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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

Dateline: 31 March 2014.

Twenty-three days have passed since Malaysia Airlines' Flight MH370 disappeared en route to Beijing with 239 passengers and crew members on board.

The search and rescue operations are now focussed on the southern part of the Indian Ocean, approximately 1,850 km west of Perth, Australia. As at the time of writing, the Malaysian Government have yet to recover conclusive evidence that the Boeing 777 has indeed crashed in this remote and desolate part of the world.

The search and rescue operations are being carried out by aeroplanes and ships from twenty six countries, including those which do not have citizens on board the missing jetliner. It is heartening to see that many countries have rallied to the assistance of our country in this time of need.

Our thoughts and prayers are with the families of the passengers and crew during this difficult time. Although the prospects of locating survivors are becoming increasingly remote with each passing day, we nevertheless hope that, miraculously, the missing aeroplane will be recovered without any loss of life.

Best Wishes and Thank You.

LEE TATT BOON
Editor-in-Chief
& Senior Partner

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ANNOUNCEMENTS

The Firm is pleased to announce that Mr Vinayak Pradhan has been appointed as a Consultant of the Firm as from 1 January 2014.

We are pleased to announce that Ms Too Ji Voon and Ms Jillian Chia have been admitted as Partners of the Firm with effect from 1 January 2014.

Ji Voon is a member of our Corporate Division. She graduated from the University of London in 2003. Her main practice areas are banking and real estate.

Jillian is a member of our Intellectual Property Division. She graduated from the University of Nottingham in 2005. Her main practice areas encompass information technology, telecommunications, intellectual property and data protection.

The Firm is also pleased to announce that Ms Sim Miow Yean and Ms Janice Tay Hwee Hoon have been promoted to Senior Associates as of 1 January 2014.

Miow Yean is a member of our Corporate Division. She graduated from Oxford Brookes University in 2007. Her main practice areas are banking and real estate.

Janice is a member of our Dispute Resolution Division. She graduated from the University of Cambridge in 2007. Her main practice areas are construction and engineering litigation and arbitration.

We extend our heartiest congratulations to Ji Voon, Jillian, Miow Yean and Janice. We have no doubt that they will contribute to make invaluable contributions to the Firm.

WHO'S WHO LEGAL AWARDS 2014

We are pleased to announce that SKRINE was named the recipient of the Malaysian Law Firm of the Year 2014 at the Who's Who Legal Awards 2014 ceremony in New York on 31 March 2014.

This is the sixth time that SKRINE has received this Award, the previous occasions being in 2008, 2009, 2010 , 2011 and 2013.

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.

WITH GREAT POWER COMES

Yeong Hui examines the powers under the Anti-Money Laundering

Enforcement agencies in Malaysia are increasingly relying on the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA") as the basis for starting or augmenting their investigations into various suspected criminal activities due to the wide coverage of, and extensive powers conferred by, that legislation.

Originally named the Anti-Money Laundering Act 2001 when it came into operation on 15 January 2002, the AMLATFA was amended on 6 March 2007 to include provisions to combat terrorism financing after the 9/11 tragedy in the United States of America.

In addition to conferring wide powers on enforcement agencies to achieve the objective of fighting the scourge of money laundering and terrorism financing, the AMLATFA also imposes obligations on various industries and professions, such as the financial services sector and the legal and accounting professions, to monitor the activities of their clients and report suspicious transactions.

> "the AMLATFA lists more than 250 offences ... as "serious offences""

This article examines the powers conferred by the AMLATFA on the enforcement agencies where a person is suspected of engaging in money laundering activities.

OFFENCE OF MONEY LAUNDERING

Section 4(1) of the AMLATFA makes it an offence for a person to engage in, or attempt to engage in, or abet the commission of money laundering.

The term "money laundering" is widely defined and refers to the act of a person who (a) engages in a transaction that involves proceeds of any unlawful activity; or (b) receives, disguises, transfers, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, or ownership of proceeds of any unlawful activity.

The common element in the various activities that constitute "money laundering" is that the person concerned must have participated in an "unlawful activity".

According to the AMLATFA, "unlawful activity" is one that is related, directly or indirectly, to a "serious offence" or "foreign serious offence".

The Second Schedule of the AMLATFA lists more than 250 offences drawn from about 40 Acts of Parliament as "serious

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GREAT RESPONSIBILITY

conferred on enforcement agencies and Anti-Terrorism Financing Act 2001

offences", which include various offences such as criminal breach of trust, misappropriation and theft under the Penal Code, accepting or giving gratification under the Malaysian Anti-Corruption Commission Act 2009, illegal deposit taking and carrying on unlicensed financial services under the Banking and Financial Institutions Act 1989 (replaced by the Financial Service Act 2013) and insider trading or market rigging under the Securities Industry Act 1983 (replaced by the Capital Market and Services Act 2007).

Making incorrect declarations, falsifying documents, smuggling, and offering and receiving bribes under the Customs Act 1967 and the failure to furnish returns, filing of incorrect returns and tax evasion under the Income Tax Act 1967 are also deemed to be "serious offences" under the AMLATFA, as is the infringement of copyright under the Copyright Act 1967.

A "foreign serious offence" is an offence (a) against the law of a foreign State stated in a certificate issued by the government of that foreign State; and (b) consists of or includes an act which, if it had occurred in Malaysia, would constitute a serious offence.

" an enforcement agency may freeze … property … when (it suspects) that a money laundering offence has been, or is about to be, committed "

Section 4(2) of the AMLATFA further provides that a person may be convicted of an offence of money laundering irrespective of whether he is convicted of, or prosecuted for, committing a serious offence or foreign serious offence. Thus a person who is alleged to have committed a serious offence, such as tax evasion, may be convicted of the offence of money laundering notwithstanding that he is not prosecuted or convicted for tax evasion.

POWERS DURING INVESTIGATION

Under Section 44(1) of the AMLATFA, an enforcement agency may freeze any property of a person when the agency has reasonable grounds to suspect that a money laundering offence has been, or is about to be, committed. The freezing order may, among other things, prevent the relevant property from being dealt with by any person or his nominee (except in the manner specified in the order), or authorise an officer of the agency to take such property into his custody and control.

An order issued under Section 44(1) is valid for a period of 90 days if the person against whom the order was made is not charged in court with an offence under the ALMLATFA. The Section implies that if the person is charged, the freezing order will remain in force until the conclusion of the trial.

Section 44(6) of the AMLATFA protects enforcement agencies against claims for damages or cost arising from the issue of the freezing order unless it is proved that the order was not made in good faith.

Where the property consists of 'monetary instruments', such as domestic or foreign currency or cheques and such property is in the control or custody of a financial institution, the Public Prosecutor may issue a freezing order under Section 50(1) of the AMLATFA after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Financial Services Authority, as the case may be.

Before exercising the powers under Section 50(1), the Public Prosecutor must be satisfied that the relevant monetary instrument is in the custody or possession of a financial institution. It has been held in *City Growth Sdn Bhd v Government of Malaysia* [2006] 1 MLJ 581 that an order issued under Section 50(1) is not subject to judicial review because it was issued to assist with the investigations into money laundering and forms part and parcel of such investigations.

POWERS OF FORFEITURE

Where an offence of money laundering has been proven against an accused, Section 55(1) of the AMLATFA requires the court to order property to be forfeited if it has also been proven that such property is the subject matter of the offence or has been used in the commission of the offence. This provision is consistent with the objectives of the AMLATFA.

However, the powers conferred on the court under Section 55(1) go beyond that as it empowers the court to forfeit the property even where the offence of money laundering is not proven when the court is satisfied that the accused is not the true and lawful owner of the property and that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

Section 56 of the AMLATFA pushes the envelope even further by setting out a forfeiture mechanism for property which is subject to a freezing or seizing order even where a person is not prosecuted or convicted for the offence of money laundering. This section permits the Public Prosecutor to apply to the High Court within 12 months of the freezing or seizing order for an order to forfeit the frozen or seized property.

The High Court judge hearing an application under Section 56 of the AMLATFA may issue a forfeiture order if he is satisfied

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DANGLING THE CARROT?

Shi Wen and Syaida explain the proposed leniency regime under the Competition Act 2010

INTRODUCTION

Cartels are the mother of all anti-competitive conduct. They are agreements between competing businesses not to compete with each other which may lead to price increases, lessen the competitive pressure among market players and ultimately harm consumers and the economy itself. As such, similar to the competition authorities in other countries, the Malaysia Competition Commission ("MyCC") regards its battle against cartels as its highest priority.

As cartels are typically sophisticated and difficult to discover and deter, competition authorities throughout the world have introduced or adopted a leniency regime, a regime which is universally regarded as the most effective way to investigate cartels. Following its counterparts in other jurisdictions, the MyCC proposes to introduce a leniency regime, and has, to this end, issued the draft Guidelines on Leniency Regime ("Draft Guidelines") on 15 January 2014.

CHARACTERISTICS OF THE LENIENCY REGIME

In the context of competition law, a leniency regime is, in essence, an arrangement whereby an enterprise is granted a reduction of financial penalties that would be imposed on that enterprise in return for its admission of complicity in a cartel and the provision of co-operation by supplying information on the cartel, its activities and members to the authority.

> **“ Similar to leniency regimes around the world, the Draft Guidelines only apply to horizontal agreements ”**

Similar to leniency regimes around the world, the Draft Guidelines only apply to horizontal agreements, i.e. cartels. Section 41(1) of the Competition Act 2010 ("CA") lays down two conditions that have to be satisfied in order for an enterprise to qualify under the leniency regime. First, the enterprise must admit to an infringement of the prohibition against horizontal agreements under section 4(2) of the CA. Secondly, it must provide "significant assistance" to the MyCC in identifying or investigating any finding of an infringement of a prohibition under the CA.

The CA and the Draft Guidelines do not define the term "significant assistance". The latter confers discretion on the MyCC to determine what would be considered as "significant assistance" on a case-by-case basis and sets out a list of information which is to be provided when making an application for leniency. These include, amongst others, a detailed description of the infringement to which the applicant is admitting involvement ("Admitted Infringement"), copies of documents such as minutes or notes of meetings, and the names and contact details of all enterprises involved in the Admitted Infringement.

The MyCC has stated in the Draft Guidelines that assistance may be in the form of information or co-operation relating to another infringement of a prohibition under Part II of the CA, such as an infringement of the prohibition against horizontal agreements by another cartel or an abuse of dominant position by an enterprise.

PERCENTAGES OF REDUCTION

The leniency regime under Section 41 of the CA permits different percentages of reduction to be granted to an enterprise that makes a leniency application ("Applicant"). The provision also sets out the factors to be considered by the MyCC in determining the percentage of reduction to be granted to a successful Applicant, namely:

(a) whether the Applicant was the first person from the cartel to bring the Admitted Infringement to the attention of the MyCC;

(b) the stage in the investigation at which an involvement in the Admitted Infringement was admitted or any information or other co-operation was provided; or

(c) any other circumstances which the MyCC deems appropriate to consider.

The Draft Guidelines provide that the amount of reduction will generally depend on the stage of investigation, the nature and value of the information and other co-operation to be provided by the Applicant. For example, an Applicant is likely to receive a greater reduction if an application is made at the early stages of an investigation.

The MyCC has also stated in the Draft Guidelines that it is their policy to grant a 100% reduction in the financial penalty to a successful Applicant if it is the first to apply and has admitted its involvement and provided information or other form of co-operation in relation to the cartel in which the MyCC has no knowledge. The Draft Guidelines also confer discretion on the MyCC to grant a reduction of up to 100% in other circumstances.

APPLYING FOR LENIENCY

Preliminary Step

An enterprise intending to apply for leniency is required to contact the Leniency Officer appointed by the MyCC through the Leniency Hotline. The Applicant can then enquire as to the availability of leniency and the requirements for making a leniency application.

The Applicant may also request for a 'marker' to preserve its priority in receiving leniency over other potential applicants. An Applicant who has been granted a marker must complete its application within 30 days from the marker being granted, failing which it will lose its position of priority.

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Making the Application

An Applicant is required to submit its application in writing (unless otherwise authorised by the MyCC). The application should include the information listed in the Draft Guidelines, such as a detailed description of the Admitted Infringement (including the objectives, activities and *modus operandi* of the cartel), the names and contact details of all other enterprises which are involved in or have knowledge of the cartel and copies of documents such as minutes or notes of meetings, conversations and price lists relating to the Admitted Infringement.

The Draft Guidelines require an Applicant to maintain confidentiality in relation to its Application.

Leniency Agreement

An Applicant is required to enter into an agreement with the MyCC which sets out the conditions that have to be satisfied by the Applicant for the grant of leniency. The standard conditions include, amongst others, an admission of the infringement, the provision of "significant" assistance, a commitment to cease and desist from further infringement (unless authorised by the MyCC for the purposes of its investigations), and undertakings not to destroy relevant documents or harass or intimidate others to participate in the cartel.

> **“ a grant of leniency is conditional until … the Applicant has fulfilled all conditions imposed by the MyCC ”**

Decision by MyCC

It is worth noting that a grant of leniency is conditional until such time that the Applicant has fulfilled all conditions imposed by the MyCC for the grant of leniency and the MyCC has made an infringement decision with respect to the cartel concerned. The formal grant of leniency will only be made in the infringement decision.

Revocation of Grant

A grant of leniency, whether before or after it has become unconditional, may be revoked by the MyCC if it discovers that the Applicant has not fulfilled any of the conditions imposed in the grant. Before doing so, the MyCC is required under the Draft Guidelines to notify the Applicant in writing and to give the Applicant an opportunity to submit written representations within 14 days from service of the notice by the MyCC.

If a grant of leniency is revoked, the MyCC may take appropriate action against the Applicant under the CA.

THE CARROT AND THE STICK

In 2005, the European Commission ("EC") granted a full reduction of penalty to British Polythene Industries PLC and one of its subsidiaries, Combipac BV (collectively "BPI") on cartel infringements relating to the agricultural and industrial plastic film market under its leniency regime (which is similar to the proposed leniency regime in Malaysia).

According to the EU, BPI was the first of the undertakings involved in the cartel to contact the EC in November 2001 and had voluntarily provided evidence of the infringement and continuous co-operation throughout the investigation. This had contributed substantially to the EC's investigation which led to fines in excess of €290 million being imposed on 23 entities.

Eight other entities were awarded reductions that ranged from 10% to 30% based on the level of assistance provided to the EC during the investigations. The applications for leniency by several other members of the cartel were rejected by the EC.

According to a media report by BPI on 30 November 2005, it had conducted a comprehensive competition compliance audit following the initiation of the inquiry by the EC. The audit led to BPI uncovering anti-competitive practices which it then disclosed to the EC as part of its application for leniency.

CLOSING REMARKS

It is important to note that the grant of leniency under the leniency regime only operates to reduce the financial penalty which may otherwise be imposed on an enterprise for the infringement under the CA. A successful Applicant can still be subjected to civil proceedings by aggrieved parties under Section 64 of the CA despite any grant of leniency by the MyCC.

As advised by the MyCC in the preface to the Draft Guidelines, enterprises should conduct a self-assessment exercise in respect of their business conduct and put in place competition compliance procedures throughout all levels of their operations. By doing so, they would avoid having to seek leniency from the MyCC as the risk of being anti-competitive is minimised through proper internal procedures. As the saying goes, prevention is better than cure!

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INJUNCTION SANS FRONTIÉRES

A primer on "worldwide injunctions" by Leong Wai Hong and Eyza Farizan Mokhtar

The worldwide Mareva injunction probably owes its fame in this region to the case of *Bolkiah (HRH Prince Jefri) & Ors v State of Brunei Darussalam and Brunei Investment Agency (No 2) and other appeals* [2001] 2 LRC 134 wherein the Government of Brunei and the Brunei Investment Agency (BIA) sued, among others, the youngest brother of the Sultan of Brunei for allegedly misappropriating the funds belonging to the state and the BIA in his capacity as Minister of Finance for Brunei Darussalam and Chairman of the BIA.

In conjunction with the suit, the plaintiffs obtained a worldwide Mareva injunction in Brunei against the defendants and later on the same day, obtained an order from the High Court of England and Wales to freeze the assets of the defendants in those jurisdictions.

THE EVOLUTION OF THE MAREVA IN ENGLAND

The English courts had up to 1995 been reluctant to issue a pre-trial injunction to restrain a foreign defendant from disposing of his assets pending trial. A change in judicial attitude occurred in 1975 when the English Court of Appeal granted injunctions in two cases, namely *Nippon Yusen v Karageorgis & Anor* [1975] 1 WLR 1093 and *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 to prohibit foreign defendants from removing their assets from the jurisdiction.

> **"the court had jurisdiction to grant a pre-judgment Mareva injunction over a defendant's foreign assets"**

Although the decisions of the English Court of Appeal in *Karageorgis* and *Mareva* appeared to be novel developments in English law, Lord Denning MR in *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) & Anor* 1978 QB 644 highlighted that the seizure of a defendant's assets before judgment was not a new procedure in England as a process of "foreign attachment" had existed in market towns like London, Bristol and Lancaster since the eighteenth century. According to the learned Master of the Rolls, this process enabled a plaintiff to attach the assets of a defendant which are located within the jurisdiction of the court if the defendant is outside the jurisdiction when legal proceedings are commenced against him.

Since 1975, the English courts have gradually extended the Mareva jurisdiction laid down in *Karageorgis* and *Mareva.* The evolution of the Mareva jurisdiction was neatly traced by Millet LJ in *Crédit Suisse Fides Trust SA v Cuoghi* [1997] 3 All ER 724, 727 :

"The Mareva jurisdiction was established in 1975 as an exceptional remedy to prevent a foreign defendant from defeating any ultimate judgment by removing his assets from the jurisdiction. It was progressively extended, in 1979 to English defendants, in 1982 by restraining defendants from dissipating their assets within the jurisdiction as well as removing them from the jurisdiction, and finally in 1990 by restraining defendants from dealing with their assets both inside and outside the jurisdiction. This last step was taken in Babanaft International Co SA v Bassatne [1989] 1 All ER 433, [1990] Ch 13 …"

TRANSCENDING BORDERS

In *Babanaft*, the plaintiffs obtained judgment against two Lebanese nationals who lived mainly outside the United Kingdom. When the defendants failed to satisfy the judgment, the plaintiffs obtained an injunction which restrained the defendants from dealing with their assets outside the jurisdiction without giving notice to the plaintiffs of their intention to do so.

The Court of Appeal recognised that the English courts had the jurisdiction to grant an injunction over the defendants' foreign assets but was wary not to make an order which though purporting to restrain the actions of defendants who were subject to its jurisdiction, may be understood to impose obligations upon persons resident abroad who are not subject to its jurisdiction. To address this concern, the Court required such an injunction to be qualified by a proviso which made it clear that the injunction did not affect the rights of third parties. This proviso has come to be known as the *Babanaft proviso.*

> **"the plaintiff must show that the defendant does not have sufficient assets within the jurisdiction to satisfy the plaintiff's claim"**

Although *Babanaft* concerned a worldwide post-judgment injunction, Kerr LJ, one of the appeal judges, expressed *per obiter* that the same principles would apply to a pre-trial worldwide injunction.

Babanaft was followed barely a month later by another decision of the Court of Appeal in *Republic of Haiti v Duvalier* [1989] 1 All ER 456. In this case, the Republic of Haiti commenced proceedings in France to recover from a former president of the republic and his family and associates about US$120 million which was alleged to have been embezzled by the president while he was in power. A writ was issued in England and on the same day, the plaintiff obtained, *ex parte,* a Mareva injunction restraining the defendants from dealing with their assets, wherever situate. The defendants, after failing to set aside the order, appealed to the Court of Appeal.

The Court of Appeal dismissed the defendants' appeal. Staughton LJ (with whom Strocker and Fox LJJ concurred) stated that he would have agreed with the view expressed by Kerr LJ in *Babanaft* that the court had the jurisdiction to grant a Mareva injunction pending trial, over assets worldwide, if counsel for the

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defendants had not already conceded that the court had the jurisdiction to do so.

The learned Judge then held that the *Babanaft proviso* should be modified so that it affords protection to third parties except to the extent that the order was enforced by the courts of the states in which the defendants' assets were situate and that the proviso should only apply to assets and acts done outside England and Wales and not to individuals resident in England and Wales.

The court's jurisdiction to grant a Mareva injunction was challenged in the Court of Appeal on an interesting ground in *Derby & Co Ltd v Weldon (No 2)* [1989] 1 All ER 1002. The 4th defendant contended that it was a precondition for granting of a Mareva injunction that the defendant had some assets within the jurisdiction of the court. As the 4th defendant did not have assets in England, it submitted that the court had no jurisdiction to grant the worldwide injunction.

The Court of Appeal rejected the 4th defendant's arguments and held that the court had jurisdiction to grant a pre-judgment Mareva injunction over a defendant's foreign assets, notwithstanding that he had no assets within the jurisdiction, if such an order was necessary to prevent the defendant from taking action to frustrate subsequent orders of the court. To protect the position of third parties outside the jurisdiction, the Court of Appeal ordered the Mareva injunction to be modified to include a proviso along similar lines as ordered by the court in *Duvalier*.

THE MALAYSIAN POSITION

The Malaysian courts have taken the view that they have the jurisdiction to grant worldwide Mareva injunctions. This can be seen in the following three cases.

In *Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad b Hj Hassan & Ors* [2005] 1 MLJ 654, the High Court granted an injunction to the plaintiffs to restrain several defendants from dealing with their assets, both within and outside Malaysia, on the premise that the defendants had allegedly embezzled a sum of approximately RM125 million belonging to the plaintiffs' clients. In making the order, Abdul Malik Ishak J stated:

"I even venture to say that a 'worldwide' Mareva injunction may even be granted where the assets which are to be frozen are wholly located abroad or where some of the assets are within the jurisdiction and some are abroad."

In *Khidmas Capital Sdn Bhd & Anor v NRB Holdings Ltd and other appeals* [2006] 4 MLJ 194, the Court of Appeal upheld a worldwide Mareva injunction granted by the High Court in favour of the respondent, a South African, to freeze the appellant's assets worldwide as there were sufficient grounds for the respondent to fear that the appellant would dissipate the assets it owns across the globe to frustrate any judgment that the respondent may obtain.

In *Securities Commission v Lee Kee Sien, Albert & Ors* (Kuala Lumpur High Court Civil Suit No. D7-22-805 of 2007 (unreported)), the Securities Commission obtained an injunction, *inter alia*, to restrain the defendants from acting as an unlicensed fund manager and/or an unlicensed investment adviser, whether through "Swiss Mutual Fund" or "Swisscash" or otherwise. At the same time, the Commission obtained a worldwide Mareva injunction to restrain the defendants from disposing of, or dealing with, any of their assets (including monies held in bank accounts), whether in or outside Malaysia to the extent of US$83 million. The proceedings taken by the regulator resulted in a settlement with a sum of RM32.7 million being recovered for the investors who had been duped into investing in the schemes operated by the defendants.

> **" the worldwide Mareva injunction ... can be utilised ... to prevent a defendant from ... dissipating his assets "**

THE PROCEDURE

To obtain a Worldwide Mareva Injunction

The grant of a worldwide Mareva injunction follows the same principles as that of a conventional Mareva injunction. According to *Iain S. Goldrein, Commercial Litigation: Pre-Emptive Remedies (International Edition), Sweet & Maxwell, 2005*, the applicant must first satisfy the court as to the following :

(1) The existence of a legal and equitable right;
(2) The court must have jurisdiction in relation to that right;
(3) The applicant has a good arguable case for a certain or approximate sum;
(4) The respondent has assets (which need not necessarily be within the jurisdiction);
(5) Risk of dissipation, i.e. that a refusal of an injunction would involve a real risk that a judgment or award in the applicant's favour would remain unsatisfied; and
(6) The applicant's consent to an undertaking as to damages save in very exceptional circumstances.

In addition to the above, the applicant must show that the respondent's assets within the jurisdiction are insufficient to meet

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RESTATING THE TEST FOR JUDICIAL REVIEW

Vijay Raj explains the Federal Court's decision on locus standi

In a recent judgment delivered on 12 February 2014, the Federal Court in *Malaysian Trade Union Congress & 13 Ors v Menteri Tenaga, Air dan Komunikasi & Anor* (unreported) ("MTUC Case") held that the test laid down by the Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 ("Lim Kit Siang") to determine whether a claimant has capacity or standing to initiate an action (or as it is commonly referred to, *locus standi*) is not applicable when determining whether a person may apply for judicial review. Judicial review is the mode of action through which the courts may be approached to check on and review administrative decisions, actions and omissions of public authorities.

LIM KIT SIANG

In *Lim Kit Siang*, the Ministry of Works issued a Letter of Intent to United Engineers (M) Berhad ("UEM") indicating that the Government of Malaysia was prepared to enter into a contract with UEM in respect of the construction and maintenance of certain roads.

Mr Lim Kit Siang ("Lim"), who was the leader of the Opposition in the Dewan Rakyat at that time, claimed that UEM was ultimately owned and controlled by UMNO and that its leaders had taken part in Cabinet deliberations relating to the same project and that therefore, the award to UEM was improper, unfair and tainted with bias.

> "the "adversely affected" test was the single test for all the remedies provided for under Order 53"

The question arose as to whether Lim had *locus standi* to commence the action in the High Court. Dato' V.C. George J (as he then was) ruled in favour of Lim. The Government appealed the decision to the Supreme Court, which was then the apex court of Malaysia.

The Supreme Court held that a litigant may only commence an action if he seeks redress for an interference with a right that is private or personal to him or, in the event of an interference to a right that is common to all members of the public, if he suffers special damage peculiar to himself. As a result, the Court ruled that Lim did not have *locus standi* to commence the action because it could not be said that there was or would be an interference with his private or personal right nor could it be said that he had or would suffer special damage peculiar to himself.

BACKGROUND FACTS

The brief facts of the *MTUC Case* were as follows. The services of the Selangor Water Supply Department had been privatised with effect from 15 March 2002. As a result, water distribution was taken over by Perbadanan Urus Air Selangor Bhd, which was subsequently taken over by Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS").

About two years later, SYABAS was granted a 30-year concession to supply treated water to the State of Selangor and the Federal Territory under a Concession Agreement which, *inter alia*, provided that SYABAS was entitled to increase the water tariffs if it achieved a 5% reduction in what was known as non-revenue water.

SYABAS subsequently applied to increase the water tariffs by 15% based on an audit report which purportedly confirmed that SYABAS had achieved a 5% reduction in non-revenue water ("Audit Report"). Thereafter the Minister announced that SYABAS had met the performance target and was eligible to increase water tariffs by 15% as from 1 November 2006.

The Malaysian Trade Union Congress ("MTUC") applied to the Minister for a copy of the Concession Agreement and the Audit Report justifying the 15% increase. The Minister refused to furnish the documents as he considered them to be classified. On 15 January 2007, MTUC and 13 others filed an application for judicial review asking for, amongst others, a declaration that the general public and MTUC had a right to view the two documents and an order directing the Minister to disclose the contents of the same.

> "it is not necessary ... to establish infringement of a private right or the suffering of special damage"

In the High Court, Hadhariah Syed Ismail JC (as her Ladyship then was) allowed the judicial review application. The Government's appeal against the High Court's decision was allowed by the Court of Appeal, with Mohd Hishamudin Yunus JCA dissenting.

THE DECISION OF THE FEDERAL COURT

MTUC and the other Applicants obtained leave to appeal to the Federal Court on the following question of law:

"Whether the test of locus standi propounded by the Supreme Court in Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 i.e. that an applicant must establish infringement of a private right or the suffering of special damage still applies to (an) application for judicial review, and to what extent, in light of the present Order 53 Rule 2(4) of the Rules of High Court 1980?"

Order 53 of the Rules of High Court 1980 ("RHC") prescribes the mode and procedure by which an application for judicial review is to be made. It was only inserted into the RHC after the Supreme Court's decision in *Lim Kit Siang*. Order 53 allows any person who was "*adversely affected by the decision of any public authority*" to apply for judicial review.

The Federal Court answered the question posed above in the negative. The Court adopted the principles laid down in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, 541-542 where the Court of Appeal held as follows:

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"[16] It is to rid this dichotomous approach which often produced injustice that O.53 in its present form was introduced. There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected". At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned …

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in Malik Brothers v Narendra Dadhich AIR [1999] SC 3211, where, when granting leave, it was said:

> *[P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated."*

On the basis of the foregoing, the Federal Court held that the "adversely affected" test was the single test for all the remedies provided for under Order 53 of the RHC. Hence the answer to the question posed in this appeal has to be in the negative.

The Federal Court then held that in order to pass the "adversely affected" test, an applicant has to at least show that he has a real and genuine interest in the subject matter. The Court added that it is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

The Federal Court found that MTUC possessed the necessary *locus standi* to bring the action. The Federal Court said:

"MTUC claimed that it and/or the public are entitled to the two documents on the basis that the government is under a responsibility to provide safe and affordable treated water; water being an inalienable and basic right to human existence and living; there should not be unreasonable profiteering given that the supply and distribution of treated water had been privatised; and they have a legitimate expectation that the government shall at all times ensure that its people has affordable access to treated water …

Looking at the whole legal and factual context of the application especially the fact that this is a public interest litigation, we are of the view that MTUC had shown that it had a real and genuine interest in the two documents. Hence, MTUC was adversely affected by the Minister's decision …"

As the other Applicants did not make a similar request to the Minister as MTUC did for the documents, the Federal Court held that these Applicants were "strangers to the application" and did not satisfy the *locus standi* threshold set out in Order 53. The apex court further held that the dissatisfaction by the Appellants with the decision made by the Minister in rejecting MTUC's application did not make them persons who were "adversely affected" within the meaning of Order 53 of the RHC.

Notwithstanding its finding that MTUC had the *locus standi* to commence the proceedings, the Federal Court went on to conclude on other grounds that MTUC was not entitled to the two documents.

CONCLUSION

The pronouncement by the Federal Court on *locus standi* in this case is significant as it seems to signal a wider access to the courts for the purpose of having decisions, actions and omissions of public authorities reviewed by the judiciary as the test laid down in the *MTUC Case* appears to be less stringent than that laid down in *Lim Kit Siang*.

Although the RHC has been replaced by the Rules of Court 2012, this decision remains relevant as Order 53 of the Rules of Court 2012 is substantially similar to the repealed provision of the RHC.

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PAYING FOR PAST CINS: DAMAGES AS A REMEDY IN OPPRESSION ACTIONS

Lee Shih analyses the Federal Court decision in CIN Holdings Sdn Bhd

Section 181 of the Companies Act 1965 ("Section 181") allows an aggrieved member of a company to apply for Court relief where there is oppressive conduct affecting that applicant's interests as a member. In granting relief, the Court is empowered to make any Order to bring that oppressive conduct to an end.

The Federal Court in *Koh Jui Hiong @ Koa Jui Heong & 8 others v Ki Tak Sang @ Kee Tak Sang* (Federal Court Civil Appeal No. 02-83-11/2012(M)) has confirmed that an award of damages can be made in an action under Section 181, if the order is with the view to bring to an end or to remedy the matters rightly complained of under Section 181.

BACKGROUND FACTS

The High Court Proceedings

The dispute involved shareholders in a company named CIN Holdings Sdn Bhd ("CIN"). CIN was an investment holding company and held shares in public listed companies, including 1,346,100 shares in Polymate Holdings Berhad ("Polymate Shares").

A Section 181 Petition was filed by a director of CIN (the 1st Petitioner), several minority shareholders of CIN (the 2nd to 8th Petitioners) and CIN itself (the 9th Petitioner) against the majority shareholders who collectively held 74% of the shareholding of CIN (the Respondents).

The complaints raised in the Section 181 Petition were in respect of, *inter alia*, irregular financial transactions, including the disposal of 446,100 Polymate Shares without Board or members' approval, and the purported removal of the 1st, 4th and 6th Petitioners as directors of CIN.

The High Court allowed the Section 181 Petition (see the case of *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang & Ors* [2009] 8 MLJ 818). This was despite the challenges raised against the standing of the 1st Petitioner (who was a director but not a shareholder) and CIN to bring such an action.

The High Court granted various Orders including a share buyout order where the 1st Respondent would purchase the 2nd to 8th Petitioners' minority shareholding and also awarded damages to CIN, the 9th Petitioner.

The damages were assessed based on the loss suffered by CIN being the difference between the quoted value of the 1,346,100 Polymate Shares as at two specified dates. The High Court awarded the difference in value of approximately RM2.8 million as the quantum of damages to CIN.

The Court of Appeal Proceedings

At the Court of Appeal, a consent Order was entered to set aside the share buyout Order. Thus, the sole issue before the Court of Appeal was the quantum of damages awarded to CIN.

The Court of Appeal held that CIN was only entitled to damages for the 446,100 Polymate Shares disposed of without authority. The Court of Appeal accordingly reduced the quantum of damages. Leave to appeal to the Federal Court was granted on the issue of the award of damages to CIN.

THE DECISION OF THE FEDERAL COURT

CIN's (Lack of) Standing

Before considering the question of law raised in the appeal, the Federal Court highlighted an unusual aspect of the case in that damages were awarded to CIN *qua* petitioner in the same petition in which the affairs within CIN were sought to be remedied. The Federal Court therefore needed to ascertain whether CIN could be a nominal petitioner in a Section 181 action and whether the action was in fact a derivative claim.

The Federal Court first considered the issue of CIN's standing. Section 181 provides that only a member of a company has the standing to invoke that provision. There may be circumstances where a person who claimed membership, albeit disputed by the other parties, may still have the requisite standing (and the Federal Court referred to its own decision in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113). However, this did not extend to allowing for the company itself to have standing to bring a Section 181 action.

The second consideration was that to obtain relief, a petitioner must prove, essentially, that the affairs of the company are being conducted oppressively against him. This requirement could not apply to the company *qua* petitioner.

The Federal Court concluded that CIN had no standing to bring an action under Section 181. CIN could have been joined as a nominal respondent but it could not be a nominal petitioner. CIN was pursuing what could only be called a derivative action. The action was brought by the minority in the name of CIN against the majority and the complaint concerned the alleged wrongdoings by the majority against CIN. The award of damages was also to compensate CIN for loss caused to CIN.

Damages as a Remedy

Nonetheless, the Federal Court proceeded to consider the leave question on "whether an award of damages can be made in a petition under section 181(1) of the Companies Act 1965".

It was noted that damages to members is not among the reliefs expressly provided for under Section 181 but the Federal Court affirmed the settled principle that Section 181 gives wide discretion to make any order the Court thinks fit with a view to bringing to an end the matters complained of.

The Federal Court referred to Singapore case law where that wide discretion extended to allowing for compensation to be made to the company. The Federal Court took note that the Hong Kong

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Companies Ordinance allows the Court to order payment by any person of such damages and interest on those damages as the Court may think fit to any members. The Federal Court was of the view that such a provision was merely a codification of the common law position.

The Federal Court therefore concluded that the authorities it had referred to would allow for relief of a compensatory nature to an oppressed member. In a suitable case, the Court could even award relief to the object company.

On the facts however, it was held that since the share buyout order had brought to an end all the matters complained of, there was nothing further to be remedied by that order of damages. The Federal Court further considered the circumstances of the 1st Petitioner (as director) and CIN (the subject company) had no standing and that in effect, the claim by CIN was either a common law derivative action or a statutory derivative action, both of which were defective.

The Federal Court confirmed that an award of damages can also be made in an action under Section 181, if the order is with the view to bring to an end or to remedy the matters rightly complained of under Section 181. Nonetheless, based on the facts, the Federal Court allowed the appeal and set aside the award of damages.

COMMENTARY

The Federal Court has provided a useful confirmation that Section 181 allows a wide discretion in the reliefs that can be granted and that damages can be awarded if it is done with the view to bring an end to the oppressive conduct.

While the door is open for aggrieved members to seek for damages to be paid to them in a Section 181 action, in practice, it may be difficult to demonstrate what damage that they have personally suffered. The company itself may have been the actual party that incurred the loss and in appropriate circumstances, may then be compensated with damages.

This decision also highlighted the fatal defects in this Section 181 Petition in that non-members were listed as Petitioners. The 1st Petitioner was only a director and had no standing to bring himself within Section 181. In terms of CIN, it also had no standing to be a Petitioner but CIN should have been listed as a Respondent instead. That could have then preserved the possibility of CIN being awarded damages.

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INJUNCTION SANS FRONTIÉRES

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the applicant's claim.

Before granting a Mareva injunction, whether conventional or worldwide, the Court must weigh all the evidence before it and be satisfied that it is just and convenient to grant the injunction.

To enforce a Worldwide Mareva Injunction

A worldwide Mareva injunction is enforceable against the defendant. However, it cannot be enforced against a person outside the jurisdiction who holds an asset which is frozen under the injunction unless a court in the foreign jurisdiction registers that injunction under available legislation or issues an injunction on similar terms against that person.

For example, if a worldwide injunction is issued by a Malaysian court to restrain a defendant from disposing of his moneys in a bank in Thailand, the defendant may be subject to contempt proceedings in Malaysia for breach of the injunction if he disposes of his money in the Thai bank. However, the Thai bank cannot be cited for contempt proceedings in the Malaysian court notwithstanding that it permits the money to be withdrawn by the defendant.

CONCLUSION

In a world where commercial activities and the flow of money are becoming increasingly borderless, the worldwide Mareva injunction is an important pre-trial tool which can be utilised by a plaintiff to prevent a defendant from defeating any ultimate judgment by dissipating his assets which are located within and outside the jurisdiction of the Court where legal proceedings have been commenced.

The courts have, understandably, set a high bar for the grant of a worldwide Mareva injunction. In particular, the plaintiff must show that the defendant does not have sufficient assets within the jurisdiction to satisfy the plaintiff's claim and that there is a real risk that the defendant would dissipate his assets with a view of negating the effect of a judgment that may be obtained against him.

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A REVIEW OF THE COMPANIES BILL 2013 - PART III

Sheba and Ai Hsian continue our review of the Companies Bill 2013

We commenced our review of the Companies Bill 2013 ("Bill") in Legal Insights 3/13 and 4/13. We continue our review by examining the provisions of the Bill that relate to directors and meetings.

DIRECTORS

"Shadow Director"

The Bill defines a "director" to include "*any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the* ***majority of directors*** *of a corporation are accustomed to act ...*"

According to the Corporate Law Reform Committee ("CLRC"), the corresponding definition of a "director" in the Companies Act 1965 ("CA") makes it practically impossible to hold a person accountable to the company since it must be proven that the *entire* board (i.e. every director) is accustomed to act in accordance with that person's instructions or directions.

The inclusion of the word "majority" is in line with the recommendations of the CLRC and reduces the requisite threshold for establishing that a person is a "shadow director".

Requirements for "Directors"

Clause 195 of the Bill sets out the requirements of a director. The Bill permits a private company to have only one director (clause 195(1)(b)), and a public company to have at least two directors (clause 195(1)(c)). The minimum number of directors must ordinarily reside in Malaysia, i.e. have his principal or only place of residence in Malaysia (clauses 195(3) and (4)).

The CA does not specify the minimum age for a director but requires him to be *"of full age"*. This is clarified in clause 195(2) of the Bill which expressly requires a director to be at least 18 years of age.

The Bill also removes the age limit of 70 years for directors of a public company and its subsidiaries prescribed in section 129 of the CA.

Share Qualification

Section 124 of the CA, which prescribes the time-frame for a director to fulfil the shareholding qualification, if any, specified in the articles of association of his company, will be removed by the Bill. As a result, a company which intends to impose any share qualification on its directors will have to incorporate such requirement in its constitution.

Resignation of Directors

The articles of association of a company usually confer a right on a director to resign from office. Regulation 72(e) of Table A (Fourth Schedule) of the CA ("Table A") provides that a director's resignation takes effect by him giving written notice of his resignation to the company. There is no requirement for any further act, such as acceptance by the company, unless provided otherwise by the articles.

However, an issue that a director may face is that his resignation is not made public, and in some cases, the necessary information or documents (i.e. the updated return in the particulars of the directors in Form 49) are not lodged by the company with the Registrar. This issue arises as the CA only allows the company, and not the director who has resigned, to file the Form 49. As a result, this may cause difficulties to the director who still remains on record as a director despite his resignation.

The Bill introduces a provision which states that a notice of resignation given by a director is effective when it is delivered to the company or at a later time specified in the notice (clause 207(3)). This, however, does not address the foregoing issue as regards the notification of such resignation to the Registrar. The Hong Kong Companies Ordinance (section 464(3)) and the Singapore Companies Act (Cap 50) (section 173(6A)) have addressed this by allowing the resigning director to lodge the requisite notice with the Registrar if he has reasonable grounds to believe that the company will not do so.

> **"The Bill ... removes the age limit of 70 years for directors of a public company and its subsidiaries"**

Directors' Duties, Responsibilities and Penalties

The provisions of the CA as regards directors' duties and responsibilities (such as the duty to exercise powers for a proper purpose and to act in the best interest of the company) are generally mirrored in the Bill. However, the penalties under the Bill for contravention of such provisions have increased significantly. For example, a director who fails to exercise his powers in the best interest of the company will be liable to imprisonment for a term up to 10 years or a fine up to RM10 million or both.

Proceedings of the Board of Directors

Subject to a company's constitution, the provisions in the Fourth Schedule of the Bill will govern the proceedings of the board of directors (clause 228). The Fourth Schedule of the Bill is a more concise version of the corresponding provisions in Table A.

Directors' Remuneration

The CA does not have any specific provision to regulate the manner or quantum of remuneration for directors as this is generally left to the company to determine (see regulation 70 of Table A which provides that the remuneration of directors shall from time to time be determined by the company in general meeting).

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The Courts usually do not intervene in this matter as it is deemed to be a management matter to be determined in accordance with a company's articles of association (see *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 and *Low Tien Sang & Sons Holding Sdn Bhd & Ors v How Kem Chin & Ors* [2000] 2 MLJ 334).

Among the changes to be introduced under the Bill are the requirement for directors' remuneration to be approved by the members of a company and the right to inspect directors' service contracts.

Clause 229(1) of the Bill requires the remuneration and any benefit payable to a director of a public company to be approved at a general meeting.

In the case of a private company, subject to its constitution, the board may approve such remuneration and benefits (clause 229(2)). If the members of a private company who hold at least 10% of the total voting rights consider that the payment is not fair to the company, they may within one month after being notified of such payment, require the directors to pass a resolution either by way of a members' written resolution or at a general meeting to approve the payment (clause 229(4)).

Clauses 231(1) and (2) of the Bill require a public company to keep available for inspection a copy of every director's service contract (including any amendments thereto) with the company or with its subsidiaries at its registered office. Copies of such contracts must be retained and kept available for inspection for at least one year after its termination or expiry (clause 231(3)).

According to clause 230(1) of the Bill, a "service contract" is a contract under which (a) a director of the company undertakes personally to perform services (as director or otherwise) for a public company or its subsidiary; or (b) services (as director or otherwise) that a director of a public company undertakes personally to perform are made available by a third party to a public company or its subsidiary.

Clause 232 of the Bill sets out the minimum requirements for the inspection of contracts. According to this clause, every contract required to be kept under **clause 219** shall be open to inspection by a member holding at least 5% of the total paid up capital of a public company having share capital, or at least 10% of the members of a public company not having share capital.

The reference to clause 219 (which relates to disclosure by a director of contracts in which he has an interest) in clause 232 appears to be a cross-referencing error as it is inconsistent with paragraph 1.40 of the CLRC's Consultative Document on Clarifying and Reformulating the Directors' Role and Duties which recommends that a director's service contract be made available for inspection by members.

The codification of shareholders' approval for directors' remuneration and the right of inspection of service contracts are timely as they serve to minimise conflicts of interest in relation to directors' remuneration. These provisions will complement the provisions of the Main Market and ACE Market Listing Requirements which require a listed company to disclose the remuneration of all directors in its annual report. In addition, the listing requirements only permit fees payable to directors to be increased pursuant to a resolution passed at a general meeting.

GENERAL MEETINGS

Ordinary resolution

The Bill introduces a definition of an "ordinary resolution", that is, a resolution which is passed by a simple majority of members who are entitled to vote and do vote (clause 286). The Act does not have a corresponding provision.

The Bill also provides that, subject to the provisions of the constitution of a company, any matter that may be passed by ordinary resolution may also be passed by special resolution (clause 286(4)).

Special resolution

The essence of section 152(1) of the CA, which lays down the requirements of a special resolution, is retained in clause 287 of the Bill save for the omission of the minimum notice period of 21 days. The new provision is divided into sub-clauses to distinguish between voting by a show of hands, by poll and by written resolution. Clauses 287(2) and (5) of the Bill include an additional requirement that a special resolution must be expressly stated to be a special resolution.

There appears to be an inconsistency in clause 287 as sub-clause (1) sets the threshold at "**more than 75%**" whereas sub-clauses (3) and (4) set the threshold at "**not less than 75%**". This inconsistency must be reconciled by the Companies Commission of Malaysia ("CCM").

General rules on voting

The Bill purports to adopt the provisions on the rules on voting contained in section 147(1)(c) of the CA, that is, on a show of hands, every member is to have one vote for every share held by him (clause 288(c)(ii)); and on a poll, every member is to have one vote for every share held (clause 288(c)(iii)). There is an error in clause 288(c)(ii) in that on a show of hands, every member should have only one vote regardless of the number of shares held by him.

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STANDING INDEPENDENTLY

Wai Loon explains a recent landmark decision of the Federal Court on jurisdiction

The Federal Court has made it clear in *Petrodar Operating Co Ltd v Nam Fatt Corporation Bhd & Anor* [2014] 1 CLJ 18 that the procedural provision in O. 11 r. 1 of the Rules of the High Court 1980 ("RHC 1980") confers extra-territorial jurisdiction over a foreign defendant, and that this procedural order operates independently from section 23 of the Courts of Judicature Act 1964 ("CJA 1964") which confers the Malaysian court jurisdiction over a claim.

Although the RHC 1980 has been replaced by the Rules of Court 2012 ("RC 2012"), the provisions of O. 11 r. 1 of the RHC 1980 are retained in O. 11 r. 1 of the RC 2012, save that the latter has an additional sub-paragraph (M). Therefore, this Federal Court decision remains relevant and applicable for the purposes of O. 11 r. 1 of the RC 2012.

BACKGROUND

The appeals in the Federal Court arose from the decision of the High Court based on the facts which follow. Petrodar Operating Co Ltd ("Petrodar") is the Appellant in this appeal. The First Respondent is Nam Fatt Corporation Bhd and the Second Respondent is NF Energy Sdn Bhd, a subsidiary of the First Respondent (collectively, "Respondents"). Petrodar is an offshore company whilst the Respondents are companies incorporated in Malaysia.

By a construction contract entered into between Petrodar and a joint venture company comprising the Respondents ("Contract"), the Respondents were appointed by Petrodar as the contractor to carry out construction works on a project in Sudan. Pursuant to the terms of the Contract, the Respondents procured CIMB Bank (L) Limited ("CIMB") to issue a bank guarantee in favour of Petrodar.

The project was substantially completed. However, there were some unresolved claims between Petrodar and the Respondents with regard to variation works and charges to the works under the Contract. While the parties were negotiating for a settlement, Petrodar made a call on the bank guarantee.

THE HIGH COURT ACTION

The Respondents commenced a writ action in the Shah Alam High Court, naming Petrodar as the First Defendant and CIMB as the Second Defendant. With regard to CIMB, it was only a nominal defendant and not a party relevant to the appeals subsequently filed by Petrodar.

At the High Court, the Respondents, as the Plaintiffs, applied and obtained, firstly, an *ex parte ad interim* order to restrain Petrodar from enforcing the guarantee or taking any proceeding whatsoever, or appointing receivers and managers under the security, except with leave of court; and secondly, an *ex parte* injunction to restrain the Petrodar from receiving the money under the guarantee or from making a call on and receiving any payment under the guarantee pending the *inter partes* hearing.

The Respondents subsequently obtained leave of court pursuant to O. 11 r.1 of the RHC 1980 to serve out of jurisdiction, the writ of summons as well as the injunction order and other related cause papers on Petrodar. In the meantime, the High Court also granted an *ad interim* order in respect of the *ex parte* injunctive reliefs granted pending the disposal of the *inter partes* hearing. In pursuing their claim in the High Court, the Respondents alleged, amongst others, that the demand made on the guarantee by Petrodar was fraudulent and/or unconscionable.

Petrodar entered a conditional appearance in this High Court action and filed two applications. In the first application, Petrodar sought to set aside the concurrent writ of summons, notice of concurrent writ to be served out of jurisdiction and the leave order granted to serve out of jurisdiction. The second application sought to set aside the *ad interim* injunction order.

In essence, one of the grounds in support of both applications was that the Malaysian court had no jurisdiction over the dispute, which is governed by Sudanese law, and that the parties had, by contract, agreed to submit the matters to the jurisdiction of the Sudanese court.

> **" O. 11 r. 1 of the RHC 1980 ... confers extra-territorial jurisdiction on the Malaysian court over a foreign defendant "**

The High Court dismissed both applications. However, the High Court also made an order to stay part of the High Court suit pending reference to arbitration, but on terms, *inter alia*, that the application for the *inter partes* injunction be proceeded with and be heard and disposed of in the High Court.

In coming to its decision, the High Court held that:

(a) the Malaysian court has jurisdiction over a foreign defendant by virtue of O. 11 r.1 of the RHC 1980 which gives powers to the High Court to grant leave to serve a writ of summons out of jurisdiction. The jurisdiction over a foreign defendant is implicit in the power to grant leave for service out of jurisdiction under O. 11 r. 1 of the RHC 1980;

(b) the alleged fraudulent demand constituted a tort committed in Malaysia. As such, the Plaintiffs' (i.e. the Respondents) case was grounded on a tort committed within the Malaysian jurisdiction, which therefore falls under the circumstances specified in O. 11 r. 1(1)(iii)(h) of the RHC 1980. In this circumstance, the Malaysian court had jurisdiction;

(c) the Malaysian court was the appropriate forum to try the action and it would be unjust to compel the Plaintiffs to sue in Sudan. The Court held that the governing law of the Contract was the law of Sudan but the decision on jurisdiction was

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different from the question of the proper law of contract to be applied; and

(d) Petrodar did not adduce any material and valid ground to justify the reversal of the *ad interim* injunction order.

THE COURT OF APPEAL

Petrodar lodged separate appeals against the High Court decision in relation to the two applications filed. The Court of Appeal upheld the decision of the High Court and dismissed both appeals.

THE FEDERAL COURT

Petrodar obtained leave from the Federal Court to appeal on the following questions in respect of the two appeals.

With regard to the first appeal, the question posed was:

Whether O. 11 of the RHC 1980 confers jurisdiction or whether this is predicated on section 23 of the CJA 1964?

With regard the second appeal, there were two questions posed, *viz*:

(a) Whether the balance of convenience test is applicable to performance bond injunctions at an inter partes stage or at the earliest possible stage?

(b) Whether the High Court, upon staying the suit subject to an arbitration agreement and parties having pursued arbitration proceedings, retains jurisdiction to hear the injunction application on an inter partes basis?

The first appeal

The question of law posed in this appeal required the Federal Court to consider the perceived inconsistencies between two previous decisions of Malaysia's apex court concerning jurisdiction, namely *American Express Bank Ltd v Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273, and *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

The Federal Court answered the question posed in the negative. In coming to its decision, the Federal Court held as follows:

(a) O. 11 r. 1 of the RHC 1980 confers jurisdiction over a foreign defendant. In addition, it stands independently on its own and is not predicated upon compliance with any of the requirements set out in section 23 of the CJA 1964;

(b) the difference between O. 11 r. 1 of the RHC 1980 and section 23 of the CJA 1964 is that the former confers extra-territorial jurisdiction on the Malaysian court over a foreign defendant, whereas the latter, over a claim. If any of the requirements set out in section 23 of the CJA 1964 applies, then O. 11 r. 1 of the RHC 1980 becomes merely a procedural formality to enable a plaintiff to effect service of the cause papers abroad. However, if section 23 of the CJA 1964 does not apply, then O. 11 r. 1 of the RHC 1980 assumes jurisdictional importance. The Supreme Court decision in *American Express Bank Ltd v Mohamad Toufic Al-Ozeir & Anor* was followed;

(c) there were no inconsistencies between the two previous apex court decisions cited. The case of *R Rama Chandran* dealt with different issues not akin to the issues pertaining to jurisdiction over a foreign defendant and therefore, was distinguished from the present case;

(d) the Respondents' reliance on O. 11 r. 1(1)(iii)(h) of the RHC 1980 was proper as that provision expressly permits the service of a writ out of jurisdiction if the action begun by the writ is founded on a tort committed within the jurisdiction;

(e) notwithstanding the jurisdictional clause in the guarantee, the Malaysian court could not be precluded *simpliciter* thereby from exercising the discretion according to the doctrine of *forum non conveniens*. In applying this doctrine, the court would consider factors such as the suitability or appropriateness of having the matter heard before the Malaysian court, and not convenience itself. In this regard, given the facts that the guarantee was issued in Kuala Lumpur by a Malaysian bank having a place of business in Kuala Lumpur, the guarantee money sought to be restrained was in Malaysia, the demand of the guarantee was made in Malaysia, and the issues pertaining to logistics, costs of proceedings, political climate and geographical constraints in having the matter litigated in Sudan, the Malaysian court is the appropriate forum to litigate this action. The Federal Court also stressed that it was an important factor in this case that the Respondents' agreement to submit to the jurisdiction of the courts in Sudan was non-exclusive.

The second appeal

With regard to the first question posed, the real issue was whether it was proper for the High Court to split the hearing of the interim injunction application by separating the balance of convenience argument to be argued and heard separately in both the application to set aside the *ad interim* injunction and the *inter partes* stage.

The Federal Court held that the argument on the balance of convenience in the granting of an injunction was not required

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SAME BUT DIFFERENT

Chee Kheong revisits the landmark case of Salomon v Salomon

The appellant, Aron Salomon, had successfully carried on business as a leather merchant and boot manufacturer for more than 30 years. Sometime in 1892, the appellant formed A. Salomon and Company, Limited, the respondent, under the Companies Act 1862 ("Act").

To comply with the Act which required a company to be incorporated with at least seven shareholders, the appellant and six members of his family each subscribed for one share of £1 each in the respondent.

The respondent acquired the appellant's business from 1 June 1892 and issued to the appellant 20,000 shares of £1 each and £10,000 of debentures, the latter of which were secured against the assets of the respondent. The appellant obtained a £5,000 loan from a certain Mr Broderdip. The loan was secured against the debentures issued by the respondent.

The respondent encountered financial difficulties and defaulted in paying interest on the debentures. On 11 October 1893, Mr Broderdip commenced proceedings to enforce his security under the debentures against the assets of the respondent. Shortly thereafter, a winding up order was issued against the respondent on 26 October 1893 upon the application of its unsecured creditors.

The liquidator of the respondent sought, *inter alia*, to set aside the issue of the debentures and an indemnity from the appellant for the business liabilities of the respondent.

THE DECISION OF THE HIGH COURT

The High Court held that the respondent was merely a nominee for the appellant and was therefore entitled to be indemnified against its business liabilities by the appellant who was its principal. The court came to this decision notwithstanding that all the shares held by the appellant in the respondent were fully paid.

THE DECISION OF THE COURT OF APPEAL

The appellant's appeal to the Court of Appeal was dismissed.

According to Lindley LJ, the Act was intended to encourage trade by enabling a small number of persons, namely not less than seven, to carry on business with limited liability. It was not the legislature's intention to extend the principle of limited liability to sole traders or to a number fewer than seven persons.

The court held that it was manifest that the six shareholders who held one share each had practically no interest in the respondent and their names had been used by the appellant to enable him to form a company and screen himself from liability.

The learned judge was of the view that in this case, there was no doubt that an attempt had been made to use the machinery of the Act for a purpose for which it was never intended. His Lordship held that the formation of the respondent and the issue of debentures which enabled the appellant to obtain priority over the other creditors of the respondent were devices by the appellant to defraud creditors.

THE DECISION OF THE HOUSE OF LORDS

On further appeal, the House of Lords by a unanimous decision of six judges, allowed the appellant's appeal.

The Lordships proceeded to examine the effects of sections 6 and 8 of the Act. The former provided, *inter alia,* that any seven or more persons, associated for a lawful purpose, may form a company with limited liability by subscribing to the memorandum of association and complying with the other requirements of the Act, whilst the latter stipulated, *inter alia,* that no subscriber shall take less than one share.

According to their Lordships, section 6 did not prohibit the subscribers from being related to one another and section 8 made it clear that the holding of a single share was sufficient for a person to qualify as a shareholder. Their Lordships further stated that the Act did not, expressly or impliedly, impose any limit on the number of shares which a shareholder may subscribe for or take by allotment.

> **" a company is at law a different person ... even though after incorporation, the business is the same as it was before ... and the same persons receive the profits "**

Their Lordships held that once a company has been legally incorporated, it had to be treated like any other independent person with rights and liabilities appropriate to itself.

According to Lord Macnaghten, when the memorandum of association is signed and registered, the subscribers become a body corporate which is capable forthwith of exercising all the functions of an incorporated company, even though only seven shares are taken.

His Lordship emphasised that a company is at law a different person altogether from the subscribers to the memorandum, and is not an agent of the subscribers or trustee for them, even though after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same persons receive the profits.

According to Lord Halsbury LC, the respondent was either a legal entity or it was not. If it was, the business belonged to it and not

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to the appellant. If it was not, there was nothing to be an agent of at all.

As it was not disputed by the parties that all the requirements of the Act in relation to the formation of the respondent had been complied with, the respondent could not be an agent of the appellant, but was a legal entity in its own right. Accordingly, the apex court held that the High Court had erred in its findings that the respondent was an agent of the appellant and that the latter was bound to indemnify the respondent.

With regards to the Court of Appeal's conclusion that the formation of the respondent and the issue of the debentures were schemes contrary to the true intent and meaning of the Act, Lord Herschell stated that there was no means of ascertaining the intent and meaning of the Act except by examining its provisions and finding what conditions had been imposed for trading with limited liability.

According to His Lordship, the Act required the memorandum to state the amount of the capital of the company and the number of shares into which it is to be divided and that no subscriber is to take less than one share. The shares may be of as small a nominal value as those who form the company determine: the statute prescribes no minimum; and although there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The legislature therefore, in His Lordship's opinion, clearly sanctions a scheme by which all the shares except six were owned by a single individual.

> **"the motive of a person who becomes a shareholder … was not a relevant consideration"**

Lord Halsbury LC further opined that the motive of a person who becomes a shareholder or is made a shareholder was not a relevant consideration. The Lord Chancellor then ventured to opine *per obiter dicta* that even if six of the subscribers were trustees of the seventh, the statute would have made them all shareholders.

According to Lord Halsbury LC, the Court of Appeal judges had erred in that they "*never allowed in their own minds the proposition that the company has a real existence. They had been struck by what they have considered the inexpediency of permitting one man to be in influence and authority (over) the whole company; and, assuming that such a thing could not have been intended by the Legislature, they sought various grounds upon which they might insert into the Act some prohibition of such a result.*"

His Lordship reiterated that if a company has been duly constituted by law, he could not insert into the Act limitations that were not found in the Act, regardless of the motives of the persons who constituted a company.

The contention that the issue of debentures was part of a scheme to defraud the creditors was rejected by Lord Herschell. Although His Lordship acknowledged that the issue of debentures to the vendor of a business as part of the purchase price may be subject to abuse, the learned judge held that there was nothing in the law which rendered the creation of the debentures unlawful.

For the reasons set out above, their Lordships ordered the decision of the Court of Appeal to be reversed.

CONCLUSION

In coming to their decision in *Salomon v Salomon*, the learned judges in the House of Lords adopted a literal interpretation of the relevant provisions of the Act. The case firmly establishes that a company is a separate legal entity from its shareholders and that a shareholder is not liable for the debts of the company except to the extent provided in the Act, that is, where a shareholder knowingly allows a company to continue trading for more than six months after the number of shareholders have been reduced below the minimum number prescribed by the Act, or in the case of a winding up of the company, where a shareholder is liable to the extent of the amount of capital which remains unpaid on the shares taken up by that shareholder.

Although the courts have declined to follow the House of Lords' decision in *Salomon v Salomon* in instances where a company has been used for an illegal or improper purpose, such instances are the exception rather than the rule. This decision remains a cornerstone of company law in common law jurisdictions to this day.

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The decisions of the High Court and the Court of Appeal are reported in [1895] 2 Ch D 323 and the House of Lords in 1897 AC 22.

THE SQUIGGLY DISPUTE

Lee Quin examines a significant Federal Court decision on section 46(1) of the Trade Marks Act 1976

The Federal Court in *LB (Lian Bee) Confectionery Sdn Bhd v QAF Ltd* [2012] 4 MLJ 20 reaffirmed the decisions of the High Court and the Court of Appeal which held that the use of a registered trade mark by a licensee is deemed to be use by the proprietor of the said trade mark, even though the licensing agreement is pending registration by the Registrar of Trade Marks.

BACKGROUND FACTS

QAF Ltd ("QAF") is a public listed company in Singapore and is a manufacturer and seller of bakery products. QAF had registered its "Squiggles" trade mark in 2004 for various products, including cream-filled buns.

By a licensing agreement made sometime in July 2003, QAF authorised its subsidiary, Gardenia Bakeries (KL) Sdn Bhd ("Gardenia"), to use the "Squiggles" trade mark in relation to various products, including cream-filled buns. The application for registration of Gardenia as the registered user of the "Squiggles" trade mark was made on 3 April 2008, and the certificate of registered user was issued on 8 April 2008.

> **" an infringer of a trade mark cannot be an 'aggrieved party' ... under section 46 of the TMA "**

Sometime in 2007, LB (Lian Bee) Confectionery Sdn Bhd ("LB") started to use the mark "Squiggle", a mark which was claimed to be deceptively and confusingly similar to QAF's registered "Squiggles" trade mark, in relation to cream-filled buns.

LB sought to expunge QAF's "Squiggles" trade mark pursuant to section 46(1)(b) of the Trade Marks Act 1976 ("TMA") on grounds that:

(1) it was an aggrieved party as it was prevented by QAF's registered "Squiggles" trade mark from using its "Squiggle" trade mark for cream-filled buns; and

(2) for a period up to one month before its application to expunge QAF's registered "Squiggles" trade mark, there had not been any use in good faith of that trade mark by QAF, as the registered proprietor, or by any registered user, in relation to cream-filled buns for a period of not less than three years.

In connection with the second contention raised by LB, it is to be noted that under section 48(5) of the TMA, the use of a registered trade mark by a registered user thereof is deemed to be use by the registered proprietor of the mark to the same extent that the mark has been used by the registered user. However, the TMA is silent as to the effect of the use of a trade mark by a licensee prior to its registration as a registered user of that trade mark.

LB contended that the effective date of Gardenia's use of QAF's trade mark was the date of its registration as the registered user thereof in 2008 and could not be backdated to an earlier date.

Both the High Court and Court of Appeal decided in favour of QAF.

DECISION

The Federal Court dismissed LB's appeal and upheld the findings of the High Court that use of the trade mark by QAF's licensee, Gardenia, was equivalent to use by QAF even though Gardenia was not a registered user under section 48(1) of the TMA before 2008.

The Federal Court held that the TMA must be applied purposefully and meaningfully, and must meet commercial realities and objectives. It cannot be right that the 'registered user' status, including the recognised period of use, could take effect only on the date of registration of the user. According to the learned judge, Zulkefli bin Ahmad Makinudin CJ (Malaya):

"As rightly found by the Court of Appeal, there is nothing in s 46 of the TMA or reg 81(2) of the (Trade Mark Regulations) which could be read to preclude the use of a trade mark by a registered user to be in force retrospectively before the date of the application to register the registered user. We are also of the view that s 48 of the TMA must be applied purposely and meaningfully, and must meet commercial realities and objectives."

His Lordship continued:

"It cannot be right that a "registered user" status, including the recognised period of use, takes effect only on the date of registration of the user status. Section 48(1) clearly recognises the pre-existence of the licensing agreement between the proprietor and the intended user by virtue of the opening words … 'where the registered proprietor of a trade mark grants, by lawful contract, a right to any person to use the trade mark.'"

Accordingly, the Federal Court rejected LB's contention that the effective date of Gardenia's use of QAF's trade mark was the date of its registration as the registered user thereof and not prior to that date.

Besides adopting a purposive reading of section 48, the Federal Court did not consider regulation 81(2) of the Trade Marks Regulations 1997 (which provides that the date on which the application was made for the registration of a registered user, is deemed to be the date on which the registered user was so registered) as affecting the registered proprietor's entitlement to benefit from the use of the registered trade mark by the registered user as of the date on which he grants authorisation or licence for the use of the registered mark.

As QAF's "Squiggles" trade mark was lawfully subsisting and used in good faith in the course of trade by the registered user since 2003 in relation to cream-filled buns, the subsequent use by LB of its "Squiggle" trade mark in relation to the same product in

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2007 was tantamount to both infringement and passing off.

The Federal Court agreed with the High Court judge and held that as LB was an infringer, it could not be regarded as an aggrieved party on policy grounds. In coming to this decision, the Federal Court relied on the principle of construction in *bonam partem* which is explained in Bennion on Statutory Interpretation (2005) (5th Edition) Lexis Nexis, p 792, in the following terms:

(1) it is a rule which developed from the principle that law should serve the public interest. If a statutory benefit is given on a specified condition being satisfied, it is to be presumed that Parliament intended the benefit to operate only where the required act is performed in a lawful manner; and

(2) it is related to three specific legal principles, namely that (a) a person should not benefit from his own wrong; (b) if a person has to prove an unlawful act in order to claim the statutory benefit, this maxim would preclude him from succeeding; and (c) where a grant is in general terms there is always an implied provision that it shall not include anything which is unlawful or immoral.

The Federal Court added that if LB were to be regarded as a 'person aggrieved' for the purposes of section 46(1)(b) of the TMA, it would mean that all infringers may apply to expunge the very trade mark they have been infringing and this would be contrary to principle of not allowing them to benefit from their very own wrong or unlawful act.

CONCLUSION

The judgment of the Federal Court in this case is important as it clarifies the law in several respects. Firstly, for the purposes of expungement proceedings under section 46(1)(b) of the TMA, the use of a trade mark by a licensee thereof prior to the registration of a registered user agreement is deemed to be use of the relevant mark by the registered proprietor. Secondly, an infringer of a trade mark cannot be an 'aggrieved party' who is entitled to have the registered mark expunged on the grounds of non-use under section 46 of the TMA.

This decision reiterates the importance for a proprietor of a registered trade mark who has granted a licence to another party to use his trade mark, to take proactive steps to secure its rights by ensuring that his licensee is registered as a registered user of the mark under the TMA.

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STANDING INDEPENDENTLY

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to be fully ventilated and determined at the application to set aside the *ad interim* injunction order. Rather, the Federal Court took the view that it was more desirable and appropriate that the question of balance of convenience be argued and decided at the *inter partes* stage of the hearing of the injunction.

It was held that it was the standard practice of the courts that, after the grant of the *ad interim* injunction, the parties would move on to the hearing of the *inter partes* injunction whereupon the parties would ventilate all issues and their respective contentions in the *inter partes* hearing of the injunction itself. There is neither a necessity for arguments on, nor a decision to be made on, the issue of balance of convenience before the *inter partes* stage as it would otherwise result in a multiplicity of proceedings.

The Federal Court found it unnecessary to answer the second question as Petrodar did not appeal against this part of the decision of the High Court. In any event, the Federal Court found that the facts did not support Petrodar's case. This was because the order for stay made by the High Court was on the terms, *inter alia*, that the application for the *inter partes* injunction be proceeded with and be heard and disposed of in the High Court. Petrodar never objected to this term and had in fact participated in the injunction hearings.

CONCLUSION

The decision of the Federal Court is important for at least three reasons. Firstly, it clarifies the differences between the application of O. 11 r. 1 of the RHC 1980 and section 23 of the CJA 1964 with regard to the issue of jurisdiction.

Secondly, it affirms the position that the jurisdiction of the Malaysian court cannot be precluded *simpliciter* by the parties' agreement to litigate any dispute under the contract in a foreign court and further, explains the application of the principles governing the doctrine of *forum non conveniens.*

Thirdly, the decision clarifies that in an application for an interim performance guarantee injunction, the High Court is only required to consider and decide on the balance of convenience at the *inter partes* stage.

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WITH GREAT POWER COMES GREAT RESPONSIBILITY

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that (a) the property is the subject matter of, or was used in, the commission of the offence of money laundering; and (b) there is no purchaser in good faith for valuable consideration in respect of the property.

In *Public Prosecutor v Thong Kian Oon* [2012] 10 MLJ 140, Ghazali Cha J observed that a forfeiture application is a serious matter and requires the applicant to set out clearly the case which the respondent has to answer. The learned Judge held that the evidence produced by the applicant in this case was insufficient to satisfy the court that the subject properties were the subject matter of a money laundering offence and dismissed the applicant's application. This decision is significant as it illustrates how the courts balance the rights of an individual as against the aims and acts of the lawful authorities.

CLAIMS BY BONA FIDE THIRD PARTIES

The AMLATFA is not devoid of protection for *bona fide* third parties. Section 61 of the AMLATFA stipulates that before an order for forfeiture of property is made under Section 55 or 56, the court must publish a notice in the *Gazette* to inform any third party who claims to have any interest in the said property to attend court on a specified date to convince the court why the said property should not be forfeited.

> "The AMLATFA confers far-reaching powers on enforcement agencies in their fight against the scourge of money laundering and financial terrorism"

Section 61(5) lays down five conditions that have to be satisfied by a third party in order to succeed in his claim for the property. In essence, the claimant must satisfy the court that he did not participate in any manner in the illegal activity and had not been wilfully ignorant that the property was being used for illegal purposes or did not willingly consent to same. If the five conditions are satisfied, the property will not be forfeited but be returned to the claimant.

OTHER SPECIAL PROVISIONS

Unlike other criminal provisions which usually abate upon the death of the accused, Section 65 of the AMLATFA permits forfeiture proceedings to be instituted or continued against the personal representative or beneficiaries of a deceased person's estate if investigations had been commenced against a person but he dies before proceedings are instituted or a conviction is obtained against him.

Other significant departures that the AMLAFTA makes from the usual realm of the criminal justice system are with regard to the issue of the standard of proof, documentary evidence and admissibility of statements made by an accused person.

In criminal matters, it is trite that the prosecution has to prove its case beyond reasonable doubt. Under Section 70(2) of the AMLATFA, the prosecution remains bound by this standard insofar as it has to prove that an offence has been committed under the AMLATFA or any subsidiary legislation thereunder. However, in relation to any other facts, Section 70(1) of the AMLATFA requires that they be decided only on the balance of probabilities, which is the test applicable to civil matters.

The AMLATFA also makes an exception to the requirements of the Evidence Act 1950 in relation to the admissibility of documentary evidence. Section 71 allows any document or copy of a document or other evidence obtained by the Public Prosecutor or an enforcement agency in the exercise of his powers under the AMLATFA to be admitted in evidence in any proceedings under the AMLATFA, notwithstanding anything to the contrary in any written law. This section allows the prosecution to produce copies of documents as evidence even if the usual requirements for producing such secondary evidence stipulated in the Evidence Act 1950 have not been satisfied.

Finally, statements made by an accused to or in the hearing of an officer of any enforcement agency are admissible under Section 72(1) of the AMLATFA unless the court is satisfied that the statement was caused by inducement, threat or promise sufficient to give the accused reasonable grounds for supposing that by making the statement, he would gain an advantage or avoid any evil of a temporal nature.

CONCLUSION

The AMLATFA confers far-reaching powers on enforcement agencies in their fight against the scourge of money laundering and financial terrorism. As some of these powers depart from the conventional rules that govern the administration of criminal justice, the courts as the last bastion of justice must exercise care to ensure that the enforcement agencies in Malaysia exercise these great powers with great responsibility.

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Yeong Hui extends his appreciation to C. Vignesh Kumar, a former colleague, for his contribution to this article.

A REVIEW OF THE COMPANIES BILL 2013 - PART III

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Clause 288(c)(i) provides that in relation to a written resolution, every member is to have one vote for every share held by him.

Vote by proxy

The Bill provides that a proxy may vote on a show of hands if he is the only proxy appointed by a member (clause 289(1)). This provision is welcomed as it avoids a situation where the articles of association permit a member to appoint more than one proxy but do not specify how these proxies are to vote on a show of hands.

Clause 289(2) also clarifies that where a member appoints more than one proxy, the appointment is invalid if the member does not specify the proportions of his holding which are to be represented by each proxy.

“ the Bill dispenses with the requirement for a private company to hold an annual general meeting ”

Votes of joint holders

The Bill provides, *inter alia*, that the vote of joint holders of shares in a company is not valid if the joint holders do not exercise their vote in the same way (clause 290(2)(b)). This is a departure from regulation 55 of Table A which provides that the vote of the most senior joint holder who casts a vote shall be accepted to the exclusion of the votes of the other joint holders, and that seniority shall be determined by the order in which the names of the joint holders appear in the register of members.

DISPENSATION OF AGM FOR PRIVATE COMPANIES

A major change to the existing regime is that the Bill dispenses with the requirement for a private company to hold an annual general meeting (“AGM”).

The rationale behind this change stems from the idea that AGMs for a private company are unnecessarily burdensome, particularly where members are actively involved in managing the company. As the members of such a company have access to the corporate information of the company, AGMs serve little purpose.

The requirement for a public company to hold AGMs is retained to ensure that members who are not actively involved in the management of the company are given the opportunity to discuss matters relating to the company with the directors. These are set out in clauses 338 to 341 of the Bill.

Clause 306(3) of the Bill contains a safeguard to protect minority shareholders of a private company as it provides that members holding at least 5% of paid-up capital may request the directors to hold a physical meeting if (i) more than 12 months have lapsed since the last meeting convened under the clause; and (ii) the proposed resolution is not vexatious or frivolous.

Incidental Matters relating to the “No-AGM” regime

New provisions have been introduced in the Bill in consequence of the introduction of the “no-AGM” regime for private companies.

A private company is required to circulate its financial statements and reports to its members within six months of its financial year end (clause 255(1)).

Auditors of a private company, who are usually appointed during an AGM under the CA, are now appointed by the board (for newly incorporated companies) and subsequently by members by way of ordinary resolution (clauses 262(3) and (4)). The appointments must be effected at least 30 days before the end of the period for the submission of the financial statements to the Registrar.

The retirement of directors of a private company, which is currently being carried out during an AGM under the CA, is to be decided by the members by way of written resolution under the Bill (clause 204(2)).

Finally, the annual returns of a private company are now required to be lodged with the CCM within 30 days from each anniversary of its incorporation date (clause 67(1)). Under the CA, annual returns are required to be lodged within one month of the AGM.

WRITTEN MEMBERS’ RESOLUTIONS NO LONGER UNANIMOUS

Section 152A of the CA requires written resolutions of members to be passed by unanimous approval of the members. The Bill relaxes this requirement and allows ordinary and special resolutions of a private company to be passed as written resolutions with the same threshold (i.e. simple majority and 75%) as those applicable to resolutions at a physical meeting (clause 301(4)).

A written resolution may be proposed by a director or a member (clause 292(1)) but cannot involve the removal of a director or an auditor before the expiration of his term of office (clause 292(2)).

The proposed changes to written resolutions under the Bill are to be welcomed as they promote the efficacy of written resolutions and dispense with the burden of holding physical meetings. These provisions should be extended to unlisted public companies to enable such companies that only have a few members, to dispense with the inconvenience of holding physical meetings.

Circulation of written resolution

Where a written resolution is proposed by the board, the resolution is to be circulated to every eligible member (clause 296(1)).

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A REVIEW OF THE COMPANIES BILL 2013 - PART III

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However, where a written resolution is proposed by a member (being a member who holds a total of 5% of the total voting rights of all eligible members), he may require the company to circulate the resolution for it to be moved as a written resolution (clause 297(1)).

A written resolution requested by a member may be circulated with a statement of a maximum of 1000 words on the subject matter of the resolution (clause 297(3)).

A resolution may be moved as a written resolution unless it is inconsistent with any law or the company's constitution, or is defamatory, frivolous or vexatious (clause 297(2)).

Unless a company otherwise resolves, the expenses incurred in circulating a written resolution requested by a member are to be borne by the member who made the request. The company is not obliged to circulate the resolution until a sufficient sum has been deposited with the company to meet such expenses (clause 299).

"The right of members to requisition a general meeting under section 144 of the CA is retained"

A company is not required to circulate a written resolution requested by a member if the court, upon the application by the company or a person who claims to be aggrieved, is satisfied that the rights under clause 297 are being abused. The court may order the member who requested for the written resolution to pay the whole or part of the costs incurred by the company in the application even if such member is not a party to the proceedings (clause 300).

Procedure for signifying agreement to written resolution

Clause 301 of the Bill sets out the procedure for passing a written resolution. The company must first receive an authenticated document from the member which identifies the relevant resolution and indicates that member's agreement to the resolution. The document may be sent in hard copy or electronic form.

The member's agreement, once signified, cannot be revoked. A written resolution will be passed once the required majority of eligible members have signified their agreement to it.

Unless otherwise provided in a company's constitution, a proposed written resolution will lapse if the required majority has not been obtained within 28 days from the circulation date. Any agreement of a member after the expiry of that period will be ineffective (clause 302).

PASSING RESOLUTIONS AT GENERAL MEETINGS

Power to convene general meetings

The Bill places the power to convene meetings with the board (clause 305). Regulation 44 of Table A which confers the right on any director to convene an extraordinary general meeting and section 145(1) of the CA which confers the right on two or more members who satisfy the criteria set out in that section to convene a general meeting have been omitted from the Bill.

Requisition

The right of members to requisition a general meeting under section 144 of the CA is retained (clause 306). The time frame to convene a meeting has been abridged in that the board is required to convene the meeting within 14 days and hold such meeting within 28 days from the date of issue of the notice to convene the meeting (clause 307(1)). Presently, section 144(1) requires the board to hold the meeting within two months from receipt of the requisition notice.

As in section 144 of the CA, the requisitionists may call and hold the meeting if the board fails to do so (clause 308(1)).

Court ordered meetings

The power conferred on the court to order a general meeting under section 150 of the CA is retained in clause 309 of the Bill with minor differences.

Notice requirements for general meeting

The Bill requires at least 14 days' notice (or such longer period specified in the constitution) to be given by both private and public companies for meetings; and in the case of the latter, at least 21 days' notice for an AGM (clauses 311(1) and (2)). It is unclear whether the requirement under section 152 of the CA for 21 days' notice to be given in respect of a special resolution applies to the Bill.

The requirements for convening a meeting by short notice in section 145(3) of the CA are retained save that in the case of a private company, the percentage has been reduced from 95% to 90% unless the company's constitution specifies a higher percentage not exceeding 95% (clause 311(5)).

Unlike the CA, the Bill sets out the manner in which notice of meetings are to be given to members (clause 313). Unless otherwise provided by a company's constitution, the Bill permits notice of meetings to be given by e-mail or publication on the company's website (clauses 313 and 314).

The Bill also requires a notice of meeting to be given to every member (including a person entitled to the share upon death or bankruptcy of a member), every director and the company's auditor (clause 315).

A company is now required to state the general nature of the business to be transacted at every general meeting (clause 316(1)(b)). Regulation 45 of Table A only requires the general nature of business to be given in respect of special business (and not ordinary business to be transacted at AGMs) (see regulation 46 of Table A).

Circulation of member's statement

In line with the "no-AGM" regime for private companies, clause 319 of the Bill, which corresponds with section 151 of the CA in allowing members to require the company to circulate a written statement not exceeding 1000 words in relation to matters to be discussed at an AGM, will apply only to public companies.

PROCEDURE AT MEETINGS

Multiple venues

Section 145A of the CA permits a company meeting to be held in two or more places within Malaysia using instantaneous communication technology. Clause 323 of the Bill liberalises this provision by dispensing with the requirement for the venue(s) to be within Malaysia. However, the chairman is required to be at the main venue of the meeting, which must be in Malaysia.

> " where a company only has one member, the quorum shall be one "

Quorum

The requirement in section 147(1)(a) of the CA that at least two members (or such higher number as is stipulated in the constitution) are required to constitute a quorum is retained in the Bill (clause 324(2)). The Bill expands on this by providing that in the case where a company only has one member, the quorum shall be one (clause 324(1)).

The Bill also clarifies that where a member appoints more than one representative or proxy, they shall be counted as one member for the purpose of quorum (clause 324(3)).

Chairman

The provisions for appointment of a chairman of a meeting under section 147(1)(b) of the CA and regulation 51 of Table A have been substantially retained in the Bill, subject to two interesting changes, namely that (i) a proxy may be appointed as chairman (unless prohibited by a company's constitution) (clause 332); and (ii) where a company's constitution expressly states the person who is to be chairman, the members shall not have a right to elect a chairman (clause 325(2)).

Corporate representative

As in the case of section 147(3)(a) of the CA, a member which is a body corporate may by resolution of its board or other governing body authorise a person or persons to represent that member at a general meeting (clause 329(1)). If a corporation appoints more than one representative, their exercise of power on behalf of that member shall not be valid if the representatives do not exercise the power in the same way (clause 329(4)(b)).

Proxies

The Bill abolishes the requirement that a proxy must be a member or qualified person specified in section 148(1)(b) of the CA (clause 330(1)). If a member of a company having share capital wishes to appoint more than one proxy, the member is required to specify the proportion of his holding which each proxy represents (clause 330(2)).

The Bill introduces a new provision which governs the termination of a person's appointment as proxy (clause 334).

DECISIONS OF SOLE MEMBER

Clause 344(1) of the Bill requires a member who is the sole member of a company to provide the company with details of any decision taken by it which may be taken at a general meeting of the company and has effect as if it had been agreed at a general meeting, unless the decision is made by way of a written resolution. Failure by the member to do so will not affect the validity of the decision taken (clause 344(3)).

RECORDS OF RESOLUTIONS AND MEETINGS

Clause 342 of the Bill requires a company to maintain for not less than seven years, records of all written resolutions, minutes of proceedings at general meetings and details of decisions provided to the company under clause 344. Unless the contrary is proved, such records are deemed to be evidence of proceedings held and decisions taken (clause 343).

A member is entitled to inspect the records mentioned in clause 342 without charge (clause 345(3)). However, this provision appears to be less comprehensive than section 157(2) of the CA which allows a member to request for copies of those records, subject to payment.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

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This newsletter is produced by the LEGAL INSIGHTS' Editorial Committee. We welcome comments and feedback on LEGAL INSIGHTS. You may contact us at skrine@skrine.com for further information about this newsletter and its contents.

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