ISSUE 2/2015 • JUNE 2015

KDN No. PP 13699/01/2013 (031337)

LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The second quarter of 2015 has been an interesting one from the perspective of legal developments. On the domestic front, Malaysia became the 161st country to introduce goods and services tax on 1 April 2015.

Elsewhere, three cases are worthy of mention. The first is *R (on behalf of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* where the UK Supreme Court by a unanimous decision made on 29 April 2015, ordered the UK Government to take steps to comply with nitrogen dioxide limits set by the EU under Directive No. 2008/50/EC by the end of 2015. The UK had failed to comply with the EU's rules for the past five years.

This case was followed by *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* where the Hague District Court issued an order on 24 June 2015 requiring the Dutch Government to reduce greenhouse gas emissions by 25% (as compared to 1990 levels) to avert the negative impact of climate change on the health of Dutch citizens.

On 26 June 2015, the United States Supreme Court by a 5:4 majority in *Obergefell & Ors v Hodge, Director, Ohio Department of Health & Ors*, issued a landmark ruling that States cannot ban same-sex marriages.

We wish our Muslim clients and friends "Selamat Hari Raya Aidil Fitri".

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

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I HEREBY ASSIGN TO THEE, ABSOLUTELY

Claudia Cheah and Witter Yee examine a recent decision on an absolute assignment of rights relating to land

In the recent case of *Damai Freight (M) Sdn Bhd v Affin Bank Berhad* (unreported), the Federal Court was called upon to answer the following question of law:

"Whether a lender having an absolute assignment of rights to land may realise his security under the terms of the assignment, where the document of title to the land was issued subsequently, without the need to resort to the remedies under the National Land Code, 1965."

FACTS

This case concerns a piece of land located in Port Klang, Selangor Darul Ehsan ("Land") which was to be alienated by the State Government of Selangor to Perbadanan Kemajuan Negeri Selangor ("PKNS"). Pending the issuance of a title to the Land, PKNS entered into an Agreement to Lease dated 28 November 1988 ("the Principal Agreement") whereby it granted a lease over the Land to the appellant for 30 years.

In 1990, the appellant obtained loans from Bank Buruh (Malaysia) Berhad ("BBMB"). As security for the said loans, the appellant executed a Loan Agreement Cum Assignment dated 16 April 1990 ("LACA") whereby it assigned absolutely all its rights, title and interest under the Principal Agreement to BBMB. BBMB subsequently transferred and vested its business and assets (including its rights under the LACA) to the respondent.

> **"The LACA created an absolute assignment not by way of charge only"**

In 2003, unknown to the respondent, the title to the Land was issued and registered in the name of PKNS.

The appellant defaulted in repayment of the loans and was indebted to the respondent for approximately RM1.3 million. On 26 February 2004, the respondent obtained judgment against the appellant for moneys owing under the loans.

In exercise of its rights under the LACA, the respondent conducted a public auction and sold its rights, title and interest under the Principal Agreement to the sole bidder at the reserve price of RM1.8 million. As the Land had already been registered in the name of PKNS, the respondent informed PKNS of the same. PKNS was prepared to consent to the auction sale, provided that the Deed of Assignment by way of Transfer was forwarded to PKNS.

PROCEEDINGS AT THE HIGH COURT AND THE COURT OF APPEAL

On 19 April 2006, the appellant filed an originating summons in the High Court against the respondent seeking, *inter alia*:

(a) a declaration that the respondent has no right to enforce the LACA;

(b) a declaration that the auction sale by the respondent was *ultra vires* the National Land Code 1965 ("NLC"); and

(c) an order that the auction sale be set aside.

The appellant's application was allowed by the High Court but the decision was reversed by the Court of Appeal. The Federal Court granted leave to the appellant to appeal on the question of law set out earlier in this article.

APPEAL TO THE FEDERAL COURT

Appellant's Contention

The appellant contended that once the title to the Land has been issued, the respondent loses its rights to sell the Land by way of a further assignment and is obliged to procure a legal charge over the title and thereafter, effect a sale pursuant to section 256 of the NLC. The appellant relied on the principles set out in the High Court cases of *Ooi Chin Nee v Citibank Bhd* [2003] 1 CLJ 548 and *Jashin Scaffolding (M) Sdn Bhd v Chew Ai Eng Sdn Bhd, OCBC Bank (Malaysia) Bhd* [2004] 6 CLJ 497.

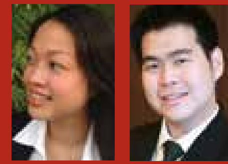
> **"When title was issued … the respondent did not lose … its power of sale under the LACA"**

The appellant also argued that if there is a power to sell privately any property with title, without an order of the court, then the provisions of sections 256 and 257 of the NLC and the Rules of Court 2012 would be rendered redundant at the option of financial institutions. The protection of the Court envisaged under a judicial sale would then be rendered nugatory.

Respondent's Contention

The respondent contended that the Court of Appeal in rejecting the principles propounded in *Ooi Chin Nee* and *Jashin Scaffolding* had in effect extended the principle enunciated by the Federal Court in *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 which recognized the power of the bank to auction off a property in a situation where no title had been issued, to one where title has been issued.

The respondent also submitted that it is settled law that an absolute assignment creates an equitable mortgage and not an equitable charge. The respondent also argued that in enforcing its rights against the appellant, the respondent did not sell the



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Land *per se*, but rather, it had sold its rights and title under the LACA and the Principal Agreement, namely its rights to a lease of the Land.

Decision of the Court

The Federal Court, by a unanimous decision, answered the question of law posed in the affirmative and dismissed the appeal.

The Federal Court rejected the appellant's contention that once the title to the Land has been issued, the respondent has to first create a charge under the NLC before proceeding with any foreclosure proceedings.

Their Lordships agreed with the judgment in *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154, where the High Court had to determine a similar issue as to whether a lender having an assignment may realise his security when there is a title to the property, without first creating a charge and obtaining an order for sale from the court.

"The purchaser merely takes a legal right of the chose in action that was assigned"

In *Goh Sin Khai*, the High Court disagreed with the reasoning and observations made in *Ooi Chin Nee* and *Jashin Scaffolding* and held that the issuance of the title to a property did not have the effect of extinguishing an absolute assignment of rights which has been created over a property. As such, the lender may proceed to sell the property under the assignment without the need to create a charge under the NLC and to obtain an order for sale from the court.

In essence, the Federal Court's findings are as follows:

(a) The LACA created an absolute assignment not by way of charge only. This means that the respondent should have all the rights, title and interest of the appellant under the Principal Agreement;

(b) When title was issued to the Land, the respondent did not lose its security or its power of sale under the LACA. The absolute assignment under the LACA survives;

(c) The respondent is thus empowered to realize its security for the loans by way of a private sale of the Land;

(d) The purchaser merely takes a legal right of the chose in action that was assigned to the respondent. The sale of a chose in action is permissible under section 4(3) of the Civil Law Act 1956;

(e) There is no necessity for the respondent to first create a charge or to resort to the statutory remedy of a foreclosure action under section 256 of the NLC to realize its security. The respondent's recovery action stands independently; and

(f) Section 206(3) of the NLC recognises the contractual operation of any transaction relating to alienated land or any interest therein. Thus, the respondent is entitled to exercise its powers of sale under the LACA and to transfer the chose in action under the Principal Agreement to a purchaser by way of a further assignment.

"There is no necessity … to first create a charge or to resort to … a foreclosure action"

CONCLUSION

This landmark decision by the Federal Court has laid to rest the confusion caused by a string of conflicting High Court decisions on the rights of a lender under an assignment in a situation where the title to land has been issued.

This decision is welcomed by lenders as it allows a quick disposal of the security created under an assignment over land without the need to first create a charge under the NLC and obtaining an order for sale, thereby avoiding unnecessary delay and costs in the debt recovery process.

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ALMOST READY TO JOIN THE CROWD

Fariz Abdul Aziz examines the Securities Commission's guidelines on equity crowdfunding

BACKGROUND

In "*Joining the Crowd*" in Legal Insights 3/2014, we provided an overview of the equity crowdfunding framework proposed by the Securities Commission of Malaysia ("SC") in its Consultation Paper dated 21 August 2014 and Public Response Paper dated 22 September 2014 on the Proposed Regulatory Framework for Equity Crowdfunding ("Proposal Papers").

On 10 February 2015, the SC released the Guidelines on Regulation of Markets under Section 34 of the CMSA ("REF Guidelines"). The REF Guidelines set out the registration and on-going requirements that apply to a "registered electronic facility" ("REF") under Section 34 of the Capital Markets and Services Act 2007 ("CMSA"). In particular, Part E of the REF Guidelines contains additional requirements that apply to an REF which is an equity crowdfunding platform ("ECF Platform").

On 11 June 2015, the SC announced that it had approved the registration of six out of 27 applicants, namely Alix Global, Ata Plus, Crowdonomic, Eureeca, pitchIN and Propellar Crowd+, to operate ECF Platforms in Malaysia ("Operators"). It is anticipated that the offering of equities *vide* the ECF Platforms will commence by the end of 2015.

> "An Issuer may only raise up to RM3.0 million in a 12-month period (and) a maximum amount of RM5.0 million"

In this article, we will discuss the requirements which an entity ("Issuer") will have to comply with in order to be hosted on an ECF Platform as well as the provisions that will apply in relation to fundraising on an ECF Platform.

CROWDFUNDING 101

Crowdfunding is a way of raising funds, primarily through the internet, by obtaining small sums of money from a large number of people. According to the UK Crowdfunding Association, there are three types of crowdfunding: donation/reward crowdfunding, debt crowdfunding and equity crowdfunding.

Donation crowdfunding is a form of crowdfunding whereby a person donates money to a cause without receiving any return, except for the satisfaction of having contributed to a cause which he believes in and the cause promoters retain 100% control over their products and services.

Like donation crowdfunding, reward crowdfunding is usually motivated by the donor's desire to support a cause; the difference being that in the case of reward crowdfunding, the donor receives a form of reward, such as event tickets, gifts or coupons, in return for his donation.

Debt crowdfunding is a form of fundraising whereby investors advance money (whether on an interest or non-interest bearing basis) to the promoter of a project.

In equity crowdfunding, an investor receives shares or stocks in return for his investment in the enterprise which promotes the business.

The REF Guidelines only regulate equity crowdfunding and not the other forms of crowdfunding described above.

THE ISSUER

Eligibility

An Issuer which proposes to offer shares under the ECF framework must be a locally incorporated private company (other than an exempt private company). It may be controlled by Malaysians or non-Malaysians. Certain companies, such as listed companies and their subsidiaries, companies with commercially or financially complex structures, companies with no business plans, companies which have a paid-up share capital exceeding RM5.0 million and companies (other than microfunds) which propose to use the funds raised to provide loans or make investments in other entities, are not allowed to raise funds through the ECF Platform.

> "an Issuer will only be entitled to the proceeds ... if the targeted investment amount has been met"

An Issuer is not allowed to be hosted on multiple ECF Platforms concurrently.

An Issuer which is a microfund may be hosted on an ECF Platform if it is registered as a venture capital company with the SC and has a specified investment objective. A microfund may only raise funds from sophisticated investors and angel investors.

Disclosure requirements

An Issuer which seeks to be listed on an ECF Platform must submit all relevant information to the Operator, including the following:

(a) the key characteristics of the Issuer;

(b) the purpose of the listing and the targeted amount to be raised;

(c) the business plan of the Issuer; and

(d) the following financial information relating to the Issuer:

- for offerings below RM300,000 - financial statements/

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information certified by the Issuer's management (if such statements/information is required by the Operator for verification purposes);

- for offerings between RM300,000 to RM500,000 - audited financial statements if the Issuer has been established for at least 12 months or financial statements/information certified by the Issuer's management if the Issuer has been established for less than 12 months; and

- for offerings above RM500,000 - audited financial statements of the Issuer.

Limits on fundraising

An Issuer may only raise up to RM3.0 million in a 12-month period, irrespective of the number of projects for which it may seek funding during the aforesaid period. Further, an Issuer may utilise an ECF Platform to raise a maximum amount of RM5.0 million, excluding its own capital contribution and funding through private placements.

The above limits will not apply to an Issuer which is a microfund that satisfies the criteria set out earlier in this article.

> **" an Operator is required to hold the amounts raised in a trust account until the specified conditions for the release of funds are met "**

THE INVESTOR

Equity crowdfunding will be accessible to sophisticated investors, angel investors and retail investors.

Investment limits

There are no restrictions on the amounts which a sophisticated investor may invest, but a retail investor is only allowed to invest a maximum of RM5,000 in any one Issuer and a total amount not exceeding RM50,000 within a 12-month period.

An investor that is accredited as an angel investor by the Malaysian Business Angels Network may invest a maximum of RM500,000 within a 12-month period without any limit on the amount which it may invest in each Issuer.

Investor safeguards

To safeguard investors, the SC has adopted an '*all or nothing*' (AON) model, whereby an Issuer will only be entitled to the proceeds raised on an ECF Platform if the targeted investment amount has been met, instead of the '*keep-it-all*' (KIA) model, where an Issuer will be entitled to receive the proceeds raised even if it falls short of the targeted investment amount.

An investor has a right to withdraw his investment within a cooling-off period of six business days.

An Operator will not be allowed to release the proceeds of the offer to the Issuer if any material adverse change occurs during the offer period. A material adverse change includes:

(a) the discovery of a false or misleading statement in the disclosure document for the offer;

(b) the discovery of a material omission of information required to be included in the disclosure document; or

(c) a material change or development in the circumstances relating to the offering or the Issuer.

To give effect to the above safeguards, an Operator is required to hold the amounts raised in a trust account until the specified conditions for the release of funds are met.

FALLING BETWEEN THE CRACKS?

The following points which were addressed in the Proposal Papers appear to have been omitted from the REF Guidelines:

(a) the right of an Issuer to accept an oversubscription, provided that the Issuer has reserved the right to do so and has disclosed to Investors as to the manner in which it proposes to use the oversubscribed amount and that the total amount raised, including the oversubscription sum, is within the fundraising limits mentioned above;

(b) details of the mechanism and the window period within which Investors may dispose of their shares in the Issuer through an ECF Platform in order to provide a measure of liquidity for investments;

(c) the requirement for an offering to be a primary offering (i.e. the issue of new shares) and not the sale of issued shares by existing shareholders; and

(d) the flexibility accorded for shares offered in a single offering to be ordinary shares or preference shares or a combination of both.

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PERSONALITY PROTECTION AND PUBLICITY RIGHTS

Yen May discusses the protection afforded by intellectual property laws over "publicity rights"

Beyond the paparazzi intrusions into the private lives of celebrities, the recent case involving Rihanna and Topshop (*Fenty and others v Arcadia Group Brands Ltd and another* [2015] EWCA Civ 3) highlighted other problems that come with the celebrity life. The case involved the sale of a fashion T-shirt by Topshop with a well-known image of Rihanna. This case raises the question of what control people, in particular celebrities, have over their image.

For many famous people, their fame provides a substantial source of income. Celebrities often endorse products and brands through advertising campaigns or release their own line of products. Fans buy these products thinking that it is endorsed by their idols. The recent trend of celebrities such as Jennifer Lopez, Britney Spears, Kim Kardashian, the Beckhams and Paris Hilton, releasing their own branded fragrances illustrates the great demand for such celebrity-branded products. It was reported that One Direction's perfume called "Our Moment" even outsold popular classic fragrances such as Chanel No 5 (the Guardian 20 August 2014).

> " image rights … is not recognised by the English Courts "

In addition, the House of Lords has recognised "the right of a celebrity to make money out of publicizing private information about himself, including his photographs on a private occasion" in *Douglas v Hello! Ltd and others (No 3)* [2007] UKHL 21.

IMAGE RIGHTS

Although image rights exist in the United States of America, it is not recognised by the English Courts. This was confirmed in *Fenty,* where Kitchin LJ stated that "there is in English law no "image right" or "character right" which allows a celebrity to control the use of his name or image". It was also said in *Douglas* that "under English law it is not possible for a celebrity to claim a monopoly in his or her image, as if it were a trademark or brand."

As such, celebrities need to seek a different cause of action, such as breach of contract, breach of confidence, infringement of copyright or passing off, in order to protect and control the use of their images.

PERSONALITY ENDORSEMENT AND CHARACTER MERCHANDISING

Personality endorsement and character merchandising can be distinguished and is well explained by Laddie J in *Irvine v Talksport Ltd* [2002] EWHC 367 (Ch). Here, Laddie J said that "When someone endorses a product or service he tells the relevant public that he approves of the product or service or is happy to be associated with it … Merchandising is rather different. It involves exploiting images, themes or articles which have become famous … The purpose (of merchandising is) to make available a large number of products which could be bought by members of the public who … wanted a reminder of it."

A celebrity such as Rihanna may earn fees by agreeing to endorse certain products. In fact, Rihanna's merchandising and endorsement business is managed by a company known as "Live Nation" which handles her agreements with leading brands such as Nike, Gillette, Clinique and LG Mobile.

PASSING OFF

Rihanna's case was essentially one of passing off. The tort of passing off perhaps provides the strongest protection for celebrities to control the way their image is used.

In order to succeed in a claim for passing off, the three elements set out in *Reckitt & Colman Products Ltd v Borden Inc and others* [1990] 1 All ER 873 must be satisfied: (i) that there is goodwill in the goods or services which the claimant supplies in the mind of the purchasing public by association with the particular name or get up under which the goods or services are offered to the public, such that the name or get up is recognised by the public as distinctive of the claimant's goods or services; (ii) that there has been a misrepresentation leading or likely to lead the public into believing that the goods or services offered by the defendant are the goods or services of the claimant; and (iii) that damage has occurred or will occur as a result of the misrepresentation.

In this instance, a passing off claim in a merchandising case, it must specifically be shown that the application of Rihanna's image to the garment told a lie. The lie must also have been material. It is more than merely creating a false suggestion that the goods have been licensed or endorsed by her. The lie must induce the customer into thinking that there is an arrangement which gave Rihanna some control over the quality of the garment and play a part in the customer's decision to buy it.

In Rihanna's case, it was clear that she had "ample goodwill" and that "the scope of her goodwill was not only as a music artist but also in the world of fashion, as a style leader." That damage had been incurred was also not contested, as Rihanna runs a large merchandising and endorsement business through Live Nation which would expect to earn significant sums from the sale of merchandise associated with her. As such, she would have lost out on fees she could have charged for the endorsement plus the loss of revenue to her merchandising business.

The contentious matter of her case was whether or not Topshop had indeed committed a misrepresentation by selling the T-shirt with her image on it. Factors such as the fact that Rihanna had previously been legitimately associated with Topshop (e.g. a contest enabling the winners to enjoy a shopping session with her in 2010) and that the image, taken from a music video of a single from her "Talk That Talk" album, was a recognisable one,

contributed to the judge's finding that there would be a real likelihood of people being deceived into thinking that the item was an authorised product and would purchase it on that basis.

The broad scope and protection offered by passing off was noted in *Irvine* by Laddie J who said that "if someone acquires a valuable reputation or goodwill, the law of passing off will protect it from unlicensed use by other parties". Laddie J also noted that "the law of passing off (has) expanded over the years."

TRADE MARKS AND COPYRIGHT

While celebrities may trade mark their names or brands and copyright certain images, there are limits to the amount of protection afforded by these means. For example, copyright did not provide Rihanna a cause of action as the photograph which was used on the garment was taken by an independent photographer who had granted Topshop a licence to use the image; thus there was no copyright infringement. A claim for copyright infringement in the Malaysian case of *Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd* [2014] 7 MLJ 298 also failed on similar grounds. However, copyright does offer limited protection for character merchandising by providing a cause of action if an image is reproduced without permission from the copyright holder.

Similarly, the limits of trademarks can be seen in *Elvis Presley Trade Marks* [1997] RPC 543 (HC), and *Tarzan Trade Mark* [1970] FSR 245.

In *Elvis Presley*, Elvis Presley Enterprises attempted to register "Elvis A. Presley", "Elvis" and "Elvis Presley" as trade marks. However, the marks were rejected for not being sufficiently distinctive to act as a badge of origin, i.e. the marks did not indicate that the merchandise originated from a specific proprietor. Laddie J observed that although "Elvis" was undoubtedly famous, his fame would in fact make the mark less rather than more distinctive. The judge compared it to *Tarzan Trade Mark* where it was held that "Tarzan" could not be registered for films and other merchandise as it had become a household and descriptive word.

CONCLUSION

Although Rihanna was successful in her action for passing off, Underhill LJ regarded the case as being "close to the borderline". Underhill LJ seemed to think that it was only due to the particular facts and circumstances of this case, such as Rihanna's past public association with Topshop and the features of the image which showed off her distinctive hairstyle which was used for Talk That Talk, that tipped the scales in her favour. Thus, while passing off does provide protection against the use of one's image, it may not be easily granted or provide as broad a protection as was suggested in *Irvine* by Laddie J. Further, the main reason why Rihanna and Eddie Irvine were successful in their respective cases was because they could demonstrate that they were in the business of endorsing products for significant amounts of money.

Some may argue that the current laws on publicity are insufficient to protect the image of celebrities who have invested a great deal of time and effort into building their images. On the other hand, others argue that publicity rights should not be heavily guarded as it is the public and society who made them famous, thus, celebrities should not be the only ones who are able to profit from their fame.

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ANNOUNCEMENTS

CHAMBERS MALAYSIAN LAW FIRM 2015

The Partners of Skrine are pleased to announce that the Firm was awarded the "Malaysian Law Firm of the Year" at the Chambers Asia-Pacific Awards for Legal Excellence 2015.

IFLR 1000 RANKINGS 2015

The International Financial Law Review 1000 (IFLR 1000) recently released its rankings of law firms for 2015.

The Firm was ranked in Tier 1 in four out of the six practice areas, namely Energy, Infrastructure, Mergers and Acquisitions, and Oil and Gas. This was the highest number of Tier 1 rankings amongst Malaysian law firms.

We would like to thank our clients for their continued support, without which we would not have been able to achieve the above-mentioned accolades.

FROM STAR CHAMBER TO CELESTIAL

Lee Shih discusses a liquidator's ability to obtain audit working papers

The Singapore Court of Appeal in *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] SGCA 20 laid down important guidelines on the grant of an Order to summon persons connected with the wound up company and to produce documents. The liquidator had successfully compelled the former auditors of the company to hand over all the audit-related documents including the audit working papers.

The statutory provision is far from being a "Star Chamber" clause (as originally described in *In re Greys Brewery Company* (1884) 25 Ch D 400 at 408). Times and attitudes have changed and the Court recognised that the power of summoning persons and ordering production of books can assist in promoting corporate governance.

The Singapore provision mirrors Malaysia's section 249 of the Companies Act 1965 and this case would be of persuasive value here.

BACKGROUND FACTS

The appellants were PricewaterhouseCoopers and two of its audit partners ("Auditors"). They were the former auditors of Celestial Nutrifoods Limited ("Celestial"), a company formerly listed on the Singapore exchange. It was incorporated in Bermuda and had three wholly-owned British Virgin Island ("BVI") subsidiaries. In turn, these BVI subsidiaries were the investment holding companies for subsidiaries incorporated in the People's Republic of China ("PRC").

Celestial was wound up in 2010 and a private liquidator ("Liquidator") was appointed. After taking control of Celestial, the Liquidator discovered that the group's operating companies, management and directors were all based in the PRC. He was unable to obtain any meaningful assistance from them with regard to the affairs of Celestial and of its subsidiaries.

The Liquidator identified several key suspicious and/or irregular transactions undertaken by Celestial and the group which warranted further investigation.

As Celestial did not have the funds to enable the Liquidator to investigate the suspicious transactions, the Liquidator entered into a funding agreement with several creditors in 2012. The funding agreement was sanctioned by the High Court.

Thereafter, the Liquidator filed an application under section 285 of the Singapore Companies Act ("section 285") against the Auditors. The Liquidator wanted the Auditors to disclose documents in their custody, power or control relating to Celestial's trade dealings, affairs and property, including documents given to the Auditors by Celestial's subsidiaries. The application also sought for an oral examination of the two audit partners.

The Auditors had provided the Liquidator with three arch-lever files of documents. They only contained high-level consolidation schedules, limited company and subsidiary level financial information, year-end balances and other minutes which the Liquidator had already recovered from other sources.

The Liquidator sought further documents from the Auditors to allow him to reconstruct the financial records of Celestial and to investigate the suspicious transactions. These included the general ledger and trial balance(s) of each entity in the group, bank statements and bank reconciliations by each entity, a register of fixed assets of each entity, loan facilities documents, contracts, detailed creditors and debtors schedule. In particular, the Liquidator also sought the Auditors' working papers.

The Auditors resisted the application. They argued that the Liquidator was not objective, the Liquidator's true motivation in making the application was to obtain evidence for a negligence suit against the Auditors, the disclosure may be illegal under PRC law, and that the request was too wide.

The High Court allowed the Liquidator's application and the Auditors filed an appeal to the Court of Appeal.

THE POWER TO SUMMON PERSONS CONNECTED WITH THE COMPANY: TWO-STAGE TEST

As mentioned, the Singapore section 285 mirrors section 249 of the Companies Act 1965. Both sections provide that the Court "*may summon before it any officer of the company or … any person whom the Court deems capable of giving information concerning the … affairs … of the company.*" Further, the Court may "*require him to produce any books and papers in his custody or power relating to the company.*"

Provisions similar to section 285 may be found in other jurisdictions such as in England (section 236 of the UK Insolvency Act 1986), Australia (section 597 of the Corporations Act 1989) and Hong Kong (section 221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance).

The Court of Appeal held that section 285 is couched in very generous terms and should not be interpreted in a restrictive manner. It is not limited to eliciting such information as would reconstitute knowledge which the company once had or had been entitled in law to possess. This is the more constrictive view seen in some of the English decisions, for instance, in *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90.

Instead, the Court of Appeal preferred the more expansive view as adopted by the Singapore High Court in *W&P Piling Pte Ltd v Chew Yin What and others* [2004] 3 SLR(R) 164 ("*W&P Piling*") which followed the House of Lords decision of *British & Commonwealth Holdings Plc (Joint Administrators) v Spicer and Oppenheim* [1993] AC 426.

This wider approach allows the power under the English-equivalent of section 285 to be invoked to assist in the accumulation of facts,

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information and knowledge that would enable or facilitate a liquidator to better discharge his statutory function. This includes information that the company may not have been apprised of prior to the onset of insolvency.

The Singapore Court of Appeal held that the grant of such an order would be a two-stage process:

1. The liquidator has to show some reasonable basis for his belief that the person can assist him in obtaining relevant information and/or documents, and that they are reasonably (and not absolutely) required. There is a general predisposition in favour of the liquidator's views.

2. There is then a balancing of conflicting interests. On the one hand, the liquidator is usually a stranger to the affairs of the company, and may be unable to obtain information which he needs from the persons connected with the company. A liquidator requires a strong and cost-effective mechanism to enable him to discharge his functions, including determining the cause of the insolvency and whether to commence legal proceedings against any wrongdoers. On the other hand, in view of the inquisitorial power conferred by the provision, the court should be careful not to make an order that is wholly unreasonable or oppressive.

THE BALANCING EXERCISE

In carrying out the balancing exercise in the second stage, the following seven principles are instructive:

(i) No distinction should be made in the exercise of the power against officers of the company and third parties. The absence of a fiduciary or contractual relationship with the company in the case of third parties should not fetter the exercise of the power so long as the third party is able to provide relevant information or documents. The lack of a direct relationship between the company and the respondent is nonetheless a pertinent factor that would be considered.

(ii) The risk of a respondent being exposed to liability is a factor relevant to determining whether there would be oppression. But it does not bar the making of an order. This provision is to enable a liquidator to discover facts and documents relating to specific claims against specific persons. He is entitled to do so with as little expense as possible and with as much ease as possible. Nonetheless, the closer a proposed respondent is to being a defined target, the more oppressive an order for examination is likely to be.

(iii) An order for oral examination is much more likely to be oppressive than an order for the production of documents. An order for the production of documents involves only advancing the time of discovery if an action ensues. On the other hand, oral examination provides the opportunity for pre-trial depositions which the liquidator would otherwise not be entitled to. The person examined has to answer on oath and his answers can both provide evidence in support of a subsequent claim brought by the liquidator and also form the basis of later cross-examination.

(iv) The risk of exposure to a claim for serious wrongdoing/fraud carries with it an element of oppression. It is oppressive to require someone suspected of serious wrongdoing/fraud to prove the case against himself on oath before proceedings are brought. But it is not a conclusive factor as there is a public interest in the investigation of fraud.

(v) Attempts to gain undue advantages in the litigation process will also be closely scrutinised to prevent abuse.

(vi) Weight will be given to the risk that compliance might expose the respondent to claims for breach of confidence, or criminal penalties in the jurisdiction in which the documents are situated.

(vii) The practical burden imposed on a respondent when a great deal of time and expense is required to comply with an order for disclosure of documents.

PROCEDURE

The procedure for a section 285 application and examination is provided for under rules 49, 52, 55, 56 and 57 of the Singapore Companies (Winding Up) Rules. The Singapore provisions are almost identical to the same rules in our Companies (Winding-Up) Rules 1972.

The Court of Appeal adopted the following three points made by *W&P Piling* on the section 285 procedure:

(a) Rule 49 states that the application to the Court to summon persons for examination "*shall*" be made *ex parte*. Nonetheless, the Court of Appeal held that it is not mandatory that all applications be made *ex parte*. In the normal course of events, applications should be made *inter partes*. But the Court would be pragmatic if the liquidator is able to adduce some evidence that prior notice of such an application might result in the redefining of facts, or the concealment or destruction of documents.

(b) Secondly, in the absence of special considerations, a liquidator ought to elicit the co-operation of the proposed examinee before invoking section 285. It is sound practice for a liquidator to first make a written request for the documents he seeks or

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A MACAO SCAM

Hong Kong Court winds up listed company on grounds of public interest

On 9 March 2015, the High Court of the Hong Kong Special Administrative Region issued its grounds of decision in *Re: China Metal Recycling (Holdings) Ltd* [2015] HKCFI 332 in which it ordered a listed company to be wound up pursuant to a public interest petition filed by the Hong Kong Securities and Futures Commission ("Commission").

BACKGROUND

On 10 June 2009, China Metal Recycling (Holdings) Limited ("Company") issued a Prospectus ("Prospectus") in connection with an initial public offering of its shares. The shares were listed on the Main Board of the Stock Exchange of Hong Kong Limited ("Exchange") on 22 June 2009.

The Company is a holding company and has 38 subsidiaries (collectively "Group"), one of which is Central Steel (Macao Commercial Offshore) Limited ("Macao Subsidiary"), an indirect wholly-owned subsidiary of the Company.

According to the Prospectus, the Group is involved in the scrap metal business. The Prospectus also disclosed that the Macao Subsidiary was the sourcing arm of the Group and purchased scrap metal from the international markets for the Group's operations in China and sold scrap metal to external customers.

Based on evidence submitted by the Commission, the Macao Subsidiary contributed substantially to the revenue and profits of the Group. Before the listing of the Company, the Macao Subsidiary contributed between 34.8% to 60.3% of the Group's revenue and between 69.5% to 120.0% of the Group's profits. Thereafter, from 2009 to 2012, the Macao Subsidiary contributed between 36.6% to 78.1% of the Group's revenue and between 100.3% to 142.5% of the Group's profits.

THE BASIS FOR THE PETITION

Subsequent to investigations initiated by the Commission against the Company for its alleged involvement in the disclosure of false or misleading information to induce transactions in its shares, the Commission filed a petition on 26 July 2013 to wind up the Company.

The petition was founded on section 212(1)(a) of the Securities and Futures Ordinance ("SFO") which, *inter alia*, permits the Commission to apply to wind up a corporation where "*it appears to the Commission that it is desirable in the public interest that a corporation should be wound up … on grounds that it is just and equitable …*" and section 117(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance ("C(WUMP)O") which permits the court to wind up a company if the court is of the opinion that it is just and equitable to do so.

The learned judge, Harris J, observed that although the Commission had on previous occasions exercised its powers under section 212 of the SFO and its predecessor provision in other circumstances, this case was the first instance in which the Commission had sought to wind up a company on a public interest petition under the said provision.

In the absence of local case law on section 212, the learned judge, Harris J drew on cases under sections 124(4) and 124A of the Insolvency Act 1986 of the United Kingdom ("UK Insolvency Act") for guidance in dealing with the petition.

Approach to a Public Interest Petition

In *Re Walter L. Jacob & Co Ltd* (1989) 5 BCC 244, the court opined that a two-staged approach should be adopted in a public interest petition.

First, the Secretary of State had to form and hold an opinion that it is in the public interest that a company should be wound up. This is a prerequisite to the presentation by him of a winding up petition under section 124(4) of the UK Insolvency Act.

Once a petition has been presented by the Secretary of State, the next stage is when the petition comes before the court. At this stage, the court has to consider the totality of the evidence, weighing the factors which support the conclusion that it would be just and equitable to wind up the company against those which support the opposite conclusion, and must be satisfied that it is in the public interest to make a winding up order. This is so even when the petition is undefended (*Secretary of State for Trade & Industry v Driscoll Management Facilities Ltd & Ors* (2001) 1 WL 949826, 29 June 2001 at page 1).

"Public interest"

Although the expression "*public interest*" is not defined in the relevant statutes in Hong Kong, Harris J drew on the regulatory objectives and functions of the Commission in the SFO for guidance, which *inter alia* includes -

(1) providing protection for members of the public investing in or holding financial products and minimising crime and misconduct in the securities and futures industry (sections 4(c) and 4(d)); and

(2) securing an appropriate degree of protection for members of the public investing in or holding financial products and suppressing illegal, dishonourable and improper practices in the securities and futures industry (sections 5(1)(l) and 5(1)(n)).

Referring to *The Inertia Partnership LLP* [2007] Bus LR 879, a decision of the English courts, the Judge concluded that it is in the public interest that, where necessary, the Commission seeks orders from the court to advance and achieve the regulatory objectives stated in the SFO.

The court highlighted the significance attached by the legislature to the integrity of material produced for the purposes of dealing in securities by referring to sections 294, 298 and 300 of the SFO

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and section 342F of the C(WUMP)O which render it an offence to disseminate false or misleading financial information.

The Judge referred to *Re Walter L. Jacob & Co Ltd* (*supra*) where Nicoll LJ observed (at page 256E) that –

"For many years Parliament has recognised the need for the general public to be protected against the activities of unscrupulous persons who deal in securities … The public interest requires that individuals and companies who deal in securities with the public should maintain at least the generally accepted minimum standards of behaviour, and that of those who, for whatever reason, fall below those standards should have their activities stopped."

The Judge then referred to *Re Derek Colins Associates Limited* (No 3092, 3093 and 3094 of 2002, 31 July 2002 at section 47) and *In re Highfield Commodities Ltd* [1985] 1 WLR 149 at 156E where the courts opined that a company which "*is run on the back of a fundamental misrepresentation or falsehood*" or is a "*fraudulent company*" should be wound up to promote public interest.

The court stated that the fact that a company has ceased the offending activities before the presentation of the winding up petition does not mean that a more lenient approach should be taken and cited *Re UK-Euro Group plc* [2006] EWHC 2102 (Ch) as authority for this proposition.

THE TRIAL

During the trial, the Commission produced extensive evidence, including evidence from a forensic accounting expert who conducted a funds flow tracing analysis of funds transferred among the Macao Subsidiary and its suppliers and customers between 2007 to 2009 and in 2012, and a shipping expert who analysed certain bills of lading for purported shipments of scrap metal from various ports to China between 2007 to 2009 and in 2012 and 2013 among the Macao Subsidiary and its suppliers and customers.

Round Robin Funds Flow

The forensic accounting expert concluded that there had been a "round robin" flow of a substantial amount of funds during the relevant years. Moneys belonging to the Macao Subsidiary had been transferred to certain suppliers and a substantial amount of those funds had been transferred almost immediately by those suppliers to the customers of the Macao Subsidiary, who in turn, transferred a substantial amount of the funds back to the Macao Subsidiary, thereby completing the round robin flow of funds. The forensic accounting expert opined that the circular flow of funds was unusual and lacked commercial substance.

As the Company did not provide any sensible explanation for the circular funds flow, the court was satisfied that the Commission had demonstrated, on the balance of probabilities, that a round robin funds transfer had taken place.

Bills of Lading

Having examined approximately 1,042 bills of lading for the periods under review, the shipping expert was of the view that 71.50% of the bills of lading did not represent genuine shipments and a further 9.60% of the bills were unlikely to represent genuine shipments.

The Commission also adduced evidence that 17 master bills of lading had been fabricated as the shipping company stated that the seal numbers on those bills had not been generated by them.

Other Evidence

The Commission also submitted evidence that most of the purported suppliers and customers of the Macao Subsidiary had been set up upon the instructions of Chun Chee Wai ("Chun"), the Chairman, Chief Executive Officer and controlling shareholder of the Company, or persons associated with him.

A former sales manager of the Macao Subsidiary said that she had been instructed by her supervisor to issue emails to certain webmail accounts (i.e. Gmail or Yahoo mail) to confirm the business transactions to "*make up some proof of contact and confirmation for the purposes of coping with (the request) of the auditor*" of the Company.

The court was satisfied that the evidence adduced by the Commission established that fraud on an "industrial scale" had been perpetrated by persons in charge of the Company on investors, the Exchange and others involved in the listing of the Company. The Judge was of the view that it was highly likely that Chun had caused the round robin transactions and the creation of the bogus bills of lading to produce significantly better figures in order to advance the Company's initial public offering and induce investors to subscribe for shares. Having started this process necessitated its continuance.

According to Harris J, "*It is difficult to think of a clearer case of it being in the public interest that a petition be brought by the Commission for a winding up*" and "*… the appropriate remedy given the gravity of what has taken place is clearly an immediate winding up of the Company.*"

THE LEGAL POSITION IN MALAYSIA

Although we do not have a provision which is in *pari materia* with section 212(1)(a) of the SFO, the Companies Act 1965 ("CA") and

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A FIERY END

Tan Su Wei explains the demise of the doctrine of fundamental breach

A body of law has developed in England from the 1950s to the 1970s known as the 'doctrine of fundamental breach' – a breach that went to the very root of the contract, such that the party guilty of it could not rely on an exclusion clause in the contract to exempt itself from liability or limit its liability.

There has been a long line of cases whereby this supposed rule of law has been invoked by the courts to negate the effectiveness of exclusion clauses. These cases include *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 (CA); *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 All ER 225 and *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 (CA).

The application of the doctrine of fundamental breach can be seen in *Levison v Patent Steam Carpet Cleaning Co Ltd,* where Lord Denning MR held that the defendant could not rely on a clause in a contract which limited its liability to £40 when a fine Chinese carpet worth £900 belonging to the plaintiffs was stolen while being cleaned by the defendant.

Notwithstanding the above, the application of the doctrine of fundamental breach and past judicial equivocation in this area of law appears to be short-lived in light of the House of Lords' decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 which reintroduced the common law approach to exclusion clauses that existed before the advent of this doctrine.

BACKGROUND FACTS

Photo Production Ltd ("Photo Production"), the owner of a card-manufacturing factory, entered into a contract with Securicor Transport Ltd ("Securicor"), a security company, for the provision of security services by Securicor at the factory. While carrying out a night patrol at the factory, an employee of Securicor deliberately lit a fire which got out of control. The factory and stock inside were completely destroyed.

Photo Production sued Securicor for damages on the ground that they were liable for the act of their employee. Securicor pleaded an exclusion clause in the contract which, *inter alia*, provided that *"under no circumstances shall [Securicor] be responsible for any injurious act or default by any employee … unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of [Securicor] as his employer; nor, in any event, shall [Securicor] be held responsible for … any loss suffered by [Photo Production] through … fire or any other cause, except in so far as such loss is solely attributable to the negligence of [Securicor]'s employees acting within the course of their employment …"*.

Photo Production claimed damages in excess of £648,000 based on breach of contract and/or negligence. At first instance, MacKenna J rejected allegations against Securicor of want of care and failure to use due diligence as employers. It was held that Securicor were entitled to rely on the exclusion clause, and were thereby exempted from liability.

DECISION OF THE COURT OF APPEAL

Photo Production's appeal was allowed by the Court of Appeal and the judgment of MacKenna J was set aside.

The court held that Securicor's employee, by deliberately setting the factory on fire, was doing the very thing he was employed to prevent. According to their Lordships, this constituted a breach so fundamental as to justify that the contract was henceforth terminated in respect of all further performance; and as the contract has ceased to exist, Securicor could not rely on the exclusion clause (whatever its wording) to escape the consequences of the breach.

Following his own judgment in *Harbutt's Plasticine*, whereby the speeches of Lord Reid and Lord Upjohn in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 were relied upon as authority, Lord Denning MR held that the doctrine of fundamental breach applied, and a fundamental breach was destructive of the contract in its entirety.

The *Suisse Atlantique Case* in his view *"affirms the long line of cases … that when one party has been guilty of a fundamental breach of the contract … and the other side accepts it, so that the contract comes to an end … then the guilty party cannot rely on an exception or limitation clause to escape from his liability for the breach"*.

According to Lord Denning, the presumed intention of the parties also has to be taken into consideration to ascertain whether or not, in the situation that had arisen, the parties could reasonably be supposed to have intended that the defaulting party should be able to avail himself of the exclusion clause. The court ruled in favour of Photo Production, and held that the parties could not reasonably be presumed to have intended that such a deliberate and erroneous act by the employee should be covered by the exclusion clause.

Securicor appealed to the House of Lords.

DECISION OF THE HOUSE OF LORDS

The House of Lords, by a unanimous decision of five judges, allowed Securicor's appeal and restored the trial judge's decision.

The apex court held that the question whether an exclusion clause protected one party to a contract in the event of breach, or in the event of what would (but for the presence of the exclusion clause) have been a breach, depended upon the proper construction of the contract. The court found that the exclusion clause precluded all liability notwithstanding that harm was inflicted intentionally.

Their Lordships overruled the principle advocated by the Court of Appeal that there was a rule of law which could be invoked by a court to deprive a party of the benefit of an exclusion clause if he had been guilty of a fundamental breach of contract.

Lord Wilberforce, who delivered the leading judgment, rejected Lord Denning's purported reliance on the *Suisse Atlantique Case*

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and opined that the whole purpose and tenor of that case pointed to quite the opposite conclusion, which was to repudiate the doctrine of fundamental breach.

In arriving at his decision, His Lordship nevertheless recognised and conceded that the doctrine, in spite of its fallacies, had served a useful purpose in preventing the operation of an exclusion clause where it would produce injustice. This eventually led to the passing of the Unfair Contract Terms Act 1977 ("UCTA") which limits the application of exclusion clauses to what is just and reasonable, and provides the courts with a statutory means by which to provide a remedy for consumers.

According to the learned judge, it is significant that Parliament refrained from legislating over the whole field of contract in this regard; particularly in commercial matters when parties are not of unequal bargaining power. It can be deduced therefore that it is Parliament's intention that parties should be free to apportion the risks as they think fit. The court adopted the view that where parties have decided how risks inherent in certain types of contracts may be most economically borne, it is wrong to use a strained construction when the words are capable of clear meaning.

On the facts, Lord Wilberforce concluded that the exclusion clauses *"have to be approached with the aid of cardinal rules of construction [in] that they must be read contra proferentem and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary. I think that these words are clear"*.

Furthermore, the court held that as the *Photo Production Case* arose before the inception of UCTA, the basic principles of the common law of contract would apply, in that the parties are free to determine their respective primary obligations to which the contract is the source.

According to Lord Diplock, *"an exclusion clause is one that modifies an obligation that would otherwise arise"*, and *"(p)arties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract …"*.

As a security service provider in this case, Securicor had, in the absence of any exclusion clause, assumed a primary obligation to procure that a night patrol service at the factory is to be provided for by their employee(s) with reasonable care and skill. Although not expressly stated as such, this obligation would have arisen by implication from the contract to provide a security service. In setting fire to the factory, the employee did not exercise reasonable care and skill in executing his duties, and Securicor's failure to procure such compliance by their employee would have constituted a failure to fulfil its primary obligation, thus resulting in a breach of contract.

However, this primary obligation of Securicor had been modified by virtue of the exclusion clause. As emphasised by Lord Wilberforce, the exclusion clause must be construed against the party relying on it, i.e. Securicor. Lord Diplock held that the court may well form its view as to whether the departure from a party's obligations by virtue of an exclusion clause is reasonable; but it is not entitled to reject the exclusion clause (however unreasonable it may be) if the words are sufficiently clear and fairly susceptible to only one meaning.

The exclusion clause in this case modified the primary obligation to the effect that Securicor would only be liable for any *"act or default (by any employee) which would have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer"*. As such, Securicor were only under an obligation to exercise due diligence as the employer. As the employee had satisfactory references, Securicor could not have foreseen that he would set fire to the factory, and were therefore not negligent in employing him. The court unanimously held that the words in the exclusion clause were clear, and as a matter of construction, the clause was effective and Securicor had not breached the contract. Hence, the exclusion clause relieved Securicor from liability.

CONCLUSION

It is noteworthy that much of the history of the doctrine of fundamental breach is revealed in terms of the conflict between the freedom of contract on the one hand, and the court's concern to prevent abuses of unequal bargaining power, on the other. The doctrine therefore is a label that the courts could use to provide a remedy to the consumer whose rights had been excluded by carefully drafted and wide-ranging exclusion clauses contained in standard form contracts employed by manufacturers and suppliers.

Nevertheless, the passing of UCTA now provides the courts with a statutory means by which to protect the consumer, and the courts are now free to decide each case on the rules of construction. In Malaysia, a similar legislation, namely the Consumer Protection Act 1999, has also been enacted to provide greater protection for consumers and to allow an aggrieved consumer to seek redress or relief from unfair practices by manufacturers or suppliers of goods and services.

It is clear that the doctrine of fundamental breach which renders an exclusion clause ineffective has perished in the flames of the *Photo Production Case*. In the aftermath of this decision, the question to be asked in any instance where an exclusion clause is relied upon in the United Kingdom is whether that clause, on its true construction, extends to cover the obligation or liability which it sought to exclude or restrict.

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LETTERS OF COMFORT – BINDING OR MORAL OBLIGATIONS?

Amy Hiew explains when a letter of comfort may or may not be legally binding.

Letters of comfort, also known as letters of support, are commonly used in the world of banking and finance. But what value do they really have? Are they legally binding? These issues were considered in *OSK Trustees Berhad v Kerajaan Malaysia* (Civil Appeal No. W-01-7-01/2012) where the Court of Appeal outlined the principles to be applied in determining the legal effect of such documents.

BRIEF FACTS

Malaysian International Tuna Port Sdn Bhd ("MITP") is a special purpose vehicle incorporated for the purpose of carrying out upgrading works in Kompleks LKIM Batu Maung, Penang and to manage and operate the said complex under a Concession Agreement which it entered into on 16 December 2004 with Lembaga Kemajuan Ikan Malaysia ("LKIM")("Concession Agreement").

To finance its work under the Concession Agreement, MITP issued RM240 million of Islamic bonds under a Bai Bithaman Ajil Islamic Securities Facility ("BAIS Facility") pursuant to a Trust Deed dated 10 April 2007. OSK Trustees Berhad ("Trustee") was appointed as the trustee for the holders of these bonds.

> **"each case must be determined based on its own facts and circumstances"**

The Ministry of Agriculture and Agro-Based Industry ("MOA"), on behalf of the Government, issued a letter of support dated 2 October 2006 ("letter of comfort") to the Trustee in connection with the Islamic bonds. After referring to the upgrading works and the Concession Agreement, the letter of comfort stated as follows:

"2. MITP has to incur borrowings in order to implement this important national project. By virtue of this, we confirm the viability of MITP, including its ability to incur borrowings and repay which is critical to ensure the successful implementation and completion of the project as envisaged by the Government through the said Concession Agreement dated 16 December 2004 and the Shareholders' Agreement between LKIM and Bindforce Sdn Bhd dated 26 October 2006 and the Supplementary Agreement to the said Shareholders' Agreement signed on 1 August 2005 where the Government through LKIM:

(a) Ensures that MITP is (in) a position to meet (and do meet on a full and timely basis) their liabilities in respect of all amounts borrowed for so long as the amount in respect of the borrowings remain outstanding; and

(b) Provide all necessary support to MITP and also ensure that MITP shall not take any detrimental action which cause MITP not being able to perform its obligations in respect of its borrowings.

3. This letter is strictly limited to the points raised in paragraph 2(a) and (b) above and there is no express or implied guarantee with regards to the borrowings of MITP."

MITP defaulted on its repayment obligations under the BAIS Facility and the Trustee obtained judgment against MITP for a sum of approximately RM208 million. The Trustee then filed an action against the Government on the ground that the Government had breached its undertaking, representation and assurance in the letter of comfort.

It was the Government's case that MOA had issued the letter of comfort upon the request of MITP to assist MITP in obtaining the initial A+ rating from the Malaysian Rating Corporation Berhad ("MARC") only. The Government also contended, amongst others, that the letter of comfort was merely supportive and without any liability to be imposed upon the Government.

The High Court dismissed the Trustee's claims and held that the letter of comfort issued by the Government was not intended to create any binding effect between the parties. The Trustee appealed against the decision of the High Court.

COURT OF APPEAL DECISION

The Court of Appeal unanimously dismissed the Trustee's appeal and upheld the High Court's decision that the letter of comfort issued by the Government was not intended to create any binding effect between the parties.

Having found that the decision of the learned High Court Judge was primarily based on findings of facts, the Court of Appeal emphasised that an appellate court will not readily interfere with the findings of facts made by the High Court unless the Trustee is able to show that the trial judge was wrong and that the decision ought to have been the other way.

The Court of Appeal agreed with the High Court that three main questions had to be answered, namely:

(1) Whether the letter of comfort amounted to an undertaking, representation and assurance that the Government would ensure that MITP would be in a position to fulfil its obligations under the BAIS Facility or whether the letter of comfort was merely a letter of comfort without any legal liabilities;

(2) Whether the subscribers for the Islamic bonds relied upon the undertaking, representation and assurance when subscribing for those bonds. If yes, whether the Government can be found liable based on that reliance; and

(3) Whether the Government officials had given an undertaking, representation and assurance as alleged during the meetings between the Trustee's and the Government's representatives.

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In answering the above questions, the Court of Appeal laid down the following guiding principles in determining the nature of a letter of comfort.

Whether the parties intended to create legal obligations

In determining whether a letter of comfort gives rise to a contractual relationship between the parties, the overriding test is that of the intention of the parties as deduced from the document as a whole seen against the background of the practices of the particular trade or industry (*Banque Brussels Lambert SA v Australian National industries Ltd* [1989] 21 NSWLR 502 and *HSBC Ltd v Jurong Engineering Ltd & Ors* [2000] 2 SLR 54).

Whether a letter of comfort is capable of giving rise to a legally binding undertaking will depend on the intention of the parties and the circumstances under which the same is given (*North South Properties Sdn Bhd v David Teh Teik Lim & Anor* [2005] 2 CLJ 510).

Whether the terms are sufficiently promissory in nature

The meaning of an agreement is to be discovered from the words used, read in the context of the circumstances in which the agreement was made (*Bank of Credit and Commerce International SA v Munawar Ali, Sultana Runi Khan and Others* [2001] 1 All ER 961).

Whether the essential and critical terms have been agreed upon

While there is a presumption with commercial arrangements that parties intend to create legal relations, and that the courts should strive to give effect to the express arrangements and expectations of those engaged in business, nonetheless there can be no binding and enforceable obligation unless the terms of the bargain, or at least their essential and critical terms, have been agreed upon (*Atco Controls Pty Ltd (in Liquidation) v Newtronics Pty Ltd* [2009] VSCA 238).

The Court of Appeal concluded that the effect to be attributed to a letter of comfort (or letter of awareness) is essentially a matter of construction and each case must be determined based on its own facts and circumstances.

Application to the facts

Two of the Government's witnesses testified that the draft letter of comfort was proposed by MARC. A letter dated 28 September 2006 was produced wherein MITP requested MOA to immediately release the letter of comfort and reiterated that "*the wording in the support letter does not amount to any guarantee from MOA but merely a strong support letter from MOA reaffirming what is required in the Shareholders Agreement dated 26.10.2004.*" Based on the above evidence, the Court was satisfied that the Government did not intend to be legally bound by the terms of the letter of comfort.

The Court of Appeal then turned to the issue of reliance by the subscribers of the Islamic bonds. The Court upheld the High Court Judge's finding that the subscribers did not rely solely on the letter of comfort even though it was acknowledged that the letter of comfort was the main factor for the A+ rating given to the bonds. The Court of Appeal noted that this conclusion was reached based on the trial judge's assessment of the evidence of two of the Trustee's witnesses.

The Court of Appeal then examined the words used in the letter of comfort. The Court was of the view that the words used in the letter of comfort did not contain words which convey the idea that the Government would be undertaking a contractual obligation.

The Court of Appeal quoted the words of Tadgell J in the Supreme Court of Victoria case of *Commonwealth Banking of Australia v TLI Management Pty Ltd* [1990] VR 510, "*it would have been very simple, if that had been intended, to have used words of promise, such as "we agree", "we undertake", or even "we promise". The words "we confirm that we will …" were, in the circumstances, at least ambiguous*". The Court of Appeal opined that the absence of such words of promise further fortified the Government's argument that the letter of comfort did not have any binding effect on them.

CONCLUSION

Based on the Court of Appeal's decision, one may conclude that the factual matrix behind the issuance of the letter, the intention of the parties, and an analysis of the language used, will be key determinants in deciding the legal effect of a letter of comfort.

While it is possible for letters of comfort to carry little legal weight, it is also possible that some letters of comfort may be interpreted as containing binding legal obligations even though the parties may not have intended as such. It would primarily depend on whether the wordings used indicate such an intention.

Perhaps the lesson to take away from this case is that utmost care must be given to the drafting of a letter of comfort or before accepting one, as the case may be, to ensure that the words used are unambiguous and accurately reflect the intention of the parties.

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BOOM TIMES!

A commentary on the case of Au Kean Hoe v Persatuan Penduduk D'Villa Equestrian by Denise Cheong

With the increasing crime rate and growing safety concerns, boom gates have become a common sight in neighbourhoods in the Klang Valley; what was once a through road today may be blocked by barricades tomorrow.

Even with easy access to mobile applications like *Waze* and *Google Maps*, drivers in unfamiliar neighbourhoods are often met with dead-ends as these semi-permanent structures go unregistered by these applications. Further, and as many residents are aware, the installation of boom gates often comes with monthly fees, the obligatory halt, and, in the case of non-residents, cursory enquiries as to the reason for their visit, before the security guards raise the barriers to allow a car to pass.

This can be frustrating when one is in a hurry and it would not be surprising if fantasies of driving through the gates unscathed cross the minds of drivers in the queue of cars at the barriers which stand between them and their homes.

Mr. Au Kean Hoe, the appellant in the recent Federal Court decision of *Au Kean Hoe v Persatuan Penduduk D'Villa Equestrian* [2015] 3 CLJ 277, did just that. In order to understand why Mr. Au did that, we must first delve into the facts of the case.

> “the SDBA has no application where the local authority has given approval for the so called obstruction”

BACKGROUND

Mr. Au and his wife were the co-owners of a house in D'Villa Equestrian Housing Estate ("the housing estate"). They moved into the house in January 2007.

There is only one entrance and exit road to the housing estate. The developer of the housing estate had constructed two boom gates and a guardhouse on this access road. Until December 2007, the developer was responsible for the security and maintenance, including the two boom gates and the guardhouse, of the housing estate. As such, when Mr. Au and his wife moved into their house, the boom gates and the guardhouse were already in place and functioning.

The respondent in the Federal Court was the Residents' Association ("RA") of the housing estate. Beginning from January 2008, the residents of the housing estate were required to pay RM250.00 per month (subsequently reduced to RM200.00 per month) to the RA as security and maintenance charges. At a meeting held on 21 July 2007, the residents of the housing estate unanimously agreed that those who did not pay the security and maintenance charges would not enjoy the facilities provided by the guards at the boom gates or the security facilities. This included having to raise and drop the gates themselves when entering or exiting the housing estate.

From May 2009 to March 2010, Mr. Au was not only a member of the RA but he was the Treasurer. He took no objection to the boom gates during this period. Mr. Au ceased to be a member of the RA sometime in August 2010 and since then, stopped paying the maintenance and security charges.

To reiterate the decision made at the meeting of 21 July 2007, the RA issued a circular on 25 October 2011 stating that residents who did not pay the security and maintenance charges would have to raise the boom gates themselves without the assistance of the security guard on duty. According to the High Court Judge in the case, the execution of the instructions contained in the circular brought with it the onslaught of the dispute.

One day, Mr. Au returned home in the late afternoon. Frustrated by the security guard's refusal to lift the boom gate for him, and being of the opinion that he had every right to clear the obstruction on the public road, Mr. Au decided to drive through the boom gate. In what must have been an unusual sight, he first placed his car's carpet between the boom gate and his car's windscreen and then drove slowly until the boom gate was sufficiently bent to enable his car to pass through.

> “regulated access to a defined area is not an obstruction in law”

Matters did not end there. In January 2012, Mr. Au commenced an action against the RA on the grounds of, *inter alia*, nuisance and that the alleged obstructions were illegal structures that amounted to obstructions in law. Additionally, Mr. Au sought an order that the alleged obstructions be demolished. The RA counterclaimed for arrears of security and maintenance charges and also for an injunction to restrain Mr. Au from harassing the RA and the security guards at the guard house.

FEDERAL COURT

Although Mr. Au's claim was dismissed in both the High Court and the Court of Appeal, all was not lost as he successfully obtained leave to appeal to the Federal Court on the following questions of law:

(1) Whether the erecting of a guardhouse and a boom gate across a public road in a residential area amounts to an obstruction within the meaning of section 46(1)(a) of the Street, Drainage and Building Act 1974 ("SDBA"); and

(2) Whether a local government is empowered to authorise or

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otherwise approve an obstruction within the meaning of section 46(1)(a) of the SDBA.

Obstruction?

Mr. Au claimed that the guardhouse and boom gates across a public road in a residential area amounted to an 'obstruction' for three reasons. First, he, his family and guests, as well as all other non-paying residents, had to alight from their vehicle to raise the boom gate themselves.

Secondly, the RA, in imposing the operation of the boom gates, was in breach of the Petaling Jaya City Council ("MBPJ") Guidelines and the MBPJ Letter of Approval dated 22 December 2011 in that (i) residents who were not participants of the scheme should not have been obstructed at all from entering their residence at any time; and (ii) the boom gates were permitted to be operational from 12.00 a.m. to 6.00 p.m. but was in fact being operated 24 hours a day (albeit with a security guard present at all times).

Thirdly, the legality of the boom gates remained to be decided as they had not been included in the plans of the guardhouse that were approved by the MBPJ.

> **" the balancing of the individuals' inconvenience against the communities' interest … is of paramount concern "**

In response, the RA contended that the subject of Mr. Au's complaint was not in reality the illegality of the boom gates, but rather, he was seeking to use the issue to obtain an assurance that the operation of the boom gates would not inconvenience him in spite of him being a non-paying resident. The court was therefore invited by the RA to decline to answer the question on illegality.

Legal or Illegal Barrier?

The court did not accept the RA's contention. It took the view that the two questions posed in the appeal which relate to the illegality issue of the boom gates would nevertheless have to be dealt with.

The court did not agree with Mr. Au's contention that the boom gates were illegal in that they constituted an obstruction over a public road.

Instead, their Lordships were of the view that the principal issue to be decided in this case is whether the guardhouse and the boom gates were constructed with the approval of the relevant local authority, namely, the MBPJ. Upon an analysis of the facts and the relevant provisions of the Town and Country Planning Act 1976 ("TCPA"), the SDBA and the Local Government Act 1976 ("LGA"), the court concluded that the guardhouse and boom gates were duly authorised structures under the statutes.

The court referred to *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Sdn Bhd & Other Appeals* [2009] 1 CLJ 329 where it was held that section 46(1)(a) of the SDBA has no application where the local authority has given approval for the so called obstruction. Their Lordships also noted that a "building" as defined in the SDBA and the TCPA includes a "gate".

As the guardhouse and the boom gates were authorised structures under the TCPA, the SDBA and the LGA, these structures could not be considered to be an obstruction under section 46(1)(a) of the SDBA. Thus, the first question in the appeal was answered in the negative.

The court declined to answer the second leave question as their Lordships were of the view that the question was too general and not based on specific factual circumstances.

A Balance of Inconvenience

The Federal Court then went on to consider the issue of nuisance raised by Mr. Au. The court pointed out that the assumption that the operation of a security gate system in a residential area amounted to an actionable obstruction in law was clearly wrong. The court elaborated that regulated access to a defined area is not an obstruction in law, especially if it is for security purposes whereas the denial of access to a public place would amount to an obstruction.

In the instant case, their Lordships held that in reality, Mr. Au's complaint was one of inconvenience and not of obstruction. According to their Lordships, Mr. Au did not complain that he or his family was prohibited from access at all or that the boom gates were a barricade against him or his family. Instead, his complaint was that he was inconvenienced because he had to engage in self-service to lift the gate. In dealing with this point, their Lordships, relying on a statement by Romer J in *Lingke v Mayor of Christchurch* (1912) 3 KB 595, were of the view that the underlying rule was a recognition that individuals live within a community and it is always the balancing of the individuals' inconvenience against the communities' interest that is of paramount concern.

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RESTRAINING A CALL ON PERFORMANCE BONDS

Shannon Rajan provides an update on recent developments on restraining a call on performance bonds.

INTRODUCTION

The Malaysian Courts have now adopted the Singaporean and Australian approach in recognising unconscionability, apart from the fraud exception, as a separate and distinct ground to restrain a beneficiary from making a call on an on-demand performance bond.[1] The rationale for embracing this equitable exception is premised on the notion *that "a person should not be permitted to use or insist upon his legal right to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself."* [2]

There are concerns that this new approach would open the floodgates of plaintiffs challenging the beneficiary's conduct of calling upon an on-demand performance bond and cause unwanted interference with the machinery of irrevocable obligations assumed by the banks, which has been described as the "*life-blood of international commerce*".

In the recent Singaporean case of *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another* [2014] SGHC 266, the High Court had to consider the effect of a clause in a contract which expressly excluded unconscionability as a ground to restrain a party from making a call on or receiving cash proceeds under the performance bond. In other words, the clause operates to counter the common law position on performance bonds in Singapore. This case would therefore be instructive in the Malaysian context of performance bonds.

> **"the Court's powers to grant injunctions flow from its equitable jurisdiction and cannot be curtailed by clauses in a contract"**

BACKGROUND FACTS

The First Defendant, a property developer, engaged the Plaintiff as its main contractor for the development of three blocks of residential flats. Pursuant to the terms of the main contract, the Plaintiff provided a performance bond, which was issued by the Second Defendant, a bank.

The First Defendant, being dissatisfied with the Plaintiff's performance under the contract, issued a notice of termination and called on the performance bond. In turn, the Plaintiff filed an injunction application to restrain the First Defendant from calling on the performance bond on the ground that the call was unconscionable. In opposing the injunction application, the First Defendant relied on Clause 3.5.8 ("Clause 3.5.8") of the preliminaries (which were incorporated into the main contract), which prohibited the Plaintiff from seeking injunctive relief on the ground of unconscionability. In other words, the Plaintiff's right to seek injunctive relief was limited to the ground of fraud only.

The main issue to be determined by the High Court was whether Clause 3.5.8 was unenforceable as being an attempt to oust the court's jurisdiction.

DECISION

Clause 3.5.8 provided:

"In keeping with the intent that the performance bond is provided by the [plaintiff] in lieu of a cash deposit, the Contractor agrees that ***except in the case of fraud****, the Contractor shall not for any reason whatsoever be entitled to enjoin or restrain:-*

(a) The [first defendant] from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond; or

(b) The [second defendant] under the performance bond from paying any cash proceeds under the performance bond,

on any ground including the ground of unconscionability.*"* (*Emphasis provided*)

> **"policy considerations underpinning the doctrine of unconscionability … cannot be lightly brushed aside"**

The First Defendant relied on the above clause to argue that the Plaintiff could only apply for injunctive relief on the ground of fraud. The First Defendant argued that the Court should have regard to the parties' intention and relied on the District Court decision of *Scan-Bilt Pte Ltd v Umar Abdul Hamid* [2004] SGDC 274. In that case, the District Court considered a similar clause, which reads as follows:

*"****Except only in the clear case of fraud****, the Contractor shall not be entitled to enjoin or restrain the Employer from making any call or demand on the performance bond or receiving monies under the performance bond,* ***on any ground including the ground of unconscionability****"* (Emphasis added)

The District Court in *Scan-Bilt* held that there were no grounds to strike down the clause on account of public policy and that the clause was clear and unequivocal in its intent. The Judge also observed that the parties dealt at arm's length and that there was no reason not to give full effect to the clause. The

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Judge further held that *"justice required that the parties be held to the terms of the bargain which they had struck."*

The High Court in *CKR Contract Services* disagreed with the District Judge's reasoning and conclusion in *Scan-Bilt* for the following reasons.

First, giving effect to Clause 3.5.8 would severely curtail the court's jurisdiction and discretion to grant an injunction and would therefore be contrary to public policy. The Judge relied on the Malaysian Federal Court case of *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2014] 3 MLJ 61 in which clause 15 of a non-disclosure agreement entered into by the parties provided that the appropriate remedy for a breach of the respondent's duty of non-disclosure would be injunctive relief instead of monetary damages. The Federal Court held that the existence of clause 15 did not *ipso facto* entitle the appellant to injunctive relief and did not fetter its jurisdiction and discretion to decide whether to grant such relief. The High Court, whilst acknowledging that the clause in *AV Asia* was different from Clause 3.5.8, stated that the general principle expressed in *AV Asia* was relevant because Clause 3.5.8 was similarly an attempt to oust the court's jurisdiction, which is a severe incursion on the High Court's freedom to grant injunctive relief.

Second, the Court's powers to grant injunctions flow from its equitable jurisdiction and cannot be curtailed by clauses in a contract.[3]

Third, there are important policy considerations underpinning the doctrine of unconscionability, which cannot be lightly brushed aside by the parties' agreement. It must be noted that the Plaintiff's argument fails to consider the conscious choice made by the Singaporean Courts in moving away from the English position. The recognition of the ground of unconscionability was a considered and deliberate decision by the Singaporean Courts in striking a balance between the principle of party autonomy and the Court's concern in regulating dishonest and unconscionable behavior on the part of the beneficiaries.[4] Thus, the Court's supervisory role of scrutinising possible unconscionable conduct in the context of performance bonds cannot be summarily displaced by an agreement.

COMMENTARY

The High Court in arriving at its decision had the unenviable task of balancing between competing principles and policies. On one hand, the Court will as far as possible uphold the parties' entrenched right to freedom of contract by interpreting the clauses of the contract to give effect to the parties' mutual intention as it existed at the time of entering into the contract. On the other hand, the Court possesses an inherent jurisdiction to do justice between the parties and apply such principles as are necessary for attaining this objective and for giving decisions which conform with the requirements of social conditions of the community. In this case, the High Court applied the latter principle to place limitations on the parties' freedom to contract and the reasons proffered by the High Court must be examined in greater detail.

First, the High Court's application of the general principle propounded in *AV Asia* may be questionable. It must be noted that clause 15 only limited the appropriate remedy for a respondent's breach. The said clause did not extend to say that the injunctive relief shall be automatic or as of right upon a respondent's breach, which would mean that the Court's jurisdiction was ousted completely. Therefore, the Malaysian decision has to be read within the context of the peculiar wordings of the said clause. The Federal Court did not deal with the issue as to whether the parties could, by agreement, exclude an injunctive relief, which would in effect fetter the Court's jurisdiction. An answer to this question may give rise to a general principle, which may have been applied in the manner suggested by the High Court.

Second, the principle that the parties cannot by agreement exclude the Court's inherent jurisdiction to grant injunction may have been overstated by the High Court. There was no attempt by the parties to do so as they merely agreed to restrict the available grounds in common law to resist a call of a performance bond. Such a right is recognised in law. For instance, the contracting parties are able to agree to exclude a common law right or remedy by a clearly worded term in a contract (so long as it does not contravene public policy).[5] Next, a party who is contracting at arm's length, having agreed to exclude the common law ground of *"unconscionability"* by contract, may be estopped from reneging on its contractual obligations. This approach is consistent with the well-known maxim '*modus et conventio vincunt legem*', which means that the manner and agreement of the parties overrides the strict letter of the law.[6]

Last, the Malaysian policy consideration for adopting unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on an on-demand performance bond appears to be different from the Singaporean position. The Malaysian position is essentially premised on *"good commercial sense"* and there is no express declaration by our Courts that it is a conscious (and deliberate) departure from the English position. It must be noted that the English position is still very much alive and applicable when it comes to restraining

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RESTRAINING A CALL ON PERFORMANCE BONDS

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a bank from paying out on a performance bond. It remains to be seen whether the Malaysian policy consideration for recognising unconscionability would be a sufficient ground for disallowing parties (who are trading at arm's length) from excluding unconscionability as a ground to resist a call on an on-demand performance bond.

Whilst the Singaporean decision would undoubtedly be persuasive and have an impact in Malaysia, there are some policy differences between the two jurisdictions, which may result in a different outcome in Malaysia. Thus, the Malaysian Courts may still have a hand in striking a uniquely different balance between ensuring certainty in irrevocable security instruments and maintaining fairness in respect of abusive calls on performance bonds.

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POSTSCRIPT

Subsequent to the completion of the above commentary, the Court of Appeal of Singapore released its judgment wherein it overturned the High Court's decision in the above case. It would appear from the Court of Appeal's judgment that the present position in Singapore is that the parties may, by agreement, exclude unconscionability as a separate and distinct ground for resisting a call on an on-demand performance bond. The Court of Appeal's judgment will be discussed in the next issue of Legal Insights.

Endnotes:

[1] *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401.
[2] *Stern v McArthur* (1988) 165 CLR 489.
[3] The High Court referred to the following in support of its decision: Ian C F Spry, *"The Principles of Equitable Remedies"* (Sweet and Maxwell, 9th Ed., 2014) at p.333 and *JBE Properties Pte Ltd v Gammons Pte Ltd* [2011] 2 SLR 47.
[4] *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] SGCA 28.
[5] In *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, the Court recognised the parties' ability to expressly exclude the common law right to terminate by clear terms of their contract.
[6] *Binions and another v Evans* [1972] 2 All ER 70 and *Bruner v Moore* [1904] 1 Ch. 305.

ALMOST READY TO JOIN THE CROWD

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Another issue which has not been addressed is the effect of section 15(1)(b) of the Companies Act 1965 ("CA") which, *inter alia*, limits the number of members of a private company to 50 (excluding present and former employees of the company or its subsidiaries). This restriction may affect the efficacy of equity crowdfunding as the *raison d'etre* of crowdfunding is to raise small sums of money from a large number of people.

The omission of the above matters from the REF Guidelines will not preclude the Operators and Issuers from embarking on equity crowdfunding. Nevertheless, the inclusion of those points would have made the crowdfunding framework in Malaysia more complete.

ALMOST THERE …

No doubt the Operators are now in the midst of drafting their rules to comply with the REF Guidelines, including the requirements that have to be complied with for Issuers to be hosted on their respective ECF Platforms and for Investors to invest in the Issuers.

A 'safe harbour' provision will be introduced pursuant to the proposed Capital Markets and Services (Amendment) Act 2015. The proposed new section 40H of the CMSA provides, *inter alia*, that the provisions of the CA relating to the offering of shares to the public by a private company shall not apply where the offer or invitation is made by a private company on a "recognized market", i.e. a stock market operated by an approved operator registered under section 34 of the CMSA. Once the amendment comes into effect, a private company may offer shares on an ECF Platform to members of the public.

It would appear that we will be good to go once the rules of the Operators are in place and the safe harbour provision, enforced. Malaysia is almost ready to join the crowd.

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FROM STAR CHAMBER TO CELESTIAL

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to submit a list of questions to the proposed respondent (or both).

(c) Thirdly, a liquidator should place his reasons for the application on record and on oath and this should be disclosed to the proposed respondent. But instances might well arise where, because of public interest considerations or sensitivity involving informants, the confidentiality of communications with the court might have to be strictly preserved. The court would in such cases be prepared to maintain the confidentiality of such information.

APPLICATION OF THE LAW

Court's Powers Not Limited by Availability of Pre-Action Procedures

The Singapore Court of Appeal held that section 285 does not provide that it should be restricted by pre-action procedures such as pre-action discovery. Further, it does not state that it cannot be used once a liquidator contemplates litigation. Section 285 is couched in very generous terms and should not be interpreted in a restrictive manner.

Stage 1: Threshold Requirement

The Court was satisfied that the Liquidator had shown that there was a reasonable belief that the Auditors were able to assist him, and that the documents he sought were reasonably required.

The Court rejected the Auditors' assertion that the Liquidator was not objective based on two grounds, namely that the Liquidator was incentivised under the funding arrangement to pursue a claim against the Auditors and that the Liquidator sought to maximise recovery for the creditors by applying pressure on parties using section 285 to obtain more reasonable settlement offers.

The Court saw nothing objectionable about the funding arrangement. Firstly, although the Liquidator stood to recover half of his outstanding fees if he could identify potential claims, it was also in the interest of all the creditors that a proper investigation be done to determine whether there were any viable claims. The Liquidator was duty-bound to identify potential claims to maximise recovery for Celestial's creditors. The Liquidator should not be hindered by allegations of bias merely because he too may benefit from the same.

Secondly, one of the Liquidator's duties was precisely to maximise recovery for the creditors. The fact that some of the creditors had agreed to fund the investigation and pursue potential claims was irrelevant.

Stage 2: Balancing Exercise

The Court balanced various factors and found that the disclosure order would not be oppressive for the following reasons:

(i) It is legitimate for a liquidator to rely on section 285 to investigate whether a claim exists, and if so, to sue the party responsible. It would be a breach of a liquidator's duty if he does not sue when there is a legitimate claim against a third party.

(ii) The Court recognised that the audit working papers did belong to the Auditors and contained proprietary information meant for internal use. But this does not mean that the disclosure of these documents cannot be ordered. The Court referred approvingly to English and Hong Kong authorities where working papers were ordered to be turned in. The papers should be disclosed as long as they contain information that is relevant to the liquidator's investigation.

(iii) Next, the Court was not convinced that the Auditors would expose themselves to civil and criminal sanctions under PRC law if they were to comply with the disclosure order. The Auditors would also not be in breach of their duty of confidentiality owed to the PRC subsidiaries since the documents and information were disclosed pursuant to a court order.

(iv) Finally, the Court found that the disclosure order was not too wide. It was not uncommon for courts to grant orders compelling parties to disclose all documents in their possession, custody or control relating to the insolvent company in question. The Auditors also came from a respected and large audit firm. It should have kept proper records in relation to Celestial and should have the means to retrieve and disclose them expeditiously.

LOCAL APPLICATION

This Singapore Court of Appeal decision sets out useful guidelines for the grant of a Court Order under section 285 for the production of the documents, including the audit working papers.

As Malaysia has not had any appellate authority on the equivalent section 249 of the Companies Act 1965, this decision would provide guidance and be persuasive, given that the Singapore decision in *W&P Piling* has already been cited with approval by the High Court of Malaya in *HICOM Bhd v Bukit Cahaya Country Resorts Sdn Bhd & Anor* [2005] 8 CLJ 194.

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A MACAO SCAM

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the Capital Markets and Services Act 2007 ("CMSA") of Malaysia contain provisions that could be relied upon by the Malaysian regulatory authorities to wind up a company which participates in fraudulent conduct of a similar nature.

The CA

Section 195 of the CA, *inter alia*, confers power on the Minister of Domestic Trade, Co-operatives and Consumerism ("Minister") to declare a company, whether incorporated under the CA or a foreign company, to be a "declared company" if he is satisfied that –

(a) a *prima facie* case has been established that, for the protection of the public or the creditors of the company, it is desirable that the affairs of the company should be investigated; or

(b) it is in the public interest that allegations of fraud, misfeasance or other misconduct by persons who are concerned with the formation or management of the company should be investigated; or

(c) it is in the public interest that the affairs of the company should be investigated for any other reason.

Upon a declaration being made under section 195, the Minister will appoint one or more inspectors to investigate the affairs of that company and provide a report to him.

After a report has been made by the inspector in respect of a declared company, the Minister may petition to the court under section 205 of the CA for the winding up of the company, or in the case of a foreign company, the winding up of the affairs of that company in relation to its assets within Malaysia.

The court may order a "declared company" to be wound up under section 218(1)(g) of the CA if an inspector appointed in respect of that company has opined in his report that it is in the interest of the public or creditors that the company should be wound up.

The court may also wind up a company if it is of the opinion that it is just and equitable that the company be wound up or is satisfied that the company is being used for unlawful purposes or for any purpose which is prejudicial to public interest.

The CMSA

Section 361 of the CMSA provides that a company which has contravened any securities laws (including the CMSA and any subsidiary legislation made thereunder) may be wound up by the court upon the petition of the Securities Commission of Malaysia ("SC") regardless of whether the company has been charged with an offence in respect of that contravention, and whether the contravention has been proved.

While it is clear that the Malaysian court has the power under section 361 to wind up a listed company which is incorporated in Malaysia, it would not have the power to do so in respect of a foreign company which is listed on Bursa Malaysia as that section applies only to a company which is incorporated under the CA or any corresponding previous legislation.

The only instance where the SC has sought recourse under section 361 of the CMSA occurred in 2010, when it successfully obtained a winding up order against SJ Asset Management Sdn Bhd, an asset management company, on grounds that the latter had been involved in deceitful and improper business practices.

A stock exchange, derivatives exchange and an approved clearing house may also petition to wind up a company under section 361 of the CMSA. It is likely that such an entity may only exercise this power against a company which is subject to the regulatory oversight of the relevant entity and not against one which is not subject to its oversight. However, this remains a moot point.

Conclusion

From the above, it can be seen that if a listed company which is incorporated in Malaysia contravenes any provision of any securities laws in Malaysia, the SC may petition for that company to be wound up under section 361 of the CMSA.

On the other hand, if the misconduct, whether committed by a locally incorporated company or foreign company, does not constitute a contravention of any securities law in Malaysia, the SC can nevertheless seek assistance from the Minister to exercise his powers under sections 195 and 205 of the CA.

Whilst the Malaysian court does not have the jurisdiction to wind up a foreign company which is listed on Bursa Malaysia under section 361 of the CMSA for a contravention of Malaysian securities laws, the court can nevertheless issue an order upon the application of the Minister under section 205 of the CA to wind up the affairs of the foreign company in relation to its assets in Malaysia if the conduct giving rise to a contravention of the securities laws falls within any of the circumstances in which the Minister may declare such company to be a "declared company" under section 195 of the CA.

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BOOM TIMES!

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Hence the Federal Court agreed with the courts below and found that the inconvenience encountered by Mr. Au by virtue of the presence of the guardhouse and the boom gates was not an actionable nuisance.

Having answered the first question in the negative and decided that the existence of the guardhouse and boom gates were not an actionable nuisance, the Federal Court dismissed Mr. Au's appeal.

CONCLUSION

The perception that law enforcement agencies in Malaysia are ineffective in combating crime, in particular, house break-ins and robberies, has resulted in residents of housing estates resorting to self-help by hiring community security guards and erecting barricades to protect themselves and their loved ones, at some cost and inconvenience to themselves.

The dangers of ill-considered semi-permanent barriers could be fatal. One must not forget the tragic loss of two lives in a fire in 2011 when firemen were delayed from gaining access to a housing area as they had to cut through an unmanned security barrier (*The Star,* 3 March 2011).

The Federal Court of *Au Kean Hoe v Persatuan Penduduk D'Villa Equestrian* has made it clear that boom gates which are erected with the approval of the relevant local authority are neither an illegal obstruction nor a nuisance to residents who do not subscribe to the security scheme in their housing estate.

As mentioned by a newspaper commentator in the *Star Metro* (21 April 2015), this judgment should encourage local authorities to work with communities to ensure safer neighbourhoods. In doing so, local authorities must ensure that safety concerns are properly addressed when they approve the construction of boom gates and barriers. Are "boom times" here to stay?

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PADDLING WITH THE DRAGONS

This year marks the 10th Anniversary since the formation of the Firm's Dragon Boat team – the Skrine Dragons!

In May, we participated in the National Canoe Championships in Putrajaya where our Men's team placed 4th in the Heats and Women's team placed 1st in the Heats and clinched 4th place in the Finals. The Team also took part in the Malacca Dragon Boat Race in early June, racing 8 times into the Semi-Finals.

Our proudest moment thus far is undoubtedly our achievements in the Sun Life Stanley Dragon Boat Championships in Hong Kong on 20 June 2015 which attracted about 290 teams and 5,500 paddlers.

Our Mixed Team and Women's Team both entered the Finals, with the Mixed Team winning a Silver Cup. The Skrine Dragons also made international waves, literally and figuratively, as we emerged the Champion for the "Most Outstanding Outfit Award", appearing in several Hong Kong newspapers!

The best part is our Season is not over! The Skrine Dragons will be representing the Firm in the bi-annual Skrine Regatta in November to paddle for charity. Until then, Paddles Up!

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

THE FIRM'S CLIENT PORTFOLIO COVERS VARIOUS INDUSTRIES INCLUDING FINANCE, COMMERCIAL BANKING, INVESTMENT BANKING, INSURANCE, INFORMATION & COMMUNICATIONS TECHNOLOGY, MULTI-MEDIA, CONSTRUCTION, ELECTRONICS, MINING, OIL AND GAS, AVIATION, SHIPPING AND PHARMACEUTICAL INDUSTRIES. THE FIRM HAS DEVELOPED OVERSEAS TIES THROUGH ITS MEMBERSHIP OF INTERNATIONAL ORGANISATIONS SUCH AS LEX MUNDI, PACIFIC RIM ADVISORY COUNCIL, THE INTER-PACIFIC BAR ASSOCIATION, THE ASEAN LAW ASSOCIATION, THE INTERNATIONAL TRADEMARKS ASSOCIATION AND THE INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

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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Photography
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Skrine Publications Sdn Bhd
Unit No. 50-8-1, 8th Floor,
Wisma UOA Damansara,
50, Jalan Dungun,
Damansara Heights,
50490 Kuala Lumpur,
Malaysia.
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Printed By
Nets Printwork Sdn Bhd
58 Jalan PBS 14/4,
Taman Perindustrian,
Bukit Serdang,
43300 Seri Kembangan,
Selangor Darul Ehsan.
Tel: 603-8945 2208
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