressed the view that Mr Jones was exaggerating his physical symptoms.

The court ordered the experts to hold discussions and to prepare a joint statement. The discussion took place on the telephone and Mr El-Assra prepared a draft joint statement, which Dr Kaney signed without amendment or comment.

The joint statement was damaging to Mr Jones’s claim. It recorded agreement that his psychological reaction to the accident was no more than an adjustment reaction that did not reach the level of a depressive disorder of PTSD.

The joint statement further stated that Dr Kaney had found Mr Jones to be deceptive and deceitful in his reporting, and that the experts agreed that his behaviour was suggestive of “conscious mechanisms” that raised doubts as to whether his subjective reporting was genuine.

It also seemed that although the joint statement did not reflect Dr Kaney’s true view, she had felt pressured into agreeing it.

Kirwans sought permission to change their psychiatric expert, but the district judge did not permit them to do so. Mr Jones was then constrained to settle his claim for a significantly lesser sum than would have been achieved had Dr Kaney not signed the joint statement in the terms which she did.

Mr Jones sued Dr Kaney for negligence. Dr Kaney relied on the defence of expert immunity. Her defence prevailed at first instance. However, Blake J granted a ‘leapfrog certificate’ for a direct appeal to the Supreme Court, as it involved a point of law of general public importance.

THE SUPREME COURT DECISION

The majority view

The majority of the Justices of the Supreme Court (Lord Phillips, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson) allowed the appeal and thereby abolished immunity for expert witnesses from claims for breach of duty.

Expert witness and advocates

The Court considered the position of expert witness as analogous to that of advocates who had lost their immunity from claims in negligence. In *Arthur J.S. Hall & Co v Simons* [2002] 1 AC 615, the House of Lord had swept away an advocate’s immunity from liability in negligence, inside and outside of court, albeit not their absolute privilege from claims from defamation.

As the arguments for barrister’s immunity and expert witness immunity were similar, the majority of the judges in the Supreme Court were of the view that expert witness immunity should be likewise abolished.

Expert witness and lay witness

The Court found that there was a marked difference between an expert witness and a lay witness. An expert witness would have chosen to provide his services and would have voluntarily undertaken duties to his client for reward under contract whereas a lay witness did not have such motive for giving evidence.

A wrong should have a remedy

The first rule of law is that a wrong should have a remedy and there would need to be compelling reasons to maintain any immunity. The Court found that there were no compelling reasons and

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immunity should be removed so that the wronged client would enjoy, rather than be denied by rule of law, his proper remedy.

Effect on experts

The Court opined that the removal of the immunity was unlikely to have any drastic effect in deterring expert witnesses from giving evidence. One of the reasons for this was because experts were already at risk of professional disciplinary proceedings and such proceedings would have far more serious effects upon the experts in terms of professional standing and their livelihoods. Further, the experts are professional people who are insured or can obtain insurance readily, and those who are not insured can limit their liability by contract.

The Court also found it unlikely that the removal of immunity would cause an expert to tailor his evidence. One of the justifications for immunity put forward by Dr Kaney's counsel was that the immunity was to ensure that the expert was able to give honest evidence in court, even if this proved adverse to the case of his own client. Counsel added that the immunity would allay any apprehension that the expert witness had in taking such a course.

“ the removal of the immunity would prevent an expert witness from pitching the merits of his client's claim too high at any stage ”

The Court rejected the arguments by Dr Kaney's counsel on the basis that removal of the barrister's immunity had not resulted in any diminution of the advocate's readiness to perform that duty. Lord Phillips, President of The Supreme Court, observed that:-

"It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty."

The Court also rejected the argument that immunity from suit was required to allow experts to comply with their duty to court. The Court was of the view that there was no conflict between the duty to the court and the duty to the client. As explained by Lord Dyson:

"There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client."

Partial Immunity

Before *Jones v Kaney*, expert witnesses had enjoyed only partial immunity as the immunity did not cover the expert's initial advice which was not primarily for the purpose of litigation. According to the Court, this could present a paradox where the expert might be reluctant in court proceedings to resile from a more extreme position that he may have taken in an earlier advice for fear of conceding that the earlier advice had been erroneous. The Court opined that the removal of the immunity would prevent an expert witness from pitching the merits of his client's claim too high at any stage.

Vexatious Claims

The argument that removal of immunity would lead to vexatious claims being brought against experts by disgruntled clients was rejected by the Court.

The Court found that it would not be easy for a litigant to support a vexatious claim without professional support and would most likely have his case struck out. Again, the Court made a comparison with barristers and noted that there had not been a flood of vexatious claims from disappointed litigants since the removal of the barrister's immunity.

The dissenting view

Lord Hope and Lady Hale dissented and did not agree with the removal of the immunity enjoyed by expert witness.

Lord Hope stated that there should be a compelling reason before the longstanding immunity is removed and did not see any compelling reason for doing so. His Lordship added that the purpose of the rule that affords immunity to witnesses is to ensure that witnesses are not deterred from coming forward to give evidence in court and from feeling completely free to speak the truth.

Lord Hope also expressed the view that if there was a need to reform the law in this area, it ought to be dealt with by the Parliament instead of the Court.

Lady Hale was particularly concerned about disappointed litigants as well as the potential impact of removing expert immunity on family proceedings.

CONCLUSION

The decision of the Supreme Court to abolish expert immunity appears to be driven by policy considerations, drawn largely on the experience in the United Kingdom subsequent to the abolition

continued on page 9

VOLUNTARY NOTIFICATION OF COPYRIGHT

Sri Richgopinath explains the procedure for voluntary notification of copyright

The Copyright (Amendment) Act 2012 which came into operation on 1 March 2012 introduced new Sections 26A, 26B and 26C into the Copyright Act 1987 ("Act"). These provisions establish a new and revolutionary framework for the voluntary notification of copyright into Malaysian copyright law.

The Copyright (Voluntary Notification) Regulations 2012 ("Regulations") came into operation on 1 June 2012.

This article discusses the procedure for notification of copyright under the Regulations and matters which are incidental to such notification.

NOTIFICATION OF COPYRIGHT

Regulation 5 permits any of the following persons, namely (i) the author of the work; (ii) the owner of the copyright; (iii) an assignee of the copyright; (iv) a licensee of an interest in the copyright; or (v) a person acting on behalf of any of the persons referred to in items (i) to (iv), to submit a notification of copyright to the Controller of Copyright ("Controller").

Regulation 5(1) requires the notification to be made by a citizen or a permanent resident of Malaysia. It appears to suggest that an owner, author or licensee of the copyright who is not a citizen or permanent resident of Malaysia has no locus to lodge a notification under the Act. Therefore, they will have to appoint a citizen or permanent resident of Malaysia to lodge the notification on their behalf.

A notification of copyright is made by filing (i) the prescribed forms; (ii) a statutory declaration; and (iii) a copy of the work with the Controller. The notification must be accompanied by payment of the prescribed fees.

The form(s) of notification to be submitted in respect the various types of work is summarised in the Table below:

Applicant	Type of Work	Form
Author/Owner/ Assignee/Licensee	Literary/Musical/Artistic/ Films/Sound Recording/ Broadcasts	CR-1
	Derivative Works	CR-2
Representative of Author/Owner/ Assignee/Licensee	Literary/Musical/Artistic/ Films/Sound Recording/ Broadcasts	CR-1 CR-3
	Derivative Works	CR-2 CR-3

The statutory declaration that accompanies the notification must, *inter alia*, (i) identify the work and exhibit a copy of the work; (ii) confirm the status of the applicant, i.e. author, assignee or licensee; and (iii) state the date on which the work was created.

Where the applicant is not the owner of the work, the owner must be identified in the statutory declaration and a copy of the instrument under which the applicant claims a right to the work, such as a licensing agreement, must be included as an exhibit to the declaration.

The copy of the work that is to be submitted together with the declaration must be clear and of durable quality. It may be in printed form or stored in digital format such as CD-ROM, digital video disc, thumb-drive, secure digital card or external hard disk.

The prescribed fees comprise a notification fee of a fixed amount and a deposit fee for the work which varies according to the mode of depositing and the length, or file size, of the work.

The Regulations prescribe the manner in which the notification form is to be signed. In the case of a natural person, the form must be signed personally or bear the thumb print of the applicant. Where the applicant is a society, organisation, body corporate or firm, the form is to be signed by a director, manager, secretary, partner or other similar officer or person on its behalf.

"The new regime for voluntary notification of copyright is a welcomed development in Malaysia"

Regulation 6 permits a notification of copyright to be amended by submitting a Form CR-4 together with payment of the prescribed fee of RM30-00.

REGISTER OF COPYRIGHT

Regulation 8 provides that if a notification of copyright is in order, the Controller will issue a letter to the applicant stating that such notification has been entered into the Register of Copyright ("Register").

An applicant may request the Controller to issue a certificate that states that the notification of copyright has been entered on the Register by filing Form CR-5 with the prescribed fee of RM50-00.

Regulation 12 permits any person to request, in Form CR-9 together with payment of a prescribed fee that varies according to the length, or file size, of the extract, for an extract or a certified extract from the Register. Section 26B(5) of the Act provides that a certified extract from the Register shall be *prima facie* evidence of the particulars entered therein and be admissible in all courts.

A person may also examine the Register by filing Form CR-8 together with a prescribed fee of RM20-00 per hour.

An applicant is required to notify the Controller when there is a change to an address entered in the Register by filing Form CR-10 together with payment of a prescribed fee of RM20-00.

SRI RICHGOPINATH SALVAM

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CLERICAL ERRORS

An applicant may request the Controller to correct any clerical error in the Register by submitting Form CR-6 together with the prescribed fee of RM30-00.

CORRECTION, EXPUNGEMENT OR AMENDMENT

Where a court order has been made under Section 26C of the Act to correct, expunge or amend any entry in the Register, the person who obtained such order is required to serve a sealed copy of the order on the Controller together with Form CR-7. The Controller will make the necessary changes to the Register upon his receipt of these documents.

ASSIGNMENT, LICENCE OR TESTAMENTARY DISPOSITION

Where the copyright in a work that has been entered into the Register has been transferred by assignment, testamentary disposition or operation of law, or a licence has been granted in respect of such work, the person concerned or his representative may notify the Controller of the assignment, disposal or grant of licence in Form CR-11 together with payment of a prescribed fee of RM50-00.

CONCLUSION

The new regime for voluntary notification of copyright is a welcomed development in Malaysia and will undoubtedly assist in establishing the subsistence of copyright in a particular work. However, it should be noted that the voluntary notification regime does not derogate from the requirement of non-formality for the enjoyment and exercise of copyright protection under the Berne Convention.

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A RIGHT FOR EVERY WRONG

continued from page 7

of an advocate's immunity in 2002.

Interestingly, the majority of the judges in *Jones v Kaney* concluded that there were compelling reasons to withdraw immunity from expert witnesses whereas Lord Hope, one of the dissenting judges, arrived at the opposite conclusion on this issue.

It is important to note that whilst *Jones v Kaney* has abolished the principle of expert immunity, the Supreme Court's decision does not affect the absolute privilege defence open to expert witnesses from defamation claims, nor does it undermine the long-established immunity of other witnesses in litigation.

Jones v Kaney may be a watershed for expert witnesses as the implications are wide. Some of the implications are:

(1) A client who has been wronged will now have the right to seek appropriate legal redress against his expert witness;

(2) Expert witnesses would be more anxious to get proper professional indemnity insurance and may wish to ensure that it covers their activities as expert witnesses;

(3) There is a possibility that the supply of experts may decrease;

> **"Jones v Kaney may be a watershed for expert witnesses"**

(4) Experts may now seek to limit or exclude their liability through contractual means; and

(5) Experts would be more concerned to ensure that accurate advice is given at all stages of proceedings.

Although this landmark decision is not binding in Malaysia, it will be interesting to see whether the Malaysian courts will follow the trend set by the Supreme Court in England.

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TRANSFORMATION!

Lee Ai Hsian discusses the issues on conversion to a limited liability partnership

In the previous issue of LEGAL INSIGHTS, we discussed the main features of the Limited Liability Partnerships Act 2012 ("Act") which is expected to come into operation later this year. We also discussed the main features of a limited liability partnership ("LLP") and the procedures for the formation of the same.

The Act permits a conventional partnership or a private company to be converted to a LLP. In this second of a two-part article, we will discuss the procedures by which the conversion is to be carried out and the issues that may arise in relation to such conversion.

References in this article to a "Part", "Schedule" or "Section" are references to a Part, Schedule or Section respectively of the Act.

CONVERSION TO LLP

The provisions on conversion of a conventional partnership or a private company to a LLP are contained in Part V of the Act. In the context of Part V, "convert" refers to the transfer of the properties, interests, rights, privileges, liabilities, obligations and undertakings of a conventional partnership or private company, as the case may be, to a LLP.

Conversion from conventional partnership

Section 29(1) permits a conventional partnership to be converted to a LLP provided that the LLP shall comprise *all* the partners of the existing conventional partnership and no other person.

As part of the conversion process, the conventional partnership is required to lodge with the Registrar of LLPs ("Registrar") a statement signed by all its partners stating, *inter alia,* that as at the date of the application, the conventional partnership appears to be able to pay its debts as they become due in the normal course of business (Section 31(1)(a)(iii)).

A professional practice, such as a firm of Chartered Accountants or Advocates and Solicitors, which seeks a conversion to a LLP is also required to lodge an approval letter from its governing body with the Registrar (Section 31(b)).

Conversion from private company

A private company that seeks to be converted to a LLP must satisfy the conditions set out in Section 30(1), namely that:

(a) there is no security interest subsisting over its assets at the time of application; and

(b) the partners of the LLP comprise *all* the shareholders of the private company and no one else.

A private company is also required under Section 31(2) to lodge with the Registrar a statement signed by all its shareholders stating, *inter alia,* that:

(i) as at the application date, the company appears to be able to pay its debts as they become due in the normal course of business and all outstanding statutory fees or any amount owing to any government agency has been settled; and

(ii) all of its creditors have agreed to its application to convert to a LLP.

REGISTRATION AND EFFECTS OF CONVERSION

Upon approval of the application for conversion of a conventional partnership or a private company ("transferor"), the Registrar will issue a notice of registration to state that the LLP has been registered under the Act ("registration notice") from the date specified in the registration notice ("registration date").

> **"The Act permits a conventional partnership or a private company to be converted to a LLP"**

The registration of the conversion will, *inter alia,* result in the following:

(a) *Vesting of properties and transfer of rights and liabilities* - All properties vested in the transferor, all interests, rights, privileges, liabilities and obligations relating to the transferor, and the whole of the transferor's undertaking shall be transferred to and vest in the LLP without the requirement for any further act or deed (Section 33(1)(a));

(b) *Pending proceedings, judgments or convictions* - All proceedings by or against the transferor which are pending on the registration date may be continued, completed and enforced by or against the LLP. This similarly applies to any conviction, ruling, order or judgment in favour of or against the transferor (Sections 34 and 35);

(c) *Existing agreements and arrangements* - Every agreement, deed, contract, bond, instrument and arrangement to which the transferor was a party immediately before the registration date, shall as from that date continue in force as if the LLP is the party thereto and shall be enforceable by or against the LLP (Sections 36 and 37);

(d) *Continuance of employment* - Every contract of employment shall continue in force on or after the registration date as if the LLP was the employer thereunder instead of the transferor (Section 38); and

(e) *Existing appointment, authority or power* - Every appointment

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of the transferor in any capacity in force immediately before the registration date shall take effect from that date as if the LLP had been appointed. Similarly, every authority or power conferred on the transferor shall take effect from the registration date as if it were conferred on the LLP (Section 39).

However, the automatic vesting provisions under Sections 33 to 39 do **not** apply to any approval, licence or permit held by the transferor. It will therefore be necessary for the LLP to apply afresh for a similar approval, licence or permit (Section 40).

Notwithstanding the automatic vesting provisions, every partner of a conventional partnership that has converted to a LLP will continue to be personally liable, jointly and severally, with the LLP for the liabilities and obligations incurred by the conventional partnership prior to its conversion or which arose from any contract entered into before the conversion. Subject to any agreement with the LLP to the contrary, any partner who discharges any such liability or obligation shall be entitled to be fully indemnified by the LLP in respect of that liability or obligation (Section 41).

A LLP is also required to ensure that every invoice and official correspondence bears a statement of the conversion and the name and registration number of the transferor from which it was converted for a period of 12 months commencing 14 days after the registration date (Section 42).

CONVERSION ISSUES

As highlighted in the preceding paragraphs, a conversion entails the transfer of the properties, interests, rights, privileges, liabilities and obligations from the transferor to the LLP. Set out below are some key issues which are expected to arise upon conversion and which should be addressed by the relevant authorities before the Act comes into operation:

(1) *Income tax treatment* - It remains to be seen whether the income of a LLP will be charged with tax at the entity level or based on the individual or corporate partner's respective tax rates.

In Singapore, a LLP is deemed to be a body corporate under the Singapore Limited Liability Partnerships Act (Chapter 163A). However it is treated as a partnership for income tax purposes. Thus, the income of a LLP in Singapore is subject to tax based on the income derived by the individual or corporate partner from the LLP.

(2) *Stamp duty* - A conversion results in the automatic transfer of all the properties vested in the transferor to the LLP. Any conveyance upon the sale of any property is chargeable with stamp duty that ranges between 1% to 3% of the consideration or market value, whichever is the higher, of the property under Item 32(a) of the Stamp Act 1949.

Under the Stamp Act, a "conveyance on sale" includes every written document whereby any property, estate or interest in any property is transferred to or vested in a purchaser upon the sale thereof.

As the registration notice automatically transfers the transferor's properties to the LLP, it is possible that the registration notice may be construed as a "conveyance upon sale" and be subject to stamp duty at the rates set out above.

In Singapore, the notice of registration of a LLP is deemed to be a conveyance on sale of the assets of the transferor to the LLP. A transfer upon conversion under the LLP regime in Singapore is relieved from stamp duty if the following conditions are satisfied:

(i) the partners and assets of the LLP are those of the transferor as at the date of conversion;

(ii) in the case of a firm, the capital contributed by each partner of the LLP remains the same as in the original firm, and in the case of a company, the percentage of partnership interest in the LLP is the same as the shareholdings in the transferor as at the date of conversion; and

(iii) at least 75% of the composition of the partnership interest in the LLP held by the original partners immediately after the conversion remains unchanged for 2 years from the date of conversion.

(3) *Real property gains tax* - Real property gains tax is imposed on any chargeable gain accruing from the disposal of any real property or shares in a real property company under the Real Property Gains Tax Act 1976 ("RPGT Act").

As a conventional partnership and a company are deemed to be "chargeable persons" under the RPGT Act, the transfer of real property or shares in a real property company upon a conversion to a LLP may subject the transferor to real property gains tax.

CONCLUSION

The benefits of a LLP are manifest, the principal one being the concept of limited liability that is associated with a limited liability company, whilst allowing its partners the flexibility of adopting an internal structure akin to a conventional partnership.

continued on page 19

THE GREAT CARBOLIC SMOKE BALL CASE

Yeoh Khee Hing explains why the advertisement was held to be more than a mere puff

INTRODUCTION

The essential elements of a contract are the agreement between the parties, the contractual intention of the parties and the consideration for the contract. Before a contract can come into existence, there must be an offer and the acceptance of that offer.

Knowing when an offer has been made is important. For example, the efficiency of modern day trade and commerce would be hampered if there is no definite instance when an offer can be accepted so as to give rise to a legally binding contract between the parties. The importance of knowing what amounts to an offer cannot be overemphasised for if there is no offer, there can be no acceptance that would result in a contract that is enforceable in law.

An "offeror" is the party who makes an offer whilst an "offeree" is the party to whom the offer has been made. In short, an offer is an expression of willingness to contract made by the offeror with the intention to be bound as soon as it is accepted by the offeree. The Malaysian Contracts Act 1950 uses the term "proposal" which is synonymous with the English terminology of "offer".

A Carbolic Smoke Ball advertisement circa 1891

CARLILL v CARBOLIC SMOKE BALL

Carlill v Carbolic Smoke Ball Company [1893] Q.B. 256 is one of the leading cases for the fundamental contract law doctrine of offer and acceptance.

The case was set against the backdrop of Victorian London in the 1890s where an influenza epidemic had swept through Britain and other parts of Europe. This Russian flu pandemic took many lives including that of the eldest son of the Prince of Wales, who was then second in line to the throne of England.

The extensive press coverage over his death caused widespread fear among the public as medical treatments at that point in time had not been developed sufficiently to effectively combat influenza.

Faced with under-developed scientific medicine and the deadly influenza, the fearful public resorted to quack treatments which included *inter alia,* the "smoke ball", a device that consisted of a rubber ball with a tube filled with powdered carbolic acid. The user would stick the tube into his nose and squeeze the smoke ball which released puffs of acidic smoke to clear the nose, thereby causing the cold to be flushed out.

Riding on the public's sentiment, manufacturers of quack cures quickly advertised their products in the pages of respectable newspapers. This inadvertently produced one of the greatest precedents in the law of contract.

In this case, the defendants, the manufacturers and the sellers of the "Carbolic Smoke Ball", placed an advertisement in the Pall Mall Gazette on 13 November 1891 and other newspapers, stating that £100 would be paid to anyone who contracted influenza after having used one of their smoke balls in a specified manner three times a day for two weeks. As a gesture of their sincerity, the defendants deposited £1,000 in the Alliance Bank of Regent Street.

Mrs. Louisa Elizabeth Carlill, who saw the advertisement, decided to buy a smoke ball and used it in the specified manner for the specified period. Despite doing so, Mrs. Carlill contracted influenza. She then brought an action against the defendants to claim the £100 reward.

Essentially, the question in law boiled down to whether the advertisement constituted a valid offer by the defendants or was a mere puff which was not intended to be legally binding on the defendants.

The defendants contended that they were advertising the medicine like any other manufacturers (at that time) and no reasonable minded person would have expected it to be a valid offer.

In affirming the decision of the High Court, the Court of Appeal

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held that the advertisement amounted to an offer made to any person who performs the conditions set out in the advertisement and that the offer was accepted when a person performs those conditions. Hence, Mrs. Carlill had accepted the offer when she performed the specified conditions, thereby giving rise to a legally binding contract with the defendants.

Although at that point in time there were numerous manufacturers, apart from the defendants, who proclaimed that their medicines had the ability to cure and prevent influenza, the essential distinguishing feature was that the defendants' advertisement represented that they were committed to the promise and were prepared to pay out the £100 to whoever that contracted influenza after using their smoke balls.

The three judges in the Court of Appeal rejected the defendants' argument that the advertisement was a mere puff as there was a clear intention by the defendants to be bound by the promise to pay £100 to anyone who contracted influenza after using the smoke ball. This intention was clearly evidenced by the fact that the defendants had deposited £1,000 with the bank.

> **“ Mrs. Carlill had accepted the offer when she performed the specified conditions ”**

Had the judges decided otherwise, it would have given rise to a situation where advertisers could market their products by making spurious claims to entrap customers and thereafter avoid liability by claiming that the advertisements were mere "puff" which no person in his right mind would have taken seriously.

Subsequent to the decision, the Carbolic Smoke Ball Company raised the ante by advertising in the Sketch on 15 February 1893 that they offered £200 to anyone who contracted influenza after using the smoke balls, subject to certain strict requirements being fulfilled. However the controversial "£1,000 deposit with the bank" was omitted from this subsequent advertisement.

It is clear from the *Carbolic Smoke Ball Case* that what amounts to an offer is to be viewed objectively, and not in isolation of the context in which the offer is being made. There is however, a need to distinguish between a legitimate offer and an invitation to treat.

INVITATION TO TREAT

An invitation to treat is a communication that invites other parties to make an offer. Unlike an offer, an invitation to treat is not intended to give rise to a binding contract through acceptance by the party to whom it is addressed.

Some common examples of invitations to treat are goods displayed in shop windows and supermarkets. The displayed goods are considered as invitations to treat, and not offers. The offer is only made when the goods are brought to the check-out counter, and the cashier has the choice to either accept or reject the offer. Of course, no cashier in his right mind would, in ordinary circumstances, reject the offer.

Similarly in the case of an initial public offer of shares for listing on a stock exchange, the prospectus that is issued to potential investors is usually drafted on terms that it is merely an invitation to the public to apply for the company's shares. The offer is made when the investors submit their application forms to the company which then has a choice to either accept the offer, in whole or in part, or to reject the same. If there is an over-subscription of the shares of the company, then the company would usually determine which offer to accept (and to what extent) by a process of balloting.

In an auction, the auctioneer's request for bids is not an offer. It is merely an invitation to the prospective purchasers to submit their bids. The auctioneer may then accept or reject the offers submitted by the bidders and the contract is only formed at the fall of the auctioneer's hammer.

CONCLUSION

The principle enunciated in the *Carbolic Smoke Ball Case* is still applicable in this modern age of consumerism where almost every company has an advertising budget to market its products. If the advertisement is objectively construed as a valid offer to the public, then a contract would be formed when the recipient performs the affirmative actions that constitute an acceptance of the offer.

Nevertheless, it is essential to distinguish between an offer and an invitation to treat. The distinction lies in the intention of the maker of the statement. If the party's intention is to be bound immediately upon acceptance by the party to whom the statement is made, then it will be regarded in law as an offer and not as an invitation to treat.

Therefore, it is important to know whether an offer or an invitation to treat is being made. It may look like an offer, it may even sound like an offer, but is it an offer?

As for Mrs. Carlill, she lived until the ripe old age of 96 and passed away on 10 March 1942. The cause of death? Influenza.

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THE RESPONSIBILITY OF ISPS FOR ONLINE PIRACY

Moo Ker Wei provides an overview of recent court decisions in the United Kingdom and Australia

The roles and obligations of internet service providers ("ISPs") in relation to online piracy have been a subject of great uncertainty and debate. In the past year, ISPs in the United Kingdom and Australia have been taken to court by copyright owners to compel the ISPs to block their users' access to copyright infringing websites, specifically those involved in illegitimate file sharing and downloading. This has led to some significant rulings by the courts in both jurisdictions.

In this article, we will examine the recent decisions from the afore-mentioned jurisdictions and the obligations of ISPs in Malaysia in relation to online copyright infringement.

UNITED KINGDOM: THE NEWZBIN, NEWZBIN2 AND PIRATE BAY CASES

The Newzbin case

In *Twentieth Century Fox Corp Ltd & Ors v Newzbin Ltd* [2011] EWHC 1981 (Ch), six film production companies and studios filed a lawsuit against Newzbin Ltd, the owner and operator of a website called Newzbin. The website was accused of infringing the claimants' copyright by providing its users access to films, music, games and books on an internet system called Usenet.

> **"it was sufficient to show that the ISP had actual knowledge that one or more persons were using its service to infringe copyright"**

The High Court ruled in favour of the claimants, holding Newzbin Ltd liable for (i) authorising copyright infringement by its users; (ii) acting as a joint tortfeasor in procuring users to commit copyright infringement; and (iii) making copyrighted materials available to users. The Court granted an injunction to restrain Newzbin Ltd from infringing the claimants' copyright.

Newzbin Ltd was subsequently wound up and its website ceased operations. Soon thereafter, a website emerged at the same web address operating under the name "Newzbin2", but in a similar manner as Newzbin. However, the operator's identity was unknown.

The claimants then pursued an action under section 97A of the Copyright, Designs and Patents Act 1988 ("CDPA") against the ISP, British Telecommunications plc ("BT"), seeking an order to compel BT to remove or disable network access to Newzbin2.

The Newzbin2 Case

Twentieth Century Fox Corp Ltd & Ors v British Telecommunications plc [2011] EWHC 1981 (Ch) was the first case to test section 97A of the CDPA. The provision, an implementation of Article 8(3) of European Parliament and Council Directive 2001/29/EC, empowers the High Court to issue an injunction against a service provider where that service provider *has actual knowledge* of another person *using their service* to infringe copyright.

BT argued that their subscribers used the services of Newzbin2, and not BT's, to infringe copyright. BT contended it was merely a provider of internet access, and it was Newzbin2's services that allowed users to download materials from the site. The Court disagreed with BT and ruled that BT's users were using BT's services as much as Newzbin2's in their downloading activities.

In respect of the element of "actual knowledge", the High Court rejected BT's contentions and held that it was not essential to prove that the ISP had actual knowledge of a specific infringement of a specific copyright work by a specific individual. The Court further held that it was sufficient to show that the ISP had actual knowledge that one or more persons were using its service to infringe copyright.

The Court awarded judgment in favour of the claimants and granted an injunction ordering BT to block its users' access to Newzbin2.

The Pirate Bay case

Following the groundbreaking decision of the High Court in *Newzbin*, it did not take long for members of the music recording industry to follow suit with *Dramatico Entertainment & Ors v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch). Injunctions were sought by record companies against multiple ISPs, including BT. The targeted infringer in this case was The Pirate Bay ("TPB"), a website accused of facilitating illegitimate file sharing by their users on a peer-to-peer ("P2P") network.

P2P, as the name implies, is a file-sharing network that operates by users sharing or exchanging data or files directly from each other's computers. This is distinct from downloading data from a hosting website, such as Newzbin2.

In order to download the desired material, a P2P user has to first obtain a corresponding "torrent file" or "seed" which contains information to enable the user to track and locate other users sharing the desired file. Once the other users are identified, the downloader may then begin to download the data from these users. Downloaders of data on a P2P network also act as uploaders at the same time, i.e. as data is being downloaded on a computer, it is automatically uploaded and shared from the computer with other P2P users.

In this case, TPB serves a P2P network called "BitTorrent". TPB catalogued, indexed and arranged torrent files for all types of content, including audio and visual materials, thus making it easier for users to search for torrent files of materials that they sought to download.

Before deciding whether injunctions should be granted against the ISPs, the High Court considered whether P2P users, and

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the operators of TPB, had respectively infringed the claimants' copyright. The Court was of the view that P2P users, acting both as downloaders and uploaders of data, infringed the claimants' copyright by copying and making copyrighted materials available to other P2P users. Referring to the *Newzbin* case, the Court also concluded that the operators of TPB were liable for the tort of authorising copyright infringement and as joint tortfeasor for inducing, inciting or persuading its users to commit infringement of copyright.

Having established copyright infringement, the High Court on 27 April 2012 granted injunctions and ordered five of the ISP defendants to block access to TPB. BT was not included in this order as it had been granted more time by the Court to respond to the order to block TPB.

AUSTRALIA: ROADSHOW FILMS v IINET

In Australia, the High Court of Australia arrived at a different conclusion in *Roadshow Films Pty Ltd & Ors v iiNet Limited* [2012] HCA 16.

The claimants were owners or licensees of copyright in films and television programmes. The defendant was iiNet Ltd, an ISP in Australia. The claimants had previously issued notices to iiNet demanding that warnings be given to P2P users who infringed the claimants' copyright, or that these users' accounts be suspended or terminated. iiNet refused to comply. Hence the lawsuit was filed.

The claimants relied essentially on section 101 of the Australian Copyright Act 1968. The provision prescribes that copyright is infringed by a person who, not being the owner of the copyright, does or *authorises* any act comprised in the copyright of a work. It was the claimants' position that iiNet had authorised its users to infringe the claimants' copyright by failing to terminate the account of its copyright infringing users, specifically the P2P users.

On 20 April 2012, by a unanimous decision, the apex court in Australia found that iiNet did not authorise its users to infringe the claimants' copyright. The Court took into consideration the fact that iiNet, as an ISP, did not possess the technical power to prevent its users from infringing copyright, such as taking down or removing infringing material stored on a user's computer, or to filter or block the communication of that material over its internet service. It only had the contractual ability to suspend or terminate users' accounts, and the mere failure of iiNet to do so did not amount to authorisation.

The Court also determined that the allegations of infringement in warning notices issued by the claimants to iiNet were not supported by adequate information to justify iiNet taking actions to warn or suspend the infringing users' accounts.

COMMENTARY

The different lines of decision of the English and Australian courts reflected in the above cases may be attributed to the fact that the Australian Copyright Act 1968 does not appear to have a provision that is similar to section 97A of the CDPA, which allows the courts to grant injunctions against ISPs.

The English courts may have felt more compelled to come down hard on the ISPs owing to the force of section 97A and the relevant EU directives. The Australian claimants on the other hand had to base their claims against ISPs on the traditional grounds of copyright infringement, i.e. to prove that a particular ISP had authorised the infringing activities by its users. Section 97A of the CDPA, in comparison, appears to set a lower threshold that only requires a claimant to show that the ISP had actual knowledge that its services were being used for copyright infringement.

It remains to be seen whether the Malaysian courts will allow injunctions of such nature to be granted against Malaysian ISPs. On this note, it is worth mentioning section 43H, which came into effect on 1 March 2012 along with a raft of other amendments to the Copyright Act 1987.

Section 43H empowers a copyright owner to notify an ISP of any infringing materials and to require such materials to be removed or that access to it be disabled by the ISP. However, the provider of the removed material is equally given the right to serve a counter-notification on the ISP. Upon receipt of the counter-notification, the ISP is required to restore the material or access to it within ten days, unless the issuer of the notification informs the ISP within the ten-day period that an action has been filed for an injunction to restrain the issuer of the counter-notification from infringing his copyright.

It would appear that section 43H has limited force against infringers due to its being an administrative measure. It is unlikely that section 43H will be sufficient to form the basis for an injunction to be issued against a Malaysian ISP unless it refuses to comply with the take-down notification issued by a copyright owner.

As with Australia, Malaysia does not have a provision which is similar to section 97A of the CDPA within its statutory framework. This further limits the possibility of the Malaysian courts adopting an aggressive stance against ISPs without statutory reform.

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THE OBJECTIVES OF THE SHARIAH

Syed Adam Alhabshi explains the Maqasid As-Shariah and its application to everyday life

A businessman once mentioned to me that he thinks Islamic Finance is just a guilt-free finance for Muslims. "We need to raise capital but we cannot get involved with interest so Islamic Finance is the guilt-free alternative to our source of funds". I could not disagree with that point of view but that seems to be limiting the perspective of Islamic Finance within the realm of material wealth only.

But Islamic Finance is not just about a source of finance. All of the theories and principles (such as in a *sukuk*, deposits, product development, risk management, legal documentation, etc) are too complex to be limited to wealth *per se*. Islamic Finance can be said to be a developed discipline which exists because it fulfils the Objectives of the *Shariah* ("*Maqasid As-Shariah*").

Quite simply, *Maqasid* means objectives and *Shariah* means Islamic law. For the purpose of this article, the primary focus is on the Objectives of the *Shariah* which will be referred to as "*Maqasid*".

As a start, allow me to share what was written by an Islamic scholar and jurist named Ibn Qayyim on the general principles of *Shariah*:

"The Shariah is based on wisdom and achieving people's welfare in this life and the afterlife. Shariah is all about justice, mercy, wisdom and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to Shariah, even if it is claimed to be so according to some interpretation."

The *Maqasid* serves as an important science that allows us (not only scholars and Muslims but humanity in general as justice, mercy, wisdom and good serves the whole universe) to know the purpose and goal of the *Shariah*. It is based on ease, does not involve hardship and most importantly, it includes guidance to the best way of life.

As a science of the *Shariah*, the *Maqasid* was only formulated as a systematic methodology at a much later stage after the demise of the Prophet Muhammad (peace be upon him) as a supplement to the principles of jurisprudence in Islamic Law by the various schools of Islamic thought. Hence there was no mention of such science in the early stages of the development of Islamic legal system during the time of the Prophet or the companions of the Prophet.

This does not mean that the *Maqasid* was derived independently of the Qur'an (the Holy Book for the Muslims) and *Sunnah* (Prophetic traditions). On the contrary, the list of objectives of the Islamic law or the *Maqasid* as propounded by Ibn Qayyim was derived **completely** from the two main sources of Islamic law, namely the Qur'an and *Sunnah*.

What are these so-called objectives of Islamic law?

The first objective is to provide benefits to mankind and hence the law has been designed to protect these benefits. The second objective is to provide mercy or compassion and hence the law is there to eliminate prejudice and alleviate hardship. Thirdly, the objective of any law for that matter is to attain justice for all and hence justice has to be a principal objective of Islamic law as well.

The question is what are those benefits that the *Shariah* must protect as a manifestation of mercy and justice? To this end, Muslim jurists have considered those things that man must have in order to lead a good life. These things, considered as the basic needs, have been identified under five main headings, namely (i) faith or religion, (ii) life or physical self/body, (iii) intellect or knowledge, (iv) offspring or lineage, and (v) wealth or property which the *Shariah* aims to protect as part of its *Maqasid*. This is so because Islam seeks to provide the opportunity for good living, both at individual as well as societal levels, by protecting and promoting these five essentials.

The five basic needs enumerated above are inter-related and co-exist in a symbiotic fashion. It must be noted that the list above is not exhaustive. Some jurists have included honour as the sixth essential need whilst others, such as Ibn Qayyim, have moulded *Maqasid* in a different structure with only three key features i.e. to educate individuals, to implement justice and to protect society.

In modern context, we can include Intellectual Property under intellect, Islamic Finance and Competition Law under wealth or property.

" the Maqasid ... was derived completely from the two main sources of Islamic law, namely the Qur'an and Sunnah "

In financial literature, we would stumble upon the idea of what constitutes needs and wants and be in a constant struggle to convince ourselves to prioritise our needs over our wants. In view of such a struggle in the application of the *Shariah*, Muslim jurists began to classify the entire range of essentials of the *Maqasid* into a three-levelled hierarchy or descending categories of importance to allow a more uniformed application. The three levels are (1) necessities (*dharuriyyat*); (2) convenience (*hajiyyat*); and (3) refinements (*kamaliyyat* or *tahsiniyyat*).

Necessities (Dharuriyyat)

Necessities constitute all activities and things that are regarded as absolute requirements to the survival and spiritual well-being of individuals at the barest minimum for an acceptable level of living.

Necessities include the ability to perform the five pillars of Islam (i.e. to have proper Islamic faith, performing the five obligatory prayers in a day, fasting during the month of Ramadhan, *Zakah* or annual tithe payment and performing the Pilgrimage or *Hajj* once in a lifetime) and protection of life, ensuring sufficient availability of food, clothing and shelter, education, the right to earn a living,

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etc. It can be concluded that at this level, one has enough to live but not necessarily to be in some comfort. The Malay proverb aptly defines this as "*Kais pagi makan pagi, kais petang makan petang*" ("To live from hand to mouth").

Conveniences (Hajiyyat)

Conveniences are benefits that remove the severity and hardship that are not vital to preserve the five foundations, but rather, are needed to remove difficulties or impediments in life. Examples include the use and enjoyment of things that man can do without, but with difficulty, such as having a change of clean clothes every day, the use of a car, having a carpet over cement floor, etc.

Refinements (Kamaliyyat or tahsiniyyat)

Refinements are desires or wants which seek to perfect the customs and conduct of people of all levels. They are items which change the convenience form to comfort such as having branded and expensive clothes and perfume, the use of a driver and spare cars, numerous golf club memberships, comfortable houses with maids etc.

> **"Maqasid, in its application, boils down to our decision making process"**

The *Shariah* does not restrict people from accumulating and spending wealth. In fact, in the *Quran*, Muslims are encouraged to flaunt their blessings (see the final verse of *surah* Adh-Dhuha - The Morning Hours, Chapter 93) but not to be wasteful (see verse 27 of *surah* Al-Isra' – The Night Journey, Chapter 17) and excessive (see verse 31 of *surah* Al-A'raf- The Heights, Chapter 7) because God hates those who are wasteful and dislikes those who are excessive.

On that note, it is safe to say that the *Shariah* honours traffic laws because it protects the safety of society. It emphasises care for your parents such as not to say "*hmph*" or "*uff*" to your parents (see verse 23 of *surah* Al-Isra' – The Night Journey, Chapter 17). Care is given to issues of fidelity, raising children, embracing good morals and ethics and social justice issues even if it involves speaking out against your own self.

Slandering is not permitted under the *Shariah* and its punishment is severe as it involves the honour of another human being. In a nutshell, it can be concluded that the entire *Shariah* is to preserve either one or more of the *Maqasid*.

Maqasid, in its application, boils down to our decision making process. We make decisions every day. The moment we wake up, we are given the free will to make a decision. Do we want to go to work today? What kind of tax incentive structure would give the best tax rebate to your company if you want to raise capital? Should you look into debt financing or equity financing? What would you like to have for dinner?

These decisions come with consequences. If you do not go to work and you have no excuse or leave, you would be subject to a disciplinary hearing. If your company is not suitable for raising funds on the capital market, it would be a recipe for disaster for the future of your company. If you are allergic to certain food, having it for dinner might just spoil your night.

But if these decisions and consequences are guided with the right objectives, your chances of success would be very bright.

The point that I am driving at is this: *Maqasid Shariah* should be able to give you the parameters on how you should make that decision. Muslim jurists did not formulate the *Maqasid* only for them to apply in making Islamic rulings. It was meant as a philosophy of life that everyone can apply, Muslims or non-Muslims, as the ultimate goal is to eliminate injustice, to share mercy, do away with evil and to have an understanding in the application of knowledge i.e. to have wisdom.

Wouldn't this give you a better understanding as to why you should consider Islamic Finance apart from it being merely a guilt-free transaction?

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Translation of the Quranic verses mentioned above:

1. *Surah* Adh-Dhuha- The Morning Hours, Chapter 93, verse 9 reads: *But as for the favor of your Lord, report [it].*
2. *Surah* Al-Isra' – The Night Journey, Chapter 17, verse 27 reads: *O children of Adam, take your adornment at every masjid, and eat and drink, but be not excessive. Indeed, He likes not those who commit excess.*
3. *Surah* Al-A'raf- The Heights, Chapter 7 verse 31 reads: *Indeed, the wasteful are brothers of the devils, and ever has Satan been to his Lord ungrateful.*
4. *Surah* Al-Isra' – The Night Journey, Chapter 17, verse 23 reads: *And your Lord has decreed that you not worship except Him, and to parents, good treatment. Whether one or both of them reach old age [while] with you, say not to them [so much as], "uff," and do not repel them but speak to them a noble word.*

TAN LAI YEE

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

TRIGGER POINT

Tan Lai Yee explains when a scheme of arrangement under Section 176 triggers a termination of a PAM Contract

In *Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors* [2012] 1 MLJ 729, the Federal Court was called upon to determine the point in time at which proceedings relating to a scheme of arrangement under Section 176 of the Companies Act 1965 ("Act") would trigger the termination of a standard form Building Contract by the Persatuan Akitek Malaysia ("PAM Contract").

FACTS OF THE CASE

The Appellant/Plaintiff ("Appellant") was the Employer of a construction project under a PAM Contract. The Respondents/ Defendants ("Respondents") were the sub-contractors appointed by the Main Contractor, Autoways Construction Sdn Bhd ("Autoways"), to perform various functions under the project. Autoways was initially named as the 1st Defendant in the court of first instance but did not participate at the trial as it had been wound up.

Clause 25(2) of the PAM Contract ("Clause 25(2)") provides that *"in the event of the Contractor becoming a bankrupt or making a composition or arrangement with his creditors or having a winding up order made … the employment of the Contractor under this Contract shall be forthwith automatically determined."*

The Appellant issued a termination letter upon learning that Autoways had made an application to the Court for a restraining or moratorium order ("restraining order") under Section 176(10) ("Section 176(10)") of the Act.

> **"the issuance of a restraining order under Section 176(10) would not activate Section 25(2)"**

Subsequent to the issuance of the termination letter by the Appellant, the 1st to 4th Respondents re-entered the site to remove their plant, tools and equipment on the authorization of Autoways and in the process of doing so, damaged the temporary buildings on the site. This resulted in the Appellant claiming damages against the 1st to 4th Respondent for trespass and conversion.

DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

The High Court ruled in favour of the Appellant and held that the contract was validly terminated under Clause 25(2) and Autoways could not therefore have validly given consent to the Respondents to enter the site.

The Court of Appeal reversed the decision of the High Court on the basis that a restraining order under Section 176(10) did not activate the automatic termination under Clause 25(2). As the contract was not validly terminated, Autoways could validly give consent to the Respondents to enter the site.

The Appellant obtained leave to appeal to the Federal Court.

QUESTIONS OF LAW

Among the questions of law to be determined by the Federal Court were the following:

(1) whether a restraining order issued by the Court under Section 176(10) in favour of the contractor is proof of the '*making of a composition or arrangement*' with creditors for the purpose of Clause 25(2)?; and

(2) whether Clause 25(2) is triggered, causing an automatic termination of the main contract if the contractor petitions the Court under Section 176(1) ("Section 176(1)") of the Act for approval of a scheme of composition with its creditors?

THE DECISION OF THE FEDERAL COURT

The Federal Court upheld the decision of the Court of Appeal.

Section 176(10)

The Court held that the issuance of a restraining order under Section 176(10) would not activate Section 25(2). Their Lordships were of the view that the events contemplated in Clause 25(2) were "*essentially instances of insolvency*" and that an application for, and also the granting of, a restraining order under Section 176(10) was not an instance of insolvency so as to trigger Clause 25(2) even though insolvency was "*probable or imminent*".

Section 176(1)

According to the Court, the second question turned on the interpretation of the phrase "*making a composition or arrangement with his creditors*" in Clause 25(2).

In the opinion of their Lordships, the word "*making*" must for all necessary purposes be read as the composition or arrangement having already been made i.e. it must necessarily be a step further than a mere proposal to enter into a composition or arrangement.

Their Lordships were also of the view that the words "*becoming a bankrupt*' and "*having a winding up order made*" in Clause 25(2) contemplate that bankruptcy orders must have been entered or that winding orders have been made before the Clause 25(2) is activated and that "*making*" must be construed in a similar context.

continued on page 23

LAYING DOWN THE GROUND RULES

continued from page 5

APPEAL AGAINST DECISION TO ADMIT OR REJECT PROOF OF DEBT

The Court of Appeal recognised that there is no subsidiary legislation governing the admission and rejection of proofs of debt in relation to creditors' meetings in a proposed scheme of arrangement. Having drawn comparisons with procedures in judicial management and liquidation, the Court of Appeal held that a creditor who has submitted a proof to the chairman of a scheme of arrangement creditors' meeting can appeal the chairman's decision in respect of the admission or rejection of both the creditor's own proof of debt as well as those submitted by other creditors.

Such appeals should only be taken after the votes have been counted and it can be seen whether the vote in question would affect the result, preferably concurrently during the sanction stage. At such an appeal, the court will not ordinarily interfere with the chairman's decisions based on his professional judgment unless it was affected by bad faith, a mistake as to the facts, an erroneous approach to the law or an error of principle. The court's role is not to engage in its own valuation of a claim.

CLASSIFICATION OF CREDITORS

The principle on classification of creditors has been well established in that scheme creditors should be classified differently for voting purposes when their rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest.

The Court of Appeal provided some clarification on this dissimilarity principle in that if a creditor's (or a group of creditors') position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme (and not because of its own unique circumstances) assessed against the most likely scenario in the absence of scheme approval (for instance, the frequent scenario of insolvent liquidation), then the creditor (or group of creditors) should be placed in a different voting class from the other creditors.

WHEN SHOULD SCHEME CREDITORS VOTES BE DISCOUNTED

In the situation of related creditors, while they need not constitute a separate class of creditors for voting purposes simply because they were related parties, the Court of Appeal agreed that the cases have consistently held that it is the norm to discount such votes in light of the related creditors' special interests to support a proposed scheme by virtue of their relationship to the company. However, no guidance was provided on how much such a discount of voting weightage should be applied.

For wholly-owned subsidiaries which are unsecured creditors, it was held that while they may be classed along with the other unsecured creditors, their votes should be discounted to zero. This effectively classed them separately from other unsecured creditors. The Court of Appeal viewed wholly-owned subsidiaries as extensions of the applicant company itself and their votes would undoubtedly be entirely controlled by the applicant company.

The Court of Appeal emphasised however that its decision on this point is limited to the treatment of wholly-owned subsidiaries. It recognised that the treatment of partially owned subsidiaries also raises difficult issues but this question would be addressed in a more appropriate case.

COMMENTARY

This decision provides a great deal of guidance in the area of the laws and procedure for schemes of arrangement. While decided in a Singapore context, these principles which are aimed at maintaining the integrity of the scheme of arrangement process, particularly the process in which proofs of debt are properly admitted or rejected for the purpose of voting, should be equally applied here. Any scheme must be grounded on the principles of transparency and objectivity and implemented by an independent and impartial proposed scheme manager.

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TRANSFORMATION!

continued from page 11

The Government should minimise the incidental cost of conversion to a LLP by either exempting the registration notice from stamp duty or imposing duty of a fixed minimal amount on such an instrument. Similarly, the Government should exempt the transferor from real property gains tax in relation to the transfer of real property or shares in a real property company upon the conversion to a LLP.

If appropriate fiscal measures are not taken by the Government, the cost of conversion could be so prohibitive as to render the provisions of Part V to be a dead letter.

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BANKRUPT'S RIGHT TO APPEAL AGAINST BANKRUPTCY ORDERS CURTAILED

A commentary on Ho Ken Seng v Progressive Insurance Sdn Bhd by Loo Peh Fern

The Court of Appeal in *Ho Ken Seng v Progressive Insurance Sdn Bhd* [2012] 1 MLJ 297 held that a bankrupt is required to obtain the prior sanction of the Director General of Insolvency ("DGI") before he is competent to pursue an appeal against an Adjudication Order and Receiving Order ("AORO") issued against him.

This case has a significant impact on a bankrupt's right to appeal against an AORO.

BRIEF FACTS

The Respondent filed a Bankruptcy Notice for RM2,835,179.38 being the unpaid amount of a judgment obtained against the Appellant on 20 March 1990.

As the Appellant failed to comply with the Bankruptcy Notice, the Respondent filed a Creditor's Petition against him. The Creditor's Petition was served on the Appellant on 28 September 2004.

On 27 February 2005, the Appellant filed an application to strike out or set aside the Bankruptcy Notice, the service thereof and the Creditor's Petition.

On 8 January 2007, the Registrar dismissed the Appellant's application with costs. The Appellant, dissatisfied with the Registrar's decision, filed an appeal to Judge in Chambers on 12 January 2007.

On 16 August 2007, the Registrar granted an AORO against the Appellant. The Appellant, dissatisfied with the Registrar's decision, filed an appeal against the AORO to the Judge in Chambers on 22 August 2007.

On 11 March 2010, the learned High Court Judge dismissed both the appeals. The Appellant, dissatisfied with the Judge's decision, then appealed to the Court of Appeal.

RESPONDENT'S PRELIMINARY OBJECTION

The Respondent filed a motion to strike out the Appellant's notices of appeal. The Respondent raised a preliminary objection that the Appellant had not obtained the sanction of the DGI pursuant to section 38(1)(a) of the Bankruptcy Act 1967 ("Act") and therefore had no *locus standi* to pursue the appeals.

Section 38(1)(a) of the Act *inter alia* provides that a bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the prior sanction of the DGI if he has not obtained his discharge.

APPELLANT'S CONTENTION

The Appellant submitted that the appeal was lodged pursuant to section 92 of the Act, the relevant parts of which provide as follows:

"(1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable."

The Appellant further submitted that the appeal was not an action that involved third parties and hence the sanction of the DGI was not required.

DECISION OF THE COURT OF APPEAL

The Court of Appeal, by a majority decision, struck out both appeals.

Majority Decision

Low Hop Bing JCA, in delivering the majority judgment of the Court of Appeal (with A Samah Nordin JCA concurring), held that the question for determination was as follows:

"On the basis of the above factual background, and upon a true construction of s 38(1)(a), is the bankrupt who has not obtained the prior sanction of the DGI competent to maintain these two appeals?"

" in the event of inconsistency ... the specific provisions of section 38(1)(a) would prevail "

Low Hop Bing JCA held that section 92 is a general provision while section 38(1)(a) is a specific provision and that in the event of inconsistency between those provisions, the specific provisions of section 38(1)(a) would prevail. His Lordship then held that if a bankrupt is invoking section 92, section 38(1)(a) must apply i.e. prior sanction of the DGI must be obtained.

Low Hop Bing JCA considered the case of *Re Khoo Kim Hock* [1974] 2 MLJ 29 where the High Court held that section 38(1)(a) did not apply to an application under section 92(1) and section 105(1) of the Act where a bankrupt applied to review, rescind or vary a bankruptcy order.

His Lordship also referred to his own judgment in the High Court in *Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Ltd* [1997] 4 CLJ 185 where he declined to follow *Re Khoo Kim Hock* and held that prior sanction of the DGI was required as that case concerned an application for stay of bankruptcy order and not for an annulment of a bankruptcy order.

Further, Low Hop Bing JCA referred to the High Court case of

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Bathamani A/p Suppiah v Southern Finance Co Bhd [2000] 6 MLJ 427 where PS Gill J (as he then was) followed *Re Low Kok Tuan* and held that sanction of the DGI was required to maintain an appeal against a bankruptcy order. It was held in that case that the decision in *Re Khoo Kim Hock* merely stated that sanction of the DGI is not required for an application to review, rescind or vary a bankruptcy order under section 92(1) or section 105(1) and was silent on the bankrupt's capacity to appeal. As such, sanction of the DGI must be obtained in order to appeal against a bankruptcy order.

Low Hop Bing JCA observed that the aforesaid High Court cases diverged in interpreting section 38(1)(a). His Lordship held that the High Court judgments must now be read in the light of the Court of Appeal's judgment in *Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan* [2009] 4 MLJ 201, where it was held that a bankrupt is incompetent to maintain an action without prior sanction of the DGI and an annulment order did not operate retrospectively.

The above-referred case was appealed to the Federal Court (see *Sardar Mohd Roshan Khan (the sole owner trading under the name and style of Omar Khayam Enterprise) v Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) and another appeal* [2010] 4 MLJ 285). The Federal Court reversed the Court of Appeal's decision and held that an annulment order operated retrospectively but did not deal with the issue of the competence, or otherwise, of a bankrupt to maintain an action. Therefore, Low Hop Bing JCA held that the principle laid down by the Court of Appeal on the issue of *locus standi* remained intact.

Relying on the cases cited above, Low Hop Bing JCA (with A Samah Nordin JCA concurring) upheld the Respondent's preliminary objection that the Appellant had no *locus standi* to maintain the appeals as he had failed to obtain the prior sanction of the DGI. In the premises, both appeals were struck out.

Dissenting Judgment

Anantham Kasinather JCA in delivering his dissenting judgment held that the outcome of the Respondent's application should be decided by applying the test laid down by Azmi J (as he then was) in *Re Khoo Kim Hock*.

According to Azmi J in *Khoo Kim Hock*, the test as to whether the sanction of the DGI is required should be determined by considering whether the application involved 'property', including money, real or personal property and choses in action, which are capable of being turned into assets for the estate of the bankrupt.

In His Lordship's opinion, the test propounded by Azmi J when properly applied enables a bankrupt to challenge all orders made by a bankruptcy court in the exercise of its bankruptcy jurisdiction including appeals as in this case and even applications to set aside a judgment forming the subject matter of the bankruptcy proceedings without the need to obtain the sanction of the DGI.

As the Appellant's application did not involve 'property' of the bankrupt, His Lordship was of the view that it was not necessary to obtain the prior sanction of the DGI.

Anantham JCA disagreed with the majority judgment which held that *Re Khoo Kim Hock* only applies to applications under section 92(1) and section 105(1) of the Act. His Lordship further observed that if the test propounded in *Re Khoo Kim Hock* was applied in *Re Low Kok Tuan*, the decision would be different.

RE KHOO KIM HOCK

It is to be noted that the decision in *Re Khoo Kim Hock* was not overruled by the Court of Appeal. As such, the test propounded by Azmi J (as he then was) in *Re Khoo Kim Hock* is still relevant but is now confined to applications made by a bankrupt under section 92(1) and section 105(1) of the Act. Therefore, prior sanction of the DGI is not required when a bankrupt is making an application to review, rescind, vary or annul an AORO.

RE LIM TAI NIAN

It is interesting to note that the majority judgment in *Ho Ken Seng* cited *Re Lim Tai Nian* [2001] 4 MLJ 78, but did not analyse the case in detail.

In *Re Lim Tai Nian*, Ian Chin J followed the decision in *Re Khoo Kim Hock* and expressed the view that he was unable to agree with the decisions in *Re Low Kok Tuan* and *Bathamani A/p Suppiah*. In that case, Ian Chin J held that sanction of the DGI was not required when the bankrupt wishes to appeal against an AORO. The Court of Appeal in delivering the majority judgment could have distinguished *Re Lim Tai Nian* or expressed their views on this case.

CONCLUSION

The decision of the Court of Appeal in *Ho Ken Seng* affects the right of a bankrupt to pursue an appeal against an AORO made against him. He must obtain the prior sanction of the DGI before filing an appeal against an AORO. Without such prior sanction, a bankrupt has no legal capacity to pursue an appeal against an AORO.

The Appellant has filed a Notice of Motion for leave to appeal to the Federal Court against the decision of the Court of Appeal.

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SUPER-INJUNCTIONS

continued from page 3

The Committee recognised that although the principle of open justice is a fundamental constitutional principle, it is not an absolute principle as derogations can be properly made where, and to the extent that, they are strictly necessary for the proper administration of justice.

The Committee concluded that a super-injunction which, in the words of the Neuberger Report, threatens to create "*a form of permanent secret justice*", derogated from the principle of open justice and ought to be granted only when it is strictly necessary. The Committee stressed that a super-injunction cannot in practice, become permanent.

The Committee recommended that a 'return date' be issued whenever a super-injunction is granted, so as to enable the injunction to be kept under review by the Court.

The Committee also recommended a draft Practice Guidance be issued and emphasised that notice must be given to third parties (such as media organizations) who are likely to be affected by the super-injunction, before an application for such injunction is to be heard.

> **"a super-injunction ... derogated from the principle of open justice and ought to be granted only when it is strictly necessary"**

The aforesaid requirement that notice be given would enable Section 12 of the Human Rights Act 1998 (which embodies right to freedom of expression set out in Article 8 of the European Convention on Human Rights) to be complied with. Section 12 *inter alia* prohibits relief from being granted against a person against whom the relief is being sought, unless the court is satisfied that the applicant has taken all practicable steps to notify that person or there are compelling reasons why he should not be notified.

Although the Committee acknowledged the right to privacy under Article 8 of the European Convention on Human Rights, the Committee opined that it was beyond its remit to consider issues of substantive law reform, which was a matter to be considered by Parliament, or by the courts.

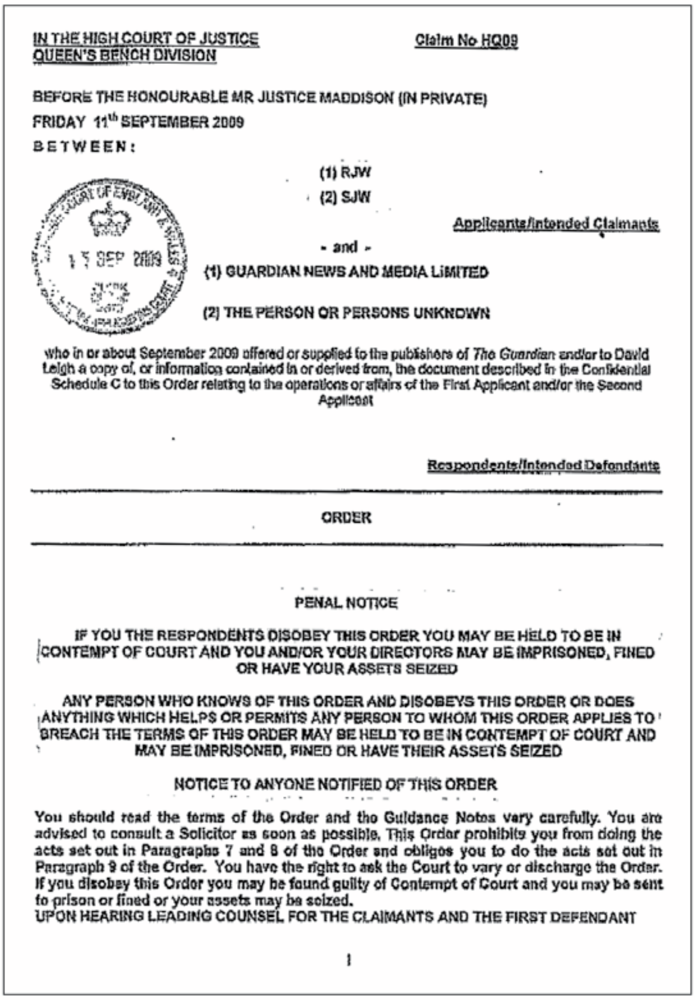
The Committee considered, but did not recommend, that applications for super-injunctions be heard by specialist judges as it was neither justifiable nor practicable. The Committee also opined that there was no justification to introduce a fast-track appeal for such injunctions as avenues already existed to seek expedited appeals.

The Committee also concluded that the perceived growth in the use of super-injunctions was a misconception. In coming to this conclusion, the Committee reviewed 18 cases that purportedly concerned super-injunctions and found that whilst all these cases involved anonymised injunctions, only 3 actually involved the grant of super-injunctions.

WOULD THE MALAYSIAN COURTS GRANT A SUPER-INJUNCTION?

The question then arises as to whether the Malaysian courts would grant a super-injunction.

In *John Terry*, the Court held that a super-injunction is granted to prevent an alleged wrongdoer from being tipped-off about the proceedings before an injunction could be applied for, or made against him, or before he can be served. In the interval between learning of the intention of the applicant to bring proceedings, and the receipt by the alleged wrongdoer of an injunction binding upon him, an alleged wrongdoer might consider that he could


IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim No HQ09

BEFORE THE HONOURABLE MR JUSTICE MADDISON (IN PRIVATE)
FRIDAY 11th SEPTEMBER 2009
BETWEEN:

(1) RJW
(2) SJW

Applicants/Intended Claimants

- and -

(1) GUARDIAN NEWS AND MEDIA LIMITED

(2) THE PERSON OR PERSONS UNKNOWN

who in or about September 2009 offered or supplied to the publishers of *The Guardian* and/or to David Leigh a copy of, or information contained in or derived from, the document described in the Confidential Schedule C to this Order relating to the operations or affairs of the First Applicant and/or the Second Applicant

Respondents/Intended Defendants

ORDER

PENAL NOTICE

IF YOU THE RESPONDENTS DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU AND/OR YOUR DIRECTORS MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED

ANY PERSON WHO KNOWS OF THIS ORDER AND DISOBEYS THIS ORDER OR DOES ANYTHING WHICH HELPS OR PERMITS ANY PERSON TO WHOM THIS ORDER APPLIES TO BREACH THE TERMS OF THIS ORDER MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED

NOTICE TO ANYONE NOTIFIED OF THIS ORDER

You should read the terms of the Order and the Guidance Notes very carefully. You are advised to consult a Solicitor as soon as possible. This Order prohibits you from doing the acts set out in Paragraphs 7 and 8 of the Order and obliges you to do the acts set out in Paragraph 9 of the Order. You have the right to ask the Court to vary or discharge the Order. If you disobey this Order you may be found guilty of Contempt of Court and you may be sent to prison or fined or your assets may be seized.
UPON HEARING LEADING COUNSEL FOR THE CLAIMANTS AND THE FIRST DEFENDANT

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The first page of the Court Order in the Trafigura Case disclose the information, and hope to avoid the risk of being in contempt of court. In some cases, an alleged wrongdoer may destroy evidence which is required to identify him as the source of the leak. Tipping-off of the alleged wrongdoer would thus defeat the purpose of the order. It is usual for the prohibition on disclosure to end once the injunction order has been served on the defendant.

The powers of a Malaysian court to grant injunctions are stipulated in the Specific Relief Act 1950 and the Rules of the High Court 1980.

In *John Terry*, two causes of actions were relied on to support the application for a super-injunction, namely, breach of confidence and misuse of private information.

In Malaysia, breach of confidence is a recognized cause of action (see *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd* [2008] 5 MLJ 157), as is the invasion of privacy (see *Maslinda Ishak v Mohd Tahir Osman & Ors* [2009] 6 CLJ 653, *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 4 CLJ 397 and *Sherrina Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd* [2011] MLJU 150). It is submitted that in appropriate cases, 'misuse of private information' can come within the ambit of "invasion of privacy".

Based on the principles cited in *John Terry*, it is likely that a Malaysian court will grant a super-injunction if the necessary elements identified in that case are satisfied.

CLOSING REMARKS

It is not known for certain whether any super-injunction has been granted by the Malaysian courts as the "super" element of such an injunction would prohibit the disclosure of the existence of the injunction.

With the existence of many local bloggers, tweeters and online writers who fearlessly (and erroneously) regard the internet as a lawless frontier, it is likely that if such an injunction has been granted by the Malaysian courts, it would have been reported or tweeted on the internet as juicy secrets, such as those concerning extra-marital affairs or sexual trysts of politicians, film starlets and aspiring models, cannot be kept hidden for long.

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TRIGGER POINT

continued from page 18

Hence, the Court concluded that the presentation of a proposal of a scheme of composition or arrangement to the Court under Section 176(1) would not by itself be sufficient to activate Clause 25(2). In their Lordships' opinion, Clause 25(2) would be triggered only when the Court is called upon to approve the composition or arrangement under Section 176(3) of the Act.

In coming to its decision on this question, the Federal Court followed the approach adopted by the High Court in *Sinnadorai v New Zealand Insurance Co Ltd* [1968] 2 MLJ 70 which held that a provision similar to Clause 25(2) was only activated once the event has occurred.

CONCLUSION

This decision of the Federal Court establishes that the issue of a restraining order under Section 176(10) would not trigger the operation of Clause 25(2). It also establishes that the presentation of a proposal of a scheme of composition or arrangement under Section 176(1) by itself will not trigger the operation of the said provision unless the Court is called upon to approve the composition or arrangement as provided under Section 176(3) of the Act.

"Clause 25(2) would be triggered only when the Court is called upon to approve the composition or arrangement under Section 176(3) of the Act"

It is likely that the Malaysian Courts will apply the principles laid down in this case to interpret the provisions contained in other agreements that are substantially similar to Clause 25(2).

Parties who wish to trigger the termination of an agreement or an event of default upon a party applying for or obtaining a restraining order should draft the relevant clause so that it provides unequivocally that the application for, or the grant of, a restraining order would activate the relevant clause.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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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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