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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The first quarter of 2016 witnessed several interesting legal developments.

The Trans-Pacific Partnership Agreement was approved by the Dewan Rakyat and the Dewan Negara on 27 and 28 January 2016 respectively and signed by all 12 parties in Auckland, New Zealand on 4 February 2016. It is expected to come into force within 24 months after the affected local laws have been amended.

In mid-February 2016, the Conference of Rulers at their 240th meeting expressed the view that certain provisions of the controversial National Security Council Bill 2015 should be refined. Although the request of the Conference is an entirely extra-judicial process, their Royal Highnesses and the State Governors must be commended for expressing concern where they feel it is warranted.

Several cases are worthy of mention. First, in *Viran v Deepa*, the Federal Court affirmed its earlier decisions in *Subashini* and *Tang Sung Mooi* that the civil courts, and not the Syariah Courts, have exclusive jurisdiction in respect of divorce and custody issues that arise from a civil marriage notwithstanding that one spouse has converted to Islam.

Second, the Federal Court by a 3:2 majority held in a case involving *Victoria Jayaseele Martin* that only Muslims can practise as Syariah lawyers in the Malaysian Syariah Courts. Third, the High Court in Sarawak issued a declaration sought by *Azmi Mohamad Azam @ Roneey* that he is a Christian. *Roneey* had been converted to Islam as a child when his parents embraced the faith. The Judge held that freedom of religion is a constitutional right and *Roneey* was entitled to exercise this right as he was now an adult.

We hope that you will enjoy reading the articles and case commentaries that we have lined-up for you in this issue of our newsletter.

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

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ANNOUNCEMENTS

The Partners are pleased to announce that Shannon Rajan, Hemalatha Parasa Ramulu, Sharon Chong Tze Ying, Adzim bin Amir Hamzah and Fariz bin Abdul Aziz have been admitted as Partners of the Firm from 1 January 2016.

Shannon is a member of our Construction and Engineering Practice Group. He is an accredited Adjudicator and Mediator and on the panels of the KL Regional Centre for Arbitration and the Malaysian and Singapore Mediation Centres.

Hemalatha is a member of our Intellectual Property Division. She obtained her Bachelor of Laws from the University of London in 2005. Her practice areas include copyright, industrial design, patents and trademarks advisory work and disputes.

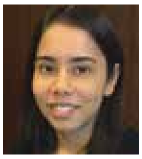
Sharon is a member of our Dispute Resolution Division. Her practice areas include corporate and commercial litigation and arbitration. She is a Fellow of the Chartered Institute of Arbitrators (United Kingdom).

Adzim is a member of our Corporate Division. He graduated from the University of Technology Mara in 2007. His practice areas include general corporate work with a focus on oil and gas, shipping, competition law and health care.

Fariz is a member of our Corporate Division. He graduated from Kings College London in 2006. His main practice areas include cross border mergers and acquisitions, oil and gas, take-overs, private equity investments, and corporate restructurings.

The Partners are also pleased to announce that Loshini Ramarmuty, Syaida Abd Majid, Sri Richgopinath Salvam, Angela Yap, Sarah Kate Lee, Nur Syafinaz Vani, Natalie Lim, Susanah Ng, Khong Siong Sie and Trishelea Sandosam have been promoted to Senior Associates.

Loshini is a member of our Construction and Engineering Practice Group. She graduated from Cardiff University in 2008 and obtained her Master of Laws from the University of Manchester in 2010.



Syaida is a member of our Corporate Division. She obtained her Bachelor of Laws from the International Islamic University of Malaysia in 2010.

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THE CHAMPION

Lee Shih explains the adoption
action by the

The High Court has recently upheld the existence of the multiple derivative action in Malaysia. This is seen in the unreported Grounds of Judgment dated 16 November 2015 in *Ranjeet Singh Sidhu and another v Zavarco plc and 15 others* (Kuala Lumpur High Court Suit No. 22NCC-179-06/2015).

A multiple derivative action is where a shareholder of a holding company files an action on behalf of the subsidiary of that holding company. This common law action would allow shareholders to seek relief against wrongdoings where there are wrongs carried out against subsidiaries further down the corporate structure.

BACKGROUND FACTS

The Plaintiffs are shareholders of Zavarco plc ("Zavarco UK"), a UK incorporated company. Prior to the dispute, Zavarco Bhd ("Zavarco Malaysia"), a Malaysian incorporated company, is a wholly-owned subsidiary of Zavarco UK. At that material time, Zavarco Malaysia held 91% of the shares in a Malaysian incorporated company, V Telecoms Bhd ("V Telecoms"), the operating entity within Zavarco UK's group of companies.

Filing of the Civil Suit and the Impugned Consent Judgment

In May 2014, a Malaysian company, Open Fibre Sdn Bhd ("Open Fibre"), filed a suit in Malaysia against Zavarco UK and Zavarco Malaysia. The Plaintiffs alleged that Open Fibre was being controlled by the alleged wrongdoers in this action. Both Zavarco UK and Zavarco Malaysia were represented by Malaysian solicitors in that suit.

In July 2014, Zavarco UK and Zavarco Malaysia entered into a consent judgment. This consent judgment essentially required:

(i) Zavarco Malaysia to transfer all its shares in V Telecoms over to Open Fibre and for Zavarco UK to allow Zavarco Malaysia to carry out this consent judgment;
(ii) Both Zavarco UK and Zavarco Malaysia to transfer control and management of V Telecoms to Open Fibre together with all the documents of V Telecoms; and
(iii) Zavarco UK to issue new shares to Open Fibre equivalent to RM150 million.

The Plaintiffs alleged that the suit and the consent judgment were sham proceedings pursuant to a conspiracy to defraud Zavarco UK and Zavarco Malaysia. They alleged that these proceedings allowed Open Fibre to misappropriate V Telecoms and to gain control of Zavarco UK and Zavarco Malaysia.

In February 2015, Zavarco UK issued and allotted shares to Open Fibre, resulting in the latter controlling 82.5% of the shares in Zavarco UK.

The Plaintiffs also discovered that all the shares in V Telecoms were then transferred to another Jersey incorporated company called Aries Telecoms Ltd ("Aries"). Aries was essentially

LEE SHIH

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ARRIVES

of the multiple derivative Malaysian Courts

controlled by Open Fibre which was in turn controlled by the alleged wrongdoers in this dispute.

Filing of the Multiple Derivative Action in Malaysia

The Plaintiffs filed a multiple derivative action in the Malaysian courts in a representative capacity for the benefit of Zavarco UK and Zavarco Malaysia and for themselves.

The multiple derivative action sought, among others, the following reliefs:

(i) To set aside the consent judgment;
(ii) To unwind the transfer of the shares in V Telecoms to Open Fibre;
(iii) An order for Aries to transfer all the shares in V Telecoms back to Zavarco Malaysia;
(iv) An order for Open Fibre to deliver up to the Plaintiffs all documents of V Telecoms that have been transferred through the consent judgment; and
(v) An order that all shares in Zavarco UK that were issued and/or transferred to Open Fibre through the consent judgment be cancelled and for Zavarco UK's share register be rectified and restored accordingly.

> **" the right to bring a multiple derivative action also exists in Malaysia "**

Defendants' Striking Out Applications

The Defendants filed applications to strike out the Plaintiffs' multiple derivative action. One of the grounds for the striking out was the argument that the Plaintiffs did not have standing to file the action due to the failure to obtain permission from the English Courts to file this action.

It was argued that the UK Companies Act had abolished the common law derivative action and that only the statutory derivative action route remained. Therefore, the Plaintiffs as shareholders of Zavarco PLC had to obtain permission from the UK Courts to bring such a statutory derivative action to sue on behalf of Zavarco PLC.

It was further argued that Zavarco UK was an indispensable party in this action since it was the parent company of Zavarco Malaysia. Hence, the failure to obtain permission from the English Courts meant that the entire Malaysian action crumbled.

FINDINGS BY THE COURT

Ability to File a Multiple Derivative Action

First, the Court referred extensively to the Hong Kong Court of Final Appeal decision in *Waddington Ltd v Chan Chun Hoo Thomas & Ors* [2009] 2 BCLC 82. This was a landmark case which confirmed that a shareholder could bring a multiple derivative action under Hong Kong law. That decision held that if wrongdoers must not be allowed to defraud a parent company with impunity, they must also not be allowed to defraud its subsidiary with impunity.

Secondly, the Court also accepted the reasoning in the English High Court case of *Universal Project Management Service Ltd v Fort Gilkicker Ltd and others* [2013] Ch 551 ("*Fort Gilkicker*"). *Fort Gilkicker* held that the multiple derivative action continued to exist at common law.

The Court held that the right to bring a multiple derivative action also exists in Malaysia. It was a single piece of procedural ingenuity designed to serve the interests of justice. The multiple derivative action allows a member of the company, or a member of its parent company, to be a champion or representative of that company in wrongdoer control. The Court held that there was nothing in principle to prohibit the filing of a multiple derivative action in Malaysia.

> **" It was a single piece of procedural ingenuity designed to serve the interests of justice "**

The Court instead listed two reasons in support of the ability to file a multiple derivative action. First, if there was no recognition of multiple derivative actions, the law would fail in its purpose and injustice would be done without redress as there may be occasions when multiple derivative actions are necessary in the interest of justice to safeguard the interests of the companies and their shareholders. Second, multiple derivative actions may prevent a wrongdoer from benefiting from his own wrongdoing.

The Court went further to approve the approach of allowing a person who was neither a member of the subsidiary nor a member of the parent company to file a multiple derivative action. This was provided that such a person had sufficient interest to sue as the company's representative claimant for the benefit of all its stakeholders or as a suitably interested representative of the wronged company. The Court adopted the approach taken in *Fort Gilkicker* on this point.

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THE FORCE AWAKENS

Kwan Will Sen discusses the proposal to introduce corporate criminal liability for corruption in Malaysia

Should corporations be held liable for corruption offences by their employees? The figures and public sentiment appear to suggest that this is a move in the right direction.

The KPMG Malaysia Fraud, Bribery and Corruption Survey 2013 revealed that 90% of the respondents believe that bribery and corruption are major problems for businesses in Malaysia. Furthermore, the survey revealed that only 26% of the respondents believe that their organisation has adequate anti-bribery and anti-corruption control measures.

In the United Nations 2012 Compact Annual Implementation Survey, which is the largest survey on corporate sustainability practices with input from over 1,700 businesses, 39% of respondents ranked corruption as a major obstacle to sustainable development, highlighting the fact that sustainability and overall market growth cannot be achieved alongside the prevalence of corruption.

In 2015, Malaysia ranked 54th in Transparency International's annual Corruption Perception Index which evaluates nations around the world based on 13 surveys from 12 high level international institutions, including the World Bank and the World Justice Project. Whilst the results are based on perception, the gradual slide in our rankings, from 49th, 50th and 52nd (in 2012, 2013 and 2014 respectively) cannot be ignored.

Going back to the question posed earlier, one of the means proposed by the Malaysian Anti-Corruption Commission ("MACC") to further curb the scourge of corruption in Malaysia is to introduce provisions on corporate liability into the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") to make corporations liable for the corrupt acts of their employees. Various stakeholders within the Government have indicated that such a move is on the cards.

In August 2013, the Special Committee on Corruption (JKMR) had suggested that the MACC Act be updated to introduce a corporate liability provision (*Sun Daily Online*, 23 August 2013). This call was reiterated in April 2014 and again in December 2014 by the Minister in the Prime Minister's Department, Datuk Paul Low, who in both instances said that the draft amendment was in its "final stage" (*Sun Daily Online*, 22 April 2014 and *Astro Awani*, 10 December 2014). Similarly, the MACC Deputy Chief Commissioner (Prevention), Dato' Sri Haji Mustafar Ali, said that "*the drafting process had been completed*" (*NST Online, 23 December 2014*).

This article will discuss the concept of corporate criminal liability, the position of corporate criminal liability in Malaysia, the current legal framework in Malaysia *vis-à-vis* anti-corruption laws, and provide a brief overview of the position in other jurisdictions.

THE CONCEPT OF CORPORATE CRIMINAL LIABILITY

Generally, corporate criminal liability is the legal liability of a corporation for criminal actions (or the failure to act in some cases) committed by the corporation's employees for the benefit of the corporation.

This concept can be traced back to the case of *New York Central & Hudson River Railroad Co v United States*, 212 U.S. 481 (1909). In that case, the Supreme Court of the United States of America imposed criminal liability on a corporation by establishing a principal-agent relationship with its employee. The Supreme Court expressed the view that criminal liability can be extended to a corporation if it could be established that the criminal act or omission concerned was committed by its officer, employee or agent within the scope of the latter's authority and at least in part for the benefit of the corporation.

In the English case of *Mousell Bros Ltd v London and Northwestern Railway Co* [1917] 2 KB 836, 846, Atkin J (in referring to the relevant legislation in that case) stated that *"Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No mens rea being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation."*

In another English case, *ICR Haulage Co Ltd* [1944] KB 551, the Court of Criminal Appeal upheld the conviction of a company, its managing director and nine other persons for criminal conspiracy to defraud. According to Stable J, "*… the acts of the managing director of the company were the acts of the company and fraud of that person was fraud of the company.*"

Further, in *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146, the Court rejected the finding of the lower court that a body corporate could not be guilty of the offence of intentionally using a document that was false in a material particular on grounds that a body corporate could not be imputed with an act of will (*actus reus*) or state of mind (*mens rea*) that was implicit in the commission of the offence. Instead, the Court held that the acts, knowledge and intention of a responsible agent of the company (in this case, the transport manager), acting within the scope of his authority, must be imputed to the company.

An interesting development on the jurisprudence on corporate criminal liability can be seen in *United States v Bank of England* (1987) 821 F. 2d 844 (1st Cir.), where the U.S. Court of Appeals affirmed the decision of the lower court which convicted the bank for its failure to report to the Treasury Department a series of withdrawals exceeding USD10,000 made by a specific individual. The Court developed a theory known as the aggregation theory to impose corporate criminal liability, i.e. where the composite knowledge of different employees is aggregated and imputed to the corporation (and consequently, liability). The Court said *"If employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it the bank knows them all … A collective knowledge is entirely appropriate in the context of corporate criminal liability."*

KWAN WILL SEN

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In short, depending on the circumstances of each case, a corporation can be criminally liable for the criminal acts or omissions of its employees – the fact that it is a separate legal entity may not shield the corporation from the arms of the law.

CORPORATE CRIMINAL LIABILITY IN MALAYSIA

In Malaysia, there are various legislation which impute criminal liability to a corporation. Such legislation typically contain "deeming provisions" which provide that if a person, i.e. an employee, commits an offence, the corporation is deemed to have committed the same offence.

For example, section 138(3) of the Securities Commission Malaysia Act 1993 ("SC Act") provides that *"Where a person who is an employee of a body corporate contravenes any provision of this Act, the body corporate shall be deemed to have contravened such provision."*

Furthermore, section 138(2) of the SC Act states that *"Where an offence against this Act … has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer, an employee, a representative or the secretary of the body corporate or was purporting to act in such capacity, shall be deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances."*

Another example is section 144 of the Consumer Protection Act 1999, which provides, *inter alia*, that where an offence is committed under that Act by an employee, agent or employee of the agent of a principal, the principal shall be deemed to have committed that offence unless the contrary is proven.

These "deeming provisions" do not impose strict liability on a corporation or its relevant officers, as the case may be, but give rise to rebuttable presumptions that shift the burden to the corporation or its officers to prove that they did not commit the offence.

In relation to corruption offences, the MACC Act does not contain such deeming provisions *vis-à-vis* a corporation and its officers. Although specific details of the proposed amendments to the MACC Act have not been disclosed thus far, it is possible that the proposed corporate criminal liability provisions to be inserted into the MACC Act could be along similar lines to the provisions of the legislation discussed above. The effect of doing so will be that where employees of a corporation commit offences under the MACC Act (e.g. giving and accepting gratification or bribing an officer of a public body), the corporation (and its directors or officers) would be deemed to have committed the offence unless they prove otherwise.

This would inevitably impose an obligation on a corporation to be accountable for the acts of its employees and possibly those of its agents or employees of the agent. In the larger scheme of things, this may lead to a reduction of corrupt practices by corporations.

Based on the English cases referred to above, it is arguable that a corporation can be liable for corruption offences under existing provisions of the MACC Act if it can be proved that the acts were carried out by one or more persons who, in the words of Denning LJ in *H.L. Bolton (Engineering) Co Ltd v T.J. Graham & Sons Ltd* [1959] 1 QB 159, 172, represent *"the directing mind and will of the company and control what it does."* It is also worth noting that the expression "*person*", which is found in the various provisions for corruption offences in the MACC Act, is not restricted to a natural person as section 2 of the Interpretation Acts 1948 and 1967 defines a "person" to include *"a body of persons, corporate or unincorporate"*. This point remains to be tested in the Malaysian Courts.

THE LAW IN OTHER JURISDICTIONS

For purpose of comparison (in which the proposed amendments to the MACC Act could be modelled upon), we now examine the legislative framework in the United Kingdom and the United States of America.

United Kingdom

Section 7 of the Bribery Act 2010 ("UKBA") imposes strict liability for failure by a commercial organisation to prevent bribery by persons associated with it to obtain or retain business or to obtain or retain an advantage in the conduct of business for that organisation. However, a commercial organisation could be absolved from liability if it is able to show that it had adequate procedures in place to prevent persons associated with it from committing bribery.

The last quarter of 2015 witnessed two significant developments in relation to the UKBA. On 30 November 2015, the UK Serious Fraud Office ("SFO") entered into the first ever deferred prosecution agreement ("DPA") under the UKBA with ICBC Standard Bank PLC ("ICBCS") in respect of ICBCS's failure to prevent third parties who were closely connected with ICBCS from committing bribery. Under the DPA, ICBCS agreed, *inter alia*, to pay a fine of USD32.2 million and to engage a leading

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THE LOOKALIKES

Teh Hong Koon discusses homogeneous packaging of tobacco products

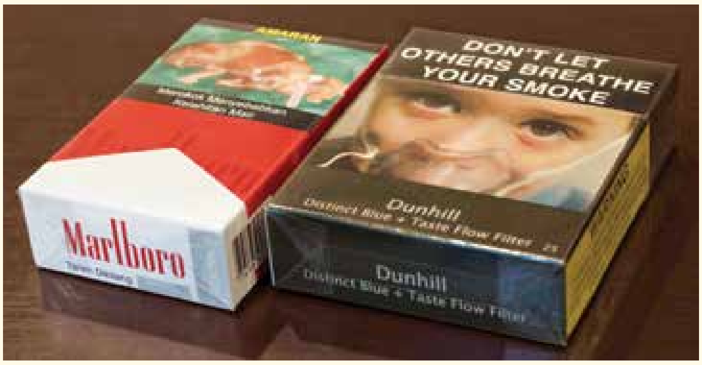
THE ADVENT OF PLAIN PACKAGING

The Australian Tobacco Plain Packaging Act 2011 ("TPP Act") and the Tobacco Plain Packaging Regulations 2011 ("TPP Regulations") came into force on 1 December 2012.

The TPP Act and TPP Regulations are the first legislation to require all retail tobacco products to be marketed in plain packaging as it is believed that packaging is a powerful marketing tool to recruit and attract smokers. By introducing plain packaging which significantly reduces the visual identity and appeal of tobacco products, the Australian Government hopes to reduce the rate of smoking in Australia.

PLAIN PACKAGING REQUIREMENTS

The TPP Act and TPP Regulations set out comprehensive requirements on the look and feel of the packaging for tobacco products. They prohibit the use of trade marks on retail packaging of tobacco products other than as permitted and significantly restrict the colour, shape and finish of such packaging.



Malaysian Packaging (L) and Australian Plain Packaging (R)

All retail packaging for tobacco products must be in a drab dark brown colour (Pantone 448C) with a matt finish, and tobacco industry logos, brand imagery, colours and promotional text are strictly prohibited on the packaging. The size of the cigarette pack must also conform to specified dimensions.

The brand and variant names are allowed but only in the prescribed font, style and size.[1] For example, the brand and variant are to be in the *Lucida Sans* typeface, no larger than 14 points size for the brand and 10 points size for the variant. Such information must be in Pantone Cool Gray 2C, with only the first letter of each word capitalised.

The restrictions imposed in the TPP Act and TPP Regulations mean that only word marks which are brand names, e.g. "*Marlboro*" or "*Camel*", or variant names may be used on tobacco packaging. The use of other trade marks, such as logos and designs, is prohibited.

REACTIONS FROM THE GROUND

This groundbreaking initiative by the Australian Government has attracted applause from anti-smoking public interest groups and scathing criticism from the tobacco companies.

Philip Morris, the owner of the *Marlboro* trade mark, has taken the view that plain packaging greatly reduces the use of trade marks and renders all packaging to be "virtually identical". This deprives them of the substantial investments that they have made in establishing their trade marks and reduces the ability of their trade marks to convey the message that their products are of premium quality. They also allege that plain packaging deprives consumers of this information and treats them as though they are not capable of making their own decisions.[2]

Japan Tobacco International lambasted plain packaging as "*an extraordinary and unprecedented attempt to derive JTI of its most valuable assets, its brands and trade marks*" and tantamount to "*nationalization of JTI's brands and trade marks*"[3].

Similarly, British American Tobacco, which markets tobacco products under more than 200 brands, including "*Dunhill*" and "*Rothmans*", expostulated with the statement "*stripping branding strips our rights*"[4] while Imperial Tobacco Australia Limited criticized it as "*illegal, unnecessary and damaging*"[5].

PLAIN PACKAGING IN OTHER COUNTRIES

It would appear that governments of other countries are inclined to follow the initiatives taken by the Australian Government. In March 2015, the Republic of Ireland became the second country in the world and the first in Europe to pass a law on plain packaging for tobacco products.

Hot on the heels of this development, law makers in the United Kingdom and France passed laws on uniform packaging for tobacco products in May 2015 which are expected to be brought into force in May 2016 and January 2017 respectively.

Following closely behind, New Zealand, Norway, Hungary, Sweden, Finland, Turkey, Bulgaria and Canada are taking steps to introduce generic packaging for tobacco products. On the local front, the Malaysian Government has indicated that we are likely to take the same stance as Australia.

LEGAL CHALLENGES BY TOBACCO COMPANIES

Unsurprisingly, tobacco companies have protested strongly against the introduction of plain packaging of tobacco products and have launched various initiatives to thwart such measures.

Philip Morris Asia Limited v The Commonwealth of Australia[6]

Philip Morris Asia fired the first salvo against the Australian Government's tobacco plain packaging legislation by instituting an investor-state arbitration based on a bilateral investment treaty between Australia and Hong Kong on 27 November 2011. Philip Morris Asia argued that Australia is in breach of the said treaty as the measures under the Australian legislation are unreasonable and discriminatory and constitute an expropriation

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of its Australian investment. The Australian Government raised objections to the Tribunal's jurisdiction. On 18 December 2015, the Tribunal decided unanimously, agreeing with Australia, that it has no jurisdiction to hear Philip Morris Asia's claim.

JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia[7]

In December 2011, British American Tobacco joined hands with Japan Tobacco International (with Philip Morris and Imperial Tobacco Australia Limited as interveners) to take the Australian Government to court on the ground that the provisions of the TPP Act amount to an acquisition of the tobacco companies' intellectual property rights and related goodwill which contravenes section 51(xxxi) of the Commonwealth of Australia Constitution Act ("Australian Constitution").

Various questions were referred to the High Court of Australia for rulings in the aforementioned proceedings. While the apex court acknowledged that the imposition of plain packaging may constitute a taking in the sense that they restrict the plaintiffs' enjoyment of their intellectual property rights and related rights, the court ruled by a 6:1 majority against the plaintiffs. The court drew a distinction between "taking" and "acquiring". According to the majority justices, an acquisition must involve the accrual of a proprietary benefit or interest. Although the TPP Act regulates the tobacco companies' intellectual property rights and imposes controls on the packaging and presentation of tobacco products, it does not confer any proprietary right or interest on the Australian Government and thus does not contravene section 51(xxxi) of the Australian Constitution.

Battle in the Northern Front

Over in the United Kingdom, Philip Morris International and British American Tobacco have filed separate suits against the UK Government arguing, *inter alia*, that the plain packaging measures unlawfully deprive them of their trade marks in contravention of English and European intellectual property laws that prohibit private entities from being deprived of their property without fair compensation; that the measures violate the laws of the European Union ("EU") that allow community trade mark to be used throughout the EU; and that they obstruct the free movement of goods through means that are neither necessary nor proportionate to achieving the UK Government's public health objectives.

Japan Tobacco International followed suit by filing an action in the High Court on the ground that the plain packaging measures infringe the UK's obligation under the rules of the World Trade Organisation ("WTO").

World Trade Organization Challenges

Allegedly funded by the big tobacco companies, the governments of five countries, namely Ukraine (who subsequently suspended the proceedings), Honduras, Indonesia, Dominican Republic and Cuba have brought claims to the WTO. The complainants argued that the TPP Act is inconsistent with Australia's WTO obligations under the Agreement on Trade-Related Aspects of Intellectual Property, the Agreement on Technical Barriers to Trade and the General Agreement on Tariffs and Trade 1994.

To date, 36 jurisdictions, namely Argentina, Brazil, Canada, Chile, China, Chinese Taipei, Ecuador, Egypt, European Union, Guatemala, India, Japan, Korea (Republic of), Malawi, Malaysia, Moldova, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, Philippines, Russia, Saudi Arabia, Singapore, South Africa, Thailand, Trinidad and Tobago, Turkey, United States, Uruguay, Zambia and Zimbabwe, have joined the disputes as third parties, a record number in any WTO cases. The rulings for these proceedings are expected to be delivered in mid-2016.

A LONG DRAWN BATTLE

It is likely that plain packaging of tobacco products will become a legislative trend in time to come if the above is any indication.

From a legal standpoint, we need to question the legitimacy of the measures taken by governments to impose restrictions and controls over one's use of private property without reasonable compensation. In this case, the implementation of plain packaging effectively erodes the value of the product's brand and trade mark. While the measures adopted by the various governments to curtail smoking, which is seen to be detrimental to public health, are laudable from a moral standpoint, they have incurred the wrath of big tobacco companies who are perceived to be profiteering at the expense of public health.

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IS UPLOADING SUFFICIENT PROOF OF PUBLICATION?

Wai Hong and Angela discuss a defamation case arising from an article published on the internet

When would an article that is uploaded onto the world wide web be considered to be 'published' to a third party under the law of defamation?

This was one of the issues considered by the High Court in *Lim Guan Eng and Professor Dr Ramasamy A/L Palanisamy v The New Straits Times Press (M) Berhad and Predeep Nambiar* [2015] 1 LNS 1140.

BACKGROUND FACTS

Lim Guan Eng, the Chief Minister and Professor Dr Ramasamy A/L Palanisamy, the Deputy Chief Minister II of Penang filed a defamation suit over an allegedly defamatory online article published on the website of The New Straits Times newspaper.

The First Defendant, The New Straits Times Press (M) Berhad ("NST") is the publisher of The New Straits Times newspaper and the owner of The New Straits Times website. The Second Defendant, Predeep Nambiar ("Predeep") is a reporter of NST who wrote the article.

The article entitled "*Indian-interest group claim thugs interrupted meeting*" ("Online Article") was uploaded onto NST's website on 4 December 2013 and was removed on the same day. The matter reported in the Online Article was never published in NST's printed newspaper.

The Online Article was a report on a press conference called by an ad hoc non-governmental organisation called Concerned Citizens of the Indian Community ("CCIC") to inform the public that certain individuals had disrupted a meeting convened by the CCIC to highlight concerns as to state of disrepair and mismanagement of the Batu Lanchang Hindu Crematorium.

The Plaintiffs identified one statement in the Online Article, attributed to N Ganesan, the spokesman for the CCIC, which they alleged to be defamatory: *"Based on what was said by these thugs, we believe these thugs were sent in by Chief Minister Lim and his Deputy P. Ramasamy."*

According to the Plaintiffs, the natural meaning of those words are understood to mean that:-

"(i) the Plaintiffs are criminals and members of a secret society and/or have involvement and dealing and/or authority and/or habitual secret society activities; and

(ii) the Plaintiffs are individuals who are involved and authority and/or habitual in supporting physical attacks on members of the public; and/or the Plaintiffs are not men of calibre and should not be leaders of the people and politicians in the State of Penang and/or Malaysia".

The Plaintiffs also complained that NST and Predeep did not seek verification from the Plaintiffs before publishing the Online Article.

NST and Predeep resisted the suit by relying on the defence that (i) the Online Article read as a whole was not defamatory; (ii) the words contained in the Online Article were not proved to be "published" to a third party; and (iii) the defence of qualified privilege is available as there was no malice on their part.

THE DECISION OF THE HIGH COURT

Whether the article was defamatory?

According to the trial judge, Judicial Commissioner Azmi Ariffin ("JC"), the Plaintiffs had to prove three essential elements to succeed in an action for defamation:-

(1) the Defendants had made the defamatory statement;
(2) the statement referred to the Plaintiffs; and
(3) the statement was published to a third party.

The learned JC added that the test to be applied to determine whether the words complained of are defamatory is an objective one and that it was necessary to consider whether the publication when read as a whole would impute any dishonourable or discreditable conduct or motives or a lack of integrity to the Plaintiffs.

Having laid down the guiding principles, the JC then dealt with the evidence adduced during the trial. The JC was of the opinion that the second element had been satisfied as it was "*plain and obvious that they (i.e. the words complained of) were written about the Plaintiff.*"

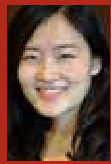
The JC was of the view that "*the subject matter of the article were matters of public interest as it involved issues on (the) Indian Crematorium which is an important matter affecting the Indian community as a whole.*" The JC held that "*when read as a whole and in context, the article did not convey the defamatory meanings which the Plaintiffs claim.*"

Furthermore, while the JC was satisfied that the Online Article was published on a website that belonged to NST, he held that "*there was no evidence adduced by the Plaintiffs to show that the online article had been accessed or download by third parties*" and that the "*Plaintiffs also did not provide any proof that the article was widely read.*"

Defence of Qualified Privilege

The learned JC added that even if the words complained of were defamatory, he would have to consider whether the defence of qualified privilege was made out by the Defendants. The JC, referring to the decision of Mohamad Dzaiddin J (as he then was) in *Ayob Saud v T.S. Sambanthamurti* [1989] 1 CLJ 152, explained the procedure that applied when the defence of qualified privilege is pleaded by a defendant:-

"Where a defence of qualified privilege is set up … the burden



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lies on the Defendant to prove that he made the statement honestly and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the Plaintiff … to show actual or express malice which upon proof thereof, communication made under qualified privilege will no longer be regarded as privileged."

The JC then held that even if the words complained of are capable of bearing a defamatory meaning, the defence of qualified privilege is available to the Defendants. The JC found that the Plaintiffs had failed to prove that NST and Predeep had acted with malice in publishing the article based on the following evidence:-

(a) The Online Article was removed on the same day and not published in the print version of the newspaper;

(b) The tone and the language of the Online Article were professional and not sensationalised. The words '*claims*' and '*believed*' used in the Online Article indicated responsible journalism;

(c) Predeep had only reported as a matter of fact on issues of public concern without adding anything beyond what was said at the press conference; and

(d) By comparison with an article published by another online news portal, Malaysiakini, on 4 December 2013 on the same event, the Malaysiakini article had used a stronger word '*concluded*' as compared to the Online Article. The Second Plaintiff, Dr Ramasamy, confirmed that he did not find the article by Malaysiakini to be defamatory.

The learned JC also appeared to cast an adverse inference on the failure by the Plaintiffs to file any suits against Ganesan, the spokesman of the CCIC, who had made the statements against the Plaintiffs at the press conference. The JC considered the Second Plaintiff's statement that he intends to file an action against Ganesan to be merely an "*afterthought*".

Failure to seek verification

In response to the Plaintiffs' contention that the Defendants had not sought confirmation or verification before publishing the words complained of, the JC opined that the failure to seek verification prior to publication is not fatal to a defence of responsible journalism as it is not a matter of law but a journalism practice. The JC reiterated that on the facts, the Defendants had only reported the truth of what transpired at the press conference and that there was no malice on their part in publishing the Online Article.

COMMENTARY

This decision is noteworthy as it appears to be the first reported Malaysian case which considered the issue of when an online article is considered to be published to a third party for the purposes of liability under the law of defamation. The High Court's decision on this issue is in accord with the decisions of the English, Singapore and Australian courts which have held that for materials placed on the internet, the claimant bears the burden of proving that the words complained of were in fact read or seen by a third party (see *Al Amoudi v Brisard and another* [2006] EWHC 1062; *Ng Koo Kay Benedict and Another v Zim Integrated Shipping Services Ltd* [2010] SGHC 47 and *Dow Jones & Company Inc v Gutnick* [2002] HCA 56). The fact that the words complained of are uploaded on a website that is accessible to the public is insufficient to prove that the words were published to a third party.

The Plaintiffs have since filed an appeal to the Court of Appeal and the appeal is now pending hearing.

It is worth noting that on 3 February 2016, some four months after the High Court's decision, the Court of Appeal delivered its decision in another defamation case, *Tan Ah Hong v CTOS Data System Sdn Bhd (Civil Appeal No. W-02(NCVC)(W)-501-03/2014)*. It was held that the requirement for '*publication*' was satisfied when the respondent intentionally uploaded the defamatory information on its database for access by third parties and that it did not matter whether a third party accessed the information by way of subscription only or by paying a fee.

The Court of Appeal's decision in *Tan Ah Hong* appears to rely on *Huth v Huth* [1915] 3 KB 32 where the English Court of Appeal acknowledged that in certain instances the law takes judicial notice of the nature of a document, such as words written on a postcard, when it may be impossible to prove that any third party read it. However, the court in *Huth* held that such a presumption did not apply to a letter that is posted in an unsealed envelope. It does not appear that the more recent cases on the publication of materials on the internet delivered by the English, Singapore and Australian courts were argued before the Court of Appeal in *Tan Ah Hong*.

The finding with regard to publication in *Tan Ah Hong* is inconsistent with English, Singapore and Australian cases mentioned above on proving publication of materials uploaded on the internet. It would be interesting to see whether another Court of Appeal will follow the approach taken in *Tan Ah Hong* or in *Lim Guan Eng*.

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ONE STEP FORWARD, HALF-A-STEP BACK

Trevor Padasian analyses the Deepa interfaith custody battle

INTRODUCTION

In a fiery field fraught with bitter conflict and undignified custody battles over innocent children, the Federal Court's decision in *Viran a/l Nagapan v Deepa a/p Subramaniam*[1] ("Deepa's Case") finally rose from the ashes with undoubtedly mixed results.

The Federal Court decided, firstly, that the civil courts in Malaysia continue to have jurisdiction in respect of divorce as well as custody issues arising from a civil marriage despite the conversion of one spouse to Islam and, secondly, that a non-Muslim marriage does not automatically dissolve upon one of the spouses converting to Islam.

However, the Federal Court in *Deepa's Case* then in effect went on to allow a custody order issued by the Seremban Syariah High Court ("Syariah Court") to prevail over a recovery order issued by the Seremban Civil High Court ("High Court"), thereby rendering otiose the jurisdiction of the High Court. This prevented the non-converting spouse from recovering a child in respect of whom the High Court had granted her custody.

FACTS

The converting spouse, Viran a/l Nagapan ("Viran"), and the non-converting spouse, Deepa a/p Subramaniam ("Deepa"), contracted a civil marriage under the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). They had two children from the marriage, a girl named Shamila a/p Viran ("Shamila") and a boy named Mithran a/l Viran ("Mithran").

On 26 November 2012, Viran converted to Islam at Pusat Dakwah Islamiah, Paroi, Negeri Sembilan and changed his name to Izwan bin Abdullah. He then registered the conversion to Islam of the two children, Shamila and Mithran at the same premises without Deepa's knowledge or consent.

Upon his conversion, Viran had applied for the dissolution of his civil marriage to Deepa at the Syariah Court. An order for the dissolution of the civil marriage was granted by the Syariah Court on 15 May 2013 pursuant to section 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003.

On 26 August 2013, Viran was granted a temporary custody order of the two children by the Syariah Court. Subsequently, on 19 September 2013, the Syariah Court granted a permanent custody order of the children to Viran but allowed Deepa to have visitation rights and access to them ("Syariah Court Custody Order").

Deepa filed a petition for divorce at the High Court and for custody of the two children on 12 December 2013. On 7 April 2014, the High Court dissolved the civil marriage between Viran and Deepa and granted permanent custody of both children to Deepa ("High Court Custody Order"). Viran was granted weekly access to the children.

On 9 April 2014, Mithran was taken away from Deepa's house by Viran without Deepa's knowledge or consent. Deepa then applied to the High Court for a recovery order pursuant to section 53 of the Child Act 2001. The High Court granted Deepa's application and made the following orders (collectively, "Recovery Order") directing the Inspector General of Police and/or his officers:-

(a) to enter Viran's residence or Taska ABIM Nur Ehsan or any premise to recover Mithran;

(b) to take custody of Mithran and to return him to Deepa's custody and control immediately;

(c) to remove Mithran from Viran's custody or from anyone having custody and control of Mithran; and

(d) to execute the High Court judgment irrespective of the Syariah Court order which had granted custody to Viran.

Viran filed two appeals. One appeal was against the decision of the High Court in granting custody of the two children to Deepa and the other, against the Recovery Order. Both appeals were heard together by the Court of Appeal.

On 17 December 2014, the Court of Appeal dismissed both appeals. The Court of Appeal affirmed the decision of the High Court in respect of the High Court Custody Order as well as the Recovery Order.

On 14 January 2015, the Federal Court allowed Viran's application for leave to appeal to the Federal Court on two questions of law:

<u>Leave Question 1</u>

"Whether in the context of Article 121(1A) of the Federal Constitution, where a Custody Order is made by the Syariah Court or the Civil High Court on the basis that it has jurisdiction to do so, whether there is jurisdiction for the other court to make a conflicting order."

<u>Leave Question 2</u>

"Whether on the interpretation of sections 52 and 53 of the Child Act 2001, a Recovery Order can be made when there exists a custody order given by the Syariah Court which is enforceable at the same time."

DECISION OF THE FEDERAL COURT

As adumbrated in the introduction, the Federal Court decided, in answer to Leave Question 1, that the civil courts have the exclusive jurisdiction in respect of divorce and custody issues in a civil marriage. It forcefully held that it is an abuse of process for a spouse who has converted to Islam to file for dissolution of the civil marriage and for custody in a Syariah Court. The Syariah Court's order in dissolving the marriage of Viran and Deepa and granting custody of the children to Viran was of no effect due to want of jurisdiction.[2]

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The Federal Court then went on to decide whether the High Court (affirmed by the Court of Appeal) was right in granting custody of both children to Deepa. In an unprecedented move, the Federal Court interviewed Shamila and Mithran in their chambers to determine whether the chidren wished to live with their mother or father. Shamila said that she was very happy to be with her mother whereas Mithran was very clear that he was happy to live with his father. As a result, the Federal Court varied the High Court Custody Order to the effect that Shamila remained with Deepa and Mithran was to be in Viran's custody.

The Federal Court may have taken this step as it had acknowledged that a change in circumstances had occurred as Mithran had been taken away by Viran two days after (and in breach of) the High Court Custody Order and had been living with his father ever since. On the other hand, Shamila had remained with her mother.[3]

Leave Question 2 was answered in the negative. The Federal Court opined that as there were two custody orders, the earlier Syariah Court Custody Order and the subsequent High Court Custody Order, the High Court should not have entertained Deepa's application to recover Mithran from Viran. It expressly acknowledged that the Syariah Court had no jurisdiction to make a custody order in the circumstances of this case but said that the Syariah Court Custody Order remained valid until it is set aside.

“ the Syariah Court has no jurisdiction to dissolve a civil marriage ”

ANALYSIS

Leave Question 1

In affirming the decision of the High Court and the Court of Appeal on the issue of the civil court's jurisdiction over divorce and custody issues arising from a civil marriage and the principle that the Syariah Court has no jurisdiction to dissolve a civil marriage, the Federal Court had correctly followed one of its earlier decisions, the celebrated *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals*[4].

The Federal Court held that Article 121(1A) of the Federal Constitution which provides that the civil courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts was clearly introduced not for the purpose of ousting the civil courts' jurisdiction. It was introduced for the purpose of avoiding any conflict between the Syariah Courts and the civil courts. The LRA continues to bind a converting spouse despite his or her conversion to Islam.

What is interesting is the Federal Court's unprecedented and last-minute decision to interview the children in chambers to ascertain their preference with regard to custody. In deciding on custody, the Federal Court relied, amongst others, on section 88(2) of the LRA[5] to have regard to, in addition to the wishes of the parents of the children, the wishes of Shamila and Mithran. This is quite unusual.

It is the usual practice in custody cases here in Malaysia as well as other Commonwealth countries[6] for a welfare report assessing the best interest of the children to be prepared by experts in child psychology or welfare in advance of the court's decision on custody. These experts would be in a better position to advise the court in respect of the custody of the children. The Federal Court's decision in *Deepa's Case* to interview the children may lead to a departure from this established practice. One course of action that could have been taken was to remit the case back to the High Court to enable the welfare report to be prepared, the experts to testify and then the children to be evaluated.

Leave Question 2

The Federal Court's refusal to enforce the Recovery Order is surprising not only because it had acknowledged that the Syariah Court had no jurisdiction to make the Syariah Court Custody Order. In effect, such refusal coupled with its order granting custody of Mithran to Viran meant that Viran was not punished for disobeying the High Court Custody Order; instead he who had come to court with unclean hands was ultimately rewarded with custody of Mithran.

Although *Deepa's Case* received much press coverage and was followed closely by 14 public interest groups that held watching briefs in the proceedings as it wound its way through the courts, the decision itself does not break new ground from a legal perspective. In confirming the jurisdiction of the civil courts to determine dissolution and custody issues in a civil marriage notwithstanding the conversion of one spouse to Islam, the Federal Court applied the law that had been laid down by the apex court of Malaysia in the earlier decisions of *Tang Sung Mooi* and *Subashini.*

The decision not to enforce the Recovery Order resulted in a situation similar to that in the Court of Appeal's decision in *Ketua Polis Negara v Indira Gandhi a/p Mutho*[7]. In both cases, the recovery orders made by the High Court in respect of minor children could not be enforced despite the stand by the court in each case that the High Court had jurisdiction over the civil marriage.

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SWITCH AT YOUR OWN RISK

Trishelea Sandosam discusses the perils of releasing cargo against 'switch' bills of lading

INTRODUCTION

On 9 October 2015, the Kuala Lumpur High Court in *P T Karya Sumiden Indonesia v. Oceanmasters Marine Services Sdn Bhd & Anor*[1] handed down a judgment in favour of a shipper who claimed damages against a carrier and its agent for loss of cargo which was delivered against 'switch' bills of lading[2], without presentation of the original bills of lading.

BACKGROUND FACTS

The Plaintiff, PT Karya Sumiden Indonesia ("PT Karya"), entered into a long term agreement with Jawad and Malik Metal LLC ("JMM") for the sale of copper wire rods under 16 consignments, three of which ("Cargo") formed the subject matter of PT Karya's claim. The sale by PT Karya was on 'free on board' ("FOB") basis with "Document against Payment" payment terms. The shipments were to be made from Tanjong Priok in Indonesia to the Port of Dammam in Saudi Arabia.

As the sale was on FOB terms, JMM as buyer was responsible to arrange for shipment of Cargo and accordingly, appointed a non-vessel owning common carrier, Oceanmasters Marine Services Sdn Bhd ("Oceanmasters") to do so. Oceanmasters in turn appointed Sapphire Line Private Limited ("Sapphire") as its agent for this purpose. At all material times, PT Karya was not aware of the existence of Oceanmasters.

Sapphire issued 'house' bills of lading[3] in relation to each of these three consignments. These bills of lading named PT Karya as shipper and JMM as consignee. One Super Express Cargo ("Super Express") who was the delivery agent, was named by Sapphire as agent in the bills of lading upon the instruction of Oceanmasters. These bills of lading were to be released by PT Karya's bank to JMM upon receipt of payment, to enable JMM to obtain delivery of the Cargo.

JMM failed to make payment of the purchase price. It however managed to obtain 'switch' bills of lading which were issued by Super Express. Thereafter, JMM gave instructions to Oceanmasters to deliver the Cargo against these 'switch' bills of lading and not the original bills of lading issued by Sapphire.

When the Cargo arrived in Saudi Arabia, Oceanmasters complied with JMM's instructions and delivered the Cargo to JMM's customer, Al-Fanar Electrical Systems ("Al-Fanar"). Upon discovering that the Cargo had been released against 'switch' bills without payment having been made by JMM, PT Karya initiated a claim against both Oceanmasters and Sapphire (collectively "Defendants") claiming loss and damage in the sum of USD$5,914,010.40, being the undisputed value of the Cargo, together with interest and costs.

ISSUES FOR CONSIDERATION

The three main issues requiring determination by the High Court were as follows:-

(1) Whether PT Karya has *locus standi* to bring this action?

(2) Whether the action brought by PT Karya is time barred under Article III Rule 6 of the Hague Rules which applied to the terms of Sapphire's 'house' bills of lading? and

(3) Whether Oceanmasters and/or Sapphire breached their contract of carriage as carrier and/or breached their duty as bailees for reward by releasing and/or allowing release of the Cargo without production of Sapphire's original 'house' bills of lading?

DECISION OF THE HIGH COURT

Locus standi

The Learned Judge, Nallini Pathmanathan J (as she then was) held that PT Karya had *locus* to initiate the claim against Oceanmasters and Sapphire. The approach taken by the Court was to give primacy to the intention of parties rather than strict labels used in the contract.

> "the issue of title is irrelevant in claims founded on breach of contract and bailment"

The crux of Oceanmasters' argument was that title to the Cargo had been transferred to JMM and therefore PT Karya had lost the right to sue for loss of the Cargo. They argued that the FOB basis of the contract of sale incorporating INCOTERMS 2000 would effectively result in a transfer of the risk of loss and damage to the buyer when the cargo passes the ship's rail, and as the contract of sale provided that title to the Cargo would pass at the same time as risk, title to the Cargo had been passed to JMM when the Cargo passed the ship's rail. Oceanmasters also cited section 1 of the antiquated Bills of Lading Act 1855 ("BoLA 1855") which states that rights of suit are transferred to and vested in the consignee of a bill of lading "*… where property in the goods has passed to him upon or by reason of such consignment …*".

The High Court rejected Oceanmasters' arguments and agreed with the submissions put forth by PT Karya. First, the Court found that the issue of title is irrelevant in claims founded on breach of contract and bailment, which was the basis of PT Karya's claim. Secondly, the Court considered the factual matrix of the case to determine when property had passed, relying on section 19 of the Contracts Act 1950 which provides that property in goods is transferred to the buyer when parties to the contract intend it to be transferred.

Despite the sale being on FOB terms, the Learned Judge was of the view that it was the intention of parties that title to the Cargo would not pass until payment of the purchase price was made. The "Document against Payment" payment term and the correspondences between PT Karya and JMM whereby both

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parties had agreed that JMM would have no rights and title to the Cargo until the purchase price was paid were important facts which led to the finding of the Court.

Thirdly, applying section 25(3) of the Sale of Goods Act 1957 which deals with reservation of rights of disposal, the Court held that as payment had not been made and the original bills of lading had not been transferred to JMM, PT Karya still retained a right of disposal over the goods and therefore property in the Cargo did not pass to JMM.

Having found that title in the Cargo had not passed due to non-payment, the Court went on to consider whether the effect of section 1 of BoLA 1855 effectively transfers title to the consignee despite non-payment. Her Ladyship examined the purpose of the section as enumerated in the case of *Borealis AB v Stargas Ltd and Another* [1999] QB 863 and found that its purpose was to prevent the mischief of consignees being unable to sue for loss of damage if they were not in possession of the bills of lading, despite the fact that property had passed to them. As property in the Cargo had not passed to JMM, the contemplated mischief did not arise. On the contrary, since the property still remained with PT Karya, PT Karya was held to have the right to sue for loss of the Cargo.

Time bar

The High Court ruled that PT Karya's action was not time barred by virtue of Article III rule 6 of the Hague Rules. In reaching this decision, the Learned Judge considered the questions of (i) whether an action for misdelivery falls within the scope of the Hague Rules; and (ii) whether it was possible to determine if the claim was time barred given the lack of evidence showing the exact dates on which the Cargo was delivered.

The two relevant articles for this purpose are Article III rule 6 of the Hague Rules which discharges the carrier from all liability if an action is brought after 1 year of delivery or the date when the goods should have been delivered; and Article II which states that "*…under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth*".

The High Court found that based on a strict reading of Article II of the Hague Rules, the Hague Rules limit the carriers' scope of responsibility from the point of loading to discharge, and therefore do not apply to cases of misdelivery, which often take place after discharge has occurred. Nallini J considered conflicting views by foreign courts but ultimately applied the 1964 binding authority of the Singapore Federal Court in *Peninsular & Oriental Steam Navigation Co Ltd & Ors v Rambler Cycle Co Ltd* (1964) 30 MLJ 443.

In *Peninsular & Oriental Steam Navigation*, the Singapore Federal Court reached the decision that the Hague Rules do not apply after discharge by considering the wording of Article II and opined that if the drafters of the Hague Rules intended for the Hague Rules to apply to delivery of goods, they would have used the word 'delivery' after 'discharge' in Article II. The same finding was also reached in more recent cases in Hong Kong and Australia. This persuaded Her Ladyship to reach a finding that liability of the carrier ceases upon discharge and therefore the time bar under the Hague Rules cannot be used to extinguish PT Karya's claim for misdelivery.

In addition, the High Court also ruled that given the uncertainty of the dates of delivery, PT Karya's claim is not time-barred. The Court drew a distinction between the date the Cargo arrived at the port of loading and the date of delivery to Al-Fanar, and stated that time would begin to run from the latter date. The lack of consistent testimony from the witnesses and the absence of delivery orders to evidence the date of delivery of the Cargo to Al-Fanar greatly weakened the Defendants' case in this respect and led to a finding in PT Karya's favour.

Misdelivery

The Court upheld the long-standing proposition of law that delivery of cargo should only be made against the presentation of the bill of lading. The Court cited the leading Privy Council decision of *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 1 MLJ 200, which has been applied in several local decisions, as authority for this proposition. The Court also made specific reference to the nature of straight bills of lading, and held that despite its non-transferable nature, presentation of the bill was still required for delivery of cargo. The Court drew support for this finding from a prominent English decision on straight bills of lading, *The Rafaela S J I Mac William Company Inc v Mediterranean Shipping company SA* [2005] 2 AC 423.

It was undisputed by the Defendants that 'switch' bills of lading could only be issued by the original carrier or its agent upon production of the original bills of lading. However, as mentioned earlier, the original bills of lading were held by PT Karya's bank and they were to be released to JMM only upon receipt of payment, but no payment had been made. Therefore, as held in the case of *The Feng Hang* [2002] 2 SLR 205, the issuance of a second set of bills of lading to a different shipper to cover goods already covered by a set of bills of lading is a breach of the contract of carriage. The Court relied on the Contracts Act 1950, as authority for PT Karya's entitlement to sue both Oceanmasters as undisclosed principal (sections 179 and 184) and Sapphire as agent (section 186) for breach of contract and breach of duty as bailees.

continued on page 22

KIT KAT NEEDS A BREAK

Yen May and Sri Komathy discuss another battle in the chocolate war between Nestlé and Cadbury

The recent decision[1] of the English High Court refusing Société des Produits Nestlé S.A ("Nestlé") the right to register the three-dimensional shape of its four-finger chocolate wafer bar as a trade mark has reignited the chocolate war between Cadbury UK Limited ("Cadbury") and Nestlé. The latest blow to Nestlé in the long-running chocolate war was delivered when Cadbury opposed Nestlé's trade mark application of its four-finger bar shape in the United Kingdom.

In this instance, Nestlé had applied to register the three-dimensional shape of its four-finger Kit Kat wafer bar as a trade mark in respect of "*chocolate; chocolate confectionery; chocolate products; confectionery; chocolate-based preparations; bakery goods; pastries; biscuits; biscuits having a chocolate coating; chocolate coated wafer biscuits; cakes; cookies; wafers*" on the basis that the shape had acquired a distinctive character, being first sold in the UK in 1935 under the name of Rowntree's Chocolate Crisp shortly before being changed to Kit Kat in 1937.

Cadbury opposed the trade mark application on various grounds, in particular under sections 3(1)(b), 3(2)(a) and 3(2)(b) of the United Kingdom's Trade Marks Act 1994 ("UK TMA"). In brief, section 3(1)(b) states that a trade mark shall not be registered if it lacks any distinctive character. Sections 3(2)(a) and 3(2)(b) preclude registration if a trade mark consists exclusively of the shape which results from the nature of the goods themselves, or the shape of goods which is necessary to obtain a technical result, respectively.

The examiner at the UK Intellectual Property Office ("UK IPO") found that the shape of the four-finger bar had three essential features: (i) the basic rectangular shape; (ii) the presence, position and depth of the grooves running along the length of the bar; and (iii) the number of grooves, which, together with the width of the bar, determine the number of 'fingers'. According to the examiner, the basic rectangular shape is a shape which results from the nature of the goods themselves and cannot be registered except in respect of 'cakes' and 'pastries', for which the shape of the trade mark is very different from the norms of the sector.

As the other two features are necessary to obtain a technical result i.e. to permit the product to be broken up for consumption, the examiner rejected the application for the remainder of the goods applied for. Therefore, except in relation to cakes and pastries, the UK IPO refused to register the mark in accordance with sections 3(2)(a) and 3(2)(b) of the UK TMA because it was neither distinctive nor had it acquired distinctiveness, and consisted exclusively of the shape which was necessary to obtain a technical result.

Nestlé and Cadbury appealed and cross-appealed the decision of the UK IPO respectively to the English High Court, where the judge found that the trade mark was not inherently distinctive in relation to cakes and pastries in addition to the other goods covered by the application. The English High Court sought clarification from the Court of Justice of the European Union on the issues of acquired distinctiveness and the need to obtain a technical result. Equipped with the European Court of Justice's preliminary ruling, the English High Court ultimately found against Nestlé by dismissing their appeal and allowing Cadbury's cross-appeal to prevent Nestlé from registering the mark even in relation to cakes and pastries.

WHAT IS A TRADE MARK?

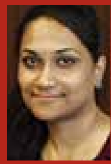
Before analysing this case in greater depth, it is essential to understand what a trade mark is and its function. In essence, a trade mark allows consumers to identify the commercial source of goods or services bearing the mark. Put simply, a trade mark serves as a "badge of origin".

Under Malaysian laws, the term 'mark' has been defined widely and it is therefore possible for a three dimensional shape to be considered as a mark.[2] Examples of shape mark registrations that have been allowed in Malaysia are the Coca-Cola bottle and the triangular configuration of the Toblerone chocolate bar. While the UK TMA precludes registration of a trade mark consisting exclusively of a shape which results from the nature of the goods themselves, or the shape of goods which is necessary to obtain a technical result, respectively,[3] Malaysia has no such parallel provisions.

The primary consequence of allowing Nestlé to register the four-finger shape as a trade mark will essentially be to allow Nestlé to monopolize the shape of the four-finger bar in relation to the goods applied for, e.g. chocolate and chocolate coated wafer biscuits. The English High Court also pointed out that the four-finger shape serves to obtain the technical result of permitting the break up of the chocolate product for consumption with minimum effort. In view of the foregoing, Nestlé's trade mark application in this instance contravenes sections 3(2)(a) and 3(2)(b) of the UK TMA.

DISTINCTIVENESS

In the Malaysian context, there is no express provision that precludes the registration of shapes as a trade mark as

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mentioned above. However it is important to note that we have provisions on registrable trade marks.[4] One of the criteria for registration outlined in section 10(1) is that a trade mark must be "distinctive" in that it must be capable of distinguishing goods or services with which the proprietor of the trade mark is or may be connected in the course of trade.[5] A trade mark may be capable of distinguishing if it is inherently distinctive or if it has acquired distinctiveness by reason of use of the trade mark or of any other circumstances.[6] Accordingly, it is possible for a shape to be allowed for trade mark registration in Malaysia if it is distinctive as required under our laws.

Inherent Distinctiveness

The shape of the four-finger bar may be allowed registration if there is sufficient inherent distinctiveness in respect of the goods applied for. As noted by the English High Court, the shape in question was necessary to obtain a technical result of facilitating the breaking of chocolate confectioneries for consumers' consumption. Although there is no provision under our laws similar to the UK precluding registration of shapes which consist exclusively of the shape which is necessary to obtain a technical result, it may be an essential consideration in determining whether the four-finger shape lacks inherent distinctiveness in respect of chocolate confectioneries.

Acquired Distinctiveness

In circumstances where a trade mark such as the shape of the four-finger bar in this instance has failed to meet the threshold of inherent distinctiveness, the applicant may rely on acquired distinctiveness. Distinctive character is acquired by a mark where consumers come to rely on the mark as indicating the origin of the goods. This is true even if the mark is not visible to consumers at the time of purchase of the goods bearing the trade mark. The English High Court even referred to an old example of stamps being used by wine producers on corks in bottles of wine which functioned as a trade mark to denote the origin of the wine although the stamp would not have been visible until the wine bottle was opened for consumption by removing the cork.

In order to prove that a mark has acquired distinctiveness, the applicant will need to show evidence of use demonstrating that the shape of the four-finger chocolate bar signifies the applicant's (i.e. Nestlé's) goods and no other in the trade. It is insufficient for an applicant seeking registration of a trade mark to prove that the relevant class of consumers recognise the trade mark and associates the same with the applicant's goods.

The applicant must prove that the trade mark indicates the exclusive origin of the applicant's goods beyond any possibility of confusion which may arise due to the use of the trade mark with any other trade mark which may also be present. In arriving at its decision, the English High Court commented that the embossment of 'Kit Kat' on each of the fingers indicated that the applicant did not consider the four-finger bar shape as a trade mark on its own and therefore the shape could not be considered as a trade mark. At most, the shape of the four-fingers may denote the origin of its goods only in conjunction with other registered trade marks, such as 'Kit Kat'.

REFUSAL OF THE APPLICATION BY THE COURT

The English High Court adopted the UK IPO's reasoning for refusing Nestlé's trade mark application for the shape in question:

(1) There was no evidence that the four-finger shape featured in any of Nestlé's promotions for many years prior to the date of the trade mark application;

(2) The four-finger bar chocolate products were sold in opaque wrappers which did not show the shape of the goods; and

(3) There was no evidence and it does not seem likely that consumers use the shape of the goods after purchase to check whether they have chosen the product from their intended trade source.

In brief, although Nestlé managed to show that a significant proportion of consumers recognised the four-finger shape as relating to 'Kit Kat', it could not prove that consumers relied on the shape, by itself, to identify the origin of the goods. To this extent, the shape on its own has not acquired distinctiveness by reason of use. Although there has been long use of the four-finger shape, the use of the shape consistently together with other registered trade marks has rendered the shape to be conceived as part of or in conjunction with other trade marks which made the shape to be incapable of functioning as a trade mark on its own.

CONCLUSION

Although the battle between Nestlé and Cadbury continues as Nestlé has indicated that it will be appealing the decision, it appears that the English High Court's decision is in line with current trade mark laws in the United Kingdom.

The decision has prevented the registration of a mark which has not been shown to be distinctive and therefore capable of serving as a badge of origin. The decision has also prevented a monopoly of the four-finger bar shape with respect to goods

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THE PERFECT ANTIDOTE?

Kelly Chung examines the groundbreaking retention of title case

In the course of trade and commerce through the centuries, there have been many a time when an unpaid seller of goods is left to bear the loss that arises from the insolvency of the buyer. Then, some 40 years ago, along came the case of *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 ("Romalpa Case") which afforded some relief to an unpaid seller's plight.

THE ROMALPA CASE

The *Romalpa Case* involved the sale of aluminium foil by a Dutch company ("Plaintiff") to an English company ("Defendant"). A receiver was appointed over the assets of the Defendant, leaving a sum of £122,239.74 owing by the Defendant to the Plaintiff as unpaid purchase price for aluminium foil supplied.

The Plaintiff sought to recover £50,235.00 worth of aluminium foil supplied by the Plaintiff which remained in the Defendant's possession as well as the proceeds from the sub-sales of the foil supplied by the Plaintiff amounting to £35,152.66 which had been kept by the receiver in a separate account.

The Plaintiff relied on clause 13 of their standard terms of sale ("Clause 13") which provided, *inter alia,* that "*the ownership of the material to be delivered by (the Plaintiff) will only be transferred to the (the Defendant) when he has met all that is owing to (the Plaintiff)*" ("First Part").

The latter part of Clause 13 ("Second Part") also provided, *inter alia*, that:

(1) if the Defendant made a new object with the foil, or mixed the material with other objects, or if the material became a constituent of another product, the ownership of the objects which contained the aluminium supplied by the Plaintiff would be the property of the Plaintiff as surety until full payment was received;

(2) the Defendant was to keep the objects for the Plaintiff as fiduciary owner, and if required, store the objects in such a way as they would be recognised as such; and

(3) the Defendant was entitled to sell these objects in the normal course of business provided that it shall, if required by the Plaintiff, hand over its claims against the buyer of the objects to the Plaintiff so long as the Defendant had not fully discharged its debt to the Plaintiff.

As sections 17(1) and 17(2) of the English Sale of Goods Acts 1893 and 1979 (which are identical to sections 19(1) and 19(2) of the Malaysian Sale of Goods Act 1957) allow the parties to determine the time at which the property in ascertained goods is to be transferred to the buyer, the retention of ownership of the aluminium foil by the Plaintiff under the First Part does not run afoul of the aforementioned legislation.

The Defendant admitted that the unsold stock of aluminium foil belonged to the Plaintiff and that the Plaintiff was entitled to recover possession of the same. However, it challenged the Plaintiff's claim to the proceeds of sub-sales of the aluminium foil amounting to £35,152.66.

It was common ground between the parties that:

(1) the effect of Clause 13 was that so long as the Defendant was indebted to the Plaintiff, any aluminium foil delivered by the Plaintiff which remained in the possession of the Defendant was held by the Defendant as bailee for the Plaintiff; and

(2) it was implied in Clause 13 that the Defendant was entitled to sell the aluminium foil to sub-purchasers (notwithstanding that the power of sale was absent from the First Part and that the Second Part only permitted the sale of objects manufactured using the foil supplied by the Plaintiff).

The trial judge, Mocatta J, agreed with the Plaintiff's contention that the bailor-bailee relationship created by Clause 13 showed that the parties had intended to create a fiduciary relationship. Accordingly, the equitable principles on tracing established in *In re: Hallet's Estate* (1880) 13 Ch. D 696 applied, namely that:

(1) where a fiduciary disposes of property, the beneficiary can take the proceeds if they can be identified; and

(2) if the bailee sells the goods bailed, the bailor can in equity follow the proceeds wherever they can be distinguished.

The judge held that the Plaintiff was entitled to the proceeds of the sub-sales of the aluminium foil amounting to £35,152.66 which had been kept by the receiver in a separate account.

The judge rejected the Defendant's contention that the Relevant Clause gave rise to a charge which is registrable under section 95(2)(e) of the English Companies Act 1948 (which is identical to section of 108(3)(f) of our Companies Act 1965). His Lordship held that there was no requirement for a charge to be registered as the property in the foil never passed to the Defendant. Accordingly, the proceeds of the sub-sales belonged in equity to the Plaintiff.

The decision of Mocatta J was upheld by the Court of Appeal. Roskill LJ was of the view that Clause 13 was designed to protect the Plaintiff in the event of the Defendant's insolvency after the Plaintiff had parted with possession, but not legal title, to the goods.

In considering whether any additional implication arose from the undoubted implied power of sale in the First Part, Roskill LJ said that one was entitled to look at the Second Part as it would be strange if the First Part did not afford any relevant security to the Plaintiff when the Second Part gave security over manufactured or mixed goods.

According to Roskill LJ, to give effect to the purpose of Clause 13, one must imply into the First Part not only a power to sell but also the obligation to account in accordance with the normal fiduciary relationship of principal and agent, and bailor and bailee. By this

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reasoning, the Court of Appeal agreed with the High Court that the principles in *Re Hallett's Estate* applied and the Plaintiff was entitled to trace and recover the proceeds of the sub-sales of the aluminium foil.

NEUTRALISING THE EFFECTS OF THE ANTIDOTE

Subsequent to the *Romalpa Case*, the English Courts had various opportunities to reconsider the efficacy of a retention of title clause ("RT Clause").

In *Re Bond Worth* [1980] Ch 228, an attempt by the supplier of synthetic fibre to trace the proceeds of sale of carpets manufactured with the fibre supplied by the supplier through a purported RT Clause was rejected by the High Court. The RT Clause in this case failed as the supplier only retained the "*equitable and beneficial*" but not legal ownership of the goods which had passed to the buyer. The Court also held that the RT Clause created a charge over the buyer's assets and required registration under the English Companies Act.

In the following year, the Court of Appeal in *Borden (UK) Ltd v Scottish Timber Products Ltd and Another* [1981] Ch. 25 rejected a seller's attempt to trace the resin supplied by it into the chipboard manufactured by the buyer and thereafter to the proceeds from the sale of the chipboard. The Court held that the seller's ownership of the goods came to an end once those goods which were the subject of an RT Clause became inextricably mixed with other materials such that they could no longer be said to exist in their original form.

An attempt by a supplier to trace the leather supplied by them which had been used in the manufacture of handbags to the proceeds of sale of the handbags under an RT Clause failed in *Re Peachdart Ltd* [1984] Ch 131. Notwithstanding the RT Clause, the Judge held that where raw material was sold to a manufacturing company, the parties must have intended that the seller should lose its ownership of every piece of leather as soon as the buyer commenced work on it. Accordingly, the seller's right to the sale proceeds was in the nature of an unregistered charge and was void for want of registration.

However, an RT Clause was held to be effective when the goods sold retained their identity even after being processed into a finished product. In *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485, property in a diesel engine was held not to have been transferred to the buyer by virtue of its being incorporated into a generator which was not ready for delivery to the sub-buyer.

In *Armour v Thyssen Edelstahlwerke AG* [1991] AC 339, which involved the supply of steel strip, the House of Lords upheld the validity of an RT Clause and observed that a provision reserving title to the seller until payment of all debts due to him were paid did not amount to the creation of a security interest in favour of the seller.

The observation by the Law Lords in *Armour* accords with the earlier decision of the Court of Appeal in *Clough Mill v Martin* [1985] 1 WLR 111. However, Goff, LJ in *Clough Mill* agreed *per obiter* with the decision in *Re Peachdart* which held that an RT Clause would give rise to a charge insofar as it purports to retain title over objects which are manufactured using the seller's goods even if such an interpretation did "*violence*" to the language of the RT Clause.

The above cases suggest that the English Courts have been reluctant to uphold the efficacy of an RT Clause to manufactured goods where the original goods have lost their identity. It should also be noted that the RT Clauses considered in these cases may not be identical and the decision of the court in each case turned on the construction to be given to the relevant clause.

Gebrueder Buehler AG v Peter Chi Man Kwong & Ors [1987] 1 MLJ 356 is a noteworthy case from Singapore. In this case, the High Court held that the plaintiffs had lost their title to certain equipment which were subject to an RT Clause when the equipment were annexed to land to such a degree that they became fixtures and formed part of the land to which they were affixed.

THE POSITION IN MALAYSIA

The efficacy of an RT Clause appears to be recognised by the Malaysian Courts. In *Emer Sdn Bhd (under Receivership) v Aidigi Sdn Bhd and Another Appeal* [1992] 2 MLJ 734, the Supreme Court referred to the *Romalpa Case* and acknowledged that an RT Clause is a means by which an unpaid seller can prevent the passing of ownership in property. However, the apex court in this case held that the preamble to an agreement relied upon by a party did not amount to an RT Clause.

In *Au Yong Kun Min v Tractors Malaysia Bhd* [1997] 5 MLJ 168, Augustine Paul J, referring to the *Romalpa Case*, commented that the right of a seller to retake possession of goods can be achieved by an RT Clause.

In *Interdeals Automation (M) Sdn Bhd v Hong Hong Documents Sdn Bhd* (Civil Appeal No. P-02-794-2004), Sri Ram JCA, referring to the *Romalpa Case*, stated that it is settled law that parties to a contract for the sale of goods may agree that ownership in the goods would only be transferred from the vendor to the buyer when the latter has met all his obligations contained in the contract. The learned judge added that such a term has the effect of making the buyer a trustee or fiduciary of the goods for the

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ONE (BABY) STEP AT A TIME

Kok Chee Kheong discusses the Paris Agreement

The Twenty-First Session ("COP 21") of the Conference of the Parties to the United Nations Framework Convention on Climate Change ("UNFCCC") took place against the backdrop of dire predictions by scientists that failure to reduce greenhouse gas ("GHG") emissions by 40% to 70% by 2050 could result in catastrophic and irreversible climate change.

Scientists warned that if climate change goes unabated, the world will experience increasingly severe draughts, floods and storms and rising sea levels that would engulf islands and coastal areas populated by hundreds of millions of people.

The potential disaster of irreversible climate change hung like the *Sword of Damocles* over the delegates as they assembled in the cold winter of Paris to hammer out a deal to save the planet. After 12 gruelling days of negotiations and horse trading, the representatives of 195 countries adopted the Paris Agreement ("Agreement") on 12 December 2015.

The President of France, Francois Hollande, congratulated the delegates, saying that they could be proud to stand before their children and grandchildren. The Secretary-General of the United Nations, Ban Kim Moon, described the Agreement as a health insurance for the planet. Others were less euphoric and expressed their disappointment that the Agreement did not go far enough in the fight against the effects of climate change.

This article will examine the key takeaways from the Agreement.

THE CORNERSTONE

The cornerstone of the Agreement is found in paragraph 1(a) of Article 2. It declares the objective of the Parties to the Agreement (severally a "Party" and collectively "Parties") to hold the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels so as to significantly reduce the risks and impacts of climate change.

Having done so, the Agreement then sets out the various means by which this objective is to be achieved.

TO EACH HIS OWN

Article 4 requires each Party to take steps that will rapidly reduce GHG emissions in the second half of this century, which is from 2050 onwards, on the "*basis of equity*" and "*in the context of sustainable development and efforts to eradicate poverty*".

Each Party is to prepare, communicate and maintain "nationally determined contributions" ("NDC") that it intends to achieve and to pursue domestic mitigation measures to achieve its NDC. It is also required to update its NDC every five years. Regression of the targets set out in the NDC is not encouraged as Article 4 states that each Party's successive NDC is to represent a progression beyond the current NDC. The NDCs of the Parties are to be recorded in a public registry to be maintained by the Secretariat of the UNFCCC.

Developed country Parties are expected to spearhead the fight against climate change by undertaking economy-wide absolute emission reduction targets. Developing country Parties are to continue enhancing their mitigation efforts and move progressively towards economy-wide emission reduction or mitigation targets.

SHOW ME THE MONEY

Article 9 requires developed country Parties to provide financial resources to assist developing country Parties in implementing mitigation and adaptation measures. They are also expected to continue to lead in mobilizing climate financing through various sources including public sector funding. Other Parties are encouraged to provide, or continue providing, financial support on a voluntary basis.

> **" the objective (is) to hold the increase in global average temperature to well below 2°C above pre-industrial levels "**

Although the Agreement does not specify any financial targets, the Parties in adopting the Agreement strongly urged developed country Parties to scale up their level of financial support to achieve the goal of jointly providing US$100 billion annually by 2020 for mitigation and adaptation.

THE HEART OF THE MATTER

The Parties recognised that funding by itself is but a means to an end. The need to fully realise and accelerate the development and transfer of technology that controls, reduces or prevents anthropogenic emission of GHG in order to implement mitigation and adaptation actions is acknowledged in Article 10. To that end, the Technology Mechanism established under the UNFCCC to enhance technology development and transfer is to serve the Agreement.

The Agreement also recognises the need to enhance the capacity and ability of developing country Parties, in particular those with the least capacity, such as the least developed countries, and those which are particularly vulnerable to the adverse effects of climate change. Hence, all Parties are required by Article 11 to cooperate to enhance the capacity of developing country Parties to implement the Agreement.

The Agreement acknowledges that capacity-building should be country-driven, based on and responsive to national needs.

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The Parties decided to establish the Paris Committee on Capacity-building. The role of this Committee is to address the gaps and needs in implementing capacity-building in developing country Parties and enhance and coordinate capacity-building activities.

THE PAPERWORK

To avoid the provisions of the Agreement being hollow avowals of noble intent, the Agreement built upon, and enhanced, the transparency framework in the UNFCCC. The existing UNFCCC requirements for biennial reports, biennial updates and international assessment, review, consultation and analysis are to be adopted for reporting purposes under the Agreement. Amongst others, the reporting framework will include tracking of each Party's progress towards achieving its NDC under Article 4.

Developed country Parties and other Parties are required to provide information on financial, technology transfer and capacity-building support provided to developing country Parties. Conversely, developing country Parties are to provide information on financial, technology transfer and capacity-building support needed and received by them.

STOCKTAKE

The Parties are required to carry out a comprehensive stocktake of the implementation of the Agreement to assess the collective progress towards achieving its purpose. The Agreement provides that the first global stocktake is to be undertaken in 2023 and every five years thereafter, unless the Parties otherwise decide.

ENFORCEMENT MECHANISM

An expert-based committee is established to facilitate the implementation and compliance with the Agreement. The committee is to be facilitative in nature and to function in a non-adverserial and non-punitive manner. It is to report annually to the Parties.

WHERE ARE WE NOW?

The Agreement is open for signature at the United Nations Headquarters in New York from 22 April 2016 to 21 April 2017 and is subject to ratification, acceptance or approval of States. Thereafter, it will be open for accession.

The Agreement will come into force 30 days after the date on which at least 55 Parties accounting for at least an estimated 55% of total GHG emissions have deposited their instruments of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

HAVE WE DONE ENOUGH?

To a great extent, the success of the Agreement will depend on the willingness of the Parties, in particular developing country Parties, to compromise their economic development for the greater good of the planet by adopting more environmentally friendly technology. The willingness of developed country Parties to provide financial assistance to developing country Parties to implement mitigation and adaptation measures will also have a significant bearing on the outcome.

The overwhelming support from the Parties will be necessary in order for the Agreement to achieve its objectives. It is likely that it will be more difficult to achieve these objectives if the Agreement receives the bare minimum support required for it to come into force.

The Agreement can be criticised for not going far enough to avert the consequences of climate change. While detailed reporting mechanisms have been put in place, the fact that the setting of an NDC is entirely at the discretion of each Party and that there is a lack of meaningful sanctions for non-compliance with the NDC appear to be significant drawbacks. While it is hoped that the technology infrastructure can be put in place to help achieve the objective of the Agreement, the lack of any clear commitment by the developed country Parties to provide funding is another weakness that may result in the Agreement failing for lack of financial resources.

On the other hand, it must be acknowledged that the Agreement involves 195 countries, many with different agendas and requirements. An uncompromising approach would have doomed the negotiations to failure. Hence the spirit of compromise would have been necessary to come up with an agreement which is acceptable to all Parties. Thus, the fact that the Agreement has been adopted by 195 countries can be regarded as a remarkable achievement.

In the final analysis, the Agreement is little more than a framework and many steps remain to be taken to implement its terms in order to avert the adverse consequences of climate change. Can the delegates at COP 21 truly stand proud before their children and grandchildren or will they hang their heads, regretting that they had not done enough for the future generations of inhabitants of this planet? Time will tell … and the clock is already ticking.

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THE FORCE AWAKENS

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audit firm to conduct an independent review of its procedures and to rectify shortcomings in the same.

In the first ever prosecution under section 7 of the UKBA, Sweett Group PLC pleaded guilty to an offence under that provision on 2 December 2015. The international construction and property consultancy admitted that it had failed to prevent bribery after its staff were found to have paid bribes to secure and retain a £1.6 million contract with Al Ain Ahlia Insurance Company to build a £63 million luxury hotel in Dubai. The company was sentenced on 19 February 2016 and ordered to pay a total penalty of £2.25 million for the offence.

These cases may have set the tone for enforcement actions on corruption offences by the SFO.

United States of America

The Foreign Corrupt Practice Act ("FCPA") contains provisions which apply to corporations. Amongst others, this includes corporations which are either incorporated or have their principal place of business in the U.S. The FCPA has been used on numerous occasions by the Department of Justice and the U.S. Securities and Exchange Commission against corporations which have violated the provisions of the FCPA. Under the FCPA, a corporation could be liable for the wrongful acts of its employees committed in the course of their employment.

CONCLUSION

The Corporate Integrity System Malaysia Framework was introduced in March 2011 to facilitate and streamline the undertaking of the Corporate Integrity Pledge ("CIP") among the public and private sectors alike. The CIP is a voluntary action that companies, businesses and other organisations in Malaysia may undertake by making a unilateral declaration against corrupt practices and expressing their resolve to work towards a highly principled Malaysian business environment. To date, there are 162 signatories from the public sector, 645 signatories from the private sector and 25 signatories from non-governmental organisations. The CIP is a good step forward, but lacks the force of law.

The proposed introduction of corporate criminal liability provisions into the MACC Act is timely. Although the scope of such provisions remains to be seen, it will be interesting to see whether the Government will resort to the "deeming provisions" found in other Malaysian legislation or will seek to impose liability on corporations for failure to prevent corruption along the lines contained in section 7 of the UKBA.

The Minister in the Prime Minister's Department, Datuk Paul Low, has expressed the hope that the Bill will be tabled in Malaysian Parliament this year (*The Star*, 11 March 2016). Without doubt, the introduction of corporate criminal liability into the MACC Act will give the MACC greater powers to combat corruption in Malaysia. Corporations and their officers must re-evaluate the adequacy of the anti-corruption compliance procedures of the corporation in view of the enhanced obligations that will be imposed when this new and powerful force is unleashed.

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Writer's Note:

It has been reported on three other occasions that Datuk Paul Low has suggested that a new law will be enacted (*Sun Daily Online*, 9 December 2014, *Malay Mail Online*, 16 October 2015 and *The Star*, 11 March 2016).

THE LOOKALIKES

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Many questions remain unanswered and the whole world awaits the decisions of the WTO challenges and the UK suits with bated breath. The results of these battles may dictate the direction that governments will take with regard to plain packaging of tobacco products. Whatever the outcome may be, the fight is far from over for those whose interests are at stake.

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Endnotes:

[1] Sections 18, 19, 21(3), 25 and 26 of the TPP Act and Part 2 of the TPP Regulations.
[2] http://www.pmi.com/eng/tobacco_regulation/regulating_tobacco/pages/generic_packaging.aspx#
[3] http://www.jti.com/how-we-do-business/product-regulation/plain-packaging/
[4] http://www.bat.com/plainpackaging#
[5] http://www.imperial-tobacco.com/assets/files/cms/Submission_to_the_second_UK_government_consultation_on_plain_packaging_of_tobacco_products.pdf
[6] UNCITRAL, PCA Case No. 2012-12.
[7] [2012] HCA 43.

THE CHAMPION ARRIVES

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Requirement for the English Courts' Permission

The Court did not accept the argument that permission from the English Courts was required to file the multiple derivative action against Zavarco UK. Some of the reasons in rejecting this argument were:

(i) There was nothing in the Malaysian Companies Act that required the English Courts' permission to be obtained before the filing of the multiple derivative action against Zavarco UK;

(ii) In relation to Zavarco Malaysia, section 181A(3) of the Malaysian Companies Act expressly preserves the right of a person to bring proceedings on behalf of a Malaysian incorporated company at common law. Therefore, there was no requirement for leave of a Malaysian Court for the Plaintiffs to file this common law derivative action against Zavarco Malaysia;

(iii) The UK provisions requiring permission were confined to the filing of derivative actions in England, Wales and Northern Ireland. There was nothing in those provisions to indicate that they had extra-territorial effect on derivative actions filed outside the UK;

(iv) The UK provisions envisaged a derivative action only in respect of a cause of action arising from negligence, default, breach of duty or breach of trust. On the other hand, this Malaysian action was based on, among others, the statutory right under section 44 of the Evidence Act 1950 to set aside an earlier judgment or order based on fraud or collusion;

(v) The Court adopted the approach taken in *Fort Gilkicker* which held that the UK provisions did not apply to multiple derivative actions; and

(vi) Even if the Court had erred in the above grounds, the Court found that these issues of law required serious argument and mature consideration at a trial. Hence, it was not appropriate to summarily strike out the suit.

The Court therefore dismissed the striking out applications.

CONCLUSION

This decision by Wong Kian Kheong, JC is a groundbreaking decision as it confirms the ability to bring a multiple derivative action in Malaysia. This brings Malaysia in line with the common law developments in Hong Kong and the UK.

This procedural device of a multiple derivative action would serve the interests of justice. In the face of wrongdoings carried out against a company or its subsidiary, the law would clothe a suitably interested representative with the necessary standing to bring an action on behalf of the wronged company and, in the words of Briggs J in *Fort Gilkicker*, to be the company's champion.

It will also be interesting to see how this concept may be extended in the future. The Court was of the view that even a representative who is not a member of the parent company or the subsidiary may have the necessary standing to bring a multiple derivative action. For example, such a representative may be a former member of the wronged company and where the wrongdoings may have resulted in the representative ceasing to be a member.

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Editor's Note:

An article on the multiple derivative action, "*Getting Away With Fraud: Defraud The Subsidiary?*" was published in Legal Insights Issue 3/2015.

KIT KAT NEEDS A BREAK

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such as confectionery, chocolate and chocolate coated wafer biscuits. Although it is theoretically possible for Nestlé to obtain registration of the mark in Malaysia as Malaysian laws do not preclude registration of three dimensional marks, Nestlé may nevertheless face difficulty in doing so if they are unable to show that the mark is distinctive.

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Endnotes:

1 *Société des Produits Nestlé S.A v Cadbury UK Ltd* [2016] EWHC 50 (Ch).
2 According to section 3 of the Trade Marks Act 1976, a "mark" includes "a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof."
3 Sections 3(2)(a) and 3(2)(b) Trade Marks Act 1994.
4 Section 10(1)(e) Trade Marks Act 1976.
5 Section 10(2A) Trade Marks Act 1976.
6 Section 10(2B) Trade Marks Act 1976.

SWITCH AT YOUR OWN RISK

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Oceanmasters' arguments, *inter alia,* that its duty was to JMM and not PT Karya as the contract was on an FOB basis and it had no knowledge that Super Express had issued the 'switch' bills of lading without obtaining surrender of the original 'house' bills of lading were rejected by the Court. Nallini J held that as the Sapphire 'house' bill of lading was issued on the instruction of Oceanmasters, there existed a contract of carriage between Oceanmasters as principal, and PT Karya as shipper. Oceanmasters was held to be in breach of its obligations to PT Karya as it, *inter alia*, failed to verify if the 'switch' bills of lading have been issued after surrender of the original bills or if PT Karya had consented to delivery against 'switch' bills; and by ultimately allowing the Cargo to be delivered against these switch bills.

With regard to the liability of Sapphire, the Court reached a decision on this issue by considering whether Sapphire owed a duty to PT Karya to deliver goods only against the original bills of lading. This question was decided in the affirmative as the Court was of the view that the 'house' bills of lading issued by Sapphire represented evidence of the contract of carriage and secured the cargo from release except against production of the original bills of lading. This was sufficient to impose liability on Sapphire. The Court refused to accept Sapphire's defence that it was acting under the instructions of its principal, Oceanmasters, or was unaware that 'switch' bills of lading were used to procure delivery of the Cargo.

The overarching principle in the mind of the Learned Judge appears to be that of certainty. This is evident from her statement that *"... the long-standing principle of allowing delivery against production of the original bill of lading requires protection in law. The law in this area has been certain for some considerable time. In the event an agent is able to carve out instances when delivery against production of the original bill of lading is waived, this will dilute the legal principle and give rise to considerable uncertainty. It is important for cargo owners to be entitled to rely on this rule of custom and practice with certainty"*.

COMMENTARY

This decision serves as a reminder that delivery of goods which are shipped under bills of lading should only be done upon presentation of the original bills of lading. It has also confirmed the Malaysian position that this presentation rule is applicable not only to transferable bills of lading but also to straight, i.e. non-transferable, bills of lading. This judgment is welcome and is in conformity with the position in other foremost shipping jurisdictions such as Australia, Hong Kong, Singapore and England.

Carriers and their agents should exercise prudence and deliver goods only against presentation of original bills of lading. They should also refuse to issue 'switch' bills of lading or deliver cargo against them without inquiring if there has been surrender of the original bills of lading. Ignorance of the fact that the 'switch' bills of lading were obtained without surrender of the originals will not absolve the carrier from liability.

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<u>Endnotes</u>:

1 [2016] 7 MLJ 589.

2 'Switch' bills of lading are essentially fresh bills of lading which are issued upon request and are usually issued after the original bills of lading have been signed.

3 'House' bills of lading are issued by non-vessel owning/operating common carriers, often a forwarding agent, who does not own or operate the ship which carries the cargo but who contracts with a shipping line for the carriage of goods.

ONE STEP FORWARD

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The issue of unilateral conversion of minor children from the marriage was not considered in *Deepa's Case* as it was not in issue before the Court. Perhaps this issue may be determined if the Federal Court grants leave to appeal on this issue in *Pathmanathan Krishnan v Indira Gandhi Mutho & Other Appeals*[8].

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<u>Endnotes</u>:

1 Federal Court Civil Appeal Nos. 02(f)-5-01-015, 02(f)-6-01-015 and 02(f)-4-01-2015(N) – Judgment delivered on 10 January 2016.

2 Paragraphs 31 and 32 of the Judgment.

3 Paragraph 46 of the Judgment.

4 [2008] 2 MLJ 147. Subashini had in turn followed the Supreme Court decision of *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117.

5 *"In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard - (a) to the wishes of the parents of the child; and (b) to the wishes of the child, where he or she is of an age to express an independent opinion."*

6 Malaysian Bar's Press Release dated 22 February 2016 *"The Exclusive Jurisdiction of the Civil Courts on Constitutional Issues and Statutory Rights Must be Preserved, Upheld and Exercised Wisely."*

7 [2015] 2 MLJ 149.

8 [2016] 1 CLJ 911.

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We extend our heartiest congratulations to Shannon, Hema, Sharon, Adzim, Fariz, Loshini, Syaida, Gopi, Angela, Sarah Kate, Syafinaz, Natalie, Susanah, Siong Sie and Trishelea. We have no doubt that they will continue to make invaluable contributions to the Firm.

THE PERFECT ANTIDOTE?

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seller thereby enabling the latter to trace them into the hands of third parties to whom the buyer may transfer them. The Court of Appeal refused to enforce a purported RT Clause in this case as it was a stipulation imposed after the contract had been entered into.

While the above-referred cases show that the Malaysian Courts recognise the validity of RT Clauses, the opportunity to consider the limits of such clauses has yet to arise.

TOWARDS GREATER TRANSPARENCY

As RT Clauses are primarily found in private contracts between a supplier and a buyer of goods, they have a tendency to come to light only upon insolvency of the buyer. For example, the receivers in *Lipe Ltd v Leyland DAF & Ors* [1993] BCC 385 received about 400 claims arising from RT Clauses when they were appointed as receivers over the assets of Leyland DAF.

To achieve greater transparency for stakeholders concerned, including secured creditors whose security over materials, work in progress and completed goods may be defeated by effective RT Clauses, various jurisdictions have introduced legislation that contain provisions which deem an RT Clause to be a "security interest" in goods and require the same to be registered. Examples of such legislation include the Uniform Commercial Code of the United States of America, the Personal Property Securities Act 2009 of Australia and the Ontario Personal Property Act 1967 of the State of Ontario, Canada.

CONCLUSION

The *Romalpa Case* has been described by the eminent jurist, Professor Sir Roy Goode, QC in *Proprietary Rights and Insolvency in Sale Transactions* (3rd Edition) as "*the most important decision in commercial law in this (i.e. the 20th) century.*"

RT Clauses have undoubtedly assisted unpaid sellers to trace and recover their goods and the proceeds of sale of such goods while those goods remain identifiable. However, the post-*Romalpa Case* decisions show that the English Courts have been reluctant to enforce RT Clauses in cases where the seller's goods have been mixed with other material in a manufacturing process and ceased to be identifiable. Hence, while an RT Clause serves an important purpose, it is by no means the perfect antidote which cures all financial ills that beset an unpaid seller when the buyer of goods becomes insolvent.

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LEGAL INSIGHTS

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