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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

This issue represents a change of the guard in some respects. Mr Lee Tatt Boon, who has been the Editor-in-Chief since the inception of our newsletter in 2004, has retired from the Firm and has handed the responsibilities of heading our newsletter to me.

Tatt Boon has been the catalyst for Legal Insights in many ways. Not only was he responsible for the launch of our newsletter, but also for the evolution of its "look and feel" to what it is today. He has also contributed immensely to the contents of Legal Insights, in particular with his suggestions for articles on the recent developments in intellectual property law. His shoes will be hard to fill but I will try my utmost to do so.

Notwithstanding his retirement from active practice, I am pleased to announce that Tatt Boon will continue to contribute to the Firm in his capacity as a Consultant from 1 January 2015.

The Firm is pleased to announce that Yap Yeong Hui and Ratha Govindasamy have been admitted as Partners of Skrine with effect from 1 January 2015.

Yeong Hui graduated from the University of Canterbury. His practice areas include international trade, compliance, shipping law and employment law. Ratha is a graduate of the University of Malaya. Her main practice areas include bankruptcy and insolvency law, banking and finance and corporate and commercial disputes.

We are also pleased to announce the promotion of Aw Ee Va, Foo Siew Li, Ong Doen Xian and Shaleni Sangaran to Senior Associates from 1 January 2015.

The Firm extends its heartiest congratulations to Yeong Hui, Ratha, Ee Va, Siew Li, Doen Xian and Shaleni. We have no doubt that they will continue to make invaluable contributions to the Firm.

Last, but by no means the least, I hope our readers will find the contents of this issue of Legal Insights interesting.

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

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ANNOUNCEMENTS

CHAMBERS ASIA-PACIFIC 2015

Chambers Asia-Pacific 2015 has ranked our Firm in the top tier for Corporate/M&A, Dispute Resolution, Intellectual Property, and Projects, Infrastructure & Energy. We congratulate the following lawyers of our Firm who were ranked by Chambers as leading individuals in their respective areas of practice:

- Lee Tatt Boon (Intellectual Property)
- Vinayak Pradhan (Arbitration (International) and Dispute Resolution)
- Janet L.H. Looi (Corporate/M&A)
- Charmayne Ong (Intellectual Property)
- Khoo Guan Huat (Intellectual Property)
- Quay Chew Soon (Corporate/M&A)
- Cheng Kee Check (Corporate/M&A)
- Leong Wai Hong (Dispute Resolution)
- Lim Chee Wee (Dispute Resolution)
- Siva Kumar Kanagasabai (Employment and Shipping)
- Faizah Jamaludin (Competition/Antitrust)
- Selvamalar Alagaratnam (Employment)
- Lee Shih (Dispute Resolution)

ASIAN LEGAL BUSINESS MALAYSIA LAW AWARDS 2015

Our Firm won three awards at the Asian Legal Business (ALB) Malaysia Law Awards 2015.

The Firm was named the KLRCA Arbitration Law Firm of the Year, the Intellectual Property Firm of the Year and received the M&A Deal of the Year for PT Pertamina's acquisition of 30 percent of Murphy Oil Corporation's Malaysian oil and gas assets. Datin Faizah Jamaludin and Fariz Abdul Aziz acted for Murphy Oil Corporation in this transaction.

CLIENT CHOICE AWARDS 2015

The Firm extends its congratulations to the following Partners who were named as winners of their respective categories for Malaysia in the Client Choice Awards 2015 –

- Ms Teh Hong Koon for Intellectual Property – Trademarks; and
- Ms Ezane Chong for Litigation.

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.

CHOLESTEROL: IT'S ALL ABOUT

Grace Teoh discusses a dispute

Dave Barry, a Pulitzer Prize-winning American author and columnist, was quoted as saying, "It is a scientific fact that your body will not absorb cholesterol if you take it from another person's plate". On 3 April 2014, the New Straits Times reported in the article *"More than a third of Malaysians suffer from high cholesterol"* that over one-third of Malaysians suffer from high cholesterol due to unhealthy lifestyles.

Lovers of *nasi lemak* in Malaysia with high cholesterol levels requiring treatment may now have access to cheaper generic drugs, as a result of the Malaysian High Court's recent decision in *Winthrop Pharmaceuticals (Malaysia) Sdn Bhd v AstraZeneca UK Ltd* (KLHC CS No. D-22IP-57-10/2011)("Suit 57") to invalidate a particular patent.

CHEM 101, PHARMA 301

One of the treatments for hypercholesterolemia, or colloquially known as high cholesterol, is the use of drugs containing the cholesterol-lowering agent known as statins. Statins reduce the level of low-density lipoprotein (LDL) cholesterol (also known as "bad cholesterol") in the blood by inhibiting the production of it in the liver. One of these statins is "rosuvastatin". Drugs containing rosuvastatin may be administered in various forms, including via injections and orally.

AstraZeneca UK Limited ("AstraZeneca") was the registered proprietor of Malaysian Patent No. MY-136382-A ("Patent 382") for a particular oral dosage form of rosuvastatin; specifically, a drug composition containing 5 to 10 mg of rosuvastatin (or 5.2 to 10.4 mg of rosuvastatin calcium)("Claimed Dosage Range") to be administered to patients orally once daily. Put simply, the patent allowed AstraZeneca to monopolise the right to manufacture and market medicine capsules containing any amount between 5 and 10 mg of rosuvastatin in Malaysia.

AstraZeneca had applied to register the equivalents of Patent 382 in various jurisdictions, including the United Kingdom, Europe, and Australia. The validity of these patent applications or registrations has been attacked by various generic pharmaceutical companies. In *AstraZeneca AB v Apotex Pty Ltd* [2014] FCAFC 99, a five-member panel sitting in the Federal Court of Australia held that the Australian Patent No. 769897 (the equivalent of Patent 382) was invalid.

In Suit 57, Winthrop Pharmaceuticals (Malaysia) Sdn Bhd ("Winthrop"), the Malaysian arm of Sanofi's generic pharmaceuticals business, filed an action in court against AstraZeneca, seeking, *inter alia*, a declaration that the patent was invalid, whether as-filed or as-amended. Winthrop challenged Patent 382 on several grounds: invalid claim to priority dates, lack of novelty, lack of inventive step, lack of support, insufficiency, and invalid claim to entitlement.

DOCTOR WHO? : THE SKILLED NOMINEE

In order to consider the issues before the Court, the Court first had to establish the "person having ordinary skill in the art", or

GRACE TEOH WEI SHAN

Grace is an Associate in the Intellectual Property Division of SKRINE. She graduated from the University of Nottingham in 2010.

THE NUMBERS, EVEN THE PATENTS

on a patent for cholesterol medication

"the skilled person", to assist the Court in donning the mantle of the notional skilled but unimaginative person faced with the available set of facts and information.

Winthrop and AstraZeneca each tendered their own expert witness in Court. After considering both parties' written submissions on the notional skilled person, and which expert's evidence the Court should prefer, the Court agreed with Winthrop's submissions that the notional skilled addressee should be clinicians working in the area of lipidology, particularly the treatment of high cholesterol.

EENY, MEENY, MINEY, MOE: ARBITRARY SELECTION

It was not AstraZeneca's claim that it invented rosuvastatin; it was agreed that the compound existed before the priority date of Patent 382. Instead, Patent 382 claimed the invention for the selection of the single daily starting dose of rosuvastatin within the Claimed Dosage Range, which according to AstraZeneca, was more efficacious than any other dosage range in the alteration of lipid levels or ratios. The priority dates claimed for Patent 382 were 6 February 1999 and 8 September 1999.

> "all the allegedly novel features of Patent 382 had been previously disclosed by the Shionogi prior art"

The main thrust of Winthrop's contentions in relation to lack of novelty and lack of inventive step was that the essential elements in Patent 382 were already known to the notional skilled person, long before Patent 382 was filed. Specifically, European Patent Application Publication No. 0521471 published on 7 January 1993 ("Shionogi prior art"), an article in the Journal of the American Medical Association, 269(23):3015-3023 published in 1993, and an article in *Bioorganic and Medicinal Chemistry*, 5(2):437-444 published in 1997 ("Watanabe prior art"), had already disclosed the alleged invention claimed in Patent 382.

By 1993, the Shionogi prior art had already disclosed the three essential elements of Patent 382: (i) the use of rosuvastatin to treat hypercholesterolemia, (ii) the fact that rosuvastatin-containing drugs can be administered orally, and (iii) the administration of rosuvastatin in the dosage range of 1 to 100 mg per day, depending on the patient's characteristics, to treat hypercholesterolemia would be more beneficial than any other dosage range.

Winthrop contended that the selection of the Claimed Dosage Range by AstraZeneca was arbitrary as there was no data within the patent specification which demonstrated clearly that the range would have clinical advantages over other ranges.

TIGER CAUGHT BY ITS TOE: LACK OF NOVELTY

The High Court agreed with Winthrop's submissions on the issue of novelty, or the lack thereof, in Patent 382.

The Court found that all the allegedly novel features of Patent 382 had been previously disclosed by the Shionogi prior art, namely that (i) rosuvastatin can be used in the treatment of cholesterolemia, (ii) rosuvastatin may be given in, amongst others, a single once daily dose, (iii) the dosage range claimed by Patent 382 is within the 1 to 100 mg range disclosed in the Shionogi prior art, (iv) the Shionogi prior art did not distinguish between a starting dose and a continuing dose, and (v) there are clear directions in the Shionogi prior art that the dosage may be administered orally. The Court observed that the rosuvastatin calcium compound, used in Claim 2 of Patent 382, had been described in Example 7 of the Shionogi prior art.

Additionally, the Shionogi prior art also disclosed the fact that clinicians could alter the doses within the 1 to 100 mg range, in accordance with the needs and characteristics of the patient.

The Court was mindful of two further pieces of evidence from AstraZeneca's expert in coming to its conclusion of lack of novelty: first, that the specification in Patent 382 did not disclose any safety data and held no promise as to the safety of rosuvastatin, even though Patent 382 claimed that the Claimed Dosage Range of rosuvastatin was safe for consumption, and second, that the Claimed Dosage Range was no more efficacious than 2.5 to 4 mg.

In the absence of data which demonstrated that the Claimed Dosage Range was particularly efficacious, the Court agreed with Winthrop's contention that AstraZeneca's selection of that range was arbitrary. The selection was motivated by the knowledge that the lower-end of a given statin dosage range was likely to be more effective, that it was safer for statin doses to be prescribed from the lower-end to avoid side effects, and that 5 to 10 mg were historically typical doses of many other statins administered for the treatment of hypercholesterolemia.

WATCHING YOUR DIET: IT'S OBVIOUS

The High Court, donning the mantle of the skilled person, examined Patent 382 through the four steps elucidated in *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59.

First step: The identification of the inventive concept in the patent. Patent 382 claimed that the Claimed Dosage Range of rosuvastatin (or 5.2 to 10.4 mg of rosuvastatin calcium) provided

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THE GRIM REAPER COMETH, BUT WHICH ONE?

Eyza Farizan Mokhtar examines a fight over the appointment of a provisional liquidator

Can a company hasten its impending death by committing suicide? While awaiting death, can a company choose its own executioner?

These were the issues faced by the High Court in *Malayan Banking Berhad v Chip Lam Seng Enterprise Berhad* [2014] 1 LNS 1583.

On 27 October 2014, the High Court decided that the Respondent could not avoid a compulsory winding up by undertaking a voluntary winding up. In coming to its decision, the High Court also discussed the court's power to appoint a provisional liquidator pending the disposal of a winding up petition.

THE DEATH SENTENCE

The Respondent, Chip Lam Seng Enterprise Berhad, is the holding company of the "Chip Lam Seng" group of companies ("CLS Group"), a family business controlled by one Mr. Tan Keng Beng ("TKB").

The CLS Group was in financial difficulties and appointed Grant Thornton Consulting Sdn Bhd ("Grant Thornton") to prepare a debt restructuring proposal. Grant Thornton prepared a report dated 30 November 2012 which stated that as at December 2012, the CLS Group had a total debt of RM500,805,244 owing to 11 banks and RM10,746,766 owing to trade creditors. The Petitioner, Malayan Banking Berhad, was the largest creditor, holding 51.39% of the total indebtedness of the CLS Group.

> **" the Respondent's voluntary winding up was not bona fide "**

On 19 December 2013, the Petitioner obtained a summary judgment against the Respondent for a sum of RM8,886,339.01. The Respondent did not appeal against the judgment.

After the Respondent had failed to comply with a notice issued under section 218(2)(a) of the Companies Act 1965 ("CA") in respect of the judgment sum, the Petitioner presented a petition to wind up the Respondent on 28 August 2014 and served the Petition on the Respondent at its registered address on the same day.

On 2 September 2014, the Petitioner's solicitors informed the Respondent's solicitors that the Petition had been filed and the Petitioner would be filing an application to appoint a Provisional Liquidator ("PL").

Two days later, on 4 September 2014, another firm of solicitors informed the Petitioner's solicitors that they had instructions to accept service of the Petitioner's application on behalf of the Respondent. On 5 September 2014, the Petitioner filed its application to appoint a PL. From the affidavits filed in the proceedings, it came to light that a flurry of events had taken place with devil's haste on 5 September 2014.

The Respondent's two directors affirmed a statutory declaration that the Respondent could not "*by reason of its liabilities continue its business*" and signed a directors' circular resolution which resolved, among others, that there be a creditors' voluntary winding up of the Respondent, for one Mr. TCK to be appointed as the Respondent's PL, and for a meeting of the Respondent's creditors to be summoned on 25 September 2014.

It also came to light that on 2 September 2014, TKB had filed a suit against the Respondent to claim for RM488,444,360 based on an alleged undertaking and indemnity given by the Respondent to TKB. TKB obtained a judgment in default of appearance against the Respondent on 18 September 2014, thereby purportedly making TKB the largest creditor of the Respondent.

SUICIDE OVER COMPULSORY DEATH

The Court found that there were no cases in Malaysia nor in any of the countries with provisions similar to the CA in their companies' legislation, i.e. Singapore, Australia, New Zealand and England, which could shed light on the validity of the Respondent's voluntary winding up by way of an appointment of a PL.

Where a winding up petition has already been presented on the ground of a company's inability to pay debts before a company's voluntary winding up, the Court held that section 276 of the CA requires the company to obtain leave of the winding up court before it could pass a special resolution under section 254(1)(b) of the CA to commence voluntary winding up. In this respect, the Court relied on *Hasjuara (M) Sdn Bhd v Bio Science Capital Sdn Bhd & Anor* [2010] 7 MLJ 33 and the decision of the Supreme Court of Victoria in *Re North Western Fruitgrowers Pty Ltd* [1965] VR 306.

The Court referred to the Australian cases of *Re Horsham Kyosan Engineering Co Ltd* [1972] VR 403, *Re South Australian Air Conditioning Centre Pty Ltd* (1977) 2 ACLR 539 and *Re Akai Australia Pty Ltd* [1978] 3 ACLR 353 as authorities that allow a company to apply for retrospective leave from the winding up court under a provision of the Australian companies legislation which is similar to section 276 of the CA.

The Court, relying on *Re Septimus Parsonage & Co* [1901] 2 Ch 424 (which was referred to by the Court of Appeal in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 CLJ 549 and subsequently, by the Federal Court in the same case reported as *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2002] 4 CLJ 401), also held that if a company commenced voluntary winding up with the intention to interfere with the winding up court's jurisdiction, such interference may amount to a contempt of the winding up court.

THE MODE OF EXECUTION

The Court gave four reasons for refusing retrospective leave to

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the Respondent.

Firstly, the Court ruled that the Respondent's voluntary winding up was not *bona fide* and was contrived to thwart, unlawfully, the Petition and the Petitioner's application to appoint a PL.

Secondly, the Court found that there were matters and transactions which required investigation by a compulsory winding up liquidator under the supervision of the winding up court.

Thirdly, the Court took into account the unanimous consensus by the Petitioner and the Supporting Creditors in opposing the Respondent's Application and the large amount of debt owing by the Respondent to them. The Court referred to two Australian cases, *Re South Australian Air Conditioning Centre Pty Ltd* and *Re Akai Australia Pty Ltd*, which decided that the wishes of the creditors is a relevant fact to be considered.

Fourthly, the Court found that the Respondent had failed to discharge the burden of establishing that there are special circumstances to show that the Respondent's voluntary liquidation was preferable to a compulsory winding up by the court. The Court held that the five reasons advanced by the Respondent did not amount to special circumstances which showed that the Respondent's voluntary liquidation was preferable and hence, did not justify leave under section 276 of the CA.

> **“ the wishes of the creditors is a relevant fact to be considered ”**

The Respondent's five reasons were as follows:

(i) That a creditors' voluntary winding up was "*more efficient and cost effective*";
(ii) A creditors' voluntary winding up would not trouble the winding up court;
(iii) There would be no prejudice to the Respondent's creditors as they could ventilate any issue before the PL appointed at the Respondent's Creditors' Meeting;
(iv) A creditors' voluntary winding up was necessary as the Respondent had concluded that it could not continue its affairs due to its financial state; and
(v) A creditors' voluntary winding up was a more democratic process as it took into account the wishes of the Respondent's creditors and contributories.

The Court observed that if the Respondent's five reasons amounted to special circumstances to justify leave being granted under section 276, this could encourage abuses of the voluntary winding up procedure as has happened in this case.

Consequently, the Court allowed the Petition as a compulsory winding up was to be preferred as it was more advantageous to the Respondent's general body of creditors than the Respondent's voluntary winding up.

THE CHOICE OF EXECUTIONER

The Respondent contended that the Petitioner should file a new suit under section 266 of the CA to invalidate TCK's appointment as the Respondent's PL and remove TCK as the Respondent's PL. The Court did not agree with this contention on four grounds.

Firstly, relying on *Indah Water Konsortium Sdn Bhd v Yong Kong Fatt* [2007] 4 CLJ 613, the Court held that section 276 of the CA also conferred power on the winding up court to do whatever was "*reasonably necessary*" after deciding whether to grant leave or otherwise - this would include the power to annul TCK's appointment as PL and to set aside his appointment as the PL for the Respondent's voluntary winding up.

Secondly, relying on *Progress Printers and Distributors Pty Ltd v Production and Graphics Communications Pty Ltd* [1996] 21 ACSR 241, the Court held that if the winding up court could appoint a liquidator for a company's compulsory winding up in place of a liquidator for a voluntary winding up who had already carried out substantial work in the voluntary winding up, the Court certainly had the power to remove a PL appointed for a voluntary winding up.

Thirdly, the Court held that section 266 applied in a voluntary winding up. As the Court had refused leave for the Respondent to continue its voluntary winding up, the section had no application in this case.

Fourthly, the Court held that if the Court agreed with the Respondent's contention, there would be duplicity in proceedings which should not be encouraged, more so when the proposed new action would not be heard by the winding up court which is the appropriate forum. The Court observed that the object of section 276 of the CA was to enable all matters regarding both voluntary and compulsory winding up of a company to be comprehensively decided by the winding up court.

The Court declared the appointment of the Respondent's PL as null and void and set aside the appointment of TCK as the Respondent's PL. The Court held that TCK's appointment as the Respondent's voluntary winding up PL lacked *bona fides*. Further, as the Court had already refused leave for the Respondent to

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CIPAA: FORWARD OR BACKWARD?

Loshini Ramarmurty explains the first reported case on the Construction Industry Payment and Adjudication Act 2012

The Construction Industry Payment and Adjudication Act 2012 ("CIPAA") came into force on 15 April 2014 ("Commencement Date"). Thereafter, the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") issued Circular 01 dated 23 April 2014 which states that it would administer and appoint adjudicators for adjudication cases in respect of any payment disputes *"which arose under a construction contract on or after 15 April 2014, regardless of whether the relevant construction contract was made before or after 15 April 2014."*

This position has now changed in light of the recent decision of *UDA Holdings Bhd v Bisraya Construction Sdn Bhd* (24C-6-09/2014) ("UDA Holdings") and *Capitol Avenue Development Sdn Bhd v Bauer (M) Sdn Bhd* (24C-5-09/2014) ("Capitol Avenue Development") which, *inter alia*, deals with the fundamental issue as to whether CIPAA operates retrospectively or prospectively.

BRIEF FACTS

The disputes in *UDA Holdings* arose out of a construction contract dated 16 October 2009, whilst those in *Capitol Avenue Development*, from a letter of award dated 13 May 2013.

> **"the application of CIPAA is to be determined by reference to a construction contract ... and not to the payment dispute or the cause of action"**

Court proceedings in the two cases were filed by the respective plaintiffs, namely UDA Holdings Bhd ("UDA") and Capitol Avenue Development Sdn Bhd ("Capitol"), around the same time. The issues in both cases arose from adjudication proceedings commenced under CIPAA and can be broadly divided into two categories.

The first concerned the challenge by the respondents, in both instances, of the jurisdiction of the adjudicator and the *locus standi* of the claimant to initiate adjudication proceedings.

In the second category of issues, the respondents in both cases disputed the applicability of CIPAA to their respective disputes as their payment disputes had arisen under construction contracts which had been entered into before the Commencement Date.

The Court took the view that the first set of issues relating to the *locus standi* of the claimant in the adjudication proceedings and the jurisdiction of the adjudicator should be taken up before the adjudicator instead of the Court and accordingly, declined to deal with those issues.

As regards the second category, which concerned the operation of CIPAA, i.e. whether it applies to payment disputes and underlying contracts that were made before the Commencement Date of CIPAA, the Court was of the view that the cases should be heard together as the issue was common to both cases. KLRCA attended the Court proceedings as *amicus curiae*.

THE POSITIONS CANVASSED

Three positions were canvassed before the High Court Judge, namely, that:

(a) CIPAA applies prospectively in that it applies to payment disputes which arose under a construction contract made on or after the Commencement Date;

(b) CIPAA applies retrospectively in that it applies to all payment disputes, regardless of whether they arose before or after the Commencement Date, or under a construction contract made before the Commencement Date;

(c) CIPAA applies retrospectively in the manner stated in KLRCA Circular 01 in that it applies to construction contracts made before or after the Commencement Date, but only in respect of payment disputes arising on or after the Commencement Date.

THE DECISION OF THE HIGH COURT

Sections 2, 3 and 41 of CIPAA

The Court identified Sections 2, 3 and 41 of CIPAA as provisions to answer the issue. The Court stated that it is clear from section 2 that Parliament's intention is for CIPAA to apply to all construction contracts made in writing regardless of when those contracts were made so long as those construction contracts are to be carried out wholly or partly within the territory of Malaysia.

The Court said that this intention is also manifested in Section 3 of CIPAA which only excludes from its ambit, any construction contract entered into by a natural person for construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

The Court further added that Section 41, when read together with Section 2, excludes from the operation of CIPAA, only those construction contracts in respect of which proceedings have been commenced in court or arbitration before the Commencement Date.

Other jurisdictions

The Court observed that certain jurisdictions, such as the United Kingdom, New Zealand, Singapore and certain States within Australia, have expressly provided that their corresponding legislation apply only to construction contracts made after the date on which the legislation came into force. Accordingly, these jurisdictions do not encounter a similar issue as that under CIPAA.

LOSHINI RAMARMUTY

Loshini graduated from Cardiff University in 2008. She is an Associate with the Dispute Resolution Division of SKRINE.

Capitol argued that the statutory adjudication regimes in South Australia and Tasmania were silent on the application of their corresponding legislation and added that an analysis of all reported cases in those jurisdictions showed that such legislation had been applied prospectively. The Court rejected this argument on the basis that the cases cited did not shed any light on the issue as to whether the relevant legislation applies prospectively or retrospectively as that issue did not come up for consideration by the courts.

Further, the Court compared the saving provision found in the South Australian legislation with Section 41 of CIPAA and commented that there was a marked difference between the two and accordingly, the positions in other jurisdictions did not alter the interpretation reached by the Court in relation to CIPAA.

Crystallisation of the payment dispute

The Court rejected the argument that CIPAA only applies to payment disputes which arose on or after the Commencement Date on the basis that CIPAA does not make any provision for such distinction in its application. The Court was of the view that Section 2 of CIPAA was the material determinant of the application of CIPAA and Section 2 clearly provides that the application of CIPAA is to be determined by reference to a construction contract which satisfies the requisites set out in that section and not to the payment dispute or the cause of action.

> **“ CIPAA is … a procedural and adjectival legislation and such legislation is presumed … to apply retrospectively ”**

Character of CIPAA

(i) <u>Procedural legislation</u>

The Court opined that CIPAA is in character, truth and substance, a procedural and adjectival legislation and such legislation is presumed in law to apply retrospectively unless there is clear contrary intention in the statute itself.

The Court relied on the Federal Court's decision in *Westcourt Corporation Sdn Bhd v Tribunal Tuntutan Pembeli Rumah* [2004] 4 CLJ 203 ("Westcourt") in concluding that CIPAA is essentially an Act which provides an additional forum by way of statutory adjudication. Accordingly, CIPAA being a legislation which provides an additional forum is retrospective in its operation as there is no provision in it to the contrary.

(ii) <u>Social legislation</u>

The Court considered CIPAA as falling within the category of "social legislation" on the basis that CIPAA is for the good and benefit of society. In *Westcourt*, the Court of Appeal was of the view that since the relevant law, namely the Housing Development (Control and Licensing) Act 1966, was a piece of social legislation, its provisions should be given a liberal and purposive interpretation and cited the Federal Court's decisions in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547 and *Hoh Khiang Ngan v Mahkamah Persekutuan Malaysia & Anor* [1996] 4 CLJ 687 as authorities for this proposition of law.

In applying a liberal and purposive interpretation to CIPAA, it follows that the choice of an additional forum of resolution should be offered to all unless there is clear provision to the contrary. Given that no such provisions to the contrary exist, the application of CIPAA is retrospective.

Substantive rights

KLRCA, UDA and Capitol submitted that CIPAA contained provisions, i.e. Sections 13, 28, 29, 30, 35, 36 and 37, which deal with substantive and not procedural matters and as such, should not be interpreted to apply retrospectively.

The Court rejected this argument. The learned Judge analysed the principles of statutory interpretation laid down by the apex court of Malaysia in various cases, such as *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36; *Yew Boon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; *Sim Seoh Beng @ Sim Sai Beng & Anor v Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 MLJ 292, and concluded that:

" … the construction and interpretation that the Court has given to the issue of the retrospective application of CIPAA in no way derogates or offend the principles established and followed in these cases …"

In comparing CIPAA with the laws that were considered in the case authorities on statutory interpretation, Her Ladyship opined that the most significant distinguishing factor is that CIPAA is an entirely new legislation. The Court found that in the earlier cases, substantive rights had already been conferred by existing written laws and the amending laws sought to alter those rights, whether by revoking them or affecting them in some way or other.

The Court stated that in comparison, there was no existing written law to begin with in the case of CIPAA and that the

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A *SINGULARIS* APPROACH TO CROSS-BORDER INSOLVENCIES

Lee Shih comments on the Privy Council decision in the Singularis Case

The Privy Council in *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2014] UKPC 36 ("*Singularis*") has clarified the extent to which courts can render common law assistance for cross-border insolvencies.

In summary, there is a limited common law power to assist a liquidator appointed by a foreign court by ordering the production of information. Such information must be necessary for the administration of the foreign winding up and this power is only exercisable if the foreign court could have made such an equivalent order.

BACKGROUND: MODIFIED UNIVERSALISM

In a cross-border insolvency, courts may be faced with difficult questions. Should a domestic court apply its domestic laws as if the case had no international aspects or should a domestic court defer to the foreign laws of the main jurisdiction of incorporation of the wound up company?

In other words, should a 'territorialist' approach be applied where the domestic court only applies its domestic laws? Alternatively, should a 'universalist' approach prevail in allowing a single set of the foreign laws of the main winding up jurisdiction to govern all of the global winding up proceedings?

> **"the Privy Council upheld the general principle of modified universalism"**

A middle ground between these two concepts is that of 'modified universalism.' The courts of all countries should cooperate, as far as possible, with the laws of the main jurisdiction, except where the domestic jurisdiction has a compelling reason to apply its domestic laws.

It is against this backdrop of the increasing recognition of modified universalism that the facts of *Singularis* are set out below.

BRIEF FACTS OF SINGULARIS

Singularis Holdings Limited ("Singularis") had been wound up in its place of incorporation, the Cayman Islands. The liquidators of Singularis ("Liquidators") obtained court orders in the Cayman Islands against the company's former auditors, PricewaterhouseCoopers ("PwC") in Bermuda, to deliver up to the Liquidators certain documents. This was in order to facilitate the Liquidators' investigations to trace certain assets. However, the law of the Cayman Islands only provided for documents "*belonging to*" a company to be delivered up to a liquidator. There was no dispute that this would not include material belonging to PwC itself, principally their audit working papers.

Subsequently, in Bermuda, while there was no ancillary liquidation of Singularis, the Liquidators obtained an order from the Bermudan court recognising their status as liquidators. Where a company is wound up in Bermuda, Bermudan law had a wider provision where documents "*relating to*" a company are to be delivered up to the liquidator of the wound up company. Relying on this Bermudan provision, the Liquidators applied for a Bermudan court order for PwC to deliver up its audit working papers.

At first instance, the Bermudan court allowed the Liquidators' application and relied on the principle of modified universalism. The Bermudan court exercised a common law power to order PwC to produce the same documents which they could have been ordered to produce under the relevant Bermudan provision.

PwC appealed the decision and on appeal, the Bermudan Court of Appeal set aside the first instance decision. The Liquidators appealed to the Privy Council.

PRIVY COUNCIL DECISION

The Privy Council, by a three to two majority decision, dismissed the appeal on grounds that the Liquidators would not have had the power to require PwC to produce the documentation under the laws of the Liquidators' main winding up jurisdiction i.e. Cayman Islands law. While the Privy Council was deciding on Bermuda law, the common law of Bermuda is the same as that of England.

> **"At common law, the Court has power to ... grant assistance to foreign insolvency proceedings"**

The Privy Council had to consider two issues:

(1) Whether a common law power existed to assist foreign liquidators by ordering parties to provide information in circumstances where the equivalent statutory power did not apply to foreign liquidators; and

(2) Whether, if such a power existed, it should be exercised where an equivalent order could not have been made by the court in the main winding up proceedings.

Firstly, the Privy Council upheld the general principle of modified universalism as set out in the Privy Council case of *Cambridge Gas Transport Corp v Navigator Holdings plc Creditors' Committee* [2006] UKPC 26 ("*Cambridge Gas*"). At common law, the Court has power to recognise and grant assistance to foreign insolvency proceedings. However, the Privy Council overruled some of the other wider principles set out in *Cambridge Gas* and held that a domestic court does not have the common law power to assist the foreign court by doing whatever it could have done

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in a domestic insolvency.

In dealing with the issues in the appeal, the majority decision held that there is a common law power to assist a foreign insolvency court by ordering the production of information, whether oral or documentary, which is necessary for the administration of a foreign winding up.

However, this common law power is subject to five limitations.

First, it is only available to assist the officers of a foreign insolvency court. It would not be available, for example, to assist a voluntary winding up, which is essentially a private arrangement and is not conducted by or on behalf of an officer of the court.

Second, it is a power of assistance and exists to enable courts to surmount the problems posed for a world-wide winding up of the company's affairs. It is therefore not available to enable foreign liquidators to do something which they could not do under the law by which they were appointed.

Third, it is available only when it is necessary for the performance of the office-holder's functions.

> **"It is … not available to enable foreign liquidators to do (what) they could not do under the law by which they were appointed"**

Fourth, such an order must be consistent with the substantive law and public policy of the assisting domestic court, in this case that of Bermuda. Following from this, it is not available to exercise such a common law power to obtain material for use in actual or anticipated litigation. Further, in some jurisdictions, it may be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency.

Fifth, the exercise of this power is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

Therefore, the Bermuda court had both the right and the duty to assist the Cayman court in so far as it properly could within the limits of its own inherent powers. This was to enable the officers of the Cayman court to do in Bermuda that which they could do in the Cayman Islands.

However, the Bermuda court could not exercise a common law power which was not exercisable by the Cayman court and could not apply the legislation applicable to its domestic winding up by analogy 'as if' the Cayman winding up was a domestic (i.e. Bermudan) winding up. It was not a proper use of the Bermuda court's common law power of assistance for it to purport to use a power analogous to the Bermudan statutory provision to compel disclosure and production of information which belonged to PwC rather than the company.

LOCAL APPLICATION

In Malaysia, the Privy Council decision would not be binding but would be persuasive. Where a foreign company is wound up by the court of its main jurisdiction, and there is no ancillary winding up in Malaysia, the foreign liquidator would likely be able to obtain a Malaysian order recognising its status as a liquidator and possibly obtain an order for the production of information which is necessary for the administration of the foreign winding up.

Similarly, a local court-appointed liquidator of a Malaysian company with worldwide links may also apply for such orders for production of information in other common law jurisdictions.

It appears that this broad principle of allowing a production of information, both oral and documentary, would allow a foreign liquidator to also apply for orders allowing for private or public examination of persons in connection with the affairs of the company in winding up (assuming that there are such equivalent provisions in the foreign liquidator's main jurisdiction).

Decades ago, the Singapore High Court in *Re China Underwriters Life and General Insurance Co Ltd* [1988] 1 MLJ 409 held that the court had no inherent jurisdiction or power to order the private or public examination of persons and dismissed the Hong Kong liquidator's application. It was recognised in that case that such a power of examination was an extraordinary one which invoked images of the Inquisition and of the Court of Star Chamber. This decision was upheld by the Singapore Court of Appeal in *Official Receiver of Hongkong v Kao Wei Tseng & Ors* [1990] 2 MLJ 321. At that time, it was held that it was only a statutory power available in a domestic winding up.

As a result of *Singularis*, we may now have a broadening of the courts' power in Malaysia to assist foreign court-appointed liquidators.

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REFORMS TO RULES ON DIVIDEND

Natalie Ooi explains the proposed new rules on dividends under the Companies Bill 2013

On 2 July 2013, the Companies Commissions of Malaysia ("CCM") released the exposure draft of the Companies Bill 2013 ("Bill") which is claimed will *"revolutionise the way people do business in Malaysia"*. Among the many ground-breaking changes proposed under the Bill are the introduction of a no par value shares regime, the use of solvency statements for certain transactions, provisions for appointment of a judicial manager and, the subject of this article, the re-writing of the rules on dividend.

Section 365(1) of the Companies Act ("CA") provides that *"No dividend shall be payable to the shareholders of any company except out of profits or pursuant to Section 60."* Section 60 which permits dividends to be paid out of the share premium account through the issue of shares to members, falls outside the scope of this article.

Section 365(1) is in *pari materia* with Section 376(1) of the New South Wales Companies Act 1961. It also shares the same position as in the UK prior to the UK Companies Act 1980 and the New Zealand Companies Act 1955.

EXISTING RULES ON DIVIDEND

The CA and the corresponding legislation in the jurisdictions described above do not define 'profits'. Arising from this, the courts have, over the years, formulated various rules in relation to the payment of dividends on an *ad hoc* basis. These rules are summarised below.

- Dividends may be paid out of trading profits for a financial year without any regard to the losses incurred in previous financial years (*Re National Bank of Wales* [1899] 2 Ch 629); and without first making good the lost capital (*Lee v Neuchatel Asphalte Co* [1889] 41 Ch D 1, *Verner v General and Commercial Investment Trust* [1894] 2 Ch 239 and *Marra Developments Ltd v BW Rofe Pty Ltd* [1977] 3 ACLR 185).

- Dividends may be paid out of revenue profit without any regard to losses in fixed assets (*Lee v Neuchatel Asphalte Co*); or the need to make provision for depreciation of fixed assets (*Ammonia Soda Co v Chamberlain* [1918] 1 Ch D 266).

- Dividends may be paid out of an unrealised capital gain resulting from a *bona fide* revaluation of fixed assets (*Dimbula Valley (Ceylon) Tea Co Ltd v Laurie* [1961] Ch 353 and *Industrial Equity Ltd v Blackburn* [1978] 52 ALJR 89).

- There is no necessity that there be available profits when the dividend is actually paid, so long as there were available profits when the dividend was declared (*Marra Developments Ltd v BW Rofe Pty Ltd* and *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action* [1996] 1 MLJ 872).

PROPOSED CHANGES UNDER THE BILL

Since the inception of the CA, this is the first attempt by the CCM to reform the Malaysian corporate law which governs the distribution of dividends to shareholders. The proposed changes are embodied in Subdivision 6 (Clauses 130 to 132) of Division 1 of Part III of the Bill.

The new provisions lay down the requirements that have to be met before a dividend can be paid, and replace the rules summarised above, which have come to be viewed as 'commercially imprudent' and 'contrary to good accounting practice'.

Definition of 'profits'

Clause 130(2) of the Bill introduces a definition of 'profits' to clarify the dividend rules. The general rule under Clauses 130(1) and 130(2) of the Bill is that a company may only make a distribution to its shareholders out of the company's *"profits available for the purpose"*, namely *"its accumulated profits so far as not previously utilized by distribution or capitalization, less its accumulated losses, so far as not previously written off in a reduction or reorganization of capital duly made"*.

UK post-1980

Section 39 of the UK Companies Act 1980 and Section 830 of the UK Companies Act 2006 have a substantially similar definition of 'profits available for the purpose'; the only difference being that the UK Companies Acts include the words 'realised profits' and 'realised losses' which have been omitted from the Bill. The word 'realised' may have been inserted into the UK legislation to enhance the clarity of the provision.

David Kershaw in *Company Law in Context: Text and Materials* (2012), referred to the test as the 'accumulated profits test'. He further explained that *"To determine whether, and the extent to which, a company can make a dividend, the company must first accumulate all its prior 'realised profits' and deduct from those profits any previous distributions that it has made or profits which it has capitalized. From this accumulated profit number the company must then deduct all its accumulated realised losses as adjusted to take account of any write-offs of its liabilities resulting from a capital reduction. If this accumulated realised profits figure exceeds the accumulated losses figure then the company may issue a dividend to the extent of the excess"*.

The operation of the 'accumulated profits test' can be illustrated as follows: In Year 1, ABC Sdn Bhd made a profit of RM100 and paid a dividend of RM80. In Year 2, it made a loss of RM200 and in Year 3, a profit of RM250. In the circumstances, ABC Sdn Bhd can pay a dividend of up to RM70 after Year 3 ((100 – 80) + 250 – 200 = 70).

The reason for introducing the above test is to prevent companies from relying on estimated or anticipated profits which might not materialise. This statutory requirement reverses the much criticised common law rule laid down in *Dimbula Valley (Ceylon) Tea Co Ltd*.

Furthermore, a plain reading of Clause 130 of the Bill suggests that a company can no longer distribute its trading profits for

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a financial year without having regard to the losses incurred in the previous financial years. In other words, past losses, both on operating losses and fixed assets, must be made good before any dividends can be paid. This abrogates the old common law rule, as noted above, which did not require losses incurred in previous accounting periods to be made good.

Hence, upon Clause 130 of the Bill becoming law, a company which is unable to satisfy the 'accumulated profits test' may have to undertake a capital reduction to eliminate its accumulated losses if it wishes to pay dividends to its shareholders.

The solvency test

Before authorising a dividend, the directors of a company are required under Clause 131(2) of the Bill to satisfy the 'solvency test'. A similar test has been applied in New Zealand since 1993.

The 'solvency test' proposed under Clause 131(2) read with Clause 131(3) of the Bill requires the directors to certify that "*the company is able to pay its debts as and when they become due in the normal course of business*" immediately after the distribution is made.

The introduction of the 'solvency test' means that the principle laid down in *Marra Developments Ltd* and *BSN Commercial Bank (M) Bhd*, which permits a dividend to be paid even if there are insufficient profits at the time of payment so long as there were available profits at the time when the dividend was declared, will not apply under the proposed new dividend regime in Malaysia.

New Zealand

Clause 131(1) of the Bill is similar to Section 52(1) of the New Zealand Companies Act 1993 ("NZ CA 1993"). Under the NZ CA 1993, the payment of a dividend is considered as a distribution, and a company is required to satisfy a solvency test before it can make a distribution to its shareholders. Gordon Williams in *Corporations and Partnerships in New Zealand* (2011) opined that "*this solvency test requires a company to be able to pay its debts as they become due in the normal course of business and to possess assets greater in value than the value of its liabilities*".

The NZ CA 1993 also requires the directors to issue a certificate of solvency before making a distribution. Michael Ross in his article *Evaluating New Zealand's Companies Law* (1994) expressed the view that "*This requirement makes explicit what was an implicit obligation at common law*". In the New Zealand Court of Appeal case of *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242, 249, Cooke J stated that:

"The duties of the directors are owed to the company. On the facts of particular cases this may require the directors to consider inter alia the interests of creditors. For instance creditors are entitled to consideration … if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency".

The NZ CA 1993 also provides that if, after a distribution is authorised and before it is made, the board of a company ceases to be satisfied on reasonable grounds that the company will, immediately after the distribution is made, satisfy the solvency test, any distribution made by the company is deemed not to have been authorised. On the other hand, Clause 131(4) of the Bill requires the directors to take all necessary steps to prevent the distribution being made. This appears to impose an additional requirement on the directors, and is unclear as to whether such dividends are also deemed not to have been authorised.

Australia

Initially, Section 254T of the Australian Corporations Act 2001 ("Australian CA") provided that dividends could only be paid out of profits and the rule was to be applied alongside a director's statutory duty to prevent insolvency.

However, Section 254T of the Australian CA was amended as from 28 June 2010 to replace the 'profits test' with an 'assets test', which requires a company to have assets in excess of its liabilities before a dividend is declared and that such excess must be sufficient for payment of the dividend.

Recently, it has been proposed in the exposure draft of the Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 ("Australian 2014 Bill") that the 'assets test' in Section 254T of the Australian CA be replaced by an 'insolvency test'; a test which would be substantially similar to Clause 131 of the Bill.

As Section 52 of the NZ CA 1993 and the proposed new Clause 254T of the Australian 2014 Bill embody similar principles as the Bill, case law from New Zealand and Australia will be of assistance to the Malaysian courts in the interpretation of Clause 131 of the Bill upon it becoming law.

CONCLUSION

The introduction of a definition of 'profits' and the implementation of the solvency test under the Bill are much welcomed as they will enhance the dividend regime in Malaysia and afford greater protection to the creditors of a company.

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BARGAINING IN A BAZAAR?

Trevor and Nimalan examine a landmark case on the appointment of a Chief Minister in Sabah

THE ORIGINAL POLITICAL'TSUNAMI'

About 23 years before Malaysia's political tsunami at the 12th General Election, its eastern state of Sabah experienced its own political tsunami. A vigorously contested Sabah state election, held on 20 and 21 April 1985, resulted in the defeat of the ruling Berjaya Party ("Berjaya") by the fledgling Parti Bersatu Sabah ("PBS").

PBS, led by Datuk Joseph Pairin Kitingan ("Datuk Pairin"), secured 25 out of 48 elected seats in the State Legislative Assembly ("State Assembly"), handing a smackdown to Berjaya (which garnered only six seats) and United Sabah National Organisation ("USNO") (16 seats). PBS was later joined by a candidate from an independent party, Parti Pasok. This was a significant milestone in Sabah's political history as it was the first time that a party which was not part of the nation's ruling coalition had earned the right to form the State Government.

IN THE DEAD OF THE NIGHT

As news trickled in of an upset victory by PBS, a strange turn of events was unfolding at the Istana Sabah. The first indication that it was not going to be an ordinary night for Tun Mohamed Adnan Robert ("Tun Adnan"), the Yang di-Pertua Negeri ("Head of State"), came at about midnight, when he received two telephone calls from former State Minister Lim Guan Sing, advising him not to allow anyone into the Istana. This ominous warning surprised Tun Adnan, but he would remain blissfully unaware of the reason behind this warning until a few hours later.

At about 2.15 a.m., Tun Adnan was informed that Datuk Harris Mohamad Salleh ("Datuk Harris") of Berjaya wished to see him at the Istana. Giving instructions that only Datuk Harris and his bodyguard were to be allowed entry, Tun Adnan changed into more appropriate attire when he noticed that his private secretary was wearing a necktie.

Thereafter, Tun Adnan went to his office with the intention of meeting Datuk Harris, but was surprised by the presence of the State Secretary ("Tan Sri Hamid") and State Attorney ("Datuk Nicholas"). In response to Tun Adnan's query as to the reason for their presence, they informed him that they were requested to be present at the Istana by Datuk Harris to arrange for the appointment of Tun Datu Haji Mustapha bin Datu Harun ("Tun Mustapha"), the leader of USNO, as the Chief Minister as USNO and Berjaya were forming a coalition government. In disbelief, Tun Adnan uttered, "*Mana boleh*" (*How can it be*).

Datuk Nicholas went further and informed Tun Adnan that in so far as it was known at that time, PBS had won the majority of seats in the State Assembly, thus rendering it improper and unconstitutional to appoint Tun Mustapha over Datuk Pairin.

In the midst of this discussion, at about 4.00 a.m., Tun Mustapha, with a number of persons in tow, entered Tun Adnan's office, without the permission of the latter.

After the exchange of pleasantries, Tun Adnan, Tan Sri Hamid and Datuk Nicholas were joined by Datuk Yahya Lampong ("Datuk Yahya"), a prominent member of USNO, and Datuk Majid Khan ("Datuk Majid"), a well-known Berjaya supporter. A ferocious debate ensued as to whether Tun Mustapha could be appointed as Chief Minister under Article 6(3) of the Sabah State Constitution ("Sabah Constitution").

The foundation of the dispute was rooted in the provisions of the Sabah Constitution which allowed for up to six persons to be nominated members of the State Assembly. The question arose as to whether USNO and Berjaya could procure the appointment of nominated members to increase their seats to a majority in the State Assembly, thereby enabling Tun Mustapha to be appointed as Chief Minister. Datuk Yahya and Datuk Majid argued that they could, while Tan Sri Hamid and Datuk Nicholas took the opposite view.

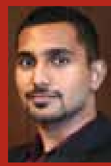
> **“ where the evidence discloses that no judgment had been made … (it is) a matter which falls within the purview of the Court ”**

The debate raged for almost two hours. As the night wore on, Tun Adnan began to feel the strain from his travelling during the preceding 24 hours. Tun Adnan admitted that he could not concentrate or think properly or rationally on the issue because of the strong pressure asserted on him.

Datuk Yahya then slipped a piece of paper to Tun Adnan, on which it was clearly written *"We will have no confidence in you and will remove you*". Noticing this exchange, Datuk Nicholas sprung out of his seat in an attempt to see what was written on the paper but before he could do so, it was snatched away by Datuk Yahya and torn into pieces before Tun Adnan could finish reading the note.

From what little he had read, the effect of the note on Tun Adnan was profound and frightened him to his very core. In his mind, it was clear that this was a direct threat to his physical well-being as there was no way that these people could legally remove him from his post as the Head of State when they were not the ones who governed the State. To Tun Adnan, it was clear that this was a death threat directed at him. He also feared for the safety of his family who were all within the Istana.

At this juncture, Tun Adnan felt there was only one possible solution to keep peace and prevent the possibility of any unrest and bloodshed, not only within the Istana but also within the

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State he loved. It was at this moment that he uttered, *"Mari lah kita sumpah Tun Mustapha."* (*Let us swear in Tun Mustapha*).

At around 5.20 a.m., Tun Mustapha took the oath in the form prescribed for the Sabah Chief Minister before Tun Adnan. Immediately thereafter, Tun Adnan went upstairs, without congratulating Tun Mustapha or providing refreshments for those present at the ceremony. Neither did he bid farewell to Tun Mustapha.

THE BATTLE LINES ARE DRAWN

Tun Mustapha's joy and reign as Chief Minister was short-lived. Within hours, Tun Adnan purported to revoke the appointment of Tun Mustapha as Chief Minister; and at 8.00 p.m. that day, appointed Datuk Pairin in his place.

Tun Mustapha refused to accept the turn of events and hauled Tun Adnan and Datuk Pairin to Court, seeking a declaration that the revocation of his appointment by Tun Adnan and the subsequent appointment of Datuk Pairin were *ultra vires* the Sabah Constitution.

Hence, it was against the backdrop of the events which took place in the dead of the night that the validity of Tun Mustapha's appointment as Chief Minister came before the High Court in Sabah in *Tun Datu Haji Mustapha Bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No. 2)* [1986] 1 MLJ 420.

THE DECISION OF THE HIGH COURT

The judge, Tan Chiaw Thong, J in essence narrowed the dispute to two main issues: first, whether the appointment of Tun Mustapha by Tun Adnan was an issue which could be considered by the court; and second, whether the said appointment was valid.

As a starting point, Tan J ruled that a distinction had to be drawn between a situation where the evidence discloses that no judgment had been made under Article 6(3) of the Sabah Constitution, which was a matter which falls within the purview of the Court to decide; and one where the evidence showed that a judgment has been made, albeit allegedly not properly made. In the latter case, the matter would not be reviewable by the Court.

Tan J then undertook a detailed review of the evidence and ultimately held that the swearing in was null and void and had no legal effect on two grounds.

The First Ground

According to the learned judge, Article 6(3) of the Sabah Constitution specifically requires the Head of State to appoint as Chief Minister a member of the State Assembly who in his judgment is likely to command the confidence of the State Assembly. Therefore, the Head of State cannot constitutionally exercise his judgment on the appointment of a Chief Minister without taking into account the number of elected seats secured by each and every political party, and for that matter by the independent candidates. If the Head of State failed to take into account the number of seats obtained by the parties, it would mean that he had not exercised his judgment under Article 6(3) and would have acted unlawfully or unconstitutionally. This would therefore mean that no judgment was made under Article 6(3).

His Lordship accepted the testimony of Tun Adnan that he had not taken into account the number of seats won by PBS when he had sworn in Tun Mustapha as the Chief Minister. Tun Adnan went further to state that he was still waiting for the official results of the elections to be announced but could wait no longer due to the pressure that was being exerted on him. Justice Tan held that this was contrary to one of the requirements of Article 6(3) of the Sabah Constitution and concluded that Tun Adnan had not made a judgment within Article 6(3) of the Sabah Constitution and that therefore, the swearing in of Tun Mustapha had no legal effect.

> **"the swearing in … was made solely as a result, cumulatively, of the pressure and threat"**

The Second Ground

The learned judge held that the Sabah Constitution envisaged that the Head of State is to be allowed to make his judgment quietly, freely, independently and impartially, without any influence, pressure, threat or other factors not sought by him which might influence his judgment. This was consistent with the tradition of all countries that have adopted the party system of government based on Parliamentary democracy and constitutions which follow the Westminster model.

Justice Tan found that the swearing in of Tun Mustapha by Tun Adnan was not made voluntarily or willingly but was made solely as a result, cumulatively, of the pressure and threat faced by Tun Adnan which operated on his mind when he was frightened, confused, and physically tired, causing him to be unable to think properly. His Lordship added that it would indeed be a remarkable and dangerous situation if he were to accept that the swearing in of Tun Mustapha in such circumstances was legal, constitutional or valid.

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DIVISION OF MATRIMONIAL ASSETS

Ezane Chong and Vivian Siew explain the principles that govern the distribution of assets upon a divorce

The issue of how to divide property following the breakdown of a marriage is a vexed one which has spawned many a battle amongst estranged couples. This article outlines the principles that govern the division of matrimonial assets among non-Muslims in Malaysia.

COURT'S POWER TO DIVIDE MATRIMONIAL ASSETS

Section 76 of the Law Reform (Marriage and Divorce) Act 1976 ("Act") empowers the Malaysian court, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage.

In this regard, a distinction is drawn between those assets acquired by the joint efforts of both husband and wife and those acquired by the sole effort of one spouse.

Division of jointly acquired assets

The principles governing jointly acquired assets are set out in sections 76(1) and 76(2) of the Act, where the court is directed to incline towards equality of division, having regard to:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit; and

(c) the needs of minor children, if any, of the marriage.

> **" a distinction is drawn between … assets acquired by the joint efforts of both … and those acquired by the sole effort of one spouse "**

Division of assets acquired by the sole effort of one spouse

On the other hand, sections 76(3) and 76(4) deal with solely acquired assets and the factors to be taken into consideration are:

(a) the extent of the contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or by caring for the family; and

(b) the needs of the minor children, if any, of the marriage.

Subject to the above considerations, the court may divide the assets or the sale proceeds in such proportions as it thinks reasonable but in any case the acquirer shall get a greater proportion.

WHAT CONSTITUTES MATRIMONIAL ASSETS?

For parties who are getting a divorce or contemplating one, it is pertinent to know just what kind of property will be classified as matrimonial property and thus subjected to division upon divorce. The Act is silent on what constitutes matrimonial assets but from a study of case law, the following have been held to comprise matrimonial assets:

- The matrimonial home and everything put into it by either spouse to be used jointly and severally for the benefit of the family as a whole;
- All landed properties acquired during the marriage apart from the matrimonial home;
- Cars, cash in bank accounts, jewellery, shares in companies including the family business(es) and even club memberships if acquired during the marriage;
- Contributions made to the Employees' Provident Fund during the marriage;
- Insurance policies, gratuity payments, employment and retirement benefits accumulated during the marriage by either or both spouse(s);
- Assets owned by one party before the marriage, provided that such assets have been "substantially improved" by the other party during the marriage or by their joint efforts (section 76(5) of the Act);
- Gifts from one spouse to the other, especially gifts of substantive value.

Inherited properties and gifts by a third party are generally excluded from division because, arguably, they do not comprise assets acquired by the "joint efforts" of both spouses or the "sole effort" of either of them. However, applying section 76(5), an inheritance or gift received before marriage may form part of matrimonial assets and be subjected to division if it can be shown that the inheritance or gift has been substantially improved through the efforts of one or both parties during the marriage.

THE OPERATION OF SECTIONS 76(1) AND 76(2)

In Malaysia, there is no presumption of equal sharing of matrimonial assets. Equality of division may apply only if the court is satisfied that the claimed property is jointly acquired by the spouses in terms of "money, property or work towards the acquiring of the assets".

In *Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 CLJ 105, the parties were married and lived in the UK for a number of years


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during which the husband bought some properties there. The UK properties were sold when the couple returned to Malaysia and the proceeds were then used to acquire other properties in Malaysia. Upon divorce 17 years later, the wife claimed *inter alia* the value of half of all those properties. The husband argued that she was not entitled to them as she did not contribute towards the purchases.

At the High Court, the judge accepted the wife's evidence that she had made a direct financial contribution as she had used her salary to pay for the upkeep of the household as well as to buy groceries, while her husband paid for the monthly instalments when they were in the UK. Since it was the monies brought back from the UK that helped the parties finance the properties subsequently acquired in Malaysia, the wife was held to be entitled to half the current value of those properties. On appeal, the Court of Appeal agreed that the division as ordered by the trial judge was reasonable.

> **“ In Malaysia, there is no presumption of equal sharing of matrimonial assets ”**

The position in England differs from that in Malaysia. Although there is also no statutory presumption of equal sharing in England, the House of Lords broke new ground in *White v White* [2000] UKHL 54 by deciding that fairness requires the division of assets to be measured against the “yardstick of equality” to ensure that there is no discrimination between the contributions of a breadwinner and a homemaker. Accordingly, equality should be departed from only if, and to the extent that, there is good reason for doing so.

Against this backdrop, it is not surprising that Pauline Chai, a former Miss Malaysia, sought to have her divorce proceedings heard in England whilst her husband, Tan Sri Khoo Kay Peng, a Malaysian tycoon, strived to have the proceedings heard in Malaysia. At the time of writing, the substantive hearings in both jurisdictions are ongoing.

THE OPERATION OF SECTIONS 76(3) AND 76(4)

The court may divide a solely acquired asset as it thinks reasonable, provided that the acquirer shall receive a greater proportion.

In *Shireen a/p Chelliah Thiruchelvam v Kanagasingam a/l Kandiah* [2012] 7 MLJ 315 the husband was the person making payments for the properties most of the time. The wife's main contribution was to the welfare of the family by looking after the home and caring for the family. Taking a broad-brush approach, the judge held that the wife was entitled to a 35% share and the husband, 65% share of the matrimonial assets.

DOES CONDUCT AFFECT THE DIVISION OF ASSETS?

At this juncture, it is appropriate to address an often-asked question: whether adultery or unreasonable behaviour by one spouse will entitle the ‘innocent’ spouse to lay a bigger claim on the matrimonial assets? The answer is ‘no’. In Malaysia, the parties' conduct however good or bad does not affect the division of assets as there is no such consideration mentioned in section 76.

> **“ Section 76 of the Act is centred on a dichotomy between “joint efforts” and “sole effort” ”**

CONCLUSION

Section 76 of the Act is centred on a dichotomy between “joint efforts” and “sole effort”. For the efforts to be treated as “*joint*”, there must usually be evidence of monetary contributions by both parties towards the acquiring of the property, whereas when dealing with “*solely acquired assets*” regard is had to the non-financial acquirer's contribution to family welfare.

As a consequence, the courts in Malaysia are required to consider the contributions, even if minute, made by each spouse towards the acquisition of the properties, to determine the proportion in which the properties should be divided. This can be a tedious exercise for both the court and the disputing parties' respective legal advisers.

That said, judges do have considerable discretion and will often strive to reach an outcome which is fair to both parties, having regard to the individual circumstances of the case.

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AARGH! IT'S A LEMON!

Kelly Chung considers the need for greater consumer protection in Malaysia

The National Consumers Complaints Centre ("NCCC") has recently been advocating for the introduction of lemon laws into our legal system (see *Star Metro* of 18 December 2014 and 10 January 2015).

To support its cause, the NCCC stated that consumer complaints on general consumer products in 2013 involved RM12.6 million worth of products. The categories of products under which most complaints were lodged were electrical and electronic appliances and furniture.

The NCCC also reported that consumer complaints in the auto-sector involved more than RM135 million worth of products from 2010 to 2013. They added that cases of defective consumer products often left consumers with the short end of the stick – suffering financial losses as well as mental stress.

In this article, we shall first examine how lemon laws have been incorporated into the laws of the UK, Singapore, New Zealand and Australia. We shall then consider the position in Malaysia with regard to such laws.

THE ORIGINS OF LEMON LAWS

The origins of lemon laws – as we know them today – can be traced back to the USA. In 1975, in an attempt to offer better consumer protection and to promote fairer and more ethical domestic trading practices, the US Congress enacted the Magnuson-Moss Warranty Act – commonly known today as the Federal Lemon Law.

Essentially, such laws provide relief to aggrieved consumers who bought products that are defective (i.e. those goods that repeatedly fail to meet standards of quality and performance). In other words, they afford protection to consumers who have, to their misfortune, received a "*lemon*". Lemon laws in the USA were first intended to cover purchases of cars, but were thereafter extended to cover most other general consumer products.

The Magnuson-Moss Warranty Act has been the impetus for the introduction of lemon laws in various other jurisdictions.

THE UNITED KINGDOM

Lemon laws in the UK are generally found in Part 5A of the Sale of Goods Act 1979 ("UK Act"). Part 5A came into effect on 31 March 2003 after a much delayed implementation of EU Directive No. 44 of 1999, and sets out the additional remedies available to consumers in certain circumstances.

Under the UK Act, a product "does not conform to the contract of sale" if at the time of delivery, there is a breach of an express term of the contract or an implied term under Sections 13, 14 or 15 of the UK Act e.g. where the product does not correspond with its description, or is not of a satisfactory quality.

Under Part 5A, where goods fail to conform to the contract of sale at the time of delivery, the buyer has the right to require the seller to repair or replace the goods within a reasonable time and without causing significant inconvenience to the buyer.

Alternatively, where repair or replacement is not possible or disproportionate as compared to the other available remedies, or where the seller fails to repair or replace the goods within a reasonable time or without significant inconvenience to the buyer, the buyer may require the seller to reduce the purchase price of the goods by an appropriate amount, or rescind the contract to obtain a refund.

Crucially, Part 5A makes it easier for aggrieved consumers to have their day in court without being given the runaround. If the defect is discovered within six months of delivery of the goods to the consumer, a presumption arises that the defect existed at the time of delivery unless the seller can prove otherwise. Beyond this initial six months, the consumer can still seek redress but will have to prove that the defect existed at the time of delivery.

SINGAPORE

Almost a decade after the introduction of lemon laws in the UK, our neighbours down south followed suit. On 1 September 2012, lemon laws were added to Part III of the Consumer Protection (Fair Trading) Act (2003)("Singapore Act").

The provisions introduced to the Singapore Act mirror largely the provisions in Part 5A of the UK Act, and as such, will not be repeated here. Lemon laws in Singapore cover all consumer goods, except real property and rented or leased goods. Perishables and consumables are also covered but the time frame of the presumption that the defects existed at the time of delivery is reduced to the normal shelf-life of the perishable or consumable item, if the shelf-life of such item is less than six months.

Lemon laws in Singapore (as they do, too, in the UK) extend to cover second-hand goods. In determining the reasonableness of a claim, the court will take into account the age and price paid for a second-hand good. For example, a buyer of a 10-year-old car cannot reasonably expect it to function like a new car, but he can expect it to perform in a manner that may be reasonably expected of a car of that mileage and model.

A retailer will not be liable for defects or limitations of the goods which have been disclosed to the consumer before the sale. However, the consumer may still require the retailer to take remedial action if the latter failed to disclose the full extent of the defects.

NEW ZEALAND AND AUSTRALIA

The New Zealand equivalent of lemon laws can be found in the Consumer Guarantees Act 1993 ("CGA"). These laws apply to most goods and services, including second-hand goods, except those bought at a private sale.

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The CGA creates a basic set of guarantees for consumers who acquire goods from suppliers or manufacturers. Sections 6, 8 and 9 of the CGA provide guarantees that goods must be of 'acceptable quality', be 'reasonably fit for any disclosed purpose' and goods sold by description must correspond to their description.

Where a failure cannot be remedied or is of a "substantial character", the consumer may reject the goods or seek compensation from the supplier for the reduction in the value of the goods below the price paid for the goods pursuant to Section 18(3) of the CGA.

According to Section 21 of the CGA, a failure to comply with a guarantee is of a "substantial character" if the failure is one where, *inter alia*, a reasonable consumer would not have acquired the goods if they had been acquainted with the nature and extent of the failure, or where the goods are substantially unfit for the disclosed purpose, or are unsafe.

> **" the CPA contain(s) provisions that confer certain implied guarantees in respect of goods "**

Where the failure can be remedied, the consumer has the right under Section 18(2) to require the supplier to remedy the failure. In such event, the supplier has the option under Section 19(1) of the CGA to remedy the failure by repairing or replacing the goods or refunding the money paid by the consumer. However, if the supplier refuses or neglects to remedy the failure within a reasonable time, the consumer may reject the goods or have them remedied elsewhere and recover all reasonable costs thereby incurred.

The CGA also allows the consumer to recover damages for reasonably foreseeable losses that arise from the failure, regardless of whether the failure is of a substantial character or not.

The lemon laws in New Zealand are largely mirrored in Australia. These can be found in the Australian Consumer Law ("ACL") which came into force on 1 January 2011 and applies throughout the country.

Unlike the UK Act and the Singapore Act, the CGA and ACL do not contain a provision which reverses the burden of proof if the failure occurs within a prescribed time period from delivery.

MALAYSIA

In Malaysia, remedies for defective goods are found primarily in the Sale of Goods Act 1957 ("SGA") and the Consumer Protection Act 1999 ("CPA").

While the SGA provides for the implied conditions as to fitness for purpose, merchantability and conformity with description, a buyer who ends up with a lemon can only seek redress in court. Further, the burden lies on the purchaser to prove that the goods were defective.

Parts V and VI (Sections 30 to 49) of the CPA contain provisions that confer certain implied guarantees in respect of consumer goods and set out the remedies available to a consumer where such goods fail to comply with any of the implied guarantees.

Sections 32, 33 and 34 of the CPA are substantially similar to Sections 6, 8 and 9 respectively of the CGA and provide implied guarantees that the goods must be of acceptable quality, reasonably fit for specified purposes and where the goods are sold by description, correspond with their description.

The remedies conferred upon a consumer in the case of non-conformity with implied guarantees as set out in Sections 41 and 42 of the CPA are largely similar to those conferred under Section 18 and 19 of the CGA.

As in the case of the CGA and the ACL, the CPA contains provisions in Parts VIII and IX (Sections 53 to 65) that confer certain implied guarantees and set out the remedies available to a consumer where services fail to comply with any of the implied guarantees.

In *Matang Plastik & Metal Work Industries Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd & Ors* [2014] MLJU 674, the Court of Appeal held that the implied guarantees in the CPA apply to a used car, thereby establishing that the CPA applies to second-hand goods.

The CPA suffers a similar drawback as the CGA and ACL in that it lacks a provision which reverses the burden of proof in relation to defects discovered within a prescribed time period after the delivery of the goods.

A Tribunal for Consumer Claims ("Tribunal") has been established under the CPA to provide an alternative and less costly avenue, apart from the courts, to dispose of claims that fall within the ambit of the CPA. Unless otherwise agreed by the parties, the Tribunal has a jurisdictional limit of RM25,000.

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HANDLE WITH CARE

Zamir Hamdy Hamdan explains the need to safeguard employees' personal data

It is unquestionably the case that a fair amount of most corporations' repositories of personal data include those of their employees. In fact, an employee's personal data is processed and retained by the employer even before the employment relationship begins - during the recruitment stage or when the services of a headhunter are utilised. This continues throughout employment and may even extend after its termination.

The Personal Data Protection Act 2010 ("PDPA") came into force on 15 November 2013, and imposes certain obligations on 'data users' in dealing with all personal data processed by them.

DOES THE PDPA APPLY TO EMPLOYEE DATA?

It appears the answer would be "Yes".

There was previously some ambiguity as to whether the PDPA would apply to employee data as it is stated to apply only to personal data in respect of "commercial transactions" (section 2(1)).

However, the Personal Data Protection Department ("PDP Department") published a Public Consultation Paper No. 3/2014 in February 2014 entitled "Guide on The Management of Employee Data" ("Employment Guideline"). The Employment Guideline has removed any such uncertainty as it states that "*it is clear that employer-employee relationship is commercial and contractual in nature as it arises from a contract of services in exchange for remuneration and the PDPA applies to such a relationship*". It must be noted, however, that to date, the Employment Guideline has yet to be implemented.

DOES THE PDPA APPLY AT RECRUITMENT STAGE?

The PDPA applies to personal data collected even at the recruitment stage. This should not be seen as a hindrance to effective recruitment policies but prospective employers must bear in mind that they are expected to strike a balance between their need for information and an applicant's right to respect for their private life. The spirit of the PDPA is also that it requires openness in respect of the data collected and the purposes for which it is collected.

After all, an individual's personal data, including his bank account details, credit card numbers, NRIC number, aren't just data. In the wrong hands they can wipe out a person's life savings, wreck their credit and cause financial ruin.

There are, unfortunately, no guidelines or regulations to provide guidance on the collection of personal data by employers in the recruitment stage. In the absence of such guidelines or regulations, it may be a good idea to adopt the guidelines issued by the Information Commissioner's Office of the United Kingdom. In brief, it is recommended that employers take the following steps:

(1) Ensure that the organisation is properly identified in advertisements as applicants have the right to know who they are applying to;

(2) Ensure that those involved in recruitment and selection are aware that data protection rules apply and that they must handle personal information in line with the PDPA; and

(3) Draft a PDPA Notice which complies with the requirements of the PDPA - ensure that important details, e.g. what personal data is to be collected, the purposes of collection and third party disclosures are stated in the PDPA Notice. This PDPA Notice is to be issued to all applicants and their consent must be obtained before their personal data is collected or processed.

Some companies have in place an online application form or receive unsolicited applications via email. This gives rise to complications because applicants who apply for jobs in this manner usually would not be issued with a PDPA Notice. The PDPA provides that the PDPA Notice is to be given as soon as practicable (section 7(2)). It is advisable for companies to immediately issue a PDPA Notice to the applicant and request the applicant to consent to the processing of his personal data, failing which his application cannot be processed and the company would be obliged to destroy the data received.

Alternatively, a web link can be inserted together with the online job application form to state that by providing his personal details, the applicant is deemed to have consented to the processing of his personal data as set out in the company's PDPA Notice.

WHAT SHOULD EMPLOYERS DO TO COMPLY WITH THE PDPA?

Employers are expected to take steps to ensure compliance with the provisions of the PDPA with regard to their employee's personal data. To this end, a carefully drafted PDPA Notice is to be issued to employees. It is advisable that a fresh PDPA Notice be issued to employees despite already issuing one during the recruitment stage. This is because the type of personal data collected, the purposes of collection of personal data, and the transfer of personal data would differ between employees and job applicants.

In dealing with employees, the PDPA Notice must also be broad enough to cover circumstances which might not seem probable at that time, for example to include clauses on transfer of personal data to group companies or affiliate companies although such companies may not exist at that time. Another example is to allow for the transfer of personal data to potential buyers in cases of a change of ownership of the company.

It is a good idea to follow the non-exhaustive list below in dealing with employee personal data:

(1) Carry out scheduled audits on all personal data in the company's possession to determine the data which is essential and discard or destroy all non-essential data;

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(2) Designate a mode of contact and contact person whom employees can contact to access or correct their personal data and inform all employees of the same;

(3) Establish operating procedures to deal with inquiries, complaints, and access and correction requests;

(4) Establish retention periods for personal data and destroy personal data after expiry of the same;

(5) Refrain from collecting data unnecessarily from employees; and

(6) Provide awareness and training for all personnel in the company, especially those responsible for processing personal data.

Particular care must be exercised when dealing with sensitive personal data. Sensitive personal data refers to personal data in respect of the physical or mental health or condition of a data subject, his political opinions, his religious beliefs or other beliefs of a similar nature, or the commission or alleged commission by him of any offence (section 4).

> “ compliance with the PDPA is required when CCTVs are installed in work premises ”

The employer may process sensitive personal data only if necessary and must obtain explicit consent before processing the same. It must be noted that in this context, “processing” of personal data includes the collecting, using, storing or disclosing of such data.

Any consent given by the employee must be capable of being recorded and must be maintained properly by the employer. If consent is sought in a manner which is also used for some other purposes, the consent for use of personal data must be prominently presented.

CAN EMPLOYERS MONITOR THEIR EMPLOYEES WHILE AT WORK?

The short answer is also “Yes”.

However, there are guidelines to follow in striking the balance between the need to ensure security of workplace and the employee’s right to privacy. The PDP Department has issued a Proposal Paper No. 5/2014, namely the “Guide on The Management of CCTV Under Personal Data Protection Act (PDPA) 2010”(“CCTV Guide”) to deal with queries in this respect.

This is pertinent as personal data under the PDPA has been defined as “*... any information ... that relates directly or indirectly to a data subject, who is identified or identifiable from that information or from that and other information in the possession of a data user ...* ” This definition is wide enough to include a person’s image captured under CCTV surveillance.

Although the CCTV Guide has yet to be enforced, it is advisable that an employer who installs CCTVs at the work place display a notice at the entrance to the CCTV surveillance zone that is visible to employees and visitors to inform them of the CCTV operation and the purposes for installation.

DEALING WITH ACCESS REQUESTS

One of the principles set out in the PDPA is the access principle (section 12). An employee, being a data subject, has the right to make a written request for access to his personal data and to correct them if any of the data is found to be inaccurate, incomplete, misleading or not up-to-date.

There are strict timelines which the employer must observe in dealing with data access requests. The employer must comply with the data access request within 21 days from receipt of such request. If the employer is unable to comply with the request for access, the employer must give notice to the employee detailing the reasons why compliance is not possible, and in any event, to comply within 14 days from the expiry of the initial 21 days.

The employer should make the correction and supply the employee with a copy of the data that has been corrected. There are circumstances in which the law permits the employer to refuse such request (section 36). Although the employer may charge a fee for giving access to personal data, such fee is regulated by the First Schedule of the Personal Data Protection (Fees) Regulations 2013, and range from RM2 to RM30.

CONCLUSION

Although the Employment Guideline has yet to come into force, it is clear that the PDP Department takes the view that the personal data of employees fall within the ambit of the PDPA. Accordingly, employers would be well advised to handle their employees’ personal data with the same degree of care as they would with personal data of their customers, suppliers and other parties.

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CHOLESTEROL: IT'S ALL ABOUT THE NUMBERS, EVEN THE PATENTS

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significantly greater results than any other dosage ranges.

Second step: The identification of the common general knowledge at the priority date of Patent 382. The Court found, amongst others, that statin drugs had varied recommended dosages including 5 and 10 mg, that the dose-response relationship for statins is non-linear, that the efficacy of higher doses of statin may plateau, and that it was safer to titrate up from lower starting doses.

Third step: Comparison of the inventive concept against the background of common general knowledge. The Court determined that the dosage range expounded in the Shionogi prior art clearly encompassed the Claimed Dosage Range.

Fourth step: To consider whether the differences would have been obvious to the skilled person. The Court agreed with Winthrop's submissions that the Claimed Dosage Range would be obvious to the skilled person in light of the Shionogi and Watanabe prior art documents, and given that it is common knowledge that the dose-response relationship for statins is non-linear where there is an initial sharp fall in LDL-C levels at lower doses.

> **" the selection of the Claimed Dosage Range did not require any degree of inventiveness "**

Having done so, the Court found that the selection of the Claimed Dosage Range did not require any degree of inventiveness.

TRIMMING THE FATS: INVALID AMENDMENTS

On 4 February 2000, Patent 382 was filed. Patent 382 claimed the priority date of 6 February 1999 based on GB Patent Application No. 99025900 and 8 September 1999 based on GB Patent Application No. 99210627. Patent 382 was amended on 5 October 2004 and again on 22 January 2008.

Winthrop challenged the validity of the 2008 amendments to Patent 382. The 2008 amendments had made two vital changes:

(i) Claims 1 and 2 of Patent 382 were amended to include the phrase "single once daily dose"; and

(ii) Page 11A was introduced to Patent 382's specification, where it first mentioned "single once daily dose" in relation to the Claimed Dosage Range of rosuvastatin.

Winthrop's challenge was based on the fact that the phrase "single once daily dose" was never disclosed anywhere in Patent 382 as it was originally filed in year 2000. The application form of Patent 382 had only disclosed that the subject matter, the Claimed Dosage Range, was a "suitable starting dose".

The Court found that the 2008 amendments, as revealed by Patent 382's prosecution history, contravened sections 26A and 79A(2) of the Patents Act 1983 as they introduced a concept that would go beyond the initial application as originally filed in year 2000. In consequence, the Court held that the claims of Patent 382 would not be fully supported by the description disclosed in the initial application, and that the description was insufficient to convey the invention in such terms that it can be understood clearly and completely for the skilled person to carry out the invention.

LIMPID LIPIDS: NAME THE INVENTORS

Post-Suit 57, it is clear that patent applicants must be careful in naming the inventor(s) in their patent application. Section 56(2)(d) of the Patents Act 1983 stipulates that the right to the patent must belong to the person to whom the patent was granted.

> **" the 2008 amendments ... contravened sections 26A and 79A(2) of the Patents Act 1983 "**

AstraZeneca had nominated Ali Raza as the inventor of the purported invention claimed in Patent 382. Winthrop's challenge with respect to AstraZeneca's entitlement to Patent 382 was grounded on the fact that the Claimed Dosage Range in the patent was first discovered by the employees of Shionogi Seiyaku Kabushiki Kaisha ("Shionogi Co"). Shionogi Co's employees had in fact, been the authors of the Shionogi and Watanabe prior art documents.

In 1993, Shionogi Co had conducted the first of a series of clinical trials on healthy volunteers using various doses, including the Claimed Dosage Range. In 1994, Shionogi Co had conducted further trials using 5, 10, and 20 mg doses per day. Between 1995 and 1996, Shionogi Co tested the efficacy of rosuvastatin at doses of 1 to 4 mg daily, and noted greater lipid reductions compared to available conventional drugs.

AstraZeneca's involvement only began after it had obtained a licence from Shionogi Co to exploit the rosuvastatin compound in 1998. In the licence agreement, all works relating to the rosuvastatin compound were disclosed by Shionogi Co to AstraZeneca, including the clinical trials conducted by Shionogi Co.

Even after the signing of the agreement, Shionogi Co was still involved in the development of drugs using rosuvastatin.

THE GRIM REAPER COMETH, BUT WHICH ONE?

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Between September and October 2004, Shionogi Co conducted yet another study using rosuvastatin on patients with mild hyperlipidaemia.

The Court highlighted that AstraZeneca's expert admitted during cross-examination that based on hindsight, it was Shionogi Co who discovered the Claimed Dosage Range. The Court's attention was also drawn to the Australian Federal Court's decision in *Apotex Pty Ltd* (*supra*) where the Australian Federal Court had noted that Shionogi Co was the first to discover the effective use of rosuvastatin at doses of 5 and 10 mg.

Given that the efficacy of the Claimed Dosage Range to lower lipid levels was known as early as 1993, thus long before the 1999 priority dates claimed by Patent 382, the High Court found that AstraZeneca was not entitled to the invention as AstraZeneca's nominee, Ali Raza, was not the inventor of the purported invention in Patent 382.

CONCLUSION: EAT THE YOLKS!

In short, the High Court found that Patent 382 was invalid for lack of novelty, lack of inventive step, lack of support due to the invalidity of the amendments, insufficiency, and lack of entitlement by AstraZeneca. As the High Court had found Patent 382 invalid, AstraZeneca's counterclaim for infringement was consequentially dismissed. The High Court further awarded costs to Winthrop and directed that Winthrop's damages arising from AstraZeneca's enforcement of Patent 382 be assessed.

It would appear that that the Court's grounds for finding invalidity will not be challenged, as AstraZeneca had only filed a motion for leave to appeal against the decision on costs. The deadline for AstraZeneca to challenge the Court's decision expired on 15 February 2015.

As cheaper generic drugs for high cholesterol may enter the market, it's time to dig in into your *nasi lemak* with extra eggs!

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continue its voluntary winding up, TCK could not continue as PL for the Respondent's voluntary winding up.

The Court also based its decision on the fact that by virtue of section 255(3) of the CA, the appointment of the PL in the voluntary winding up had lapsed after one month as there was no extension of the appointment by the Official Receiver and a liquidator had not been appointed for the Respondent's voluntary winding up.

The Court also observed that TCK had not commenced any work as PL for the Respondent's voluntary winding up.

The Court then exercised its discretion to allow the Petitioner's application to appoint a PL as the Court found that there was "*sufficient ground*" to do so under rule 35(1) of the Companies (Winding Up) Rules 1972. The Court provided a guide as to what constitutes "*sufficient ground*", namely that there must be evidence that ultimately the winding up court is likely to make a winding up order sought by the petitioner, there is a need to preserve the *status quo* i.e. to preserve the assets of the respondent company, there is some degree of urgency to appoint a PL, consideration of the balance of convenience of the competing interests and whether it is right to do so in the circumstances.

THE AFTERMATH

This case is significant as the learned Judicial Commissioner has through an insightful and carefully considered judgment, shown that the Court will not permit the voluntary winding up process to be abused in order to pre-empt a compulsory winding up.

The appeal filed by the Respondent was subsequently withdrawn. Thus the matter is laid to rest until the ghosts are resurrected in a similar case which may come before the Malaysian court in the future.

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BARGAINING IN A BAZAAR?

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The judge also held that Tun Adnan's conduct immediately after the swearing in ceremony supported the conclusion that he did not voluntarily and willingly swear in Tun Mustapha.

Having concluded that Tun Adnan had made no judgment under Article 6(3) of the Sabah Constitution when swearing in Tun Mustapha, the learned judge held that the appointment was null, void and of no legal effect.

Forced entry

In coming to his decision, Tan J also considered the contention by Tun Mustapha that he had been invited to the Istana by Tun Adnan to be sworn in as Chief Minister. After a detailed examination of the facts, the learned judge rejected Tun Mustapha's contention. Instead, the judge accepted the testimony of Tun Adnan and the collaborative evidence of two police constables guarding the entrance to the Istana that Tun Adnan had given instructions that no one was to be allowed entry into the Istana except for Datuk Harris and his bodyguard.

> **"the oath taken … without a signed and sealed instrument of appointment was insufficient"**

His Lordship also concluded that there had been a conspiracy by various individuals, including in particular, Datuk Harris, Datuk Yahya as agent of Tun Mustapha, and Datuk Majid to effect the entry of Tun Mustapha into the Istana for the purpose of having him appointed as Chief Minister.

Signed, Sealed and Delivered ('Twas Not)

His Lordship went further to find that the oath taken by Tun Mustapha without a signed and sealed instrument of appointment was insufficient to constitute a valid appointment under Article 6(3). This finding was based on the unbroken tradition, custom or usage for the appointment of a Chief Minister in Sabah.

The Nominated Members

The learned judge also considered whether the Head of State could take into account the nominated members of the State Assembly for the purpose of making his judgment as to the choice of a Chief Minister. His Lordship concluded that the Head of State could not do so, nor could he take the nominated members into consideration to inflate the seats held by a party having a minority of the elected seats in order to secure a majority over the party with the majority of elected seats.

As His Lordship found that the appointment of Datuk Pairin by Tun Adnan was made willingly, voluntarily and freely, without any influence, pressure or threat of any kind from anyone, the appointment of Datuk Pairin as Chief Minister was legal and valid.

CONCLUSION

The impact of Tan J's momentous decision was immediate and far-reaching. It enabled Datuk Pairin and PBS to lead the Government of Sabah for the next nine years.

The judgment makes it clear that the Head of State must be allowed to make his judgment for the appointment of the Chief Minister in a quiet, independent and dignified manner, and not as if it were, in the testimony of Tan Sri Hamid, *"bargaining in the bazaar."*

> **What happened is a blatant travesty**

It would be appropriate to conclude this article with a statement from Tan J's detailed and well-reasoned judgement that is at once eloquent and apposite in the heady circumstances of the day:

"[T]he events which occurred at the Istana in the early hours of April 22, 1985 for the duration of some hours … were those which all right-thinking members of the citizens of this beloved democratic country of ours would most certainly never have dreamt of their ever happening, much less expect that they would ever occur – but yet they had materialised. They have undoubtedly brought great shame and dismay to all responsible citizens who sincerely believe in the principles of parliamentary democracy practised in our country. What happened is a blatant travesty of this belief. It is to be hoped that events of such nature will never ever surface again."

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CIPAA: FORWARD OR BACKWARD?

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provisions which are submitted to be substantive rights are in reality not rights of the nature recognised by the Courts as being substantive rights.

Purposive Interpretation

The Court held that the principle of purposive interpretation of statutes embodied in Section 17A of the Interpretation Acts 1948 and 1967 applied to address the concern of the possibility that Section 2 of CIPAA provides only for a prospective application of the legislation.

Section 17A provides that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.

The Court concluded that, taking into account the object, intent and purpose of Parliament in enacting CIPAA to provide a choice of forum for a speedy, interim and relatively cheap resolution of payment disputes under construction contracts, the construction that would promote the purpose and object of CIPAA is one that enables it to be made available to all, regardless of when the construction contract or payment dispute arose.

CONCLUSION

This decision of the High Court means that all payment disputes under any construction contract can be referred to adjudication under CIPAA regardless of when the construction contract was made or when the payment dispute arose - the only exceptions being a construction contract in respect of which the payment dispute is already the subject of court or arbitration proceedings as provided in Section 41 and a construction contract by a natural person for the construction of a building which is less than four storeys and is intended wholly for his occupation under Section 3 of CIPAA.

In light of the Court's decision in the cases discussed above, KLRCA issued Circular 1A on 11 November 2014 which supersedes Circular 01. The new circular adopts the position taken by the Court in this case.

The cases went on appeal and are presently part-heard before the Court of Appeal. It will be interesting to see whether the Court of Appeal will uphold the decision of the High Court or adopt the position stated in the now superseded KLRCA Circular 01, or hold that CIPAA should apply wholly prospectively.

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AARGH! IT'S A LEMON!

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Some noteworthy features pertaining to the Tribunal are as follows:

- The procedures are simpler than those governing court proceedings
- The parties may not be represented by counsel
- An award made or a settlement recorded by the Tribunal is deemed to be an order of the Magistrate's court and enforceable accordingly
- The Tribunal is required to make its award without delay and, where practicable, within 60 days from the first day of hearing.

"the Malaysian Parliament should introduce a provision into the CPA which reverses the burden of proof"

CONCLUSION

It is clear from the above discussion that lemon laws already exist in Malaysia under the CPA, albeit in the form adopted in New Zealand and Australia. The CPA also provides a cost-effective framework within which consumer claims may be prosecuted expeditiously.

To enhance consumer protection, the Malaysian Parliament should introduce a provision into the CPA which reverses the burden of proof in respect of defects discovered within a prescribed time period after the delivery of the goods. This would align Malaysia's lemon laws more closely with those in the UK and Singapore.

Lastly, in the days of fast rising prices of consumer goods, the time may have come to increase the jurisdictional limit of the Tribunal beyond the present limit of RM25,000.

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Postscript - The Consumers Association of Singapore has recently stated that it will submit a proposal to the Ministry of Trade and Industry in May 2015 to extend the application of "lemon laws" in Singapore to manufacturers. In Malaysia, Part VII of the CPA already imposes certain obligations on manufacturers.

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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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