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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

Dateline: March 2013. A blink of an eye and almost a quarter of the year 2013 has passed. The speed at which time passes nowadays seems to be faster than before. Come 1 May 2013, our firm will be celebrating the 50th anniversary of its founding.

The firm of Skrine has come a long way. We started with five Partners and an equal number of associates. Fifty years on, because of the vision and generous disposition of the Partners, we have grown to more than 111 lawyers at the last count, of whom 40 are Partners. We are one of the largest, full service law firms in the country with our lawyers having expertise in numerous practice areas including niche areas such as international arbitration, oil and gas, competition, shipping and international trade remedies.

Throughout these years, the firm has held steadfast to the philosophy of our founding partners of professional integrity, quality of service and representing our clients without fear or favour or compromising our duties as officers of the court. These traditions have, I believe, stood us in good stead.

For the firm to reach this significant milestone, credit must be given to our clients and our staff for demonstrating their loyalty to us and for being with us through good times and challenging times. To all our clients and staff who supported us, we salute you and say 'Thank You' from the bottom of our hearts.

Best Wishes and Thank You.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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ANNOUNCEMENTS

The Firm extends its heartiest congratulations to Dato' Dr Sir Peter Mooney, our Consultant and former Partner, on being conferred the Malaysian Bar Lifetime Achievement Award 2013 on 16 March 2013, in recognition and appreciation of his dedicated and exemplary lifetime service and invaluable and outstanding contributions to the Malaysian Bar.

The Firm congratulates our Partner, Mr Siva Kumar Kanagasabai who won the International Law Office's Client Choice Award 2013 for Employment/Labour Practitioner of the Year (Malaysia).

The Partners are also happy to announce that SKRINE was named the recipient of the International Law Office's Client Choice Award 2013 for Malaysia.

This is the second year in succession that Kumar and the Firm have received their respective awards.

We are pleased to announce that Hemalatha Parasa Ramulu, Lee Li Hoong, Jason Teoh, Jeffri Cheong and Adzim Amir Hamzah have been promoted to Senior Associates as of 1 January 2013. We extend our heartiest congratulation to each of them.

Hemalatha Parasa Ramulu is a member of our Intellectual Property Division. She obtained a Bachelor of Science (Biochemistry) Degree from the University of Malaya in 2000 and her Bachelors of Laws from the University of London in 2005.

Lee Li Hoong is a member of our Dispute Resolution Division. She graduated from the University of West of England in 2006. Her practice areas include Immigration, Employment and Industrial Relations.

Jason Teoh is a member of our Dispute Resolution Division. He graduated from the University of West of England in 2006. He is primarily engaged in civil litigation and trade remedies work.

Jeffri Cheong is a member of our Intellectual Property Division. He graduated from the University of Reading in 2006. He practices intellectual property litigation. He also has a commercial arbitration practice.

Adzim Amir Hamzah is a member of our Corporate Division. He graduated from the University of Technology Mara in 2007. His practice areas include general corporate work with a focus on Oil & Gas, Shipping and Competition law.

CLIENTS' FEEDBACK

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

STRICT ADHERENCE TO

Loo Peh Fern provides a summary of a

INTRODUCTION

The Federal Court in *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 7 CLJ 802 emphasised that all interests in land in Malaysia are creatures of the National Land Code 1965 ("NLC") and protection can only be extended to such interests which are the subject of the schemes of dealings as provided under Division IV of the NLC.

BRIEF FACTS

The Appellant landowner entered into a joint venture cum project management agreement ("Agreement") with the Respondent to develop part of its land into a housing estate ("the project land"). The remaining part of the land had been sold to another company which was not involved in the case. Upon executing the Agreement, the Appellant and Respondent simultaneously executed two powers of attorney whereby the Respondent was granted certain rights in respect of the development project.

Under the Agreement, the parties had agreed that the Respondent would launch the development project by 1 June 2006. The Agreement also expressly permitted the Respondent to enter a private caveat on the project land. The Respondent entered a private caveat on the entire land, instead of the project land. Subsequently a dispute arose between the parties and the Appellant sought to terminate the Agreement on the ground that the Respondent had breached the agreement by failing to launch the development project by 1 June 2006.

The Respondent commenced a suit against the Appellant for wrongful termination of the Agreement. In the meantime, the Appellant applied to the Registrar of Titles to remove the caveat entered on the entire land. When the Respondent received notice of this application, it made an *ex-parte* interlocutory application to extend the caveat until the final determination of its suit against the Appellant.

The High Court dismissed the Respondent's application on the grounds that it had no caveatable interest to lodge or extend the caveat.

The Respondent, dissatisfied with the High Court's decision, appealed to the Court of Appeal. The Court of Appeal, by a 2:1 majority decision, allowed the Respondent's appeal.

The Appellant then obtained leave to appeal to the Federal Court on the following questions of law –

(i) With reference to section 326(2) of the NLC, what are the requirements to be satisfied by a caveator before the court may allow an extension of a private caveat on an *ex-parte* basis?

(ii) Whether a party to a joint venture agreement to develop land for profit has a caveatable interest in land?

(iii) Whether a private caveat lodged over the whole of a land

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THE STATUTORY SCHEME

landmark case on private caveats in Malaysia

can be permitted to remain if the caveator's alleged interest is only limited to part of the land?

(iv) Whether a person must demonstrate that he comes within section 323(1) of the NLC to be entitled to lodge/maintain a private caveat on the land, notwithstanding the existence of an agreement which allows him to so enter such private caveat?

THE PARTIES' CONTENTIONS

It was the Appellant's case that the Agreement, including the powers of attorney created thereunder, only gave the Respondent a contractual right to manage and develop the project land and not a right of ownership or any caveatable interest in the land.

On the other hand, the Respondent claimed that it had a registrable interest in the land by virtue of the Agreement. The Respondent argued that by virtue of the powers of attorney executed under the Agreement, the Appellant had relinquished its ownership of the land to it. The Respondent further submitted that clause 6 in the Agreement had given it the right to lodge the caveat.

“ those rights … would give rise only to a monetary interest … and did not create any interest in the land ”

DECISION OF THE FEDERAL COURT

Tun Arifin bin Zakaria CJ, in delivering the judgment of the Federal Court, stated that the sole question for determination by the Federal Court was whether or not the Respondent had a caveatable interest as contemplated by section 323(1)(a) of the NLC.

Caveatable interest

Having considered the analysis by Gopal Sri Ram JCA (as he then was) in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 as to the scope of protection under section 323(1)(a) of the NLC, the learned Chief Justice went on to hold that the only parties who are authorised to lodge a private caveat are those who may effect dealings in a particular interest in the land, and such interest was either (i) a registered title; or (ii) a registrable interest that falls short of ownership, such as leases, charges and easements; or (iii) a claim to an interest that falls under (i) or (ii).

Tun Arifin bin Zakaria CJ held that a caveat is a creature of the NLC and can only be lodged by a claimant who has a caveatable interest under the NLC. His Lordship then stated that section 323(1) of the NLC which governs the entry of a private caveat only permits a party to lodge a private caveat if he has a "registrable interest" in the land. To be caveatable, the interest must be an interest in land or that interest must be capable of registration. In other words, it must represent a transaction that can ultimately lead to its registration on the register.

Applying the law to the facts of the case, His Lordship held that although the Appellant had conferred numerous rights on the Respondent under the Agreement and the powers of attorney, all those rights were merely rights to develop the land that would give rise only to a monetary interest, i.e. a right *in personam* against the Appellant, and did not create any interest in the land.

His Lordship held that the case *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd* [2009] 5 CLJ 218, cited by the Respondent, was distinguishable on the facts. His Lordship observed that both the High Court and the Court of Appeal held that the respondent in that case had a caveatable interest by virtue of its entitlement to 80% of the subdivided lots of the land. This was unlike the present case where the Respondent was not entitled to any share of the subdivided units under the Agreement but only to a share in the profits of the development.

Potential interests

The learned Chief Justice also held that it was the considered view of the Court that a caveator under section 323(1)(a) of the NLC must have a present interest, as opposed to a potential interest, in the land. The caveator must be limited to those who are claiming an existing interest in the land or a right to such existing interest and could not include potential interest or interest *in futuro*.

The learned Judge referred to *Goo Hee Sing v Will Raja Peruma & Anor* [1993] 3 MLJ 610 where Mahadev Shankar J (as he then was) expressed this proposition in the following terms –

"The point however is that the claim must be to title or a right thereto in praesentii, and not to some contingent title or right thereto in futuro."

His Lordship held that the *Torrens* system, which is the applicable land registration system in Malaysia, would not have room for interests in the land which are unascertainable and cited *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1 as an authority for this principle. The Federal Court also noted that this principle is applied by other jurisdictions which have adopted the *Torrens* system.

Turning to the instant case, Tun Arifin bin Zakaria CJ held that even though the Respondent was given the option to purchase

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LICENCE TO DEFAME?

Kwan Will Sen explains a landmark case on defamatory statements in a police report

In Malaysia, absolute privilege as a defence to defamation claims has generally been available only for statements made in two categories of proceedings – parliamentary proceedings and judicial proceedings.

On 28 November 2012, by virtue of the landmark Federal Court case of *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145, another category has been included - statements made in a police report, commonly known as the first information report, pursuant to Section 107 of the Criminal Procedure Code ("CPC").

BRIEF FACTS

The dispute between the parties arose out of a police report made by the Respondent against the Appellant on 19 June 2008. In the police report, the Respondent alleged that the Appellant had misappropriated a sum of RM200,000.00 from a company in which the Appellant and Respondent were both shareholders and directors at the material time.

"If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes"

THE HIGH COURT SUIT

Arising from the statements made by the Respondent in the police report, the Appellant filed a suit against the Respondent, claiming that the Respondent had defamed him. The Appellant contended that the police report was made with malice and intended to coerce the Appellant into settling a separate suit involving both the Appellant and Respondent. In that other suit, the Appellant and Respondent were involved in a boardroom tussle in relation to the company where the alleged misappropriation had taken place.

The Respondent filed his defence, stating in essence that he was justified in making the police report. Thereafter, the Respondent filed an application to strike out the Appellant's writ and statement of claim, amongst others, on the basis that the Appellant's claim disclosed no reasonable cause of action. The Respondent supported his application by relying on a decision of the Court of Appeal in *Abdul Manaf Ahmad v Mohd Kamil Datuk Hj Kassim* [2011] 4 MLJ 346 ("*Abdul Manaf*").

In *Abdul Manaf*, Gopal Sri Ram JCA (as he then was), following the decision of the Court of Appeal of the Federated Malay States in *Martin Rheinus v Sher Singh* [1949] 1 MLJ 201 ("*Martin Rheinus*"), held that it is implicit that statements made in first information reports under Section 107 CPC are absolutely privileged for the law of defamation.

Further, in *Abdul Manaf*, the Court of Appeal was of the view that statements made in a police report must attract the defence of absolute privilege for reasons of public policy. The Court of Appeal held –

"If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk. The criminal law readily provides for a remedy against persons who make false police reports."

Abdul Manaf departed from the long standing legal position that statements made in a police report merely attract qualified privilege. This is illustrated in various decisions of the High Court, such as *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138, *Abdul Aziz bin Jelani & Anor v Peter Chua Swee Lai* [2000] 2 MLJ 462 and *Henry Ong Keng Sem v Patrick Ong King Kok* [2008] 7 MLJ 569.

The High Court, being bound by *Abdul Manaf*, struck out the Appellant's writ and statement of claim.

DECISION OF THE COURT OF APPEAL

The Appellant, being dissatisfied with the High Court's decision, appealed to the Court of Appeal. The Court of Appeal agreed with the High Court and the statement of law by Gopal Sri Ram JCA in *Abdul Manaf*. Jeffrey Tan Kok Wha JCA (as he then was), held –

"The impugned statements were contained in a police report … police reports must attract absolute privilege as a matter of public policy … We agree that the action could not succeed. The action was rightly struck out."

DECISION OF THE FEDERAL COURT

The Appellant obtained leave from the Federal Court to appeal on the following question of law –

"Whether statements in a police report are protected by the defence of absolute privilege and therefore no party can file a defamation suit against the maker of the police report in the Malaysian context?"

In essence, the Appellant submitted that *Abdul Manaf*, which formed the basis of the High Court and Court of Appeal's decisions, was wrongly decided and urged the Federal Court to restore the long standing position that statements in a police report are only protected by qualified privilege.

In deciding the question of law, the Federal Court considered, amongst others, the following matters –

(i) Whether absolute privilege under Section 112 CPC can be extended to Section 107 CPC; and

(ii) Whether there will be an abuse of process (such as the lodgment of a false police report) if absolute privilege is accorded.

KWAN WILL SEN

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Sections 107 and 112 CPC

The Federal Court considered Section 107 CPC (statements made in a first information report) and Section 112 CPC (statements recorded by the police from witnesses in the course of investigation).

The Federal Court observed that it is trite law that statements made under Section 112 CPC attract absolute privilege as it forms, or could form, part of judicial proceedings. For example, a witness could be examined during the trial on the statements made by him pursuant to Section 112 CPC.

In considering whether absolute privilege for statements made under Section 112 CPC should be similarly accorded to statements made under Section 107 CPC, the Federal Court analysed *Abdul Manaf* and *Martin Rheinus*. In particular, the Court had held in *Martin Rheinus* that there was no distinction with regard to privilege under Section 107 CPC and Section 112 CPC.

“ public interest should override the countervailing consideration that this may sometime lead to an abuse ”

The Federal Court then considered the legal position in India and England as regards the privilege to be accorded to a police report.

The Federal Court referred to several Indian case authorities, including *Bapalal & Co v AR Krishnaswami Aiyar* AIR 1941 Mad 26, where King J held that “*a complaint to a Police Officer from its very nature as a statement, which the complainant is prepared later, if called upon to do so, to substantiate upon oath, is absolutely privileged.*”

The Federal Court examined the position under English law and referred to the Court of Appeal case of *Westcott v Westcott* [2008] EWCA Civ 818, where Ward LJ held –

“In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank attack … In my judgment, immunity must be given from the earliest moment that the criminal justice system becomes involved.”

Having considered those cases, the Federal Court agreed with the decision in *Abdul Manaf* that on a public policy consideration, absolute privilege should be extended to a statement contained in a police report made under Section 107 CPC. According to Tun Arifin b Zakaria CJ –

“The underlying reason behind this is the overriding public interest that a member of the public should be encouraged to make (a) police report with regard to any crime that comes to his or her notice. Such a report is important to set the criminal investigation in motion. With such (a) report, the alleged crime may be investigated and the perpetrator be brought to justice.”

License to Defame?

As regards the concern that the conferring of absolute privilege to statements contained in a police report could be abused, Tun Arifin b Zakaria CJ had this to say –

“It is without doubt that public interest should override the countervailing consideration that this may sometime lead to an abuse by a malicious informant.”

However, His Lordship was of the view that the existing laws, particularly as provided for under Section 177 (furnishing false evidence), Section 182 (providing false information with intent to cause a public servant to exercise, or omit to exercise, his power) and Section 203 (giving false information in respect of an offence committed) of the Penal Code provide sufficient safeguard against any person making a false report.

An offence under Sections 177 and 203 is punishable with imprisonment for up to two years, or with a fine, or with both whereas under Section 182, the offence is punishable with imprisonment of up to six months, or with a fine of up to RM2,000.00, or with both.

CONCLUSION

The decision of the Federal Court in *Lee Yoke Yam v Chin Keat Seng* has changed the legal landscape in respect of the law of defamation *vis-à-vis* statements made in a police report. It however remains to be seen if absolute privilege can be extended to other forms of complaints, such as complaints to professional bodies (e.g. the Advocates and Solicitors Disciplinary Board and a Disciplinary Committee appointed by the Board of Architects Malaysia) or regulatory bodies (e.g. Securities Commission and Bursa Malaysia).

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AN "ABC" GUIDE TO THE "ABC" FRAMEWORK IN MALAYSIA

Fariz Abdul Aziz provides a guide to avoid some bribery and corruption pitfalls in Malaysia

INTRODUCTION

Siemens, BAE Systems, Daimler, Johnson & Johnson, Alcatel. These luminaries of the global market place have much in common with each other, be it their global brand names, ability to innovate products and leadership in their respective markets. As a testament to this fact, each is amongst the largest and most profitable companies in the world and is consistently recognised as a Fortune Global 500 company. These companies also share the dubious honour of having been required to pay hefty fines running up to hundreds of millions of US dollars for offences involving corruption and bribery.

Each of the cases involving the above-mentioned companies was investigated primarily by the US Department of Justice ("DOJ") and the Securities and Exchange Commission under the dreaded US Foreign Corrupt Practices Act of 1977 ("FCPA") which makes it is an offence for a US person, entity and certain applicable foreign entities (mainly issuers of securities on a US exchange) to make bribes or offer any inducement for the purpose of obtaining or retaining business with a US firm. Whilst the FCPA may have provided the basis for the flurry of investigations into bribery and corruption which we have seen in recent years, such actions could not have been successful without the enhanced facilitation afforded by governments around the world.

> **"The main thrust of the Malaysian ABC Framework is the Malaysian Anti-Corruption Commission Act 2009"**

Much of the credit for the increased international facilitation and cooperation in fighting corruption may be attributed to the coming into force of the United Nations Convention Against Corruption (the "Convention") on the 14 December 2005. Under the Convention, signatory countries are required to criminalise a wide range of corrupt acts, including domestic and foreign bribery and related offences such as money laundering and obstruction of justice. In addition, signatory countries agree to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation and prosecution of offenders.

Signatory countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court as well as in extraditing offenders. Statistical evidence of the effect of the Convention can be seen from the significant surge in FCPA enforcement actions that has taken place since its entry into force. In 2004, the DOJ charged only two individuals under the FCPA and collected around USD11 million in criminal fines. By contrast, it is asserted by Lanny A Breuer, Assistant Attorney General of the DOJ's Criminal Division, in a speech delivered on 16 March 2011 that the DOJ charged over 50 individuals and collected nearly USD2 billion fines in 2009 and 2010.

ANTI-BRIBERY AND CORRUPTION FRAMEWORK IN MALAYSIA

Whilst corporates who fall within the purview of the FCPA may be familiar with their anti-corruption and bribery obligations under the FCPA, it is also important for such entities operating in Malaysia to familiarise themselves with the anti-bribery and corruption framework in Malaysia ("Malaysian ABC Framework") as it is covers a broader spectrum of activities than the FCPA.

The main thrust of the Malaysian ABC Framework is the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") which came into effect on 1 January 2009. The MACC Act is the successor to the Anti-Corruption Act 1997 ("ACA") and is designed to bring Malaysia's ABC Framework in line with its international obligations under the Convention, particularly its obligations to counter bribery of foreign public officials.

The MACC Act covers the following conduct:

- the giving and accepting gratification;
- the giving or accepting gratification by an agent;
- corruptly procuring the withdrawal of a tender;
- bribery of an officer of a public body;
- bribery of foreign public officials;
- using an office or position for gratification; and
- dealing with, using, holding, receiving or concealing gratification or advantage in relation of any offence under the MACC Act.

The giving or receiving of gratification forms the basis of many offences under the Malaysian ABC Framework. The expression "gratification" has been drafted in the widest conceivable terms under the MACC Act and includes –

- money, donation, gift, loan, property, financial benefit or other similar advantage;
- any office, dignity, employment, contract of services;
- any payment, release or discharge of any loan, obligation or other liability;
- any discount, commission, rebate, bonus or percentage;
- any forbearance to demand any money or money's worth or valuable thing;
- any favour of any description, including protection from any penalty or proceedings of a disciplinary or criminal nature or forbearance from the exercise of any right, power or duty; and
- any offer or promise of any gratification within the meaning of any of the preceding items.

In terms of its effect, the MACC Act is novel in that it possesses limited extra-territorial effect in relation to citizens and permanent residents of Malaysia. Where an offence under the MACC Act is committed in any place outside Malaysia by any citizen or permanent resident of Malaysia, that person may be dealt with in respect of such offence as if the offence had been committed within Malaysia.

Despite the general application of the MACC Act, the Malaysian

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Government did not repeal existing bribery laws (with the exception of the ACA) and therefore such provisions continue to remain in force. Statutes which contain their own anti-bribery provisions include: the Penal Code, Customs Act 1967, Election Offences Act 1954, and the Banking and Financial Institutions Act 1989.

RISK AREAS

Gifts & Hospitality

The culture of corporate gift giving and hospitality is deeply entrenched in Malaysia and such practice is not generally viewed as corrupt. For instance, it is an accepted practice for businesses to host functions during festive seasons at restaurants and hotels where complimentary food and small gifts are provided. Such practices are not likely to be considered as corrupt practice under the Malaysian ABC Framework, although care should be taken to ensure compliance with applicable FCPA requirements (if applicable). It is also not uncommon for hospitality to be provided outside festive periods and in a more personal manner.

Care must be taken when engaging in the above-mentioned activities as overly generous gestures may give rise to the perception that such activities are for a corrupt purpose.

Kickbacks & rebates

Kickbacks and rebates are regarded as a corrupt practice in Malaysia. Such activities clearly fall within the scope of the MACC Act and should be avoided.

Liability for acts of agents

The MACC Act recognises that corrupt payments are often channelled through agents in order to create a buffer between the bribe giver and the bribe receiver and such arrangements are expressly caught under Section 17 of the MACC Act.

A review of the FCPA cases in recent years show that the vast majority of resolved cases have involved an agent paying bribes on behalf of his principal. Whilst the position under Malaysian law has yet to be tested, it is important to note that the US courts have affirmed that it is not necessary for the principal to have actual knowledge of the actions of his agent. It is sufficient to prove that the principal had reason to believe or suspect that the agent had the power, right or opportunity to do, or forbear from doing, the act in question and that the act was in relation to the agent's principal's affairs or business.

Facilitation payments

Particular care must be taken when considering facilitation payments. Facilitation payments are payments made with the purpose of expediting or facilitating the performance by a public official of a routine governmental action, and not to obtain or retain business or any other undue advantage. Examples of routine government action include the registration of land dealings, police protection and processing of visas. Whilst such payments fall outside the scope of the FCPA, they are caught within Section 16(B) of the MACC Act.

Travel and entertainment

Whilst paying for the travelling expenses for a guest may be *bona fide* e.g. for the purposes of inspection of facilities, conducting training etc., there have been a great many examples where companies have been found to have used such tactics as a way to channel bribes. For instance, a New Jersey based telecommunications company spent millions of dollars on approximately 315 Chinese government officials, apparently to inspect its factories. In reality, during many of these trips, the officials spent little time at the factories and instead were treated to trips to destinations such as Las Vegas, Disney World, New York and were provided sums of up to USD1,000 per day in spending money.

“ The giving or receiving of gratification forms the basis of many offences under the Malaysian ABC Framework ”

Donations to political parties

In recent times, there has been increasing practice of companies providing donations to political parties in Malaysia. Although political donations are not specifically covered by any law in Malaysia, particular care must be taken in ensuring that such donations are not construed as an inducement or a reward for doing or forbearing to do any act as this would fall within the general prohibitions of the MACC Act. Further Section 50 of the MACC Act deems a corrupt intent of the giving or receiving of gratification unless the contrary is proven.

PROTECTING YOURSELF

The increased number of enforcement actions both in Malaysia and globally bring home the need to ensure that all levels of a company's employees are made aware of corruption and bribery risks. An effective anti-corruption programme needs to be a priority and regular measurement of its effectiveness is a requirement. The GC100, a group of general counsel from

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PROTECTING AN UNGUARDED POCKET

Lee Shih explains the safeguards imposed by the Singapore Court on success-based fees

The Singapore Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and Others v TT International Ltd and another appeal* [2012] SGCA 53 revisited its earlier decision in *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 ("*TT International No. 1*") and laid down important guidelines on the disclosure of fees to be paid to a scheme manager in a scheme of arrangement.

BACKGROUND FACTS

Arising from the decision of *TT International No. 1*, the Court had ordered for meetings of the creditors to be called. At these meetings, the creditors approved a scheme of arrangement ("Scheme") which was thereafter sanctioned by the Court. Under the terms of the Scheme, a Monitoring Committee made up of representatives from some of the major creditors was set up to oversee the implementation of the Scheme by the appointed Scheme Manager ("Scheme Manager").

“ It was ... fair, reasonable and right that both the company and the Scheme Manager disclose ... the terms of the proposed Scheme Manager's appointment ”

Close to a year after the sanction, during the implementation of the Scheme, the Monitoring Committee discovered that the company had prior to the sanction of the Scheme, entered into a success fee arrangement with the Scheme Manager's firm. The Scheme Manager would be paid for the time costs incurred as well as a Value-Added Fee ("VAF") which was a success-based fee. Under the VAF component, the greater the amount of the creditors' debt that is written off or extinguished, the greater the quantum of the remuneration received by the Scheme Manager's firm. By that stage, it was estimated that the quantum of the VAF was between S$15 million to $30 million.

The Monitoring Committee informed the Court of Appeal of the existence of this success fee arrangement and requested that the Court direct that the VAF be assessed in court. The key issue before the Court of Appeal was whether the VAF should have been disclosed to the creditors and/or the Court prior to the sanction of the Scheme.

COMPANY'S DUTY TO DISCLOSE MATERIAL INFORMATION

The Court of Appeal emphasised that transparency in the affairs of a distressed company through making available all material information that could impinge on the financial interests on creditors was essential. This duty of disclosure on the company has been emphatically declared to be an independent principle of law entirely distinct from the disclosure requirements mandated by statute.

The Court of Appeal took into consideration the prevailing practice of success-based fee remuneration of scheme managers both in Singapore and abroad. It was found that it was not uncommon for some scheme managers or financial advisers to include a success-based element in their fees for the debt restructuring work which they carried out. There was also no established practice in Singapore of such success-based fees of scheme managers being voluntarily disclosed to the creditors or the courts. Nonetheless, the Court of Appeal held that a commercial practice, no matter how widespread, does not have the force of law if it is contrary to legal principle.

In considering the legal issues, the Court of Appeal held that the company's obligation to disclose all material information should cover liabilities such as the VAF which it had incurred immediately prior to the sanction of the Scheme. The VAF was a contingent liability incurred by the company which would have crystallised the moment the Scheme was successfully implemented. Ordinarily, such contingent liabilities would have been disclosed but the Scheme Manager's firm was found to have been conveniently classified as an excluded creditor and therefore did not have to submit a proof of debt.

The Court did not view favourably the current practice of companies making use of the device of "excluded creditors" in order to not reveal to other creditors the actual or contingent liabilities, which may be very substantial. That practice would permit directors of an insolvent company to commit the company to a substantial contingent financial commitment that will come from an unguarded pocket. It held that the law does not allow such a practice as it can be used to conceal all kinds of financial arrangements which may prejudice the interests of the scheme creditors.

Therefore, it was held that the company was under a legal obligation to disclose all material information to the scheme creditors to enable them to make informed decisions on whether or not to support the Scheme. The company breached this obligation by failing to disclose the VAF to the scheme creditors. Furthermore, this information should have also been disclosed to the Court at the sanction stage.

SCHEME MANAGER'S DUTY OF DISCLOSURE

In referring to *TT International No. 1*, the Court of Appeal emphasised that it has been held that the Scheme Manager has to act in good faith towards the scheme creditors and must not mislead the scheme creditors or suppress material information.

In this case, the Scheme Manager had placed itself in a position of conflict, where the quantum of the VAF which would accrue to the Scheme Manager's firm was dependant on the value of the debts which would be adjudicated upon by the proposed Scheme Manager himself. The Court of Appeal held that this conflict could only be resolved by the informed consent of the scheme creditors. There was no such informed consent because of the Scheme Manager's (and also the company's) failure to inform the scheme creditors of the VAF.

LEE SHIH

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The Court of Appeal considered that the parties with a genuine interest to ensure that the proposed Scheme Manager is being reasonably remunerated would be the scheme creditors who would determine whether the scheme is commercially viable (and preferable to liquidation). It was therefore only fair, reasonable and right that both the company and the Scheme Manager disclose to the scheme creditors and the Court the terms of the proposed Scheme Manager's appointment prior to the sanction of the Scheme.

REMUNERATION FOR INSOLVENCY PRACTITIONERS

In considering the above points, the Court of Appeal also considered that the issue of potentially exorbitant fees for insolvency practitioners was a matter of public interest. Central to this problem is the fact that their fees come from an unguarded pocket that in reality belongs to the creditors and not the financially distressed company.

> **" their fees come from an unguarded pocket that in reality belongs to the creditors "**

The Court of Appeal found that the wildly divergent interests of the stakeholders often allow insolvency practitioners almost *carte blanche* to determine (without rigorous oversight) their levels of remuneration even for the most mundane tasks.

The Court of Appeal held as a matter of general principle, the determinative consideration as to the fair and reasonable remuneration for financial advisors/scheme managers should be the value contributed to the process in terms of tangible results for the creditors and the company, as opposed to the mere quantum of debt involved or the time spent.

CONSEQUENCES OF THE BREACH OF DUTY

As the company and the Scheme Manager were in breach of their common law duty of disclosure, the Court of Appeal found that ordinarily, the Scheme should be set aside and put to a fresh vote because it might not have been approved by the scheme creditors if they had known about the VAF. However, as the Scheme had been implemented for more than two years, the Court found that it was not practical to set it aside without causing more harm to the company and the scheme creditors.

Therefore, the Court of Appeal ordered the relevant parties to the dispute to try to reach an agreement on the proper amount of professional fees to be paid out. It also ordered that, if parties are unable to reach an agreement, then the fees would be assessed by a High Court Judge.

If the matter were to proceed to assessment, then the Court of Appeal laid down the following guiding principles. The Court would first consider the value (in this case the benefits, from a holistic and not mathematical standpoint, accruing to the company and the creditors) contributed by the Scheme Manager's firm. Other factors would include the nature of the work involved, the time spent, the assistance provided, the scope of work and reasonable disbursements incurred.

CONCLUSION

Financial advisers or scheme managers in Malaysia may also include success-based components in their fee arrangements and there is no mandatory requirement to disclose such fee arrangements in the scheme papers.

Although decided in a Singapore context, the principles outlined in this decision should be equally applied here. The onus is on both the company and the scheme manager to disclose the fee arrangements of the company's financial advisers or the proposed scheme manager to the scheme creditors and to the Court in a scheme of arrangement. This ensures that the informed consent of the scheme creditors is obtained and underlines the uncompromising need for transparency in relation to material information.

The aforesaid common law duty of disclosure imposed on the company and the proposed scheme manager would strike a sound balance between valuing the work done by financial advisors/scheme managers and safeguarding the interests of the creditors.

The decision is also significant in giving some guidance on the principle that should guide the determination of remuneration for such financial advisors/scheme managers in a scheme of arrangement. Rather than a mathematical scale based on the quantum of debt or time spent, the primary factor should be the value contributed to the process in terms of results for the creditors and the company.

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AMENDMENTS TO THE INDUSTRIAL DESIGNS ACT 1996

Hemalatha P Ramulu explains the key amendments to Malaysia's laws on industrial designs

The Industrial Designs (Amendment) Act 2013 ("Amendment Act") was gazetted on 22 January 2013 and will come into operation on 1 July 2013. Some of the amendments that will be made to the Industrial Designs Act 1996 ("IDA") under the Amendment Act will have a significant effect on the protection and exploitation of industrial designs in Malaysia. The changes essentially cover four aspects of the IDA which are discussed below.

THE REQUIREMENT OF NOVELTY

One of the requirements for an industrial design to be registrable in Malaysia is that it should be new. As it currently stands, Section 12(2)(a) of the IDA dictates that if before the priority date of the design that is being applied for registration, that design or an industrial design differing from it only in immaterial details or in features commonly used in the relevant trade has been disclosed to the public *anywhere in Malaysia*, then the said design would not be considered new and would consequently, be ineligible for registration.

> **"The amendments ... will enable a registered industrial design to be in force for 25 years"**

However, the amendments to Section 12(2)(a) set a higher threshold in that they require the applicant to show that before the priority date of the design that is being applied for registration, that design or an industrial design differing from it only in immaterial details or in features commonly used in the relevant trade has not been disclosed to the public ***anywhere***. In short, the novelty of an industrial design will be assessed globally and any publication by prior use or prior user anywhere in the world will defeat the novelty claimed by the applicant in respect of that industrial design.

This amendment will have a significant consequence both in terms of registration as well as enforcement. However, an assessment of novelty on a global basis will not apply retrospectively to cases where the design has already been registered and legal proceedings are pending. The saving provisions in Section 12 of the Amendment Act state clearly that any legal proceedings which are pending before the date of coming into operation of the amendments shall be continued as if the amendments had not been enacted.

However, it is crucial to note that Section 12 of the Amendment Act states that any application for the registration of an industrial design pending on the date of coming into force of the amendments will be dealt with under the IDA as amended by the Amendment Act. This being the case, it would be necessary to ensure henceforth that designs for which registration is sought, in particular those which are non-Convention based, are novel on a global basis.

THE PERIOD OF REGISTRATION

The existing Section 25 of the IDA states that the registration of an industrial design shall be deemed to have come into force on the filing date of the industrial design application and shall subsist for an initial 5 years and thereafter, this period may be extended for *two* further terms of 5 years each. The amendments to this provision permit an applicant to extend the period of registration up to a maximum of *four* terms which in other words, will enable a registered industrial design to be in force for 25 years.

Section 12(4) of the Amendment Act provides that, save for the designs registered under Section 49 of the IDA, an industrial design that has been registered under the IDA will be entitled to protection for the extended period of 25 years, if the owner of that design so wishes.

PART V OF THE IDA

The existing Sections 29 and 30 of Part V of the IDA will be replaced *in toto* by new provisions.

The existing Section 29 *inter alia* states that the rights in relation to a registered industrial design are personal property and the laws applicable to the ownership and devolution of personal property apply to such design. The section also requires an assignment of such property to be in writing.

The above-referred principles are retained in the new Section 29, but the new provision elaborates on these principles in several respects. The new provision clarifies that a security interest can be created over a registered industrial design and expressly requires an assignment of a registered industrial design, or of an application for registration of an industrial design, to be signed by, or on behalf of, the assignor and the assignee. It also permits the owner of a registered industrial design to grant a licence to any other person to use his design.

The new Section 30 maintains the requirement under the existing Section 30 that a transfer of rights in relation to a registered industrial design, whether by way of an assignment, transmission or by operation of law, must be recorded in the Register of Industrial Designs to be effective against third parties. The new provision extends the foregoing requirement to a security interest transaction in relation to a registered industrial design.

One of the reasons for the amendments to Part V of the IDA is to implement one of the measures announced by the Prime Minister of Malaysia at the Budget 2013, that is, to enable small and medium enterprises to use their intellectual property rights as collateral to obtain financing.

NEW SECTION 46A

The new Section 46A requires the Registrar of Industrial Designs to publish an Intellectual Property Official Journal ("IPOJ") which contains all matters relating to industrial designs which

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are required to be published under the IDA. It further provides that a copy of the IPOJ shall be admitted in legal proceedings as evidence without further proof that the copy had been published and that the copy of the IPOJ shall be *prima facie* evidence of the facts stated therein.

The saving provision in Section 12(5) of the Amendment Act further provides that upon the coming into operation of the Amendment Act, any matter that has already been published in the *Gazette* will be deemed to have been published in the IPOJ.

The powers of the Minister to make regulations under Section 47 of the IDA have been extended to include the power to regulate the procedure for recording of the matters required under Section 30 and to prescribe any matters or information to be published in the IPOJ.

> **“ The new provision clarifies that a security interest can be created over a registered industrial design ”**

CONCLUSION

Owners of industrial designs who seek to register the same under the IDA will be concerned that the requirement of novelty in order for an industrial design to be registrable has been extended to a global basis.

The extension of the total period of protection for an industrial design to 25 years and the clarification that the rights in respect of a registered industrial design may be assigned by way of security and be licensed to other users will be welcomed by the stakeholders. Similarly, the clarification on the assignability of rights in relation to an application for registration of an industrial design will be welcomed.

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STRICT ADHERENCE TO THE STATUTORY SCHEME

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the units it developed and to transfer the units to itself if it chose to do so, that right had yet to be exercised at the time when the caveat was lodged. Therefore, the right had not ripened into an interest in land.

His Lordship reiterated that a caveat was purely a creature of statute and could only be lodged and maintained according to the statute by a person who was authorised to do so by the statute. Accordingly, His Lordship held that parties could not by agreement between themselves create a caveatable interest.

His Lordship also approved of the judgment in *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113, where it was held that a contract could not override a statute by inventing a right which is not recognised by the statute and that the court could not give recognition to such a right (see also *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor*).

Tun Arifin bin Zakaria CJ also held that the burden is on the caveator to show that his caveat comes within the scope of section 323 of the NLC.

As the Court concluded that the Respondent did not have a caveatable interest in the project land under section 323 of the NLC, the Court allowed the appeal and ordered the private caveat lodged by the Respondent to be removed. Accordingly, the Court answered question (ii) in the negative and question (iv) in the positive. The Court also ruled that it was not necessary to answer the remaining questions.

CONCLUSION

This decision of the Federal Court is significant in three respects. First, it clarifies the meaning of '*registrable interest*' in section 323 of the NLC. Second, it makes it clear that only a person who has a present interest, as opposed to a future or contingent interest, in land is entitled to lodge a caveat. Third, it affirms that an agreement between parties to allow a caveat to be entered on title cannot in itself create a caveatable interest for the purposes of the NLC.

The principles laid down by the Federal Court in *Score Options* will provide guidance for the Malaysian courts in subsequent cases.

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WHEN THINGS FALL FROM ABOVE

Ng Ai Rene explains the maxim of res ipsa loquitur

INTRODUCTION

An action in negligence allows a plaintiff to seek compensation or damages from the defendant whose act or omission caused the plaintiff to suffer harm. To succeed in his claim, the plaintiff must be able to establish that:

1. the defendant owed a duty of care to the plaintiff;
2. the defendant had breached that duty; and
3. the plaintiff suffered loss or damage as a result of that breach.

To prove the elements above, the plaintiff has to adduce evidence of the facts on which his claim is based. Generally, the mere fact of an accident happening is not sufficient evidence of negligence.

THE RES IPSA LOQUITUR MAXIM

In some situations, it may be extremely difficult for the plaintiff to know what precise acts or omissions led to the harm in order to make out the element of breach and it may then be impossible for him to discharge the burden of proof that the law ordinarily imposes on him.

> **“ the application of the maxim merely shifts the burden to the defendant to satisfy the court that the incident had occurred without negligence on his part ”**

In such cases the plaintiff may seek to invoke the maxim of '*res ipsa loquitur*'. *Res ipsa loquitur* translated from Latin simply means 'the fact speaks for itself'. In essence, what this means is that when the facts are so obvious so as to raise the inference that the defendant had been negligent, the plaintiff would be entitled to rely upon the mere happening of the accident as evidence of negligence.

Where the maxim is successfully invoked, the burden of proof shifts from the plaintiff to the defendant and it is then for the defendant to introduce evidence to explain how the impugned incident occurred without negligence on his part.

SCOTT v LONDON AND ST KATHERINE DOCKS CO

The principles of *res ipsa loquitur* can be traced back to the 1800s to the Scottish case of *Scott v London and St. Katherine Docks Co* [1861-1873] All ER Rep. 248 ("St. Katherine Docks").

The facts are these: The plaintiff, a customs officer who was in charge of superintending the weighing of goods, was attending to duty at the defendant's warehouse. While passing through the warehouse from one doorway to another, he was suddenly and violently hit to the ground by some bags of sugar that fell on him from an upper window of the defendant's warehouse. The plaintiff suffered serious and permanent injuries as a result.

At the trial, the court held that the plaintiff had not adduced sufficient evidence of negligence on the part of the defendants to bring the case to a jury. The plaintiff obtained a rule to set aside the court's decision. Thereafter, the rule was made absolute, resulting in an appeal being made to the Court of Exchequer.

The appeal court recognised that there would be situations in which the facts of the incident itself would establish a *prima facie* case of negligence against the defendant. In setting out the principles on which the maxim of *res ipsa loquitur* would apply, Erle CJ stated as follows:

"*There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.*"

Despite *St. Katherine Docks* being a celebrated case that has come to be regarded as the leading authority on the maxim of *res ipsa loquitur*, it is not known whether the maxim was in fact invoked in this case as the appeal court did not decide on the issue and instead, directed a new trial to assess the evidence.

WALSH v HOLST & CO. LTD

The maxim was successfully invoked in *Walsh v Holst & Co. Ltd* [1958] 3 All ER 33. The facts in this case are strikingly similar to *St. Katherine Docks*. The plaintiff was walking along a pavement between a highway and a four-storey building which was undergoing renovations. He was then found lying on the pavement with wounds on his forehead and nose. Lying a few feet away from him was half a brick but it did not have any trace of skin or blood on it.

The plaintiff then sued various parties, in particular the contractor and the occupier of the building. The High Court's refusal to apply the maxim of *res ipsa loquitur* was reversed by the Court of Appeal. According to Hodson LJ, once it has been proved that the building was in occupation and the occupier thereof had employed the contractors to carry out renovation works that involved the dislodgment of bricks, there is a *prima facie* case against both of these defendants.

As mentioned above, the application of the maxim does not mean that the defendants are negligent. Rather, the application of the maxim merely shifts the burden to the defendants to satisfy the court that the incident had occurred without negligence on their part. In this case, the Court of Appeal, by a 2:1 majority, was satisfied that the defendants had taken sufficient precautions to prevent injury to users of the highway (which presumably, included the adjoining pavement) and therefore, had not been negligent. Accordingly, the Court of Appeal upheld the decision of the High

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Court to dismiss the plaintiff's case.

APPLICATION IN MALAYSIA

A recent Malaysian case where the issue of *res ipsa loquitur* arose was in *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Ors* [2009] 4 MLJ 253. The plaintiff was standing at a road divider directly below an elevated monorail track, waiting to cross the road. Overhead, a monorail train was passing by on a test run. As it passed, a safety wheel from the train weighing 13.4 kg came off and fell on the plaintiff below, causing him to suffer serious head and bodily injuries.

The plaintiff brought an action against various parties for negligence, including the first defendant who was the designer and manufacturer of the monorail train and the second defendant who was responsible for the installation, commission and operation of the monorail system.

From the results of investigations that were conducted, it appeared that the bolts from the wheel could have been unscrewed gradually and were eventually detached from the hub, causing the wheel to come off. Harmindar Singh JC held that logically, the possibilities were that this could only have happened if the bolts had not been tightened properly by the persons in charge or if the bolts had been tampered with by someone else.

> **“The maxim … is essentially a common sense rule that enables justice to be done”**

The question then arose as to whether the plaintiff was entitled to rely on the maxim of *res ipsa loquitur* so that a *prima facie* inference of negligence could be drawn. If not, the plaintiff had to prove how the bolts could have come unscrewed to establish negligence on the part of the defendants.

The trial judge, after referring to the often cited passage from the judgment of Erle CJ in *St. Katherine Docks*, further elaborated that the maxim had been explained in the following terms by Megaw LJ in *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240:

"It means that a plaintiff prima facie establishes negligence where:

(i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and

(ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant was responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety."

Applying the above principles, the Court held that it was not in the ordinary course of things, that a safety wheel of a monorail train would fall off and hit persons below. It was also evident to the learned Judicial Commissioner that although the plaintiff could point to the safety wheel coming off, he was unable to show precisely why the wheel had come off. In the circumstances, the Court held that the plaintiff had made out a *prima facie* case of negligence against the first and second defendants and the onus had shifted to them to provide credible evidence to show that the incident occurred without negligence on their part.

As the first and second defendants were unable to provide a reasonable explanation as to how the safety wheel had come off the train, the Court held that negligence had been proven against them and held them to be equally liable to the plaintiff for damages and costs.

CONCLUSION

The maxim *res ipsa loquitur* is essentially a common sense rule that enables justice to be done when the facts that have a bearing on causation are not known to the plaintiff but ought to be within the knowledge of the defendant.

The maxim has been applied not only when things fall from above, but also in other instances where the conditions laid down in *St. Katherine Docks* are fulfilled. Indeed, it has been applied in numerous other instances, such as where the door of a train suddenly opened when a passenger looked out of the window (*Gee v Metropolitan Rly* (1873) L.R. 8 Q.B. 161), where a motor vehicle overturned on a highway for no apparent reason (*Halliwell v Venables* (1930) 143 L.T. 215), when a patient developed gangrene after receiving an injection on his arm (*Cavan v Wilcox* (1974) 44 D.L.R. (3d) 42) and where a patient who sought treatment for two stiff fingers ended up with four stiff fingers (*Cassidy v Ministry of Health* [1951] 2 K.B. 343).

It is to be noted that the present judicial trend in England is to use the expression "*prima facie* case" rather than "*res ipsa loquitur.*" To establish a *prima facie* case, it must be proven that: (1) some unexplained occurrence had happened; (2) the occurrence would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant, rather than any other person. Perhaps the cries of "*res ipsa loquitur*" that ring out from *St. Katherine Docks* will one day cease to echo through the courts of justice.

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WHISTLING WHILE THEY WORK

Foo Siew Li discusses the salient provisions of the Whistleblower Protection Act 2010

A whistleblower is defined in the Concise Oxford Dictionary (10th edition) as "a person who informs on someone engaged in an illicit activity". The implementation of whistleblowing policies in the public or private sector ensures that a good early warning system is in place which allows the organisation to be alerted of any corruption, fraud, or other wrongdoings which may be taking place. This provides the organisation with the opportunity to take steps to eradicate the illicit activity before any irreparable damage is caused to it.

TO BLOW OR NOT TO BLOW THE WHISTLE?

More often than not, it is the employees of an organisation who are the ones with inside information on improper conduct by their employers or their colleagues in the workplace. These employees are then faced with the dilemma as to whether or not they should blow the whistle on their employers or their colleagues.

In particular, the risk of disclosing improper conduct of their employers is obvious. Such a situation arose in the Enron debacle in the United States, where the then vice-president of Enron, Sherron S. Watkins, expressed her concern in an internal memorandum to her then boss and company founder, Kenneth L. Lay, that the company could "implode in a wave of accounting scandals".

Sherron resigned after inaction by Lay and after being "demoted 33 floors from her mahogany executive suite to a 'skanky office' with a rickety metal desk and a pile of make-work projects". Sherron's memorandum was discovered by an investigative committee after Enron's subsequent collapse into bankruptcy just 5 months later.

CHANGING THEIR TUNE

While whistleblowers who expose the illicit activity of their employers have previously been viewed in a negative light or as 'villains', there seems to have been a change in public perception of whistleblowers in recent years.

Today, the public appears more prepared to view whistleblowers as 'heroes' who are courageous enough to risk severe reprisal by their employers as a result of the disclosure of information which incriminates their employers. This could be the result of the growing public awareness of the need to combat corruption, fraud and other wrongdoings in the public and private sectors, which would be an impossible task if all employees were unwilling to 'stick their necks out' to blow the whistle on their employers. Hence, to encourage and facilitate these disclosures in the workplace, it is necessary for whistleblowers to be conferred some form of protection for their disclosures.

WHISTLEBLOWER PROTECTION IN MALAYSIA

The Malaysian Parliament has, in the past, introduced legal protection for whistleblowers, in particular officers and auditors of a company, in the Companies Act 1965 (Sections 174(8B), 368B(2) and 368B(3)) and the Capital Markets and Services Act 2007 (Section 320(2)) in its attempt to counter malpractices and fraud by companies.

The coming into force of the Whistleblower Protection Act 2010 ("WPA") on 15 December 2010 introduced, for the first time, employment-specific criminal liability for retaliatory or detrimental action taken by an employer against a whistleblower who has disclosed the improper conduct of their employer or colleagues. It is a significant step in the right direction for Malaysia in its efforts to combat corruption and promote good governance and brings Malaysia up to par with developed countries like the United States, the United Kingdom and Australia.

MERELY WHISTLING IN THE WIND?

While the aims and the purpose of the WPA are ambitious and noble, the million-dollar question is whether this legislation will be able to achieve all that it has set out to achieve, or whether the Act will be akin to a 'toothless tiger', one which is perhaps 'whistling in the wind'?

> **"a 'whistleblower' (is) a person who makes a disclosure of improper conduct to an enforcement agency"**

Although the actual impact of the WPA will only be apparent in time, the WPA cannot be said to be 'merely whistling in the wind' as it contains provisions which facilitate disclosure of improper conduct by employees and confers protection on employees who blow the whistle on their employers or colleagues at the workplace.

The WPA defines a 'whistleblower' as a person who makes a disclosure of improper conduct to an enforcement agency based on his reasonable belief that any other person has engaged, is engaging or is preparing to engage, in improper conduct, provided that such disclosure is not specifically prohibited by any written law.

While the phrase 'reasonable belief' is not defined in the WPA, the Court of Appeal in the UK case of *Babula v Waltham Forest College* [2007] IRLR 346 held that for an employee to be protected against detriment or dismissal on the grounds of making a protected disclosure under whistleblowing provisions, it will be sufficient for the employee to reasonably believe that the employer is in breach of a legal obligation, whether or not such belief turns out to be wrong.

Under the WPA, 'improper conduct' means any conduct which if proved, constitutes a disciplinary offence or a criminal offence.

WHISTLING TO THE RIGHT AUDIENCE

It is important to emphasize that in order to be entitled to the safeguards under the WPA, a whistleblower must disclose the

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information on improper conduct to an 'enforcement agency'. In this regard, the WPA provides a broad definition for 'enforcement agency' which includes any ministry, department, agency, or other body set up by the Federal Government of Malaysia, State Governments or local governments.

According to the Deputy Minister in the Prime Minister's Department, Datuk Liew Vui Keong, the WPA has been implemented by 7 government agencies, namely, the Royal Malaysian Police, the Malaysian Anti-Corruption Commission, the Royal Malaysian Customs Department, the Immigration Department, the Road Transport Department, the Companies Commission of Malaysia and the Securities Commission.

In other words, a whistleblower who makes the disclosure to his employer or to the media or to any other person will not be entitled to the protection under the WPA and his remedies for any detrimental action inflicted upon him by his employer would be under employment or contract law.

It is unfortunate that the protection under the WPA is not extended to disclosures made to the employer as there could be instances where an employee may wish to report improper conduct internally rather than to an enforcement agency, particularly where the illicit activity is committed by a co-worker.

PROTECTING THE WHISTLEBLOWER

The WPA confers 3 forms of protection on a whistleblower. First, the identities of the whistleblower and the person against whom a disclosure is made as well as the information disclosed by a whistleblower is to be kept confidential by any recipient of such information.

Second, a whistleblower is conferred immunity from any civil or criminal liability (including liability from administrative or disciplinary proceedings) for making a disclosure of improper conduct.

Third, a whistleblower is protected against "detrimental action" in reprisal for a disclosure of improper conduct made by him. "Detrimental action" includes any action that causes injury, loss or damage, intimidation or harassment, discrimination, demotion, suspension, termination or adverse treatment in relation to his employment as well as a threat of any of the abovementioned actions.

Each of the abovementioned forms of protection is also extended to any person who is related to, or associated with, the whistleblower.

The burden is on the employer to show that any detrimental action taken against a whistleblower is not taken as a result of the disclosure of improper conduct by the latter.

It is noteworthy that a person who commits a detrimental action against a whistleblower or any person related to, or associated with, a whistleblower in reprisal for a disclosure of improper conduct can now be held personally liable for damages or compensation. This is a significant change from the pre-WPA position whereby an employee who faced detrimental action by their employer as a result of the disclosure of improper conduct was usually left with no option but to leave their employment and make a claim for constructive dismissal against the employer.

Further, under the WPA, the whistleblower or any person related to, or associated with, him may, in certain circumstances, request the enforcement agency to apply in writing, for and on his behalf, to his employer for relocation of his place of employment.

In certain circumstances where the whistleblower or any person related to, or associated with, him are subject to detrimental action, or threats of detrimental action, by his employer, that person may apply to the Court for an injunction to prevent his employer from continuing, repeating or threatening to continue or repeat, the detrimental action.

A DUTY TO DANCE TO THE TUNE

Although the WPA does not impose a duty on any person to make a disclosure of improper conduct, it imposes a duty on an enforcement agency to investigate any disclosure of improper conduct and any complaint by a whistleblower of detrimental action taken against him.

Where any improper conduct constitutes a criminal offence, the enforcement agency is to refer the matter to the Public Prosecutor.

On the other hand, where improper conduct constitutes a disciplinary offence, the enforcement agency is to recommend that the appropriate disciplinary authority, or the employer, initiate disciplinary proceedings or take other appropriate action against the person who carried out the improper conduct. In such event, the WPA imposes an obligation on the appropriate disciplinary authority, or the employer, to report to the enforcement agency the steps it has taken to give effect to the finding and recommendation of the enforcement agency or its reasons for not taking any action. This is vital to ensure that a disclosure of improper conduct which has merit is acted upon.

REWARD FOR WHISTLEBLOWING

Another significant provision in the WPA which is likely to increase the efficacy of the WPA in encouraging whistleblowers to come forward is the provision that empowers the enforcement agency to order rewards to whistleblowers.

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YOU THINK IT, I INK IT - BUT WHO OWNS IT?

Grace Teoh explains the potential hazards of tattooing

Apparently, there's a saying among tattoo artists that goes: "You think it, I ink it".

Typically, tattoos are obtained as a graphic self-expression by the individual. The designs are usually decided in one of the following three ways: one, the individual has the exact idea of a design to be used, e.g. logos or simple drawings; two, the individual has a concept and works with the tattooist to finalise the design; and three, the tattooist has *carte blanche* to design the tattoo for the individual.

A recent development in international copyright law indicates that copyright protection may extend to tattoo designs. This is unsurprising, given that the two main criteria of copyrightable artistic works, i.e. originality and fixation, appear to be fulfilled by tattoo designs.

So, how will the Malaysian courts view this unorthodox development?

COPYRIGHTABLE?

Section 7(3) of the Copyright Act 1987 provides that an artistic work shall not be eligible for protection unless it has fulfilled the prerequisites of originality and fixation.

Fixation simply means that the work must be reduced to a material form, i.e. the embodiment of the work is in a sufficiently permanent form which permits the work to be communicated. Arguably, tattoos fulfil this requirement, wherein the skin is the canvas for the graphic art.

The courts consider originality in the expression of the idea, not the originality of the idea itself. In *Nordic Water Products Aktiebolag & Anor v Pumpen Environmental Sdn Bhd* [2010] 7 AMR 523, it was held that the determination of "originality" does not include evaluating the creativity, novelty or uniqueness of the work itself, but "*the time, effort, skill and labour expended by the author*" in the creation of the work. Great news for Ryan Fitzgerald, the tattooist who allegedly inked an image of a pile of excrement with flies buzzing around it on his ex-girlfriend, as he may be able to claim copyright and deny others from copying his "shitty" creation.[1]

However, in *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, the English courts held that "slavish copying", no matter how laboriously and skilfully done, would not equate to "originality". So, just because one were to skilfully and laboriously replicate every last pixel of Da Vinci's Last Supper as a tattoo on a thigh, it is unlikely that the work will be deemed "original".

WHO OWNS IT?

Assuming that one's tattoo fulfils the originality and fixation criteria - who owns it and gets to monopolise it; the individual or the tattooist? One would assume that the individual owns it - but one may be wrong, according to Victor Whitmill, Louis Malloy and Chris Escobedo.

Whitmill is the tattoo artist of Mike Tyson's *ta moko*-inspired facial tattoo who filed a suit in the US against Warner Bros Entertainment for the alleged unauthorised reproduction of said tattoo in the movie "Hangover II". During the interlocutory hearing for an injunction to stop Warner Bros from releasing the movie last summer pending the outcome of the suit, US District Judge Perry denied the motion for an injunction as Whitmill had not fulfilled the US equivalent of the *American Cyanamid* test, but noted that Whitmill was likely to win the suit.[2] Unsurprisingly, Warner Bros sought a settlement with Whitmill soon after. Apparently, the Maori tattoo experts take offense at Whitmill's claim, as it is contended that Tyson's tattoo was taken from *ta moko* designs.[3]

Malloy, the artist of nine of David Beckham's tattoos, reportedly threatened the Beckhams with a copyright infringement suit when he caught wind that Beckham's famous tattoos were about to be prominently displayed in advertisements.[4]

> **"who owns (the tattoo) and gets to monopolise it; the individual or the tattooist?"**

Escobedo is the tattooist of Carlos Condit's lion tattoo on his torso, which was reproduced in THQ's Ultimate Fighting Championship game that featured Condit. Escobedo recently sued THQ for copyright infringement in the alleged unauthorised reproduction of the lion tattoo on the game character resembling Condit.[5]

SOUNDS LEGIT? SEEMS SO

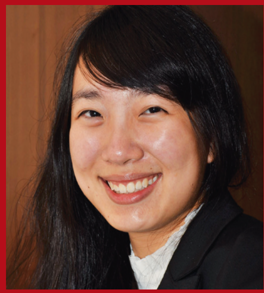
Under Malaysian copyright law, authorship and ownership are intertwined matters. According to Section 3 of the Copyright Act, authorship in artistic works other than photographs is deemed to vest in the artist. Generally, the author of the copyrighted work is considered the owner of the same - except in instances of employment, commission, consultancy, and joint undertakings. Ownership in these exceptions depends on the facts of the case.

In the circumstance where the individual and the tattooist contributed originality to the final tattoo design, it is arguable that both have joint authorship and thus joint ownership in the copyrighted work.

But, what if the tattooist had designed the tattoo for the individual? It is likely the courts would find that authorship vests in the tattoo artist - but is that the final argument in infringement suits?

DO I OR DON'T I (OWN IT)?

In *Warner v Gestetner* [1988] 4 EIPR D-89, the plaintiff was commissioned to develop a brand image for computer software



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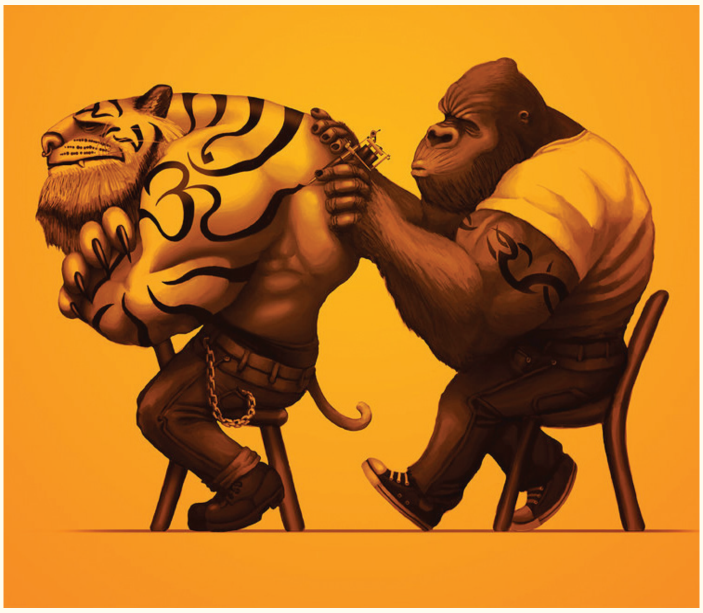
for the purpose of an exhibition. Post-exhibition, the defendant continued using the drawings for promotional purposes and the plaintiff sued for copyright infringement. The court interpreted business efficacy in the arrangement and found that there was an implied term for unrestricted right to the use of the drawings.

Drawing an analogy, especially in situations where the tattooist had specially designed the tattoo for the individual, it would not make commercial sense for the individual to then be hit by lawsuits each time his inks are inadvertently featured. It would be rather odd that each time an individual is about to get inked, the tattooist and the individual would have to haggle over the terms of ownership and/or licence first.



Tattoo © Jonathan Gonzalez Gomez

This argument may not hold water however, if the tattooist did not design a new unique tattoo for the individual, as it cannot be said that the individual had commissioned the tattooist for the piece of work.

One wonders what Julia Gnuse, Tom Leppard, Horace Ridler and Etienne Dumont would say, as some of the people who own the most ink. These individuals are famous for literally being covered from head to toe in tattoo designs, some unique and some not so. They are regularly photographed, and the subjects of the photographs are the tattoos. Do they get threatened with lawsuits by their tattooists too?

WHAT CAN I DO WITH IT?

Section 13(2) of the Copyright Act provides a series of defences for the use of copyrighted material. In scenarios with Malaysian Whitmills, Malloys and Escobedoes, individuals could argue the tattoos are parody or pastiche of the original work, or even incidental inclusions in the larger picture of things. The key to these defences appears to be the fact that the individuals are not making a profit from the copyrighted work.

Finally, even if one has ownership in a piece of artistic work, one should still practice *caveat emptor*. There exists a small impediment to one's exploitation of the artistic work, known as moral rights.

Moral rights include the right of acknowledgment as author, the right against false attribution, and the right to prevent derogatory treatment of the copyrighted work which would affect the author's reputation. A moral right is not transferable nor can it be contracted out of.

> **“What if the … glorious gold dragon … turns … into a fat faded yellow earthworm?”**

In *Syed Ahmad Jamal v Dato' Bandar Kuala Lumpur* [2011] 2 CLJ 569, the plaintiff, a renowned artist was commissioned in 1985 to complete a sculpture that was subsequently named "Lunar Peaks". In 2000, the defendant carried out various modifications, including replacing glass slabs with stainless steel plates, replacing deep blue tiles with black tiles and adding chequered black and white tiles to the external landscape surrounding the sculpture. The court found that the plaintiff's moral rights had been offended and awarded aggravated damages to the plaintiff in consolation.

In terms of tattoos, what would be considered an infringement of moral rights? What if the tattoo artist had inked a glorious gold dragon on the smooth skin of a youngster, and the youngster as well as the tattoo are frequently featured as the tattooist's best work; then several years later when age and all its peculiarities catch up, turns the dragon into a fat faded yellow earthworm? Could the tattooist sue for derogatory treatment of the copyrighted work?

Following *Syed Ahmad Jamal*, it may be that such deterioration of the work would be considered offensive to the tattooist's moral rights. But will the courts assume to tell individuals how to care for their physical bodies? Perhaps Malaysia will have its very own Honourable Judge Judy, the televised American judge who is infamous for her acerbic pearls of wisdom, before such a feat is explored.

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IS IT OR IS IT NOT A STEP?

A commentary on Life Plaza v Pasukhas Construction by Janice Tay

INTRODUCTION

The decision of the High Court in *Life Plaza Sdn Bhd v Pasukhas Construction Sdn Bhd* [2012] 5 CLJ 120 sets down some guiding principles as to what amounts to taking a positive step in court proceedings to be deemed a waiver of one's right to refer a dispute to arbitration pursuant to Section 10 of the Arbitration Act 2005 ("2005 Act").

BACKGROUND FACTS

The Plaintiff filed a claim in the High Court against the Defendant for liquidated and ascertained damages for the late completion of a project.

The Defendant contended that the dispute should be referred to arbitration by virtue of Section 10 of the 2005 Act and filed an application to stay all proceedings pending remission of the dispute to arbitration. According to the Defendant, the parties had agreed in the Letter of Award to adopt the Building Contract (Private Edition with Quantities) ("PAM Contract") and that pursuant to Clause 34.1 of the PAM Contract, the parties had agreed to refer any dispute concerning the project to arbitration.

> **"The entry of an unconditional appearance ... does not amount to taking "any other steps in the proceedings" within the meaning of Section 10"**

In response, the Plaintiff contended that the PAM Contract was separate from the Letter of Award (i.e. that there were 2 separate agreements) and the PAM Contract was never prepared and signed by the parties.

The Plaintiff further submitted that the Defendant had waived its right to arbitrate the dispute as the Defendant had taken the following steps in the Court proceedings –

1. Filed an unconditional appearance;
2. Requested an Extension of Time to file its Defence;
3. Made an application to stay proceedings after the due date to file its Defence;
4. Filed its Defence; and
5. Filed a Notice to Produce Documents and issued a letter to seek further and better particulars.

The Plaintiff also contended that the Defendant should have filed its application for a stay of proceedings before the due date for filing the defence.

Two issues required determination by the Court. First, whether the parties were bound by the PAM Contract, in particular the arbitration agreement in Clause 34.1 thereof; and second, whether the Defendant had waived its right to arbitrate the dispute by taking steps in the proceedings.

THE DECISION

As regards the first issue, the Court held that the signed Letter of Award had incorporated the PAM Contract by express reference. The parties had therefore agreed to refer any dispute to arbitration pursuant to Clause 34.1 of the PAM Contract. The Court followed the decision of the Court of Appeal in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 7 CLJ 785 by stating that it was not necessary for a letter of award itself to have an arbitration clause for parties to be bound by the need to arbitrate a dispute.

The second issue turned on Section 10 of the 2005 Act which *inter alia* requires a Court to stay its proceedings where the matter is the subject of an arbitration agreement unless the party who applies for a stay of proceedings has taken any other steps in the proceedings before the Court.

The issue in essence was whether the steps taken by the Defendant in the Court proceedings amounted to "*any other steps*" so as to operate as a waiver of its right to refer the dispute to arbitration pursuant to Section 10 of the 2005 Act.

The Court referred to *Sanwell Corporation Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213 ("Sanwell") where the Federal Court, in relation to a similar provision in Section 6 of the Arbitration Act 1952 ("1952 Act"), held as follows –

(a) The entry of appearance is a mandatory procedural step to be taken in a High Court proceeding and is therefore a permitted, excluded or exempted step in the proceeding that does not amount to "a step in the proceedings" within the meaning of Section 6 of the 1952 Act;

(b) If the applicant has served any pleadings, he has thereby elected to proceed with the Court proceedings and has clearly taken a step in the proceedings within the meaning of Section 6. He would therefore be barred from applying for a stay of proceedings to refer the matter to arbitration; and

(c) If the applicant has taken "*any other action*" in the proceedings (other than step (a) or (b) above), the Court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and abandon the right to have the dispute disposed of by arbitration.

Applying the principles laid down in *Sanwell*, the learned High Court Judge held that the Defendant had not taken any positive step in the proceedings which would deny it the right to apply for a stay of proceedings pending remission to arbitration. The reasoning of Her Ladyship is as follows –

1. The entry of an unconditional appearance by the Defendant,

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as in *Sanwell*, is a permitted, excluded or an exempted step in the proceedings which does not amount to taking "any other steps in the proceedings" within the meaning of Section 10 of the 2005 Act;

2. Although the filing of a Defence usually amounts to a positive step in the proceedings, the Court considered that on the distinct facts of this case, the filing of a Defence fell within the "*any other action*" category of *Sanwell* and required the Court to determine the nature of the action and whether it indicates an unequivocal intention to proceed with the suit and abandon the right of having the dispute disposed of by arbitration;

3. As the Defence had been filed on the express instruction of the Court, failing which judgment in default would have been granted against the Defendant, the learned Judge held that the filing of the Defence in this case did not indicate an unequivocal intention to proceed with the suit and abandon the right of having the dispute disposed of by arbitration;

4. The issue of the Notice to Produce and the letter seeking further and better particulars likewise fell within the "*any other action*" category of *Sanwell*. As these steps were taken to ascertain the exact claim against the Defendant, the Court was of the view that they could not amount to an unequivocal intention to proceed with the suit.

In relation to the Plaintiff's contention that the Defendant had taken further steps in the Court proceedings by requesting for an extension of time to file its Defence, the Judge noted that the Defendant had already filed its application to stay the Court proceedings at the time when it applied for extension of time to file its Defence. Accordingly, the Judge took the view that the Court should have allowed the Defendant's application for stay of proceedings to be heard before directing the Defendant to file its Defence.

Accordingly, the Court allowed the Defendant's application to stay the court proceedings pending remission of the dispute to arbitration.

COMMENTARY

The principles laid down by the Federal Court in *Sanwell* in relation to Section 6 of the 1952 Act have now been adopted by the High Court in *Life Plaza* in relation to Section 10 of the 2005 Act.

Nonetheless, this decision departs from *Sanwell* in that an exception was made by the learned High Court Judge in relation to the filing of pleadings, namely the Defence, by the Defendant. It is arguable that this exception may be justified in the circumstances of this case as the Defence was filed on the instruction of the Court.

It should be noted that the Judge did not expressly deal with the Plaintiff's contention that the Defendant should have filed its stay application before the due date for filing the Defence. It would appear that Her Ladyship may have taken the view that the 2005 Act and the relevant rules of courts do not expressly require such an application to be filed before the deadline for filing of a defence, notwithstanding that a party who does not do so takes the risk of default judgment being entered against it.

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AN "ABC" GUIDE TO THE "ABC" FRAMEWORK IN MALAYSIA

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leading UK companies, has published draft guidance, which in its view, may amount to adequate procedures, including:

- Establishing board level responsibility for the anti-corruption programme;
- Ensuring that a senior officer is directly accountable for overseeing the anti-corruption programme;
- Designing a code of conduct which includes an anti-corruption element;
- Vetting employees;
- Implementing a gifts and entertainment policy;
- Conducting appropriate training;
- Carrying out appropriate due diligence on foreign partners, agents, consultants and entities;
- Establishing financial controls to minimise risks;
- Establishing procedures for minimising corruption by sub-contractors and suppliers; and
- Developing whistleblowing procedures and implementing an anonymous reporting mechanism.

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DEFAULT IN PALM OIL TRADES

Syafinaz Vani explains a recent case involving the standard terms of a PORAM contract

The High Court in the case of *Alami Vegetable Oil Products Sdn Bhd v Sime Darby Futures Trading Sdn Bhd* (unreported) interpreted several provisions of the standard form contract issued by the Palm Oil Refiners Association of Malaysia ("PORAM terms") for the sale and purchase of crude palm oil ("CPO") and refined, bleached and deodorised palm oil ("RBD palm oil").

THE FACTS

The Plaintiff's Claim (CPO Contracts)

Alami Vegetable Oil Products Sdn Bhd ("Plaintiff") made a claim against Sime Darby Futures Trading Sdn Bhd ("Defendant") in respect of the sale and purchase of Crude Palm Oil ("CPO Contracts") based on the PORAM terms. One of the PORAM terms in question states that contracts are to be delivered/ collected on a '*first in, first out*' basis.

The Plaintiff had entered into separate contracts to sell CPO to Golden Jomalina Food Industries Sdn Bhd ("Golden Jomalina") and the Defendant. Prior to 27 November 2007, Golden Jomalina was unrelated to the Defendant. On 27 November 2007, via a merger exercise, the Defendant and Golden Jomalina became part of the Sime Darby Berhad Group of Companies and were wholly-owned subsidiaries of Sime Darby Plantation Sdn Bhd.

“ so long as there is more than one CPO contract … delivery must be made to the earliest contract ”

The same group of traders from Sime Darby Plantation Sdn Bhd had been executing CPO Contracts with the Plaintiff in continuity. The CPO Contracts were first signed in the name of Golden Jomalina and, later on, in the name of the Defendant. All CPO purchased from the Plaintiff were to be delivered to Golden Jomalina's refinery ("Refinery") as the Defendant did not have its own refinery.

The Plaintiff and Golden Jomalina had entered into seven CPO Contracts between 9 November 2007 and 9 January 2008 ("Earlier CPO Contracts"). The Plaintiff failed to make full delivery towards fulfilment of the Earlier CPO Contracts. In the months of April and May 2008, the Plaintiff delivered some CPO to the Refinery.

In line with the '*first in, first out*' provision, the CPO which was delivered to the Refinery was received by Golden Jomalina towards partial fulfilment of one of the Earlier CPO Contracts wherein the purchase price was RM2,985.00 per metric ton.

Subsequent to Golden Jomalina's receipt of this quantity of CPO, the Plaintiff issued invoices quoting a later contract ("Later CPO Contract") signed in the Defendant's name, wherein the purchase price was substantially higher, i.e. RM3,280.00 per metric ton. Upon receipt of these invoices, the Defendant promptly notified the Plaintiff by letters that the invoices were wrongly issued as the CPO had been received towards an Earlier CPO Contract. However, the Plaintiff initially maintained that the CPO delivery was for the Later CPO Contract.

The Plaintiff's claim was subsequently settled without admission of liability by Golden Jomalina for a sum of RM2,414,268.00, being the amount due under an Earlier CPO Contract. The trial proceeded only on the Defendant's counterclaim against the Plaintiff.

The Defendant's Counterclaim (RBD Contracts)

Between 7 April 2008 and 9 April 2008, the Plaintiff and Defendant had entered into several contracts whereby the Defendant agreed to sell to the Plaintiff certain quantities of RBD palm oil ("RBD Contracts").

The payment term stated in the RBD Contracts was "*Payment Before Delivery*". In other words, the Plaintiff was required to make payment before the Defendant delivered the RBD palm oil to it. The RBD Contracts also expressly stated that the parties were to be bound by the PORAM terms.

The Defendant sent notices to the Plaintiff requesting for payment for the RBD palm oil. The Plaintiff was expressly notified that if it failed to comply with the extension of time given to make payment, the RBD palm oil would be sold in the open market and the Plaintiff would be held responsible for all costs, price differences, expenses and damages that resulted from such sale.

As the Plaintiff failed to make payment by the final extended deadline on 15 August 2008, the Defendant sold the RBD palm oil concerned in the open market on the next working day, 18 August 2008. The market price for the RBD palm oil on both 15 August 2008 and 18 August 2008 was the same.

The sale of the RBD palm oil resulted in the Defendant suffering losses of RM3,270,000.00, being the difference between the market price of the RBD palm oil on 18 August 2008 and the price at which the Plaintiff contracted to buy the RBD palm oil under the RBD Contracts. The Defendant filed a counterclaim against the Plaintiff for this sum based on the terms of the RBD Contracts and the PORAM terms.

The Plaintiff's defence against the counterclaim was that it had requested the Defendant to set-off the sum of RM2,652,864.00 allegedly owing by the Defendant to the Plaintiff under the Later CPO Contract against the amounts payable by the Plaintiff to the Defendant under the RBD Contracts, and that since the Defendant refused to do so and did not deliver the RBD palm oil, the Defendant had committed a fundamental breach and repudiated the RBD Contracts.

The Defendant contended that it was not obliged to agree to the set-off as the Plaintiff had not complied with Clause 4 of the

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PORAM terms and had invoiced the Defendant based on the Later CPO Contract when the Earlier CPO Contracts remained unfulfilled.

The Plaintiff also contended that the RBD Contracts had lapsed as there was no extension of the delivery date for the RBD Contracts under Clause 5 of the PORAM terms. The Defendant, on the other hand, contended that it had granted indulgence to the Plaintiff beyond the contract period due to the long-standing relationship between the parties and the market practice in the palm oil industry where one party would not hold the other party in default immediately upon the expiry of the contract period.

The parties were also at variance as to the day on which the default occurred in respect of the RBD Contracts. The Plaintiff contended that the default date was the day immediately following the expiry of contract periods for the respective RBD Contracts. On the other hand, the Defendant argued that the default date was 15 August 2008, the day on which the Defendant put the Plaintiff on default of the RBD Contracts.

The Plaintiff also contended that the sale of RBD palm oil by the Defendant to Golden Jomalina, both being subsidiaries of the Sime Darby Berhad, was not an open market sale and that it was a sale by the right hand to the left hand which only resulted in a paper loss.

“ the issue of a single notice of default for all five RBD Contracts was sufficient to comply with Clause 9 of the PORAM terms ”

DECISION OF THE HIGH COURT

The High Court was required to interpret several provisions of the PORAM terms in order to decide on the Defendant's counterclaim.

The 'first in, first out' principle

Clause 4 of the PORAM terms reads –

“When there is more than one contract for similar oil between the parties for the same delivery/collection period, the delivery/collection shall follow the dates of the respective contracts on a first in first out basis.”

The Court held that the '*first in, first out*' basis meant that so long as there is more than one CPO contract between the parties, the delivery must be made to the earliest contract. According to the learned Judge, the key words in Clause 4 were that “*delivery shall follow the date of the contract in its sequence*”. Her Ladyship added that Clause 4 gave no option to the Plaintiff as the seller.

According to the Court, the '*first in, first out*' basis provided a logical solution that has been accepted amongst the market players in the palm oil industry when there is more than one similar contract. As this was the industry practice, the judge added that the purchaser was entitled to assume that the seller understood the 'first in, first out' mechanism.

The Court was satisfied that Clause 4 of the PORAM terms applied as there were similar contracts with Golden Jomalina which were earlier in time that remained unfulfilled by the Plaintiff. By reason of the 'first in, first out' basis, the CPO that was purportedly delivered under the Later CPO Contract was in fact meant to be delivery for the Earlier CPO Contract. As the sum of RM2,414,968.00 had been paid by Golden Jomalina, the Court held that the Defendant's refusal to set-off the sum of RM2,652,864.00 was justified because they did not owe this sum to the Plaintiff.

Had the RBD Contracts lapsed?

When the Plaintiff failed to make advance payment for the earliest RBD Contract at the end of May 2008, the Plaintiff did not seek an extension of time to make payment, or request the Defendant not to produce the CPO, or to cancel the contract. Instead, the Plaintiff kept quiet. The Defendant also did not insist on payment. The Plaintiff therefore contended that the RBD Contracts had lapsed in May 2008 as there was no extension agreed on those contracts.

In deciding on this point the Court considered Clause 5 of the PORAM terms which, *inter alia*, reads –

“Collection/Delivery shall be completed within the contract period. However, the time for collection/delivery may be extended by Seller/Buyer to a period (hereinafter referred to as extended period) not exceeding 14 calendar days provided a written notice be given at least 3 business days prior to expiry of contract period … However subject to mutual agreement in writing, the time for collection/delivery may be extended to a further period.”

The Court held that whether or not the RBD Contracts had lapsed must be looked at from the surrounding circumstances of the case, including the industry practice. As the parties had remained silent, the Court inferred that they had no intention to follow Clause 5 of the PORAM terms strictly.

The Court held that there is nothing in law to preclude the Defendant from giving an extension of time beyond the 14 days mentioned in Clause 5 of the PORAM terms and that, furthermore, due to the long-standing relationship between the parties, the

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DEFAULT IN PALM OIL TRADES

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Defendant had given indulgence to the Plaintiff beyond the time limit specified in Clause 5. Therefore the Court rejected the Plaintiff's contention that the RBD Contracts had lapsed.

The court took into account the contemporaneous documents which showed that neither the Plaintiff nor the Defendant had ever insisted on any prior notice of extension before a contract was carried over to be performed at a later date. In particular, the Plaintiff had issued a letter to the Defendant on 17 July 2008 (after the alleged lapse of RBD Contracts in May 2008) wherein it reminded the Defendant of the outstanding deliveries and requested the Defendant to deliver the RBD palm oil on or before 31 July 2008. This letter clearly indicated that the Plaintiff had regarded the RBD Contracts as still subsisting after May 2008.

The date of default

Since the RBD Contracts have not lapsed, the Court next considered the date on which default occurred in respect of the RBD Contracts. This date was critical as the price of RBD palm oil had crashed after the expiry of the respective contract periods of the RBD Contracts. As a result, the losses suffered by the Defendant would be significantly less if the default had occurred immediately after the expiry of the contract period of the RBD Contracts as compared to the losses that the Defendant would suffer if the default had occurred on 15 August 2008.

“ the only condition imposed by Clause 9 of the PORAM terms was for the sale to be made at the market price ”

In determining the date of default to assess the amount of damages that the Defendant was entitled, the Court looked at Clause 9 of the PORAM terms which reads –

“In default of fulfilment of this contract by either party, the other party at his discretion shall, after giving notice, have the right either to cancel the contract or the right to sell or purchase, as the case may be, against the defaulter who shall on demand make good the loss, if any, on such sale or purchase. … The damages awarded against the defaulter shall be limited to the differences between the contract price and the market price on the day of the default ...”

The Court agreed with the Defendant's contention and held that the default date was 15 August 2008, that is, the date on which the Defendant notified the Plaintiff that it would treat the Plaintiff as the defaulting party. The Court held that the Plaintiff's argument that there were different dates of default, one for each of the five RBD Contracts, was devoid of logic. As the payment for all five RBD Contracts had become overdue by 15 August 2008, the Court held that the issue of a single notice of default for all five RBD Contracts was sufficient to comply with Clause 9 of the PORAM terms.

Paper loss?

The Court held that there is nothing in law which prohibited the Defendant from selling the RBD palm oil to Golden Jomalina as the only condition imposed by Clause 9 of the PORAM terms was for the sale to be made at the market price. The Defendant was at liberty to sell to a ready buyer who was willing to buy the palm oil at the market price.

Based on the evidence, the Court was satisfied that the price at which the Defendant had sold the RBD palm oil was the best market price available on 18 August 2008. The Court also held that the sale was carried out in a transparent manner as it was registered with the Malaysian Palm Oil Board.

The Court found that the Defendant had established that the Plaintiff had breached the RBD Contracts and this breach had given the Defendant a right to claim for damages in accordance with Clause 9 of the PORAM terms. The Court therefore allowed the Defendant's counterclaim against the Plaintiff for losses in the sum of RM3,270,000.00, being the difference between the market price at which the RBD palm oil was sold on 18 August 2008 and the price at which the Plaintiff had contracted to purchase the RBD palm oil under the RBD Contracts.

CONCLUSION

This decision of the High Court is noteworthy as there are no reported cases so far which involves the interpretation of the PORAM terms. This case provides guidance as to how the Court will construe the PORAM terms, taking into account the dealings between the parties, the market practice in the palm oil industry as well as the nature of the relationship between the trading parties.

The Plaintiff has filed an appeal to the Court of Appeal against the decision of the High Court.

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WHISTLING WHILE THEY WORK

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WITHDRAWING THE PROTECTION

The protection accorded to a whistleblower under the WPA can be revoked by the enforcement agency in certain situations, for instance where the whistleblower himself has participated in the improper conduct disclosed or where he wilfully makes, in his disclosure of improper conduct, a material statement which he knows or believes to be false or where the disclosure is made primarily with the view of avoiding dismissal or other disciplinary action.

THE WAY FORWARD

It has been reported by *Bernama*, the national news agency, on 4th December 2012 that the number of complaints filed with enforcement agencies under the WPA has risen from 1,960 in 2011 to 11,841 in 2012. The exponential increase in the number of disclosures shows the effectiveness of the WPA as a weapon to combat illicit activity in the workplace.

> **“ a whistleblower is conferred immunity from any civil or criminal liability … for making a disclosure of improper conduct ”**

As the WPA imposes an obligation on employers to investigate improper conduct that constitutes a disciplinary offence, employers should establish a whistleblowing policy in their organisations to enable them to discharge this statutory obligation, should the need to do so arise.

A whistleblowing policy should be drafted in a manner that protects a whistleblower but prevents abuse by potential talebearers. A well-drafted whistleblowing policy will increase employees' trust and confidence in their employers, which in turn is vital for the successful implementation of that policy and will lead to a change in the culture of the organisation towards greater transparency and integrity.

It is important to point out that this good corporate governance practice would only be effective where employers, employees and the relevant enforcement agencies acknowledge the importance of whistleblowing in the workplace and play their respective parts in implementing the WPA. As it is often said, "*All that is necessary for the triumph of evil is that good men do nothing.*"

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YOU THINK IT, I INK IT - BUT WHO OWNS IT?

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'CHOP' DULU?[6]

On a side note, the Intellectual Property Corporation of Malaysia (MyIPO) launched the voluntary copyright notification system in June 2012. While copyright protection is automatic under the Berne Convention which Malaysia subscribes to, copyright owners (like tattooists) may wish to put the public at large on notice by filing a notification of copyright and depositing a copy of the eligible work with MyIPO. The process is merely a procedural one and does not involve the examination of the eligibility of the work. A certified extract of the Register of Copyright is *prima facie* evidence of ownership.

CONCLUSION

Admittedly, not all tattooists are as zealous as Whitmill, Malloy and Escobedo in protecting their work, but the temptation is still there, especially when the defendant has deep pockets. So, if one is thinking of getting a tattoo one of these days, before any court of law makes up its mind on this issue, one may wish to consider clarifying one's position with one's chosen tattoo artist first (especially if one is of, or hoping to gain, fame).

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Endnotes –

1. "Tatt-poo for Cheating." The Sun 29 November 2011 Web 5 February 2013
2. "The Hangover II Must Go On: Tattoo Artist Denied Injunction in Mike Tyson Tattoo Copyright Suit against Warner Brothers". Travis Burchart, Lexis Nexis. 27 May 2011 Web 27 February 2013.
3. "Maori Angry About Mike Tyson's Tattoo Artist Claiming To Own Maori-Inspired Design". Mike Masnick, Techdirt. 26 May 2011 Web 27 February 2013.
4. "Exclusive: I Own Beck's Tattoo … and I'll Sue." The Mirror 27 June 2005 Web 27 February 2013.
5. Christopher Escobedo v. THQ Inc., 2:12-cv- 02470-JAT, U.S. District Court, District of Arizona (Phoenix). The cause papers filed on 16 November 2012 can be found at: http://randazza.files.wordpress.com/2012/12/escobedo-complaint.pdf
6. "Chop dulu" is a Malaysian slang which is equivalent to "calling dibs".

We extend our gratitude to Mr Jonathan Gonzalez Gomez (brotherostavia@gmail.com) for kindly allowing us to reproduce his illustration Tattoo in conjunction with this article.

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

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